Employment Standards Act, 2000
Policy and Interpretation Manual

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About

The Manual

Welcome to the *Employment Standards Act, 2000 Policy and Interpretation Manual* ("the Manual"). This Manual is the primary reference source of the policies of the Director of Employment Standards respecting the interpretation, administration and enforcement of the *Employment Standards Act, 2000,* SO 2000, c 41 ("ESA 2000") as well as the *Employment Protection for Foreign Nationals Act, 2009,* SO 2009, c 32 ("EPFNA"). The EPFNA incorporates by cross-reference many provisions of the ESA 2000 and, like the ESA 2000, is administered and enforced by the Employment Standards Program of the Ministry of Labour.

The ESA 2000 was established by Bill 147 and proclaimed into force as of September 4, 2001. The ESA 2000 repeals and replaces the former *Employment Standards Act***,** RSO 1990, c E.14 ("the former Act") and several other related employment law statutes. This is the first comprehensive overhaul of Ontario's employment standards legislation in more than two decades. While most of the employment standards under the former Act are contained in the ESA 2000, the wording of most of the provisions has been revised, and numerous administrative and housekeeping alterations have also been made. Further, there are several significant, substantive changes as between the former Act and the ESA 2000.

The EPFNA applies to foreign nationals who are employed or attempting to find employment in Ontario pursuant to an immigration or foreign temporary employee program. Among other rights and protections afforded under the EPFNA, the EPFNA prohibits recruiters from charging fees for any goods, services or benefits provided in connection with finding employment for these foreign nationals. Employers are also prohibited from recovering any costs from such foreign nationals that were incurred in connection with arranging to employ the individual, unless permitted by regulation.

The policies contained in this Manual are intended primarily for the use of employment standards officers and persons within the Ministry of Labour administering the ESA 2000 as well as the EPFNA. The policies contained in the Manual have been developed with the input of Employment Standards Program staff. We are interested in ensuring that both the ESA 2000 and the EPFNA are applied in a consistent manner throughout the province and the Manual is designed to facilitate that objective. These policies may be revised as case law develops and interpretations evolve. Policy revisions are included in the Manual updates.

The Manual is organized by legislation and regulation: firstly, the ESA 2000 and regulations thereto, and then EPFNA and regulations thereto. The ESA 2000 is broken down by part and then by section. The EPFNA is broken down by section.

The Manual contains numerous references to decisions under the ESA 2000 of the Ontario Labour Relations Board ("the Board"). There are also references to the decisions of referees and adjudicators who had jurisdiction to hear reviews under the former Act prior to the jurisdiction being transferred to the Board on June 29, 1998. While these decisions were issued under the former Act, they are included in the Manual because the principles enunciated in the decisions remain relevant under the *Employment Standards Act, 2000*. The Board also has jurisdiction to hear reviews under the EPFNA and as decisions are issued under the EPFNA, these will also be cited when the Program considers it appropriate to do so.

It is important to note that these decisions may not necessarily reflect Program policy on a particular point. Where a decision in the Manual is not in accordance with our policy, this is usually noted in the Manual. Employment standards officers are required to follow the policies established by the Director of Employment Standards.

Employment Standards Program

The ESA 2000 and the EPFNA are both administered by the Ontario Ministry of Labour's Employment Standards Program.

This decentralized Program consists of the Employment Practices Branch (“EPB”), located in the Ministry's main office, and five regional operating areas. The directors of the five regions and the EPB report to the Assistant Deputy Minister of the Operations Division.

Each region has several Managers who are responsible for planning and giving direction for program delivery. The regions also have Regional Program Coordinators who provide program support.

The EPB has a Provincial Coordinator who is responsible for overall program coordination, and several Provincial Specialists who provide information, support and advice to the field operations; liaise with and provide support to the field and the Ontario Labour Relations Board with respect to the review process; and are responsible for the writing and updating of this Manual.

The Employment Standards Program Advisory Committee, which comprises individuals from each of the regions and the EPB, provides advice and recommendations to the Director of Employment Standards, who sets Program policy direction.

In this decentralized model, many of the statutory powers and duties of the Director of Employment Standards have been delegated to the regional operations. Note that a listing of these powers and the persons to whom they have been delegated under the ESA 2000 is contained in the Delegation of Powers section.

Delegation of Powers

Delegation of Powers – Employment Standards Act, 2000

The following lists the powers and duties of the Director of Employment Standards in the sequence that they appear in the *Employment Standards Act, 2000* and indicates to whom the powers or duties have been delegated.

Abbreviations Used

- DES – Director of Employment Standards
- RD – Regional Director
- D/PM – District or Program Manager
- RPC – Regional Program Coordinator
- ESO – Employment Standards Officer
- PC – Provincial Coordinator
- PS – Provincial Specialist (*by name)
- MTFSU – Manager, Trust Fund Services Unit
- MSPPA – Manager, Strategic Planning & Program Administration Unit
- CP – Claims Processor, Provincial Claims Centre (“PCC”)
- CPCC – Coordinator, PCC
- PMPCC – Program Manager, PCC
- ASMPCC – Administrative Services Manager, PCC
- MOF – Collector

Delegated Powers

- Section 8(2) Approval of Notice of Civil Proceeding form: Not delegated
- Section 17.1(7) Issuance of approval for hours of work: PC, PS, MTFSU, MSPPA
- Sections 17.1(16) and (19) Revocation or refusal of approval for hours of work: PC, PS, MTFSU, MSPPA
- Sections 21.1(1) and (2) Prepare and publish documents re rights and obligations under hours of work and overtime provisions: Not delegated
- Section 22.1(6) Issuance of approval for overtime averaging: PC, PS, MTSFU, MSPPA
- Section 22.1(13) Impose conditions on an overtime averaging approval: PC, PS, MTSFU, MSPPA
- Sections 22.1(14) and (17) Revocation or refusal of approval for overtime averaging: PC, PS, MTSFU, MSPPA
- Section 41(1) Approval of request to forgo vacation time: RD, D/PM
- Section 56(2)(b)(v) Approval to set the time of a temporary lay-off: RD
- Section 58(2) Approval of Form 1: Not delegated
- Section 66(1) Approval of an installment plan to pay severance pay: PC, MTFSU

- Sections 74.7(1) and (2) Prepare and publish document re rights and obligations of temporary help agencies, clients and assignment employees: Not delegated
- Section 88(2) Establishment of policies regarding the ESA 2000: Not delegated
- Section 88(5) Establishment of interest rate: Not delegated
- Section 88(8) Use of surplus interest to pay financial institution charges: PC, MTFSU, MSPPA
- Sections 88.1(1) and (3) Reassign investigation or inspection: RD
- Section 88.2(1) Give recognition to an employer: Not delegated
- Section 88.2(3) Require an employer who is seeking recognition to provide information: Not delegated
- Section 88.2(4) Publish or make available to the public information about employers given recognition: Not delegated
- Section 88(6) Revoke or amend a recognition: Not delegated
- Section 95(7) Direct Board to consider manner of service: PC, MSPPA
- Section 96(1) Approval of claim form: Not delegated
- Section 99(6) Permit claim from employee covered by collective agreement: Not delegated
- Section 105(3) Pay out vested monies to an entitled person: Not delegated
- Section 106(6) Requirement to pay amount ordered under director's order to pay issued under s. 106 to the Director of Employment Standards in trust: RD, D/PM, ESO
- Section 107(2) Requirement to pay amount ordered under director's order to pay issued under s. 107 to the Director of Employment Standards in trust: RD, D/PM, ESO
- Section 108(5) Contravention of a compliance order may be restrained upon an application to a judge: RD
- Section 109(2) Distribute money rateably: PC, MTFSU, MSPPA
- Section 112(5) Distribute monies received from an ESO, based on a settlement to the employee: PC, MTFSU, MSPPA
- Sections 116(1)(b) and (c) Accept irrevocable letter of credit for review: PC, MTFSU, MSPPA
- Section 120(3) Approval of settlement of a compliance order through a labour relations officer: RD, PC
- Section 120(6)(a) Distribute monies in accordance with settlement through a labour relations officer: PC, MTFSU, MSPPA
- Section 121(1) Referral of a benefit plan matter (Part XIII of the ESA 2000) to the Board: Not delegated
- Section 125(1) Make a third party demand: RD, D/PM, RPC, ESO, MOF
- Section 125(3) Service of the notice of a third party demand: RD, D/PM, RPC, ESO, MOF
- Section 125.1 Accept security for amounts owing: Not delegated
- Section 125.2 Issue a warrant, directed to the sheriff, to enforce payment of an order: Not delegated
- Section 125.3(1) Register a lien and charge on real property: Not delegated
- Section 125.3(2) Register a lien and charge on personal property: Not delegated
- Section 125.3(6) Register a renewal of a lien and charge on personal property: Not delegated

- Section 126(1) and (4) Certifying a copy of an order or notice of contravention: RD, D/PM, RPC, ESO, MOF
- Sections 126(2) and (4) Service of a notice of the filing of order or notice of contravention: RD, D/PM, RPC, ESO, MOF
- Sections 126(3) and (4) May enforce an order or notice of contravention as a judgment or order of the court: RD, D/PM, RPC, ESO, MOF
- Sections 127(1) – (4) Authorization of collector to exercise specified powers, collect a fee and impose conditions: Not delegated
- Section 128(3)(a)(ii) Written consent to permit collector to pay directly to person entitled to the wages, fees or compensation: PC, MTFSU, MSPPA
- Section 129(1)(b) Written approval to permit collector to settle a notice of contravention: PC, MTFSU, MSPPA
- Section 129(2) Written consent to permit collector to settle for less than 75% of monies owed: RD, D/PM
- Section 130(5) Filing of an order from a reciprocating state in court: PC, MTFSU, MSPPA, MOF
- Section 130(6) Recovery of costs in collecting order from reciprocating state: PC, MTFSU, MSPPA, MOF
- Section 135(2) Director to collect amounts ordered by court regarding certain convictions: RD, PC, MTFSU, MSPPA, Section 135(3) Director may file court order for enforcement purposes: RD, PC, MTFSU, MSPPA, MOF
- Section 137(5) Director to collect amounts ordered by court where a director, officer or agent of a corporation is guilty of offence of permitting offence: RD, PC, MTFSU, MSPPA
- Section 137(6) Director must consent to prosecution of a director, officer or agency of a corporation for permitting corporation to commit an office: RD
- O Reg 285/01, s. 32 Approve daily excess hours agreement at time of hire: Not delegated

Delegation of Powers – Employment Protection for Foreign Nationals Act, 2009

The following lists the powers and duties of the Director of Employment Standards in the sequence that they appear in the *Employment Protection for Foreign Nationals Act, 2009* (“EPFNA”) and indicates to whom the powers or duties have been delegated. Note that most of the powers and duties of the DES under the EPFNA are incorporated by reference to provisions in the ESA 2000, which appear in square brackets below where applicable.

Abbreviations Used

- DES – Director of Employment Standards
- RD – Regional Director
- D/PM – District or Program Manager
- RPC – Regional Program Coordinator
- ESO – Employment Standards Officer
- PC – Provincial Coordinator
- MTFSU – Manager, Trust Fund Services Unit

- MSPPA – Manager, Strategic Planning & Program Administration Unit
- MOF – Collector

Delegated Powers

- Section 6(2) Approval of notice of civil proceeding form: Not delegated
- Sections 12(1) – (4) Prepare and publish documents regarding EPFNA and ESA 2000: Not delegated
- Section 13(1) Authority to publish names of convicted offenders: Not delegated
- Section 20(1) Approval of claim form: Not delegated
- Section 23 Distribute monies received from an ESO, based on a settlement, to the employee: PC, MTFSU, MSPPA [ESA 2000 s. 112(5)]
- Section 24(2) Pay out vested monies (fees) to an entitled person: Not delegated [ESA 2000 s. 105(3)]
- Section 24(3) Pay out vested monies (costs) to an entitled person: Not delegated [ESA 2000 s. 105(3)]
- Section 24(6) Contravention of a compliance order may be restrained upon an application to a judge: RD [ESA 2000 s. 108(5)]
- Section 24(7) Requirement to pay amount ordered under director's order to pay issued as per s. 106 of ESA 2000 to the Director of Employment Standards in trust: RD, D/PM, ESO [ESA 2000 s. 106(6)]
- Section 24(7) Requirement to pay amount ordered under director's order to pay issued as per s. 107 of ESA 2000 to the Director of Employment Standards in Trust: RD, D/PM, ESO [ESA 2000 s. 107(2)]
- Section 24(8) Distribute money rateably: PC, MTFSU, MSPPA [ESA 2000 s. 109(2)]
- Section 29(1) Accept an irrevocable letter of credit for review of an order to pay fees or an order to pay wages: PC, MTFSU, MSPPA [ESA 2000 s. 116(1)(b)]
- Section 29(1) Accept an irrevocable letter of credit for review of a compensation order issued to a temporary help agency or a client of a temporary help agency under ESA 2000 s. 74.14 or a compensation order under ESA 2000 s. 104: PC, MTFSU, MSPPA [ESA 2000 s. 116 (1)(c)]
- Section 29(6) Approval of a settlement of a compliance order through a labour relations officer: RD, PC [ESA 2000 s. 120(3)]
- Section 29(6) Distribute monies in accordance with a settlement through a labour relations officer: PC, MTFSU, MSPPA [ESA 2000 s. 120(6)(a)]
- Section 33(2) Establishment of polices regarding EPFNA: Not delegated [ESA 2000 s. 88(2)]
- Section 33(2) Establishment of interest rate: Not delegated [ESA 2000 s. 88(5)]
- Section 33(2) Use of surplus interest to pay financial institution charges: PC, MTFSU, MSPPA [ESA 2000 s. 88(8)]
- Section 33(2) Termination and reassignment of investigation or inspection: RD (ESA 2000 ss. 88(1) and (3)]
- Section 39 Direct Board to consider manner of service: PC, MSPPA [ESA 2000 s. 95(7)]
- Section 40 Make a third party demand: RD, D/PM, RPC, ESO, MOF [ESA 2000 s. 125(1)]

- Section 40 Accept security for amounts owing: Not delegated [ESA 2000 s.125.1]
- Section 40 Issue a warrant, directed to the sheriff, to enforce payment of an order: Not delegated [ESA 2000 s. 125.2]
- Section 40 Register a lien and charge on real property: Not delegated [ESA 2000 s. 125.3(1)]
- Section 40 Register a lien and charge on personal property: Not delegated [ESA 2000 s. 125.3(2)]
- Section 40 Service of the notice of a third party demand: RD, D/PM, RPC, ESO, MOF [ESA 2000 s. 125(3)]
- Section 40 Certify a copy of an order and file in court: RD, D/PM, RPC, ESO, MOF [ESA 2000 s. 126(1)]
- Section 40 Service of a notice of the filing of an order in court: RD, D/PM, RPC, ESO, MOF [ESA 2000 s. 126(2)]
- Section 40 Enforce an order filed in court as a judgment or order of the court: RD, D/PM, RPC, ESO, MOF [ESA 2000 s. 126 (3)]
- Section 40 Apply ss. 126(1) – (3) with necessary modification to a notice of contravention: RD, D/PM, RPC, ESO, MOF [ESA 2000 s. 126(4)]
- Section 40 Written consent to permit collector to pay directly to person entitled to wages, fees or compensation: PC, MTFSU, MSPPA [ESA 2000 s. 128(3(1)(ii)]
- Section 40 Written approval of settlement by collector regarding notice of contravention: PC, MTSFU, MSPPA [ESA 2000 s. 129(1)(b)]
- Section 40 Written approval of settlement by collector for less than 75% of amount entitled to by the person: RD, D/PM [ESA 2000 s. 129(2)]
- Section 45(2) Director of Employment Standards to collect amounts ordered by court for certain contraventions: RD, PC, MTFSU, MSPPA
- Section 45(3) Director of Employment Standards may file court order for enforcement purposes: RD, PC, MTFSU, MSPPA
- Section 47(4) Director of Employment Standards to collect amounts ordered by court where a director, officer or agency of a corporation is guilty of offence of permitting offence: RD, PC, MTSFU, MSPPA
- Section 47(5) Director of Employment Standards must consent to prosecution of director, officer or agent of a corporation for permitting corporation to commit an offence: RD

Exercise of Discretion

The discussion of the various provisions under which the Director or their delegate has authority to exercise discretion frequently contains a list of factors that may be relevant when the discretion is being exercised, and may set out general principles that are usually followed. Please note that the lists are not intended to be exhaustive of all factors that may be relevant. Please also note that Program policy is that the Director (or delegate) will consider any submissions from a party as to why a listed factor should or should not be relevant, or why a general policy should or should not be departed from.

ESA Part I Section 1 – Definitions

A

Agent

"Agent" includes a trade union that represents an employee in collective bargaining;

The definition provides that "agent" includes trade unions that represent employees in collective bargaining. Trade union is also defined in s. 1. Because the definition of agent is inclusive, rather than exhaustive, agent can include people or entities other than a trade union. For example, it can include lawyers or other representatives.

Alternative Vacation Entitlement Year

"Alternative vacation entitlement year" means, with respect to an employee, a recurring 12-month period that begins on a date chosen by the employer, other than the first day of the employee's employment;

This definition was introduced by the *Government Efficiency Act, 2002,* SO 2002, c 18, effective November 26, 2002.

The definition provides that "alternative vacation entitlement year" is a recurring 12-month period that begins on a date that is not the date of an employee's first day of employment.

For further details see ESA Part XI - Vacation with Pay.

Arbitrator

"Arbitrator" includes,

(a) a board of arbitration, and

(b) the Board, when it is acting under section 133 of the *Labour Relations Act, 1995*;

This definition provides that "arbitrator" includes both a board of arbitration and the Ontario Labour Relations Board when it is acting under s. 133 of the *Labour Relations Act, 1995,* SO 1995, c 1, Sch A - that is, when it sits as a board of arbitration hearing construction industry grievances. See the definition of “board” in this section.

Assignment Employee

"assignment employee" means an employee employed by a temporary help agency for the purpose of being assigned to perform work on a temporary basis for clients of the agency;

An assignment employee is defined as an employee who is employed by a temporary help agency for the purpose of being assigned to perform work on a temporary basis for clients of the agency. Note that ESA Part I, s. 1 also provides a definition of employee that is discussed below. The Program's position is that "work on a temporary basis" would obviously include a short term assignment but would also include long term or open ended placements with a client. The work is considered to be temporary because there is no

permanent placement with the client; the assignment employee continues to be the employee of the agency and not the client throughout the period of the assignment.

Further, an assignment employee continues to be employed by the agency during both periods of assignment and non-assignment unless the relationship is ended by either party or by a lay-off that exceeds a certain number of weeks. See the related discussions in ESA Part XVIII.1, s. 74.3 and ESA Part XVIII.1, s. 74.4 regarding the employment relationship between assignment employees and temporary help agencies and work assignments as well as ESA Part XVIII.1, s. 74.11 regarding termination and severance of employment.

It should also be noted that pursuant to s. 74.8(4) and s. 74.9(4), references to assignment employee within ss. 74.8 and 74.9 are interpreted as including a "prospective assignment employee". See the discussion at ESA Part XVIII.1, s. 74.8(4).

B

Benefit Plan

"Benefit plan" means a benefit plan provided for an employee by or through his or her employer;

This definition provides that "benefit plan" means a benefit plan that is provided for an employee by or through the employee's employer. Thus, both employer-sponsored plans and plans that are provided through an employer by a third-party insurer fall within the definition of benefit plan.

Board

"Board" means the Ontario Labour Relations Board;

This defines the Ontario Labour Relations Board as the Board referred to in the Act. The definition was originally added to the former *Employment Standards Act* by the *Economic Development and Workplace Democracy Act, 1998*, SO 1998, c 8, effective June 29, 1998, at the same time the Board was given jurisdiction to deal with applications for review.

Building Services

"Building services" means services for a building with respect to food, security and cleaning and any prescribed services for a building;

This definition identifies the kinds of services included in the term "building services". The term building services appears in ESA Part IV Continuity of Employment and ESA Part XIX Building Services Providers.

The definition of building services in the ESA 2000 is exhaustive, which means that the defined term is limited to services related to food, security and cleaning and those services prescribed by O Reg 287/01. Building services cannot include other services even if they are analogous to the ones that are specifically mentioned, nor does it include construction, maintenance (other than maintenance activities related to cleaning the premises) and the production of goods (other than goods related to the provision of food services at the premises for consumption on the premises).

Food Services

The definition of building services in ESA Part I, s. 1(1) includes "food services". This is typically a food services operation that is intended to be exclusively for the use of the employees of a particular company located on the premises, and/or exclusively for the use of persons visiting the premises, but not for persons visiting the premises solely for the purpose of using the food services. It could be a cafeteria-style operation, vending machines or a full-service operation.

The operator of a food court in a shopping mall would not be considered to be providing service for a building with respect to food because, although many users of the food court services may be people who have business within the building (i.e., shoppers), it is likely that some people, such as those working in neighbouring office buildings, will come to the food court just for the food.

Likewise, operators of fast food restaurants in a food court in an office tower would not be considered to fall within the definition of building services. Such food courts are typically located in the public area of a large office building. The owner or manager of the building will typically lease space in the food court area to operators of fast food restaurants that do most of their business at lunchtime. Sometimes the owner will receive a percentage of sales in addition to the base rent. Like the food court in a shopping mall, the food court in an office tower can reasonably be expected to be used by persons who work in other buildings and only come to the food court to have a meal.

Generally, restaurants in food courts are intended for the use of persons other than just those who work or have business in the building in which the food court is located. The food court services the public at large, whether they work or have business in the building or not. Thus a food court cannot generally be said to be services for a building in accordance with the definition in ESA Part I, s. 1(1). This is in contrast to the typical 'company cafeteria' in an office tower, which is designed principally for the use of the persons who work in the building. However, see *UFCW, Local 1000A v Cara Operations Ltd.*, 2001 CanLII 18382 (ON LRB) in which the food court in an airport was determined to fall within the definition of building services under the provisions of the former *Employment Standards Act* because the food court was considered to be for the exclusive use of persons having business at the airport. Similarly, where a restaurant or food court within an art gallery or museum is virtually exclusively used by patrons of the art gallery or museum patrons, the restaurant could be considered to be services for a building with respect to food within the meaning of the definition of building services in ESA Part I, s. 1(1).

Security Services

The definition of building services in ESA Part I, s. 1(1) includes "security services". These could be performed through patrols, either on foot or in a vehicle, through a guard sitting at a front desk, through video surveillance or any combination of the above.

Cleaning Services

The definition of building services in ESA Part I, s. 1(1) includes "cleaning services". This includes cleaning the inside of the building as well as cleaning the outside of the building, e.g., window cleaning services. Cleaning is usually for cosmetic, hygienic or safety reasons. Sometimes cleaning will be referred to as maintenance - see *Federated Building Maintenance Co. Ltd.* (September 23, 1988), ESC 2377 (Franks). For example, the employees who dust, vacuum and empty the garbage in office buildings are often referred to as providing maintenance services. Although they may be called maintenance, these cleaning activities are building cleaning services. However, maintenance that is of a non-cleaning nature, e.g., repair, preventative work, etc., will not be covered.

There may be some activities that fall into a grey area between cleaning and maintenance. For example, the removal of salty road slush from an indoor parking garage in the winter could be characterized as cleaning, or it could be characterized as preventative maintenance intended to avoid erosion of the concrete. It is Program policy that if the work can be characterized as cleaning, whether or not it can also be characterized in some regard as maintenance, it will fall under the definition of building services.

Other Prescribed Services

Under s. 1 of O Reg 287/01, the following are prescribed as building services:

- Services that are intended to relate only to the building and its occupants and visitors with respect to a parking garage or parking lot and a concession stand; and
- Property management services intended to relate only to the building.

These services may or may not be provided through a comprehensive operations and maintenance contract for such things as janitorial services, landscaping services, driveway, parking lot and sidewalk snow removal, fire alarm services, elevator services, parking lot supervision, heating and air conditioning and plumbing maintenance, and repair and pest control.

For a more detailed discussion of the definition of building services see O Reg 287/01, s. 1.

Building Services Provider or Provider

"Building services provider" or "provider" means a person who provides building services for a premises and includes the owner or manager of a premises if the owner or manager provides building services for premises the person owns or manages;

This definition identifies who is a "building services provider" or "provider". The terms building services provider or provider appears in ESA Part IV Continuity of Employment and ESA Part XIX Building Services Providers.

Building services providers include cleaning, security and food companies that provide building services for a premises - see the discussion of the definition of building services above and in O Reg 287/01, s. 1.

This definition is inclusive, applying to any person, which includes a natural person as well as a corporation, who provides building services for a premises, including the owner or manager of the premises. As a result, the definition will include managers and property management companies who enter into sub-contracts with cleaning, security and food service operations, or use their own in-house staff to provide such services. It will also include owners that contract with cleaning security and food service operations or use their own in-house staff to provide building services at the premises it owns.

There may also be situations in which a major tenant of an office building, for example, contracts with a company to provide for cleaning or security services which are included in the definition of building services in ESA Part I, s. 1. Under the former *Employment Standards Act*, the application of the building services provisions was limited to an owner of a building or a manager. However, Program policy was that the term owner included lessees or tenants, where the lessee or tenant had control over the premises and was in a position to enter into agreements with contractors or other parties for the provision of building services. This policy was also supported by the courts, which took a broad view of the term owner where it appeared in the former *Employment Standards Act*, holding that it could include lessees and tenants where the context was appropriate. In this regard, see *Ritchie and Dobbie v. Stanstead and Sherbrooke Fire Insurance Company* (1940), 1 DLR 241 (ON CA). As noted above, the ESA 2000

definition of building services provider is inclusive, referring to building services being provided by any person who provides building services for a premises, including an owner or manager. It is therefore Program policy that lessees or tenants who provide building services for a building fall within the definition of building services provider whether as any person or as an owner.

Business

"Business" includes an activity, trade or undertaking;

This definition provides that a "business" will include an activity, trade or undertaking.

C

Client

"client", in relation to a temporary help agency, means a person or entity that enters into an arrangement with the agency under which the agency agrees to assign or attempt to assign one or more of its assignment employees to perform work for the person or entity on a temporary basis;

"Client" is defined in relation to a temporary help agency and means a person or entity that enters into an arrangement with the agency under which the agency agrees to assign or attempt to assign one or more of its assignment employees to perform work on a temporary basis for the person or entity. A "person or entity" includes an individual person, a sole proprietor, corporation, or a partnership.

The arrangement with the agency may or may not be in writing.

Collector

"Collector" means a person, other than an employment standards officer, who is authorized by the Director to collect an amount owing under this Act;

This provision defines "collector" as a person, other than an employment standards officer, who is authorized by the Director of Employment Standards to collect amounts owing under the Act. The term collector appears in ESA Part XXIV, ss. 127-129. These sections permit the Director to appoint collectors to collect amounts owing under the Act, whether for employees, for the Minister of Finance for amounts owed with respect to monetary penalties associated with notices of contravention or amounts owed to the former Employee Wage Protection Program or for amounts owed to the Director in the form of administrative costs.

Continuous Operation

"Continuous operation" means an operation or that part of an operation that normally continues 24 hours a day without cessation in each seven-day period until it is concluded for that period;

The term "continuous operation" appears in the public holiday provisions in ESA Part X, s. 28. Section 28 allows an employer in such an operation to require an employee to work on a public holiday if the holiday is on a day that is ordinarily a working day for the employee and the employee is not on vacation.

A continuous operation is an operation (i.e., an activity or service) or that portion of the operation that normally operates 24 hours a day until completion of the regularly scheduled operations for that period.

This may involve, for example, certain portions of, or routes on, a municipal public transportation network, a 24-hour security service, or that portion of an employer's operation requiring stationary engineers, maintenance mechanics, millwrights or production workers to run machinery, furnaces, or heat-treating baths, etc. on a continual basis until a process is completed.

The operation need not run continuously seven days per week to fall within the definition of continuous operation. However, if the operation were to stop and start more than once in a seven-day period, it would not be considered by the Program to be a continuous operation.

In this regard, the Program disagrees with the arbitrator's decision in *Collins & Aikman Plastics Ltd. v United Steelworkers, 9042*. In that case, the employer's operation ran 24 hours a day for five, six or seven days a week and there was never more than one shutdown within any week. However, the arbitrator concluded that it was not a continuous operation because in his view, a continuous operation included only those employers who "cannot stop operations midstream in order to observe a public holiday" or those employers who ran a 24/7 operation.

Only that part of an operation that operates on a 24-hour basis is a continuous operation. For example, in a casino that operates 24 hours a day, seven days a week, the games part of the casino will be a continuous operation, but the office part of the casino, if it operates only during regular business hours, will not be.

Businesses that are open seven days a week but not 24 hours a day are not continuous operations.

D

Difference in Employment Status

The definition of the phrase "difference in employment status" was repealed pursuant to the *Making Ontario Open for Business Act, 2018,* S.O. 2018, c. 14 effective January 1, 2019. The phrase appeared in section 42.1 of the ESA, 2000 – which generally prohibited employers from paying different pay rates to employees because of a difference in their employment status – and which was also repealed as a result of the same legislation. Since employees may still have a complaint relating to section 42.1 that arose during the period of time when that section was in force – from April 1, 2018 to December 31, 2018 – the discussion of this definition remains as part of this publication. The text appears in red to highlight that the definition has been repealed.

"difference in employment status", in respect of one or more employees, means,

(a) a difference in the number of hours regularly worked by the employees; or

(b) a difference in the term of their employment, including a difference in permanent, temporary, seasonal or casual status;

This term appears in section 42.1 of the ESA 2000, under Part XII (Equal Pay for Equal Work). Under that section, subject to certain exceptions, employers are prohibited from paying an employee a rate of pay less than the rate paid to another employee of the employer because of a difference in employment status, when certain criteria are met.

A difference in employment status means:

- A difference in the number of hours regularly worked by an employee and one or more other employees; or
- A difference in the term of employment of an employee and one or more other employees.

Difference in number of hours regularly worked

A difference in the number of hours regularly worked by employees constitutes a difference in employment status. “Hours regularly worked” refers to the number of hours that the employees actually work (including hours that they are deemed to have worked pursuant to section 1.1 of O Reg 285/01). A contract of employment or job description may set out the number, or a range, of hours the employee is expected to work, and may be relevant when determining whether there is a difference in the number of hours regularly worked by employees. However, if there is a conflict between the contract / job description and the number of hours actually worked, the number actually worked will be used to determine if there is a difference in the number of hours worked.

Two or more employees may be considered to regularly work a different number of hours even if they sometimes work the same number. Conversely two employees may be considered to regularly work the same number of hours even if they sometimes work a different number.

It may not always be readily apparent how many hours employees regularly work. For example, their hours may vary from day to day, week to week or month to month, in a predictable or unpredictable pattern. In these situations, the period of time over which the number of hours worked that is to be reviewed to determine the number of hours an employee regularly works will depend on the circumstances. In general, as the aim is to determine the character of the employee’s employment status, a longer period is to be reviewed when determining the number of hours an employee regularly works (i.e. a review of the number of hours worked over a period of months, rather than days or weeks, is generally the preferred approach; one exception to that approach would be, of course, where it is not possible due to the length of the employment relationship).

There is no “minimum difference” or threshold that must be met in order for a difference in the number of hours regularly worked to constitute a difference in employment status. For example, a one-hour difference or a 20-hour difference in the number of hours regularly worked by employees would both constitute a difference in employment status.

Difference in the term of employment

A difference in the term of employees’ employment constitutes a difference in employment status.

A difference in the term of employees’ employment is defined to include a difference in:

- “Permanent” status. This generally means that the employment relationship has no fixed end date.
- “Temporary” status. This generally means that the employment relationship is not permanent but has a fixed end date or will end upon the completion of a project, task etc..
- “Seasonal” status. This generally means that the employment relationship is seasonal in nature and will end when the season for which the employee was hired comes to an end.

- "Casual" status. This generally refers to an arrangement where an employee is called to work on an as-needed basis.

The list of types of difference in the term of employees' employment above is not exhaustive, and there could be other differences not listed.

Note that there could be overlap between the types of differences in the term of employee's employment listed above. But, as long as there is a difference in the term of employment as between two or more employees, they will be considered to have a "difference in employment status" for the purposes of the "equal pay" provision in s. 42.1. For example, a permanent casual employee and a temporary casual employee are considered to have a difference in employment status even though both are casual.

Director

"Director" means the Director of Employment Standards;

This defines the "Director" referred to in the Act as the Director of Employment Standards, who is appointed by the Minister of Labour, Training and Skills Development for Ontario. The Director of Employment Standards may exercise powers and is required to perform duties imposed on them under the Act. Many of the powers of the Director have been delegated. For a complete listing of the powers of the Director, and to whom those powers have been delegated, please see Delegation of Powers.

Domestic or Sexual Violence Leave Pay

"domestic or sexual violence leave pay" means pay for any paid days of leave taken under section 49.7;

This definition was added by the *Fair Workplaces, Better Jobs Act, 2017* SO 2017, c 22.

Domestic or sexual violence leave pay is defined as pay for any paid days of leave taken under ESA Part XIV, s. 49.7. ESA Part XIV, s. 49.7(5) requires that an eligible employee be paid for the first five days of domestic or sexual violence leave taken within a calendar year. The amount of domestic or sexual violence leave pay an employee may be entitled to is determined by ESA Part XIV, ss. 49.7(6), (7) and (8).

E

Employee

"Employee" includes,

(a) a person, including an officer of a corporation, who performs work for an employer for wages,

(b) a person who supplies services to an employer for wages,

(c) a person who receives training from a person who is an employer, if the skill in which the person is being trained is a skill used by the employer's employees, or

(d) a person who is a homeworker,

and includes a person who was an employee;

The definition of employee specifically includes those persons described in (a) to (d) above. Each description also either explicitly or implicitly refers to a relationship between the person described therein and an employer - see the definition discussed below. It is the existence of the relationship between the employer and the employee that defines an employee for the purposes of the Act. See *1022239 Ontario Inc. (Seventy-Five Hundred Taxi Inc.) v Director of Employment Standards*, 2011 CanLII 44478 (ON LRB) and *Professional Recovery Equipment Inc. v Mootoo,* 2014 CanLII 69932 (ON LRB) in which the Board referred to the factors considered in determining whether an employment relationship exists. In the first case, the issue was whether taxi drivers were employees of the taxi company or independent contractors. In the second case, the issue was whether a tow truck driver was an employee or an independent contractor. Likewise, the definition of employer states that the employer "has control or direction of, or is directly or indirectly responsible for, the employment of a person . . ." Therefore, the Act only applies to the employer within the context of the employee-employer relationship.

There is an abundance of case law referring to this relationship, as the roots of the employee-employer relationship date back to the common law notion of master-servant. Because the Act also defines employee in reference to the employee-employer relationship, the common law definitions, with some modification and expansion in light of the intent of the Act, are used to determine whether a person is or is not an employee. See the discussion of the common law tests for employer-employee relationships below.

In addition, this relationship of employee and employer is the subject of other statutes and has been the subject of determinations by administrative tribunals and the courts under those other statutes. However, those determinations have limited application in the context of the ESA 2000 because the purposes of those other statutes are different than the purpose of the ESA 2000.

Therefore, for the purposes of the ESA 2000, the fact that a person is, or is not, considered an employee for the purposes of income tax, employment insurance, workers' compensation, the *Labour Relations Act, 1995* or the Canada Pension Plan is not of great relevance. See *Deluxe Taxi (Barrie) Ltd. v Employees* (April 18, 1973), ESC 125 (McNish), decided under the former *Employment Standards Act,* and also see *1022239 Ontario Inc. (Seventy-Five Hundred Taxi Inc.) v Director of Employment Standards*, a decision of the Board under the current Act.

In *Homelife G.M. Ewins Limited v Chiu* (September 22, 1987), ESC 2269 (Baum), the referee dealt with a claimant who was not an employee according to a by-law of the Toronto Real Estate Board ("TREB"). The by-law stated that a person who worked full-time elsewhere would not be considered to be employed as a real estate salesperson by an agency such as the applicant. The referee, in finding the claimant to be an employee under the former *Employment Standards Act*, noted that employment standards legislation "takes its own measure" and was not controlled by the private law of such domestic bodies as TREB.

Note that as of November 27, 2017, ESA Part III, s. 5.1 prohibits an employer from treating an employee as if they were not an employee under the Act.

Statutory Provisions

Work or Service for Wages

"Employee" includes,

(a) a person, including an officer of a corporation, who performs work for an employer for wages, or

(b) a person who supplies services to an employer for wages.

These two sections include as employees those persons who perform work or supply services for wages. The Program position is that the Act does not apply to volunteers.

Employee vs. Volunteer

Since volunteers are not considered to be employees under the Act, it is important to determine whether a person is a true volunteer or an employee. The fact that no wages were paid is not determinative of volunteer status - see *Robinson o/a Station Street Café v Ramsay and Ramsay* (December 30, 1988), ESC 2434 (Adamson), a decision under the former *Employment Standards Act*; nor is the fact that there was some form of payment made necessarily determinative of employee status (e.g., a payment may have been made in the form of an honorarium as opposed to wages).

Referee Davis in *Consumer Liability Discharge Corporation v Molica* (July 24, 1981), ESC 1032 (Davis), a case under the former *Employment Standards Act*, suggested that:

One of the key factors in determining whether there has been a true volunteering of services . . . is the extent to which the person performing the services views the arrangement as being pursuant to his pursuit of a livelihood on one hand, and the extent to which the person receiving the services is conferred a benefit on the other hand. Another factor will be the circumstances of how the arrangement was initiated: and again, whether an economic imbalance between the two parties was a factor in structuring the arrangement.
Applying the first factor in the context of family-run businesses, the question will often be whether the individual is providing their services in pursuit of a livelihood or in service of the family.

Officers of a Corporation

Officers of a corporation who perform work or supply services for wages are specifically included in the definition of employee. It codifies previous Program policy that although a person may be a corporate officer, they will nonetheless be considered an employee insofar as they perform work or supplies service for wages.

A Person Receiving Training

"Employee" includes,

(c) a person who receives training from a person who is an employer, if the skill in which the person is being trained is a skill used by the employer's employees,

Clause (c) of the definition of employee defines persons receiving training from an employer as employees if the skill in which the person being trained is a skill used by the employer's employees.

This provision was amended by the *Fair Workplaces, Better Jobs Act, 2017* SO 2017, c 22. Prior to this amendment, the former s. 1(2) held that trainees who met certain conditions were not considered to be employees under the Act. However, this amendment now states that any person who receives training from a person who is an employer is an employee if the skill in which the person being trained is a skill used by the employer's employees.

Trainees

The effect of clause (c) is to define some people who receive training from an employer as employees, thereby bringing them under the Act. Note that the fact that an individual did not negotiate for or expect to receive monetary compensation while they were being trained does not preclude a finding that they were an employee, nor will the fact that an individual has agreed to take training in an employer's business on an unpaid basis in preparation for taking on a job with that employer preclude a finding that their employment began when the training commenced. See *1153800 Ontario Inc. o/a Baker's Dozen Donuts v Sherren*, 2000 CanLII 4482 (ON LRB), decided under the former *Employment Standards Act*.

In order for an individual who receives training from an employer to be an employee, the individual must be trained in a skill that is used by the employer's employees. It is the Program position that if the person receiving training is being trained in a skill that could be used by other employees of the employer, even though the employer has no other employees, that person is considered an employee.

However, it should also be noted that ESA Part III, s. 3(5) excludes certain categories of trainees who might otherwise be considered employees:

3(5) This Act does not apply with respect to the following individuals and any person for whom such an individual performs work or from whom such an individual receives compensation:

1. **A secondary school student who performs work under a work experience program authorized by the school board that operates the school in which the student is enrolled;**
2. **An individual who performs work under a program approved by a college of applied arts and technology or, a university;**

2.1 An individual who performs work under a program that is approved by a private career college registered under the *Private Career Colleges Act, 2005* and that meets such criteria as may be prescribed.

3. **A participant in community participation under the *Ontario Works Act, 1997*;**
4. **An inmate of a correctional institution within the meaning of the Ministry of Correctional Services Act, an inmate of a penitentiary, an individual being held in a detention facility within the meaning of the *Police Services Act* or someone being held in a place of temporary detention or youth custody facility under the *Youth Criminal Justice Act* (Canada), if the individual participates inside or outside the institution, penitentiary, place or facility in a work project or rehabilitation program;**
5. **An individual who performs work under an order or sentence of a court or as part of an extrajudicial measure under the *Youth Criminal Justice Act* (Canada).**
6. **An individual who performs work in a simulated job or working environment if the primary purpose in placing the individual in the job or environment is his or her rehabilitation.**

This exclusion had been scheduled to be repealed as of January 1, 2019, pursuant to the *Fair Workplaces Better Jobs Act, 2017*. However, under the *Making Ontario Open for Business Act, 2018* amendments, the repeal was delayed and it will now be repealed on a day to be named by proclamation of the Lieutenant Governor.

For further discussion of the exclusions in s. 3(5), see ESA Part III, s. 3.

Pre-Employment Selection

Activities engaged in as part of the pre-employment selection process must be distinguished from training. Persons who are engaged in some form of pre-employment activity are generally not considered employees under the Act, provided that the amount of time spent in the program is reasonably limited in duration and the activities involved do not displace the substantive training, instruction and orientation needed once an employee is hired.

Apprentices

Apprentices are generally considered to be employees for the purposes of the ESA 2000. Even though a worker may be defined as an apprentice under the *Apprenticeship and Certification Act, 1998*, SO 1998, c 22 or the *Trades Qualifications and Apprenticeship Act*, RSO 1990, c T.17 and may even have signed an agreement stating that they are to be considered a volunteer, they may still be an employee for the purposes of the ESA 2000.

In *Northland White Truck Sales Limited v Laframboise* (March 17, 1983), ESC 1380 (Barnett), a case under the former *Employment Standards Act*, the referee rejected the applicant's argument that the claimant was not an employee since his employment was regulated by the apprenticeship legislation. The referee found that although the claimant was indeed an apprentice for the purposes of that legislation, he was also an employee for the purposes of the former *Employment Standards Act* by virtue of s. 1(c) in the definition of employee.

Note, however, that there may be cases where paragraph 2 or 2.1 of ESA Part III, s. 3(5) applies, thereby excluding an apprentice from the application of the Act.

3(5) This Act does not apply with respect to the following individuals and any person for whom such an individual performs work or from whom such an individual receives compensation:

2. **An individual who performs work under a program approved by a college of applied arts and technology or a university.**

2.1 **An individual who performs work under a program that is approved by a private career college registered under the *Private Career Colleges Act, 2005* and that meets such criteria as may be prescribed.**

Work performed under an apprenticeship program may be covered by one of these exclusions, since such programs can include classroom training and, as such, form part of a program approved by a college or university or private career college. See ESA Part III, s. 3 for more details on these exclusions.

Sheltered Workshops

The ESA 2000 does not apply with respect to participants in a simulated job environment such as a sheltered workshop although such individuals might otherwise be considered trainees, and consequently employees under the ESA 2000. This exclusion had been scheduled to be repealed on January 1, 2019, pursuant to the *Fair Workplaces Better Jobs Act, 2017*. However, under the *Making Ontario Open for Business Act, 2018* amendments, the repeal was delayed and it will now be repealed on a day to be named by proclamation of the Lieutenant Governor.

Participants in a simulated job environment are specifically excluded from the application of the ESA 2000 – see paragraph 6 of ESA Part III, s. 3(5). For a more detailed discussion of this exemption, see "Individual performing work in a simulated job or working environment" under "Other exceptions – s. 3(5)".

Homeworkers

"Employee" includes,

(d) a person who is a homeworker

This paragraph clearly establishes that homeworkers are to be considered employees for the purposes of the Act, even though some of the circumstances under which homework is performed might suggest that a homeworker more closely resembles an independent contractor than an employee.

A more detailed discussion of the status of homeworkers as employees under the Act can be found in the s. 1 definition of homeworker.

Person Who Was an Employee

"Employee" includes a person who was an employee

The definition of employee also includes "a person who was an employee". This provision ensures that the recovery of entitlements that should have been given to an employee under the Act is not precluded merely because the individual concerned is no longer in the employee-employer relationship.

The Employee-Employer Relationship: Common Law Tests

The Act only applies where there is an employment relationship. The central question is whether an employee-employer relationship exists between the two parties. The determination of whether someone is an employee or an independent contractor is complex and the courts have created a number of common law tests for determining whether an employee-employer relationship exists. As noted above in the discussion of employee, the Board, referees adjudicators and the courts have referred to other sources, notably the common law tests, to determine if an employee-employer relationship exists.

The definition of employee in s. 1 is not exhaustive and has traditionally been interpreted in an expansive fashion. However, it is not always clear whether a person performing work for an employer is an employee as defined in s. 1 of the ESA 2000 or an independent contractor. An independent contractor is in business on their own account and is therefore not entitled to the same protections as employees under the ESA. Although the ESA does not contain a test for determining whether a person is an employee or an independent contractor, it is Program policy that the determination of whether or not an individual is an employee or independent contractor should be considered broadly utilizing the various tests and any other relevant factors.

Note that as of November 27, 2017, ESA Part III, s. 5.1 prohibits employers from treating employees as if they are not employees under the Act. It is important to note that parties cannot decide employee status merely by mutual agreement or by the signing of a written document, such as an employment contract or independent contractor agreement. Nor does the method of remuneration and whether statutory deductions are made greatly impact the determination of whether there is an employment relationship. Rather, it is the overall relationship that determines whether an employer-employee relationship exists. See for example *Econome Inc. v Champagne,* 2017 CanLII 14543 (ON LRB), in which the employer tried to rely on an unsigned employment agreement to indicate that the employee was not an employee. The Board disagreed and noted that the existence or form of a written contract does not impact an employee's status, particularly where the individual in question works full time and exclusively for the employer.

The Supreme Court of Canada in *671122 Ontario Ltd. v Sagaz Industries Canada Inc.*, [2001] 2 SCR 983, 2001 SCC 59 (CanLII) distinguished between the relationship of an employee and an employer and the relationship of an employer and an independent contractor, who is in business on their own account.

Major J., writing for the majority, reviewed the various tests developed by the case law and held that "there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor" (at paragraph 46). In making the determination, "what must always occur is a search for the total relationship of the parties" (at paragraph 46). Major J. provided further guidance by stating in paragraphs 47-48:

Although there is no universal test to determine whether a person is an employee or an independent contractor . . . [t]he central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks...

It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

The Supreme Court of Canada's decision in *671122 Ontario Ltd. v Sagaz* is essentially a restatement of the Federal Court of Canada's decision in *Wiebe Door Services Ltd. v M.N.R.,* [1986] 3 FC 533 (CA). The non-exhaustive list of factors above does not replace the factors in the traditional common law tests, since no single test can answer the question of whether a person is an employee or an independent contractor in all situations. As Major J. noted, the key question is "whether the person who has been engaged to perform the services is performing them as a person in business on their own account."

The classic common law tests, and the analysis given them by the Supreme Court of Canada in *671122 Ontario Ltd. v Sagaz* are discussed below.

Control Test

The Supreme Court in *671122 Ontario Ltd. v Sagaz* first reviewed the control test. Under this test, an individual is characterized as an employee if there is an employer who can control, or has the right to control the employee: "the essential criterion of employer-employee relations is the right to give orders and instructions to the employee regarding the manner in which to carry out his work" - see *Hôpital Notre-Dame de l'Espérance and Théoret v Laurent,* [1978] 1 SCR 605, 1977 CanLII 8 (SCC) at 613. Major J., writing for the Court, notes that the control test is problematic and has been criticized as having an air of deceptive simplicity. The indicia of control is thus no longer a sole determining factor of whether there is an employment relationship.

Although the control test has been rejected as the sole determining factor of whether there is an employment relationship, the element of control is one of the factors in other common law tests, notably the four-fold test, discussed below. Major J. in *671122 Ontario Ltd. v Sagaz* indicated that the level of control the employer has over the worker's activities will always be a factor in determining whether there is an employment relationship.

What is meant by the term control has expanded from the initial focus on the manner in which work was done. As workers became more specialized and skilled relative to their employers, there was less need for the workers to be told how each facet of their work was to be done. Other aspects in which employers have control of the activities of their workers fall within the element of control:

1. The right to control the method of doing the work;

2. The power to hire and to control the method of hiring;
3. The right to suspend or dismiss the alleged employee:
    - An employer has a greater degree of control over their employees than they would over an independent contractor. The employer's rights over the independent contractor are limited to terminating the contract for services where the work is not performed satisfactorily, whereas the employer has the right to suspend, dismiss or otherwise discipline employees.
4. The payment of wages or other remuneration;
    - *The manner of payment may indicate whether a sufficient degree of control is present in order for there to be an employment relationship. If a person is paid proportionate to the amount of work done rather than the time occupied or for a lump sum, this may indicate that such a person is being employed as an independent contractor*. - See *Becker Milk Co. Ltd. v Hajjar et al* (January 31, 1973), ESC (Carter).
5. The right of the employer to demand exclusive service from its worker;
6. The right of the employer to determine the place of work;
7. Freedom of action in performing the task, including the degree of supervision and the ability to designate;
8. Retention of the right to prescribe the exact work to be done; and
9. The degree of accountability on the part of the person performing the work.

Four-Fold Test

Major J. in *671122 Ontario Ltd. v Sagaz* also reviewed the classic four-fold test of *Montreal (City) v Montreal Locomotive Works Ltd.* [1944] UKPC 44, which was an attempt to deal with the problems of the control test. The four-fold test retains the element of control as a key indicator of the employment relationship, but examines additional factors to provide a means of distinguishing between an employee and an independent contractor. The test involved four elements, as follows:

1. Control: This may be defined as the power to control the method of doing the work. In other words, does the employer have the right to tell the employee not only what to do, but how to do it? Direct or immediate supervision is not essential. It is the power of control, rather than the day-to-day exercise of supervisory control that is significant.
2. Ownership of tools: "Tools" does not refer only to such items as hammers, lathes and cleaning mops, but can include any item used at the workplace, such as forms, manuals, promotional literature and a telephone. A person who owns all the equipment necessary for the work they do is more likely to be an independent contractor than an employee. Likewise, if the tools are supplied by the purported employer, it is more likely indicative of an employee-employer relationship.
3. Chance of profit.
4. Risk of loss: Elements three and four are usually linked together. Typically, an independent contractor is in business for himself or herself. This suggests that there is a financial investment

in their undertaking, so that there are variables (other than their own labour) subject to their influence that provide a chance of profit and risk of loss.

Organization Test

The Supreme Court of Canada in *671122 Ontario Ltd. v Sagaz* also considered the organization test or integration test, which was approved by that Court in *Co-operators Insurance Association v. Kearney*, [1965] SCR 106, 1964 CanLII 21 (SCC) and followed in *Mayer v J. Conrad Lavigne Ltd.,* 1979 CanLII 2088 (ON CA). This test examines whether the alleged employee is an integral part of the employer's organization, in which case the individual is an employee, or a mere accessory to it, in which case they are an independent contractor. The test was initially proposed by Lord Denning in *Stevenson, Jordan & Harrison Ltd v MacDonald & Evans* [1952] 1 TLR 101 as follows:

One feature which seems to run through the instances is that under a contract of service, a man is employed as a part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

Major J. in *671122 Ontario Ltd. v Sagaz* stressed the difficulties with the organization test: it can be a difficult test to apply, because if the question is whether the activity or worker is integral to the employer's business, the question can usually be answered in the affirmative. If the test is applied to demonstrate that, without the work of the alleged employees the employer would be out of business, a factual relationship of mutual dependency would always meet the test. Nonetheless, Major J. acknowledged that the organization test can be useful if properly applied, looking at the question of integration from the perspective of the employee and not that of the employer. If the test is applied from the employer's perspective, it is too easy to assume that every contributing cause is arranged purely for the convenience of the larger enterprise.

In *Pinnacle Roofing Systems Inc. v Thompson,* 2009 CanLII 9251, the Board summarized the organizational test as two main questions: (1) is the alleged employee an integral part of the business or ancillary [to it]?; and (2) is the employee's work subject to coordinated control as to where and when rather than the how? In applying the test, the OLRB found that a sheet metal worker was an employee because his work was an integral part of the employer's business within the meaning of the organizational test.

Statutory Purpose Test and Economic Dependence

The definition of employee in ESA PI, s. 1 is inclusive, which means that it is not a closed set of characteristics. The statutory purpose test, like the definition of employee, is meant to be expansive and inclusive. The test was first formulated in *Majestic Maintenance Services Limited* (February 8, 1977), ESC 479A (Burkett), in which Referee Burkett held that the traditional common law tests were not appropriate for interpreting the scope of the Act when the Act was clearly designed to expand upon or enhance the protections of the common law. Referee Burkett concluded that the existence of an employment relationship should be assessed by reference to the purpose of the statute, which he characterized as "intended to provide certain benefits to persons who by reason of their economic dependence or lack of bargaining power in the market place, might otherwise have to work on terms below the basic minima established in the Act." Referee Burkett further observed that "Whereas the Act is not designed to protect or underwrite the independent businessman… it must be said (and indeed it follows from the Becker decision) that it is **designed to protect those who are dependent in their employment**."

The statutory interpretation test was further parsed out by the OLRB in *Andrew Beyers Carpentry Inc. v Mohammed,* 2010 CanLII 23842 (ON LRB). The Board noted that the purpose of the ESA 2000 is to address the potential negative effects of unequal bargaining power between employees and employers. The Board stated that although the statutory purpose of the Act is easy to state, its application to a variety of "ever-changing" contractual agreements designed to obtain skills and services in a cost-effective way is challenging, and requires nuanced analyses to determine if there is economic dependence even where those agreements were specifically designed to include features that are commonly associated with independent contractors.

In applying the statutory interpretation test, the Board considered the claimant's work in the context of the construction industry. The Board noted that in the context of the construction industry, workers had more economic power in providing skills and services than in industrial settings, but there was no fundamental change to the underlying inequality between worker and employer. Furthermore, the Board stated that the fact that construction work is often done in multiple relationships of short duration and little day-to-day supervision was merely a function of the industry itself (e.g., duration of projects and the highly skilled nature of the worker), and not necessarily evidence of an independent contractor arrangement. The Board found that a relationship of economic dependence characteristic of the construction industry existed between the employer and the claimant. It was clear that the claimant agreed to provide her work regularly without any specified hour limit and with the expectation that she would be paid on a weekly basis. The Board found that the fact that the claimant agreed to use her cell phone and car was more indicative of her weak negotiating position than of her being an independent contractor. The fact that the employer did not take statutory deductions off of her pay and that the claimant was happy with that arrangement was not determinative, because the ESA 2000 is not applied in accordance with the preferences persons may have with respect to other statutes.

Application of the Common Law Tests

Following the Supreme Court of Canada's decision in *671122 Ontario Ltd. v Sagaz,* the Board has generally not applied one singular test for determining whether an employee-employer relationship exists. Rather, the Board has broadly utilized the various tests and any other relevant factors. Similarly, it is Program policy that the various common law tests and any other relevant factors should be applied and considered when determining when an individual is an employee or an independent contractor. The following Board decisions are some good examples of how the common law tests and other factors have been utilized.

In *Warren v 2006515 Ontario Inc.,* 2005 CanLII 1757 (ON LRB), the OLRB looked at several factors in determining that the claimant, a manager of a health food store, was in fact an employee and not an independent contractor. There were several facts that suggested the claimant was an independent contractor: she invested in one product for sale to her own profit; for a period, she financed the balance of the inventory; she used the terms "Nutritional Services" and "Managerial Services" on documents to describe the work she did for the employer; and no statutory deductions were made from gross amounts owing to her for work performed. However, the OLRB found that there was substantial evidence to determine that the claimant was in fact an employee: the employer had control over her activities; the employer provided the premises and the equipment used; the employer had ultimate control to determine what product would be stocked; and the claimant had essentially no opportunity for profit or risk of loss. The Board has followed the approach articulated in *Warren v 2006515 Ontario Inc.* in other decisions, for example: *Big Picture Home Entertainment Limited v MacDonald,* 2016 CanLII 82670 (ON LRB); *Iris Blu Staffing Limited v Irwin,* 2016 CanLII 56987 (ON LRB); and *Bining v 1391165 Ontario Inc. (Wallace Transport),* 2009 CanLII 33872 (ON LRB).

In *Teneva v 946900 Ontario Limited o/a Idlewood Inn/Cloverleaf Motel,* 2016 CanLII 2422 (ON LRB), the OLRB considered whether a housekeeper for a motel was an employee or an independent contractor. The employer relied on a document signed by the claimant that stated she agreed to be an independent contractor. The employer also argued that the claimant could set her own schedule, refuse work and increase her profits by cleaning more rooms.

The OLRB found that the "independent contractor agreement" was not determinative. The OLRB stated that whether or not an individual is an employee is a question of fact and law to be determined after consideration of all of the relevant factors. The OLRB noted that the intention of the parties is relevant only to the extent that it is reflected in the actual structure and circumstances of their relationship, that is, parties cannot by their "agreement" make their relationship as one of independent contractor if the facts show that there is an employee-employer relationship.

The OLRB found that the claimant was an employee based on the following facts: the employer exercised substantial control over the claimant's schedule; the claimant was expected to answer the employer's call to work, regardless of the time of day, which meant that the claimant was unable to work for any other employer or attend job interviews to find alternate employment; the employer provided the claimant with all the cleaning products and equipment she required; and the claimant had limited ability to profit from cleaning rooms, as the employer decided the number and type of rooms she was to clean.

In *Ilaris Corporation v Gadzevych,* 2007 CanLII 19192 (ON LRB), the OLRB considered whether a claimant who performed repair and renovation services for a fixed amount on a per project basis was an employee or an independent contractor. The OLRB concluded that he was in fact an employee because he was an integral part of the employer's business. Although he was hired for a fixed amount per project, he was not free to substitute someone else to perform the work and there was no sense in which he could be described as being in business for himself.

In *Appleseed Snow Blowing Service Inc. v Bourguignon,* 2005 CanLII 38056 (ON LRB), the OLRB found that the claimant, a snow shoveler, was an independent contractor whose snow shoveling activities were more akin to being engaged in business on his own account. There was no ongoing working relationship between the snow shovelers and the employer, and snow shovelers were free to engage in other activities or employment in between snowfalls. The employer exercised little control over the activities of the snow shovelers as it did not require them to work following every snowfall and did not dictate hours of work, how or in what order the work was to be done. The snow shovelers also arranged their own transportation between work sites and provided their own equipment.

Miscellaneous

There are other persons who may or may not be considered employees for the purposes of the ESA 2000, some of whom are discussed in greater detail below. For information regarding the exclusions in s. 3(5), see ESA Part III, s. 3.

Directors

Paragraph 11 of s. 3(5) and s. 3(6) of the Act read:

3(5) This Act does not apply with respect to the following individuals and any person for whom such an individual performs work or from whom such an individual receives compensation:

11. A director of a corporation, except as provided in Part XX (Liability of Directors), Part XXI (Who Enforces This Act and What They Can Do), Part XXII (Complaints and Enforcement), Part XXIII

(Reviews by the Board), Part XXIV (Collection), Part XXV (Offences and Prosecutions), Part XXVI (Miscellaneous Evidentiary Provisions), Part XXVII (Regulations) and Part XXVIII (Transition, Amendment, Repeals, Commencement and Short Title).

3(6) Where an individual who performs work or occupies a position described in subsection (5) also performs some other work or occupies some other position and does so as an employee, nothing in subsection (5) precludes the application of this Act to that individual and his or her employer insofar as that other work or position is concerned.

These sections provide that the Act does not apply with respect to directors of a corporation, in their role as directors, except as provided in ESA Parts XX-XXVIII. However, the Act does apply to an individual who is a director but who also performs work or occupies a position as an employee. In order to determine whether ESA Part III, s. 3(6) applies, however, it is Program policy that directors, who constitute the controlling mind of a corporation, are not, in the absence of clear evidence of an employment contract, to be considered employees for the purposes of the Act. See *Re D.J.'s Family Centre Ltd.*, 1977 CanLII 1331 (ON SC) and *Satellite Computer and Communication Systems Ltd. v Dryla* (May 8, 1980), ESC 784 (Adamson), decisions under the former *Employment Standards Act*.

For cases under the former *Employment Standards Act* where a director of a corporation was also found to be an employee, see *Algoma Rubber Services Ltd v Johnston* (April 19, 1982), ESC 1205 (Eaton), where the Referee held that although the claimant was a director of the company, a minority shareholder and held the position of Vice-President and General Manager, his directorship did not preclude a finding that he was an employee for the purposes of the former *Employment Standards Act*. The referee found that there was a contract of employment and that the claimant was receiving wages within the meaning of the Act, and not being paid a consulting fee for his services. In addition, he was a Director in name only and his minority shareholder position was such that he had no effective say in the control of the company. See also *Munro v Cord King International* (August 24, 1998), 2086-97-ES (ON LRB), where the adjudicator found on an application for review of an employment standards officer's decision that the applicant, who was both a president and director of a company, was an employee under the former *Employment Standards Act* and therefore entitled to receive unpaid wages. While the applicant did have the title of president, he had no control over the decisions of the company, no control over its finances, and no substantial ability to hire, terminate, discipline or set salaries for the employees. As for his directorship, the employer had designated him as a director without the applicant's knowledge or consent.

Partners

A partnership is the relationship that exists between parties carrying on business in common with a view to profit. In the same way that a person cannot be their own employee, a partner cannot be employed by the partnership. See *Berini o/a Noront Printing v Purificati* (September 9, 1975), ESC 286 (Soubliere), a case decided under the former *Employment Standards Act*. The fact that a claimant is registered as a partner is not conclusive of partnership status, as there may be factors that will lead to a conclusion that the so-called partner is actually an employee for the purposes of the Act. To be partners, parties must have an agreement to carry on business in common and share profits. Some of the other indicia of partnership status include the contribution by the parties of money, property, effort, knowledge, skill or other assets to the common business, a joint ownership interest in the business, a mutual right of control or management of the enterprise, and authority to contract liabilities in respect of the business that is being carried on. Therefore, it is essential to look closely at the relationship between the parties to determine if the facts are more indicative of a partnership or an employer-employee relationship.

Corporate Shareholders

Corporate shareholders may be employed by the company in which they own shares. Even a major shareholder with a controlling interest in the company may be an employee, though they would have to occupy an employee position - shareholder status obviously does not make an individual an employee.

Agent

An agent is someone who can make a contract or dispose of property on their principal's behalf. This authority may be held by an independent contractor or by an employee. Therefore, the fact that a claimant is an agent is not determinative. The common law tests must be applied when examining the relationship to determine whether the claimant is an independent contractor/agent or an employee/agent.

Franchisees

Bona fide franchisees are generally not considered to be employees. In *Groulx v Loeb Inc.* (November 26, 1992), ES 203/92 (Novick), a case under the former *Employment Standards Act*, the claimant argued that he was a glorified store manager, not a franchisee, due to the high degree of control exercised by the franchisor: the franchisor held the head lease for the store premises, Loeb management was generally involved in the demotion and termination of employees in the franchisee's store, the franchisor suggested retail prices for the store's products, and the franchisee store was generally required to order its stock from Loeb. The adjudicator found, however, that the franchisee was not an employee because of the following: the claimant was the sole shareholder of the franchisee operation; he invested a substantial amount of money into the store at various stages, running the risk of significant financial loss or gain; and the claimant's company owned all of the equipment and inventory in the store. The claimant also made all key decisions with respect to the purchasing of products and the prices at which they were sold, albeit in accordance with dictated norms or industry practice; decided hours the store would be open; and had authority to hire and fire employees.

Lessees

Where a claimant is party to a lease agreement, leasing the business premises from a third party, they will not generally be considered an employee.

However, there are exceptions to this. For example, in *Anderson et al v Neil operating as Gerry Neil Texaco Service* (September 13, 1973), ESC 181 (McNish), the claimant was found to be an employee under the former *Employment Standards Act* even though he had a lease agreement with the Texaco Oil Company. The referee found Mr. Neil (the claimant) to be in the same position as a foreperson in a normal employee-employer arrangement. Most significant was the fact that Texaco maintained financial control on a daily basis and that Mr. Neil was paid a flat salary, not a share in the profits of the business.

Strikers

Persons on strike are employees under common law and are also considered to be employees under the inclusive definition in the ESA 2000. For example, see *Re Domtar Chemicals Limited* (August 17, 1973), ESC 139 (Fram), a decision under the former *Employment Standards Act*.

Personal Service Corporations

When a person has incorporated and provides services through the corporation, the assumption is often made that the person is, therefore, an independent contractor as opposed to an employee. However, where the person themselves is providing services through the corporation, the fact of the incorporation

does not preclude a finding that they are an employee for the purposes of the ESA 2000. The common law tests should be applied to determine if the relationship is in fact one of employee-employer.

For example, in *Queensbury Enterprises Inc. v J.R. Corporate Planning Associates Inc.*, the Ontario High Court held that there was an employee-employer relationship where a personal services corporation was retained to provide the defendant with financial consulting services. The sole and principal shareholder of the corporation was found to be an employee of the defendant, and therefore entitled to reasonable notice of termination.

Temporary Help Agencies

Temporary help agencies provide personnel to clients who require temporary or short-term help. A common example is the agency that supplies its clients with secretaries, data entry clerks, etc. during peak periods or when a replacement is required due to illness or pregnancy or parental leave. Although the personnel are subject to the host business' control with regard to the work they do for the client, they are not employed by the client. Generally speaking they are regarded as employees of the temporary help agency, for the purposes of the ESA 2000. See *Occasional Office Help c.o.b. Data Capture v Tinney et al* (July 28, 1977), ESC 444 (Picher) and *Taylored Drivers Inc. v Beck et al* (March 3, 1980), ESC 720 (Adamson), decisions under the former *Employment Standards Act* which discussed the issue of "Elect to Work" status of temporary help agency employees.

It should be noted, however, that just as one must always look to substance and not be misled by form when determining whether an employment relationship exists, one must also look to substance and not be misled by form when considering whether the host business is in fact the employer, or at least an employer (along with the agency, under the joint unrelated employers rule) for purposes of the Act. This is particularly likely to be the case where an individual spends many years working in the same job for the same host business without interruption while having ostensibly been employed by a succession of unrelated temporary help agencies, each of whom supposedly provided the individual's services to the host and where the individual's situation throughout was not distinguishable, as a practical matter, from that of an employee of the host. However, one should not be quick to draw the conclusion that an individual supposedly employed by a temporary help agency is in fact an employee of a host business; temporary help agencies fulfill an important and legitimate function, and where someone's services are apparently being provided to a host through the medium of an agency it should not lightly be assumed that form does not in fact reflect substance.

Employer

"Employer" includes,

(a) an owner, proprietor, manager, superintendent, overseer, receiver or trustee of an activity, business, work, trade, occupation, profession, project or undertaking who has control or direction of, or is directly or indirectly responsible for, the employment of a person in it, and

(b) any persons treated as one employer under section 4, and includes a person who was an employer;

The definition of “employer” includes the persons described in (a) and (b) above. It is the existence of a relationship between the employer and the employee (in the form of employment) that imposes the statutory obligations upon the person(s) defined as employer for the purposes of the Act.

An inquiry as to whether an employment relationship exists is resolved by applying the common law tests described in the preceding discussion on the employee definition. Essentially, the common law tests may be applied to determine whether a claimant is an employee, thereby imputing the position of employer to the other party to the employment relationship.

It should be noted, however, that the term employer as defined in the Act is given a broader meaning than its ordinary common law meaning. The term employer in the Act includes persons who may not be considered employers at common law. The Act also allows for the possibility of more than one person having employer status in relation to the same employee, either as persons having control or direction of an employee or having responsibility, directly or indirectly for the employment of a person, or entities carrying on associated or related activities or businesses with such persons. Therefore, it is necessary to determine which of these possible employers owes the statutory obligations set out in the ESA 2000 to the employee.

Statutory Provisions

Owner, Proprietor, etc.

"Employer" includes,

(a) an owner, proprietor, manager, superintendent, overseer, receiver or trustee of an activity, business, work, trade, occupation, profession, project or undertaking who has control or direction of, or is directly or indirectly responsible for, the employment of a person in it,

This part of the definition states that any owner, proprietor, manager, superintendent, overseer, receiver or trustee who has control or direction of, or is directly or indirectly responsible for, the employment of a person is an employer.

In *Re National Bank of Canada et al. and McArthur et al.*, 1986 CanLII 2837 (ON SC), a receiver-manager had refused service of an order to pay under the former *Employment Standards Act* in respect of employee vacation pay entitlements, arguing that it was not an employer under the Act. On judicial review of the case, the Divisional Court ruled that the Ministry had acted properly in serving the receiver-manager with the order, as a means of ensuring that the employee entitlements were dealt with properly from the proceeds of realization. In affirming the referee's decision, the Court stated:

[The receiver-manager] clearly took control of and was directly or indirectly responsible for the employment of the employees of Windsor Packing. Nothing could have demonstrated that control or responsibility more clearly than the exercise by Price Waterhouse of the right to terminate employment in the case of many of the employees. In doing so as agent of the owner, it did so as owner, as a matter of law. This brought it squarely within the statutory definition of "employer".
Amendments to the former *Employment Standards Act* in 1987 specifically included receivers and trustees within the definition of employer to codify the principle that the definition was intended to include such persons who have control of, or direct or indirect responsibility for, the employment of a person.

It should be noted that it has not been and is not the policy of the Program to consider the receiver or trustee personally liable for ESA 2000 obligations incurred by an insolvent employer where the receiver or trustee continues to operate the employer's business for some period of time following insolvency, for the purpose of carrying out his/her obligations respecting distribution among creditors. However, if the receiver or trustee was carrying on business for a lengthy period of time with no apparent view to distribution, the Program might consider imputing personal liability on the trustee or receiver.

Joint Unrelated Employers

In *Baldeo et al v Regent Park Community Improvement Association* (May 26, 1980), ESC 790 (Ellis) the Referee held that the former *Employment Standards Act*'s definition contemplated the possibility of each employee having a number of different employers at any one time. Although he acknowledged that this concept might not accord with other substantive aspects of the Act, he felt that the definition was workable if it was interpreted as referring to a particular person as an employer as determined "by the aspect of the employment for which that person is or was in fact responsible directly or indirectly, or over which he did indeed have control or direction."

In that case, the issue was which of two entities, the Association or the Ontario Housing Commission ("OHC"), was the employer of the claimant laundry attendants with regard to their claims for unpaid wages and vacation pay. The laundry attendants had been hired by the Association and were paid by the Association, pursuant to a contract between the Association and the OHC. Under the contract, the OHC provided funds, including those paid out to the laundry attendants by the Association as wages, for the building management services supplied by the Association.

The Association took the position that the OHC was the true employer and that the Association's status as employer was nominal only.

The Referee examined the contract and the relationship between the Association and the OHC and noted (among other things) that the Association was in a legal position, pursuant to its contract with the OHC, to control the way the agreed-upon arrangements concerning the employment of the claimants were administered. The Association thereby assumed a responsibility to the persons employed, pursuant to that arrangement, to see that their rights with respect to wages and like matters would not be jeopardized by the nature of that arrangement, or the way in which it was administered.

As a consequence, the Referee held that the Association was a person who, as a "manager, superintendent or overseer", was "directly or indirectly responsible" for the compensation aspects of the complainants' employment. Therefore, the Association was an employer for the purposes of the complaints in question.

However, he also noted that the laundry rooms were the property of the OHC and, in fact, were facilities that the OHC was obligated to provide to its tenants. The supervision of the staff of those facilities (the laundry attendants) was, as a practical matter, largely assumed by the OHC senior project manager. In addition, the laundry attendants were required to attend training sessions run by OHC staff. Finally, the OHC strictly controlled the Association's funding, thereby indirectly controlling the payment of wages to the laundry attendants. The Referee therefore held:

It is also self-evident, in my opinion, that OHC clearly falls within the Act's definition of "employer" with respect to the complaining employees. OHC is the "owner or proprietor" and probably also the "manager" of the laundry services activity and while its "control or direction" of the "employment" of the claimants may be a matter for argument it is at the very least "indirectly responsible" for that employment….
Although the Referee was unable to attach any liability for the unpaid wages and vacation pay to OHC by reason of its status as a Crown agency, he did make it clear that both the OHC and the Association fell within the definition of employer under the former *Employment Standards Act* as regards the laundry attendants' claims. See ESA Part III, s. 3.1 for more information on Crown agencies and employees.

It should be noted that the referee did not suggest that every person who could be seen as falling within the broad definition of employer under the former *Employment Standards Act* would necessarily incur

every liability that could possibly befall an employer under that Act. He recognized, for example, that in light of the definition a foreperson might be considered an employer for some purposes, but that a foreperson should not be considered to be personally liable for unpaid wages. In the referee's view, the key to applying the definition in s. 1 where more than one person fell within the definition was that a person or persons could be held responsible only for those aspects of the employment relationship in respect of which it could be said that they had control or direction of, or were directly or indirectly responsible for the person's employment. This principle enunciated in *Baldeo et al v Regent Park Community Improvement Association* continues to be the Program's policy under the ESA 2000.

It is also important to note that the joint liability of OHC and the Association in the above case was not based on the provision in the Act that provides for one or more entities to be treated as one employer, often called the related employers' provision. That provision is referred to in clause (b) of the definition of employer of the ESA 2000 and defined in ESA Part IV, s. 4 - see the discussion below under Related Employers.

Related Employers

"Employer" includes,

(b) any persons treated as one employer under section 4, and includes a person who was an employer.

Section 4 of the Act is reproduced below:

4(1) Subsection (2) applies if (a) associated or related activities or businesses are or were carried on by or through an employer and one or more other persons; and

(b) the intent or effect of their doing so is or has been to directly or indirectly defeat the intent and purpose of this Act.

(2) The employer and the other person or persons described in subsection (1) shall all be treated as one employer for the purposes of this Act.

(3) Subsection (2) applies even if the activities or businesses are not carried on at the same time.

(4) Subsection (2) does not apply with respect to a corporation and an individual who is a shareholder of the corporation unless the individual is a member of a partnership and the shares are held for the purposes of the partnership.

(4.1) Subsection (2) does not apply to the Crown, a Crown agency or an authority, board, commission or corporation all of whose members are appointed by the Crown.

(5) Persons who are treated as one employer under this section are jointly and severally liable for any contravention of this Act and the regulations under it and for any wages owing to an employee of any of them.

This section expands the definition of employer to include persons who carry on or have carried on associated or related activities or businesses with the principal employer, and aims to hold them accountable as one employer. Such persons are commonly referred to as "related employers".

While each joint unrelated employer must have direct or indirect control or responsibility for the employee in order to be found to be a joint unrelated employer, related employers do not have to have such control

or responsibility, though obviously the principal employer must in order for there to be a related employer finding. It is the relationship of the related employer to the principal employer, rather than its relationship, if any, to the employee, that is the source of the liability under the Act.

For further discussion, refer to ESA Part III, s. 4.

Employment Contract

"Employment contract" includes a collective agreement;

This defines "employment contract" as including a collective agreement. The term collective agreement is not itself defined in the ESA 2000, but would presumably include any agreement between an employer and a trade union, as defined in ESA Part I, s. 1, that contains the terms and conditions of employment for employees in a bargaining unit represented by that trade union.

The definition of employment contract in ESA Part I, s. 1 is inclusive, not exhaustive. This means that, under the definition, a collective agreement is just one particular example of what constitutes an employment contract. Other examples that are not specifically mentioned in the definition but that fall under the definition include a written employment contract between an employer and a non-unionized employee, an oral contract between an employer and a non-unionized employee, and an implied contract between an employer and a non-unionized employee.

Employment Standard

"Employment standard" means a requirement or prohibition under this Act that applies to an employer for the benefit of an employee;

This defines an “employment standard” as being an employer's obligation for the benefit of an employee under the Act.

As reflected by the name of this Act, the concept of employment standards is the core of this legislation. The Act both establishes and provides for the enforcement of minimum rights, both monetary and non-monetary, with respect to the terms and conditions of employment.

Establishment

"Establishment", with respect to an employer, means a location at which the employer carries on business but, if the employer carries on business at more than one location, separate locations constitute one establishment if,

(a) the separate locations are located within the same municipality, or

(b) 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 another employee of the same employer;

An establishment is defined as a location where the employer carries on business. Separate locations will be considered one establishment if they are in the same municipality. Locations in separate municipalities will also be considered one establishment if an employee in one location has contractual bumping rights that extend to the other location. Bumping rights are typically found in collective agreements, but they can also sometimes be found in employment contracts that are not collective agreements.

It is the policy of the Program that it is the largest area of municipal organization that will constitute the municipality for purposes of the definition of establishment in the Act.

In some cases, the largest area of municipal organization will be an upper tier municipality, e.g., the Regional Municipality of Peel; in such a case, the area of a lower tier municipality within the upper tier municipality (e.g., the City of Brampton) would not be treated as the municipality for the purposes of the establishment definition.

In other cases, there may not be any upper tier or lower tier municipality, but simply a single tier municipality, e.g., the City of Toronto.

To determine whether a particular location is within an upper tier municipality, reference might be made to the Ontario Municipal Directory, which is published by the Association of Municipal Managers, Clerks and Treasurers of Ontario, or to the list of All Ontario Municipalities link on the website of the Association of Municipalities of Ontario.

F

G

H

Homeworker

"Homeworker" means an individual who performs work for compensation in premises occupied by the individual primarily as residential quarters but does not include an independent contractor;

A "homeworker" is a person who performs work for compensation in a place that is primarily used as the person's home. The definition of homeworker does not include persons employed to perform work in premises that are not their residence, such as domestic workers, housekeepers, and homecare workers of social service agencies.

If an individual performs any type of work in premises that are occupied by them primarily as residential quarters for compensation, that individual will fall within the definition of homeworker. The definition in the ESA 2000 is expansive in that it includes all types of work, including sewing operations, assembly and packaging operations (e.g., of small parts, toys or games), addressing envelopes (e.g., for direct mail advertisers), typing (e.g., of insurance policies), design of computer programs, and editing on a word processor, and other types of work that do not involve the manufacture, preparation, improvement, etc., of goods such as telemarketing.

Special rules regarding homeworkers apply in the case of recordkeeping, minimum wage and the provisions regarding advising homeworkers of the calculation of homeworkers' wages and the deadlines for completing their work. See ESA Part VI, s. 15(2), O Reg 285/01, s. 5(1) para. 4, ss. 5(2) and 5(3) and O Reg 285/01, s. 12, respectively.

Employment Relationship

A homeworker is an employee by virtue of paragraph (d) of the definition of employee in ESA Part I, s. 1(1):

"Employee" includes a person who is a homeworker

The specific exclusion of independent contractors in the homeworker definition was added in the ESA, 2000 to clarify that just because homeworkers are listed under the definition of employee does not mean that *all* homeworkers are employees.

Whether a particular homeworker is an employee, or an independent contractor not subject to the Act, may sometimes be difficult to decide.

In one decision under the former *Employment Standards Act*, *Sparta Mercantile Ltd. v Hulst* (June 21, 1984), ESC 1657 (Brown), the referee applied the standard common law tests (the four-fold test and the organization test - see the definition of employee in ESA Part I, s. 1) and and concluded that the of home-sewers was more clearly equivalent to that of an independent contractor, and that accordingly they were not employees. This decision was contrary to the Program's policy under the former *Employment Standards Act*. Consequently, *Sparta Mercantile Ltd. v Hulst* should not be relied upon for assistance in determining whether an individual who performs work for compensation out of premises that is primarily their residential quarters is an employee.

In *C.N. Shoes Ltd. v Vanin* (Feburary 4, 1985), ESC 1780 (Davis), another decision under the former *Employment Standards Act,* the claimant made leather uppers for shoes and owned most of the hand tools, while the company supplied the jack, leather, thread and beeswax. Every Friday, the claimant took to the company factory the work completed during the preceding week, and received a further supply of work for the next week. At that time he signed a standard work order for the completed items, which described the claimant as a sub-contractor, and the claimant was paid accordingly.

The employer in *C.N. Shoes Ltd. v Vanin* did not exercise the kind of control over the home-cobbler that was common to employer-employee relationships. However, the referee held that homeworkers are not required by the Act to conform to the typical employer-employee relationship and questioned the usefulness of the common law tests applied in *Sparta Mercantile Ltd. v Hulst*. After all, one of the inherent characteristics of homework is that the employee works at home with little supervision, deciding when and how to work. If a common law test is required, the referee considered the organization test to be the appropriate one in the circumstances. The claimant was a necessary and integral part of the company's business: without his work on the uppers, no shoe could be completed.

Hospital

"Hospital" means a hospital as defined in the *Hospital Labour Disputes Arbitration Act*;

This definition provides that the term "hospital" under the ESA 2000 has the same meaning as under the *Hospital Labour Disputes Arbitration Act*, RSO 1990, c H-14 ("HLDAA").

The HLDAA defines hospital as:

Any hospital, sanitarium, sanatorium, long-term care home or other institution operated for the observation, care or treatment of persons afflicted with or suffering from any physical or mental illness, disease or injury or for the observation, care or treatment of convalescent or chronically ill persons, whether or not it is granted aid out of moneys appropriated by the Legislature and whether or not it is operated for private gain.

This definition in HLDAA was amended in 2010, by replacing the terms "nursing home" and "home for the aged" with the term "long-term care home". This amendment did not alter the substance of the definition,

as long-term care home includes what was previously referred to as nursing homes and homes for the aged.

The term hospital appears in ESA Part X Public Holidays.

I

Infectious Disease Emergency Leave Pay

“infectious disease emergency leave pay” means pay for any paid days of leave taken under subsection 50.1(1.2);

This definition was added by the *COVID-19 Putting Workers First Act, 2021*, effective April 29, 2021.

Infectious disease emergency leave pay is defined as pay for any paid days of leave taken under ss. 50.1(1.2). That subsection provides eligible employees with an entitlement of up to three paid days of infectious disease emergency leave in certain circumstances related to a designated infectious disease.

The manner for calculating the infectious disease emergency leave pay an employee may be entitled to receive is established by ss. 50.1(1.11).

J

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L

Labour Relations Officer

"Labour relations officer" means a labour relations officer appointed under the *Labour Relations Act, 1995*;

This defines labour relations officers referred to in the Act as officers appointed under the *Labour Relations Act, 1995*.

M

Minister

"Minister" means the Minister of Labour;

This definition provides that references in the Act to "Minister" are references to the Minister of Labour.

However, under the authority of the *Executive Council Act*, an order in council that was approved on November 28, 2019 assigned responsibility for the ESA 2000 to the Minister of Labour, Training and Skills Development. Accordingly, this definition and references in the ESA 2000 and this Manual to the Minister of Labour are to be read as if they said the Minister of Labour, Training and Skills Development.

Ministry

"Ministry" means the Ministry of Labour;

This definition provides that references to "Ministry" in the Act are references to the Ministry of Labour.

However, under the authority of the *Executive Council Act*, an order in council that was approved on November 28, 2019 assigned responsibility for the ESA 2000 (and EPFNA) to the Ministry of Labour, Training and Skills Development. Accordingly, this definition and references in the ESA 2000 (and EPFNA) and this Manual to the Ministry of Labour are to be read as if they said the Ministry of Labour, Training and Skills Development.

N

O

Overtime Hour

“Overtime hour", with respect to an employee, means,

a) if one or more provisions in the employee's employment contract or in another Act that applies to the employee's employment provides a greater benefit for overtime than Part VIII (Overtime Pay), an hour of work in excess of the overtime threshold set out in that provision, and

b) otherwise, an hour of work in excess of the overtime threshold under this Act that applies to the employee's employment;

This provision defines "overtime hour" as:

If the employee's employment contract (which includes a collective agreement) provides a greater benefit than that provided by Part VIII of the ESA 2000 (Overtime Pay), an hour of work that exceeds the threshold in the employment contract.

The term overtime hour appears in the definitions of regular rate and regular work week, and in ESA Part VIII Overtime Pay and ESA Part X Public Holidays.

P

Person

"Person" includes a trade union;

The purpose of this provision is to avoid having to add a reference to union where the Act was making a reference to "person". In law, a trade union is not normally considered to be a person. The definition is inclusive, and so should not be taken to exclude other persons, such as individuals and corporations. In law, a corporation is a person.

Personal Emergency Leave Pay

The definition of the phrase "personal emergency leave pay" was repealed pursuant to the *Making Ontario Open for Business Act, 2018* effective January 1, 2019. The phrase appeared in section 50 (Personal Emergency Leave), which was also repealed as a result of the same legislation. Since employees may still have a complaint relating to personal emergency leave pay that arose during the period of time when personal emergency leave pay was in force – from January 1 to December 31, 2018 – the discussion of this definition remains as part of this publication. The text appears in red to highlight that the definition has been repealed.

"Personal emergency leave pay" means pay for any paid days of leave taken under section 50;

This definition was added by the *Fair Workplaces, Better Jobs Act, 2017* SO 2017, c 22.

Personal emergency leave pay is defined as pay for any paid days of leave taken under ESA Part XIV, s. 50. Section 50(5) provides an entitlement to two paid days of personal emergency leave per year if an employee has been employed for at least a week. The amount of personal emergency leave pay that an employee is entitled to is determined by ESA Part XIV, ss. 50(9), (10) and (11).

Premium Pay

"Premium pay" means an employee's entitlement for working on a public holiday as described in subsection 24(2);

Under ESA Part X Public Holidays, employees may have the right to receive, among other entitlements, premium pay if they work on a public holiday. Section 24(2) states that the amount of premium pay must be at least one and one half times the employee's regular rate.

For further discussion, please refer to ESA Part X Public Holidays.

Prescribed

"Prescribed" means prescribed by the regulations;

This definition provides that the word "prescribed" means as set out in the regulations under the ESA 2000.

Public Holiday

"Public holiday" means any of the following:

1. **New Year's Day.**
1.1 **Family Day, being the third Monday in February.**
2. **Good Friday.**
3. **Victoria Day.**
4. **Canada Day.**
5. **Labour Day.**

6. **Thanksgiving Day.**
7. **Christmas Day.**
8. **December 26.**
9. **Any day prescribed as a public holiday.**

This provision defines public holidays for the purposes of the Act. Note that where a substitution is made, as provided for in ESA Part X, that substitute day is to be treated as if it were the named public holiday. This means that the substitute holiday takes the place of the public holiday. Therefore, the formula to be used for calculating public holiday pay for the substitute holiday would be the formula that is in effect on the date of the substitute holiday.

In each year:

- New Year's Day is January 1;
- Family Day is the third Monday in February (the first Family Day fell on February 18, 2008);
- Good Friday is the Friday before Easter Sunday. Easter Sunday (which is not named as one of the days that are public holidays for the purposes of the Act) varies from year to year, but is always between March 22 and April 25. It falls on the first Sunday following the paschal full moon, which is determined from algorithmic tables and can differ from the date of the actual full moon by up to two days;
- Victoria Day is the Monday preceding May 25;
- Canada Day is July 1, unless July 1 falls on a Sunday, in which case the public holiday is July 2 by virtue of the federal Holidays Act, RSC 1985, c H-5 (see subsection 88(4) of the Legislation Act, 2006, SO 2006, c 21, Sch F);
- Labour Day is the first Monday in September;
- Thanksgiving Day is the second Monday in October;
- Christmas Day is December 25; and
- December 26 (also known as Boxing Day) is December 26.

For the purposes of the public holiday provisions, the Program considers a day to be a calendar day running from 0001 hours to 2400 hours. It is Program policy that where a shift spans two calendar days, the entire shift is, unless the employer has adopted a different policy that is reasonable and that it consistently applies, considered to have been worked on the calendar day on which the shift began. For example, where an eight-hour shift commenced at 11 p.m. on the Thursday evening before Good Friday, the seven hours actually falling on Good Friday will not be considered to have been hours worked on a public holiday. Similarly, where an eight-hour shift commenced at 11 p.m. on the evening of Good Friday, all eight hours are considered to have been worked on the public holiday, notwithstanding that seven of them actually fell on the next calendar day.

Public Holiday Pay

"Public holiday pay" means an employee's entitlement with respect to a public holiday as determined under subsection 24(1);

Under the circumstances set out in ESA Part X Public Holidays, employers must pay employees public holiday pay for a public holiday. Section 24(1) states that the amount of public holiday pay must be equal to:

1. The total amount of regular wages earned in the pay period immediately preceding the public holiday, divided by the number of days the employee worked in that pay period; or
2. If some other manner of calculation is prescribed, the amount determined using that manner of calculation.

For further discussion, please refer to ESA Part X.

Q

R

Regular Rate

"Regular rate" means, subject to any regulation made under paragraph 10 of subsection 141 (1),

- **a. for an employee who is paid by the hour, the amount earned for an hour of work in the employee's usual work week, not counting overtime hours,**
- **b. otherwise, the amount earned in a given work week divided by the number of non-overtime hours actually worked in that week;**

This definition establishes that the "regular rate", which serves as the basis for many calculations (e.g., overtime pay and public holiday entitlements, and what constitutes a week of lay-off for termination and severance purposes) under the Act, is the rate of pay for each non-overtime hour of work. In a decision under the former *Employment Standards Act*, the referee held that an agreement that incorporates a component for overtime premiums into the regular rate of pay is of no effect since it is inconsistent with the provisions of the Act and does not excuse an employer from calculating and paying overtime in accordance with the number of hours worked in excess of the statutory overtime threshold of 44 hours - see *Wen-Hal Limited v Hansen* (August 22, 1979), ESC 660 (MacDowell).

Under this definition, an employee's regular rate will be:

1. Where an hourly wage rate is set, it is the regular rate.
2. Where wages are not based on an hourly rate, regular rate will be the average hourly rate calculated by dividing the total wages earned in the week by the number of non-overtime hours worked. Overtime hour is defined in ESA Part I s. 1. This method of calculation applies to a person who, for example, is paid a fixed salary, or commission or on a piecework basis. For further information on the calculation of regular rate in the context of determining overtime pay, see ESA Part VIII, s. 22(1)
3. If a regulation made under paragraph 10 of ESA Part XXVII, s. 141(1) applies to an employee, the calculation contained in the regulation will prevail over 1) and 2) above. Paragraph 10 allows the Lieutenant Governor in Council to make a regulation setting out a formula for the determination of an employee's regular rate that would apply instead of the formula that applies under the definition of regular rate in ESA Part I, s. 1.

Regular Wages

The definition of "regular wages" was amended pursuant to the *Making Ontario Open for Business Act, 2018* effective January 1, 2019 to remove the reference to personal emergency leave pay and to section 50 of the Act. (Personal emergency leave was repealed as a result of the same legislation.) Since issues may arise with respect to the period of time when this version of the definition was in force – from January 1 to December 31, 2018 – the discussion remains as part of this publication.

"Regular wages" means wages other than overtime pay, public holiday pay, premium pay, vacation pay, domestic or sexual violence leave pay, personal emergency leave pay, termination pay, severance pay and termination of assignment pay and entitlements under a provision of an employee's contract of employment that under subsection 5(2) prevail over Part VIII, Part X, Part XI, section 49.7, section 50, Part XV or section 74.10.1;

This definition was amended by the *Fair Workplaces, Better Jobs Act, 2017* SO 2017, c 22, when "domestic or sexual violence leave pay", "personal emergency leave pay" and "termination of assignment pay" were introduced into the Act.

This definition establishes that regular wages, which serves as the basis for the calculations of public holiday pay in ESA Part X, s. 24(1) and termination pay and severance pay entitlements in ESA Part XV, ss. 60(1), (2) and ss. 65(1),(5), (6), includes all wages except:

- Overtime pay;
- Public holiday pay;
- Premium pay;
- Vacation pay;
- Domestic or sexual violence leave pay
- Personal emergency leave pay;
- Termination pay;
- Severance pay;
- Termination of assignment pay; and
- Entitlements under an employment contract (which includes a collective agreement) that provide a greater right or benefit with respect to the standards of overtime pay, public holidays, vacation with pay, domestic or sexual violence leave, personal emergency leave, termination and severance of employment and termination of an assignment.

Note that premium pay is defined in ESA Part I, s. 1 to mean an employee's entitlement for working on a public holiday as described in ESA Part X, s. 24(2). It does not mean, for example, a premium rate of pay of an extra 50 cents an hour that an employee earns under an employment contract for working the weekend shift. Such monies owing would be **included** in the definition of regular wages.

Regular Wages

Regular wages" means wages other than overtime pay, public holiday pay, premium pay, vacation pay, domestic or sexual violence leave pay, infectious disease emergency leave pay, termination pay, severance pay and termination of assignment pay and entitlements under a provision of an employee's contract of employment that under subsection 5(2) prevail over Part VIII, Part X, Part XI, section 49.7, subsection 50.1(1.2), Part XV or section 74.10.1;

This definition establishes that regular wages, which serves as the basis for the calculations of public holiday pay in ESA Part X, s. 24(1) and termination pay and severance pay entitlements in ESA Part XV, ss. 60(1), (2) and ss. 65(1),(5), (6), includes all wages except:

- Overtime pay;
- Public holiday pay;
- Premium pay;
- Vacation pay;
- Domestic or sexual violence leave pay;
- Infectious disease emergency leave pay;
- Termination pay;
- Severance pay;
- Termination of assignment pay; and
- Entitlements under an employment contract (which includes a collective agreement) that provide a greater right or benefit with respect to the standards of overtime pay, public holidays, vacation with pay, domestic or sexual violence leave, paid infectious disease emergency leave, termination and severance of employment and termination of an assignment.

Note that premium pay is defined in ESA Part I, s. 1 to mean an employee's entitlement for working on a public holiday as described in ESA Part X, s. 24(2). It does not mean, for example, a premium rate of pay of an extra 50 cents an hour that an employee earns under an employment contract for working the weekend shift. Such monies owing would be **included** in the definition of regular wages.

Regular Work Day

"Regular work day", with respect to an employee who usually works the same number of hours each day, means a day of that many hours;

This provision provides that where an employee **usually** works the same numbers of hours each day, that number of hours is the employee's "regular work day". An employee does not have to work the same number of hours every work day for there to be a regular work day, just so long as they regularly and ordinarily work that number of hours.

The term regular work day appears in ESA Part VI, s. 15(3) with respect to an exception to the requirement for employers to record the number of hours worked by each employee in each day and week, and in ESA Part VII, s. 17(1) with respect to the daily limits on hours of work. If an employee does not usually work the same number of hours each day, they will not have a regular work day for the purposes of s. 15(3) or s. 17(1).

Regular Work Week

"Regular work week", with respect to an employee who usually works the same number of hours each week, means a week of that many hours but not including overtime hours;

It provides that where an employee usually works the same number of hours each week, the "regular work week" for that employee will be that number of hours, **excluding overtime hours**.

For further information see the overtime hour definition in ESA Part I, s. 1.

The term regular work week appears in ESA Part VI, s. 15(3) with respect to an exception to the requirement for employers to record the number of hours worked by each employee in each day and each week, in ESA Part XI, s. 33(3) with respect to the calculation of the number of single vacation days to which an employee is entitled, and in ESA Part XI, s. 34(2) with respect to the calculation of the number of vacation days earned during a stub period. In addition, it appears in the provisions that specify what constitutes a week of lay-off for termination and severance purposes in ESA Part XV, ss. 56(3)-(3.6) and ss. 63(2)-(2.4), as well as the provisions for the calculation of termination pay and severance pay entitlements in ESA Part XV, ss. 60(1), (2) and ss. 65(1), (5), (6). In this regard, also see the discussion of the work week in this section.

In *Stewart Warner Corporation of Canada Limited v Employees* (April 25, 1983), ESC 1406 (Egan), Referee Egan distinguished work week from a regular work week as referred to in s. 57(13)(b)(i) (then s. 40(6)(b)(i) of the former *Employment Standards Act,* which is substantially the same as s. 60(1)(b) of the ESA 2000). In that case, the employer had temporarily cut the shifts from five per week to three per week just prior to terminating the employees.

In calculating termination pay owing to the employees, the employer had claimed that the regular work week consisted of three shifts. The referee disagreed, stating that the reduction in shifts was anticipated to be a temporary measure only and that the regular work week still consisted of five shifts in each work week. As a consequence, termination pay in lieu of notice had to be the pay the employee would have received had he been working five shifts per week.

Regulations

"Regulations" means the regulations made under this Act;

This definition states that "regulations" as referred to in the Act refers to regulations made under the ESA 2000.

The authority to make regulations generally originates from the *Legislation Act, 2006*, SO 2006, c 21, Sch F. Section 17 of the *Legislation Act, 2006* states:

"Regulation" means a regulation, rule, order or by-law of a legislative nature made or approved under an Act of the Legislature by the Lieutenant Governor in Council, a minister of the Crown, an official of the government or a board or commission all the members of which are appointed by the Lieutenant Governor in Council, but does not include,

- **a) a by-law of a municipality or local board as defined in the *Municipal Affairs Act*, or**
- **b) an order of the Ontario Municipal Board.**

The authority to make regulations under the ESA 2000 is found in ESA Part XXVII, s. 141.

In accordance with s. 22(2) of the *Legislation Act, 2006*, regulations come into force on the day on which the regulation is filed unless otherwise stated in the regulation or in the Act under which the regulation is made.

Section 25(1) of the *Legislation Act, 2006* further provides that regulations must be published on the e-Laws website promptly after their filing and in *The Ontario Gazette* within one month of filing or in accordance with another timeline that may be specified a regulation made by the Attorney General. A regulation that is not published is not effective against a person who has not had actual notice of it.

Reservist

"Reservist" means a member of the reserve force of the Canadian Forces referred to in subsection 15 (3) of the *National Defence Act* (Canada);

This definition was introduced by the *Fairness for Military Families Act (Employment Standards and Health Insurance), 2007,* SO 2007, c 16, in the creation of Reservist Leave.

A reservist is defined to mean a member of the reserve force of the Canadian Forces referred to in s. 15(3) of the federal *National Defence Act,* RSC 1985, c N-5, which states:

There shall be a component of the Canadian Forces, called the reserve force, that consists of officers and non-commissioned members who are enrolled for other than continuing, full-time military service when not on active service.

For further details, refer to ESA Part XIV, s. 50.2.

S

Standard Vacation Entitlement Year

"Standard vacation entitlement year" means, with respect to an employee, a recurring 12-month period that begins on the first day of the employee's employment;

This definition was introduced by the *Government Efficiency Act, 2002*, effective November 26, 2002. The definition provides that "standard vacation entitlement year" is a recurring 12-month period that begins on a date that is the date of an employee's first day of employment.

For further details, refer to ESA Part XI.

Statutory Notice Period

"Statutory notice period" means,

a) the period of notice of termination required to be given by an employer under Part XV, or

b) where the employer provides a greater amount of notice than is required under Part XV, that part of the notice period ending with the termination date specified in the notice which equals the period of notice required under Part XV;

"Statutory notice period" is the period equal to the length of notice to which the employee is entitled under the Act. Where more notice is given than is required by the Act, the statutory notice period is the last part of the longer notice that is given. For example, if an employee was entitled under the Act to eight weeks' notice but was given 12 weeks' notice, it is the last eight weeks of the 12-week period, not the first eight weeks, that constitute the statutory notice period.

The definition becomes relevant for determining the timing of employees' statutory entitlements in situations where an employer has given a longer period of notice than it is required to give under the Act. For example, employees are to receive their full pay during the statutory notice period, even if no work is available. If an employee entitled to eight weeks' notice of termination was given 10 weeks' notice and was sent home in the ninth week due to lack of work, the employee would entitled to be paid during the

ninth and tenth week, notwithstanding that they did not work, because the statutory notice period was the last eight weeks of the 10 weeks' notice.

Another example comes from ESA Part XV, s. 63(1)(e) and s. 63(3). Under those sections, an employee who receives notice of termination and then subsequently resigns is entitled to severance pay if they gives their employer at least two weeks' notice of the resignation and the notice of resignation takes effect during the statutory notice period, assuming that the other qualifying criteria for severance pay are met. If an employee was entitled under the Act to eight weeks' notice but was given 12 weeks' notice by the employer, the employee's resignation must take effect some time during the last eight weeks of the 12-week notice period in order for the employee to be entitled to severance pay. If the employee's resignation takes effect some time during the first four weeks of the 12-week notice period, the employee will not be entitled to severance pay.

Stub Period

"Stub period" means, with respect to an employee for whom the employer establishes an alternative vacation entitlement year,

- **a) if the employee's first alternative vacation entitlement year begins before the completion of his or her first 12 months of employment, the period that begins on the first day of employment and ends on the day before the start of the alternative vacation entitlement year,**
- **b) if the employee's first alternative vacation entitlement year begins after the completion of his or her first 12 months of employment, the period that begins on the day after the day on which his or her most recent standard vacation entitlement year ended and ends on the day before the start of the alternative vacation entitlement year;**

This definition was introduced by the *Government Efficiency Act, 2002*, effective November 26, 2002.

The definition sets out what a "stub period", as referred to in ESA Part XI Vacation with Pay, means.

For details, refer to ESA Part XI.

T

Temporary Help Agency

"temporary help agency" means an employer that employs persons for the purpose of assigning them to perform work on a temporary basis for clients of the employer;

A "temporary help agency" is defined as an employer (also see the definition of "employer" in s. 1 of the Act) that employs persons for the purposes of assigning them to perform work on a temporary basis for clients of the employer. In other words, a temporary help agency is defined by the fact that it employs "assignment employees" for the purposes of assigning them to perform work for its clients.

One question that has arisen is whether employers such as management consulting firms or security companies whose employees perform work for clients of the employer are operating a temporary help agency.

The definition of temporary help agency provides that the agency must employ persons for the "purpose of assigning them to perform work on a temporary basis for clients". The client is defined in relation to a temporary help agency as an "entity that enters into an arrangement with the agency under which the agency agrees to assign or attempt to assign one or more of its employees to perform work" on a temporary basis for that entity.

Determinations as to whether a particular employer is a temporary help agency or not would of course depend on all the facts in any given situation.

As an example, although a security company's employees may work on a client's premises, it is possible that company is not operating as a temporary help agency as that term is defined in s. 1.

One consideration would be whether the company can be said to be hiring employees to provide the company's services to clients rather than for the purposes of performing work for a client. A related consideration would be whether the contract or agreement with the client is to provide certain services for the client rather than an agreement to assign one or more of its assignment employees to perform work for the client. Such an arrangement may be indicated where the work done by the employees is under the control and direction of the company rather than the client. Again, a determination as to whether an employer is, or is not, a temporary help agency would depend on all of the facts.

Termination of Assignment Pay

"termination of assignment pay" means pay provided to an assignment employee when the employee's assignment is terminated before the end of its estimated term under section 74.10.1;

This section, subject to certain exceptions, requires temporary help agencies to provide an assignment employee with one week's notice or pay in lieu if an assignment that was estimated to last for three months or more is terminated before the end of its estimated term unless another assignment lasting at least one week is offered to the employee.

For further discussion, please refer to ESA Part XVIII.1, s. 74.10.1.

Tip or Other Gratuity

"tip or other gratuity" means,

(a) a payment voluntarily made to or left for an employee by a customer of the employee's employer in such circumstances that a reasonable person would be likely to infer that the customer intended or assumed that the payment would be kept by the employee or shared by the employee with other employees,

(b) a payment voluntarily made to an employer by a customer in such circumstances that a reasonable person would be likely to infer that the customer intended or assumed that the payment would be redistributed to an employee or employees,

(c) a payment of a service charge or similar charge imposed by an employer on a customer in such circumstances that a reasonable person would be likely to infer that the customer intended or assumed that the payment would be redistributed to an employee or employees, and

(d) such other payments as may be prescribed,

but does not include,

(e) such payments as may be prescribed, and

f) such charges as may be prescribed relating to the method of payment used, or a prescribed portion of those charges.

This definition establishes the meaning of “tip or other gratuity”. This phrase is used in Part V.1 (“Employee Tips and Other Gratuities”). It also appears in the s. 1(1) definition of “wages” (which explicitly excludes tips and other gratuities from the definition).

(a) Voluntary Payments Made to Employees

Clause (a) of the definition provides that “tip or other gratuity” means, “ **a payment voluntarily made to or left for an employee by a customer of the employee's employer in such circumstances that a reasonable person would be likely to infer that the customer intended or assumed that the payment would be kept by the employee or shared by the employee with other employees”.**

Payments voluntarily made to or left for an employee by a customer include, but are not limited to: money left on a table or bar for a server; money given to a receptionist as a tip for a hair stylist; money left in a hotel room for cleaning staff; and money left in a tip jar.

The test for determining whether a voluntary payment is a tip or other gratuity under this clause is: would a reasonable person be likely to infer that the customer intended or assumed that the payment would be kept by the employee or shared by the employee with other employees (i.e., as part of a tip pool)?

It is generally understood that the reasonable person standard is to be determined on an objective, rational and informed basis. Whether the circumstances are such that a reasonable person would be likely to infer that the customer intended or assumed that the payment would be kept by the employee or shared by the employees with other employees will depend on the facts.

(b) Voluntary Payments Made to Employers

Clause (b) of the definition provides that “tip or other gratuity” means, “**a payment voluntarily made to an employer by a customer in such circumstances that a reasonable person would be likely to infer that the customer intended or assumed that the payment would be redistributed to an employee or employees”.**

Payments voluntarily made to an employer by a customer include, but are not limited to: a tip added by a customer onto a debit or credit card payment, and cash given to an employer that the customer says is for the employee.

The test for determining whether a payment made voluntarily to an employer by a customer is a tip or other gratuity is: would a reasonable person be likely to infer that the customer intended or assumed that the payment would be redistributed to an employee or employees (i.e., as part of a tip pool)?

It is generally understood that the reasonable person standard is to be determined on an objective, rational and informed basis. Whether the circumstances are such that a reasonable person would be likely to infer that the customer intended or assumed that the payment would be redistributed to an employee(s) will depend on the facts.

(c) Service Charges, etc., Imposed by Employers

Clause (c) of the definition provides that “tip or other gratuity” means, ““**a payment of a service charge or similar charge imposed by an employer on a customer in such circumstances that a reasonable person would be likely to infer that the customer intended or assumed that the payment would be redistributed to an employee or employees”**

Service charges or similar charges imposed by an employer on a customer include, but are not limited to: gratuity or service fees charged by caterers, banquet halls, reception halls and convention halls; and automatic service charges imposed upon groups of certain sizes in restaurants.

The test for determining whether a service charge or similar charge imposed by an employer on a customer is a tip or other gratuity is: would a reasonable person be likely to infer that the customer intended or assumed that the payment would be redistributed to an employee or employees (i.e., as part of a tip pool)?

It is generally understood that the reasonable person standard is to be determined on an objective, rational and informed basis. Whether the circumstances are such that a reasonable person would be likely to infer that the customer intended or assumed that the payment would be redistributed to an employee or employees will depend on the facts.

For example, if a banquet hall service contract or catering bill explicitly specifies a certain amount as a "gratuity" and another amount as an "administrative fee", a reasonable person would likely infer that the customer intended or assumed that only the amount specified as a "gratuity" would be redistributed to the employee(s). Conversely, a reasonable person would likely infer that the customer did not intend or assume that the administrative fee would be redistributed by the banquet hall or catering company to the employee(s).

The Ontario High Court in *Shabinsky v Horwitz et al,* 1971 CanLII 729 (ON SC) held that where an employer charged the hotel customer an additional 15 percent for gratuities, it was understood by the customer, employee and employer that this charge amounted to a tip for the employees because the customers were deliberately given the impression they were paying into a fund for gratuities in lieu of individual tips.

(d) Other Payments as Prescribed

Clause (d) of the definition provides that “tip or other gratuity” means, “**such other payments as may be prescribed”.**

At the time of publication, no such other payments are prescribed.

(e) and (f) What is Not Included as a Tip or Other Gratuity

Clauses (e) and (f) of the definition provide what “tip or other gratuity” does not include.

Clause (e) states that “tip or other gratuity” does not include, **“such payments as may be prescribed**”.

At the time of publication, no such payments are prescribed.

Clause (f) states that “tip or other gratuity” does not include, **“such charges as may be prescribed relating to the method of payment used, or a prescribed portion of those charges”.**

O Reg 125/16 has been made pursuant to this provision. O Reg 125/16provides that a "tip or other gratuity" does not include a portion of a service charge or similar charge imposed by a credit card company on an employer for processing a credit card payment made to the employer by a customer.

Under O Reg 125/16, the portion of the charge that is excluded from the definition is determined by multiplying the total amount of the tip or other gratuity by the greater of:

- the percent charged by the credit card company for processing the payment; and
- 1.5 percent.

See O Reg 125/16 for details.

Trade Union

"Trade union" means an organization that represents employees in collective bargaining under any of the following:

1. **The Labour Relations Act, 1995.**
2. **The Crown Employees Collective Bargaining Act, 1993.**
3. **Part X.1 of the *Education Act*.**
4. **Part IX of the Fire Protection and Prevention Act, 1997.**
5. **The Colleges Collective Bargaining Act.**
6. **Any prescribed Acts or provisions of Acts;**

This definition sets out the broad scope of the phrase "trade union". The definition covers organizations representing employee interests, whether or not they are called a trade union, under one of the above statutes.

This definition is necessary because the ESA 2000 recognizes the agency status of trade unions in certain circumstances. For example, under ESA Part III, ss. 6 and 7, settlements and agreements or authorizations made by a trade union on an employee's behalf are binding.

Labour Relations Act, 1995

Section 1(1) of the LRA 1995 provides:

“Trade union” means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

Crown Employees Collective Bargaining Act, 1993

Although the *Crown Employees Collective Bargaining Act, 1993,* SO 1993, c 38 ("CECBA") does not contain a definition of trade union, that term has the same meaning in CECBA as it does in the *Labour Relations Act, 1995* as a result of the referential incorporation of the *Labour Relations Act, 1995* (with some modifications) and its definitions.

Education Act

The *Education Act*, RSO 1990, c E.2 provides as follows:

277.1(1) In this Part, … "designated bargaining agent" for a teachers' bargaining unit means the bargaining agent described in subsection 277.3(2),

277.4(3) or (4) as the bargaining agent for the unit;

277.3(2) The following bargaining agents represent the corresponding bargaining units:

1. **For the elementary school teachers' unit at an English-language public district school board, the Elementary Teachers' Federation of Ontario is the bargaining agent.**
2. **For each of the secondary school teachers' units at an English-language public district school board, The Ontario Secondary School Teachers' Federation is the bargaining agent.**
3. **For every teachers' bargaining unit at an English-language separate district school board, The Ontario English Catholic Teachers' Association is the bargaining agent.**
4. **For every teachers' bargaining unit at a French-language district school board, l'Association des enseignantes et des enseignants franco-ontariens is the bargaining agent.**

277.4(3) The bargaining agent for a bargaining unit is each of the following organizations, acting jointly, that, on December 31, 1997, had a branch affiliate representing a member of the bargaining unit for collective bargaining purposes under the School Boards and Teachers Collective Negotiations Act:

1. **L'Association des enseignantes et des enseignants franco-ontariens.**
2. **The Elementary Teachers' Federation of Ontario.**
3. **The Ontario English Catholic Teachers' Association.**
4. **[Repealed. 1997, c. 31, s. 122.]**
5. **The Ontario Secondary School Teachers' Federation.**

(4) Despite subsection (3), the bargaining agent for a bargaining unit described in paragraph 1 or 2 of subsection (1) is l'Association des enseignantes et des enseignants franco-ontariens.

Fire Protection and Prevention Act, 1997

"Bargaining agent" is not defined in the *Fire Protection and Prevention Act, 1997*, SO 1997, c 4 ("FPPA"), although ss. 46(1) and (2) of the FPPA provide as follows:

46(1) The majority of firefighters in a bargaining unit may request an association of firefighters to represent them and act as their bargaining agent for the purpose of collective bargaining under this Part.

46(2) an association of firefighters that, immediately before the date this Part comes into force, was a party to, or bound by, an agreement made under section 5 of the Fire Departments Act or was bound by the decision or award of a board of arbitration under section 6 of that Act shall, on and after the day this Part comes into force and until such time as a new bargaining agent is requested under subsection (1), be deemed to be the bargaining agent for the firefighters in the bargaining unit.

The FPPA also defines the bargaining units as follows:

45(1) The firefighters employed in a fire department constitute a bargaining unit for the purposes of collective bargaining under this Act

45(2) The bargaining unit shall not include persons who are deemed not to be firefighters under subsection 41(2).

As per s. 41(1) of the FPPA, a firefighter, for the purposes of defining a bargaining unit under the FPPA, means "a person regularly employed on a salaried basis in a fire department and assigned to fire protection services and includes technicians but does not include a volunteer firefighter". In addition, s. 41(2) of the FPPA states that managers are deemed not to be firefighters for the purposes of defining a bargaining unit.

Colleges Collective Bargaining Act, 2008

The *Colleges Collective Bargaining Act, 2008*, SO 2008, c 15 provides as follows:

"Employee organization" means an organization of employees formed for the purpose of regulating relations between the employer and employees under this Act, but does not include such an organization of employees that discriminates against any employee because of age, sex, race, national origin, colour, or religion.

Any Prescribed Acts

As of the time of writing, no other Acts have been prescribed.

U

V

Vacation Entitlement Year

"Vacation entitlement year" means an alternative vacation entitlement year or a standard vacation entitlement year;

This definition was introduced by the *Government Efficiency Act, 2002*, effective November 26, 2002.

The definition provides that "vacation entitlement year" means an alternative vacation entitlement year or a standard vacation entitlement year. Both of these terms are defined in ESA Part I, s. 1.

For further details, refer to ESA Part XI.

W

Wages

"Wages" means,

(a) any monetary remuneration payable by an employer to an employee under the terms of an employment contract, oral or written, express or implied,

(b) any payment required to be made by an employer to an employee under this Act, and

(c) any allowances for room or board under an employment contract or prescribed allowances,

but does not include,

(d) tips or other gratuities,

(e) any sums paid as gifts or bonuses that are dependent on the discretion of the employer and that are not related to hours, production or efficiency,

(f) expenses and travelling allowances, or

(g) subject to subsections 60(3) or 62(2), employer contributions to a benefit plan and payments to which an employee is entitled from a benefit plan;

This provision defines what are and what are not wages for the purposes of the ESA 2000. According to this definition:

Wages Include:

Any monetary remuneration owed to an employee under a contract of employment

This would include regular wages, whether the employee is paid on an hourly or salaried basis, or through commissions or piece work payments. It would also include any other monetary compensation to which the employee is entitled under their contract.

Any monetary payment owed to an employee under the Act

This includes payments where work is not performed, such as vacation pay, public holiday pay, personal emergency leave pay, domestic or sexual violence leave pay, termination pay and severance pay.

Any allowances for room or board

O Reg 285/01 prescribes maximum amounts at which room and board can be valued for purposes of determining whether an employer has paid at least the minimum wage to an employee; such amounts are considered to be wages under the definition. Note, however, that where the employee is, say, entitled to receive an allowance for room or board that exceeds the amount prescribed in the regulation, that higher amount is considered to be wages for purposes other than determining compliance with the minimum wage requirements. For example, if the employee is provided with an allowance of $75 a week for meals, only $53.55 could be counted towards the employer's minimum wage obligation, but all $75 is considered to be wages, and could be taken into account, for example, in determining the employee's termination pay entitlement in the event of termination without notice.

Note also that since s. 5(4) of O Reg 285/01, which sets out the maximum allowances for room and board, does so for the sole purpose of determining if the minimum wage requirements in the Act have been met, the maximum allowances do not apply to employees who are exempt from the minimum wage provisions in ESA Part IX. One example of such employees is superintendents, janitors and caretakers of a residential building who reside in the building. Therefore, where, pursuant to a contract of employment,

an apartment superintendent occupies without charge an apartment at an agreed value of, for example, $400/month, an amount that, incidentally, exceeds the maximum allowances under O Reg 285/01, that amount will be considered to be part of their wages. Note that if the value had not been agreed upon, the true value, i.e., the rent the employer would have otherwise received for the premises, would be included in the calculation of the wages paid to the employee.

Any other money paid to employee on a non-discretionary basis

Bonuses:

- That have been pre-arranged by both employer and employee and thus consequently become part of the employment contract - see *William Beasley Enterprises Limited (Beasley Amusements) v Finley et al* (November 23, 1979), ESC 669 (Betcherman), a decision under the former Employment Standards Act;
- For cost of living, which are part of an agreement between employer and employee; and
- That are related to hours of work, production or the efficiency of the worker. This is so even if the awarding of the bonus is otherwise discretionary, by virtue of paragraph (e) of the definition. As noted by the referee in *Yarzab Brothers Limited v 23 Employees* (April 6, 1982), ESC 1194 (Aggarwal), a decision under the former Employment Standards Act, this type of bonus "is an award of the [employee's] labour, generally known as an incentive bonus."

Commissions:

Such as sales commissions based on the employee's productivity - see *Tim Wilkins Pontiac Buick Ltd. d.b.a. Lorne Brett Motors Ltd. v Ojamae et al* (October 2, 1980), ESC 878 (Davis), a decision under the former *Employment Standards Act*. Note, however, that in *Winfield Reas Estate Limited v Rajani* (May 7, 1978), ESC 610 (Brent) where the employee, a real estate agent, received 100 per cent commission for the sale of her own house, this representing an additional 30 per cent compared to what she normally earned, the referee held that the making of this arrangement was discretionary on the part of the employer and was not related to hours, production or efficiency. He concluded that this arrangement, therefore, satisfies the double test in paragraph (b) of the definition under the former *Employment Standards Act* excluding the sum from wages. This part of the definition of wages under the former *Employment Standards Act* is substantially the same as paragraph (e) of the definition in the ESA 2000.

Profit-Sharing:

Where profit-sharing is included in the contract of employment and does not depend on the discretion of the employer, any monetary remuneration earned under the profit-sharing plan will be considered to be wages. For example, see the profit-sharing bonus agreements in *Tim Wilkins Pontiac Buick Ltd. d.b.a. Lorne Brett Motors Ltd. v Ojamae et al* and *Bayside Kenworth Limited v Havelin* (April 11, 1983), ESC 1409 (Aggarwal), both decisions under the former Employment Standards Act.

Prizes for Contests in Workplace:

Such as a sales contest that is intended to serve as an incentive to employees to stimulate sales, productivity, etc. The contest becomes part of the contract of employment and consequently any monetary remuneration earned pursuant to the contest is part of wages - see *Square Court Investments Limited o/a Bay & Lada v Poplawski* (April 5, 1983), ESC 1390 (Davis), a decision under the former *Employment Standards Act*.

Wages Do Not Include:

Any non-monetary remuneration received by the employee

For example, neither stocks nor stock options (whether the stocks are subsequently sold or the stock options exercised) are considered to be wages because they are not monetary remuneration at the time they are given to the employee. It should be noted that dividends are also not considered to be wages. An employee, as part of their employment contract may be offered shares in the company and as a result of ownership of these shares, the employee may receive dividends but would do so in their capacity as a shareholder and not in their capacity as an employee.

Tips or other gratuities

Tips or other gratuities, whether they are: received by employees directly or indirectly from a customer of the employees' employer; service charges or similar charges imposed by an employer upon the employer's customer; or a portion of a redistribution of tips, commonly known as a tip pool. For more information on tips or other gratuities, see ESA Part 1, s. 1.

Gifts and bonuses that are discretionary and unrelated to hours of work, production and efficiency

For example, this would include Christmas bonuses, suggestion or patent awards, and profit-sharing plans where the amount to be paid is determined independent of hours, production or efficiency of employees.

Travelling allowances for travel time

This does not include remuneration for hours spent travelling where that is part of work time - see O Reg 285/01, s. 1(1) for examples of travel time that does and does not count as hours of work.

Expense allowances

Living allowances

For example, when the employer provides the employee with money to pay for, or reimburses the employee for, the expenses that they incurred for such things as food, gas, hotel room, laundry, etc.

Employer contributions to a benefit plan, and payments from a benefit plan to the employee

This includes plans like Blue Cross, dental plans, sick pay plans, etc., whether they are provided by a third-party insurer or are part of an employer-funded plan.

Note that the termination and severance provisions in ESA Part XV, ss. 60(3) and 62(2) deem employer contributions to benefit plans to be wages in the circumstances described in those sections.

Other benefits paid by the employer such as

- supplementary unemployment benefits,
- pension plans and union welfare fund,
- strike pay,
- Workplace Safety and Insurance Board payments,
- financial assistance and discounts given to employees, and

- payment of tuition fees

Work Week

"Work week" means,

a) a recurring period of seven consecutive days selected by the employer for the purpose of scheduling work, or

b) if the employer has not selected such a period, a recurring period of seven consecutive days beginning on Sunday and ending on Saturday.

This definition clarifies the meaning of the term "work week", which appears in various sections throughout the Act.

A work week is the period of seven consecutive days within which the employer, through custom or practice, normally schedules work. If the employer has not established such a period, work week will be from Sunday to Saturday.

X

Y

Z

Section 1(2)

Assignment to Perform Work Includes Training – s. 1(2)

1(2) For greater certainty, being assigned to perform work for a client of a temporary help agency includes being assigned to the client to receive training for the purpose of performing work for the client.

Subsection 1(2) clarifies that “assigned to perform work” includes an assignment to receive training from a client of the agency for the purposes of performing work for the client.

For more detail, see the “assignment employee” section in the definition of “employee” in ESA Part I, s. 1.

Section 1(3)

Agreements in Writing - s. 1(3) and (3.1)

1(3) Unless otherwise provided, a reference in this Act to an agreement between an employer and an employee or to an employer and an employee agreeing to something shall be deemed to be a reference to an agreement in writing or to their agreeing in writing to do something.

1(3.1) The requirement in subsection (3) for an agreement to be in writing is satisfied if the agreement is in electronic form.

In the case of many employment standards established by the Act, the standard consists of an entitlement on the part of an employee or a prohibition applicable to an employer (the default standard), together with a provision that permits the employer and the employee to agree (in writing or in electronic form) that some other entitlement or protection will apply instead. For example, agreements can be made:

- To pay an employee's wages by cash or cheque at a place other than the workplace - s. 11(3);
- To pay an employee's wages by direct deposit into an institution that does not have an office or facility within a reasonable distance from where the employee usually works - s. 11(4);
- To exceed the daily hours of work limits - s. 17(2);
- To exceed the weekly hours of work limits - s. 17(3);
- To forego the requirement for a period of at least eight hours free from work between shifts when the total time worked on successive shifts exceeds 13 hours - s. 18(3);
- To break the required 30-minute meal break into two shorter periods that total 30 minutes - s. 20(2);
- To average hours of work for the purpose of determining overtime entitlements - s. 22(2);
- To compensate an employee for overtime hours with paid time off rather than with pay - s. 22(7);
- To delay the taking of paid time off in lieu of overtime pay up to 12 months after the work week in which it was earned - s. 22(7)(b);
- By employees who are not required to work on a public holiday to work on a public holiday - ss. 27, 30;
- To pay an employee premium pay plus public holiday pay for working on a public holiday rather than giving a substitute holiday - ss. 27(2)(b), 29(3), 30(2)(b);
- To delay the taking of a substitute holiday until up to 12 months after the public holiday on which it was earned - ss. 27(3)(b), 28(3)(b), 29(2)(b), 30(3)(b);
- To take vacation days earned in vacation entitlement year in periods of less than one week (s. 35) and to take the vacation days earned in a stub period in periods shorter than those set out in paragraphs 1, 2 and 3 of s. 35.1(2) - para. 4 of s. 35.1(2);
- To pay an employee's vacation pay as it accrues or at any other time agreed upon - ss. 36(3), 36(4);
- That allow an employee, with the Director's approval, to forego their vacation time - s. 41;
- In certain circumstances, by employees on a leave to defer taking their vacation to later than when the leave expires - s. 51.1;
- To allow an employee who stops providing care or support to a relative before the end of a week in which they took a family medical leave to return to work before the end of the week - s. 52.1
- To allow a temporary lay-off that would otherwise be deemed a termination once it exceeds 13 weeks in a 20 consecutive week period, if the employer and an employee not represented by a union agree to a recall date within a specified time that will not result in the lay-off lasting 35 weeks or more in a 52 consecutive week period - s. 56(2)(b)(vi);
- To agree to receive severance pay in instalments over up a period of up to three years - s. 66;

- By retail employees to work on a Sunday or a public holiday, subject to their right to change their mind with proper notice - s. 73(3);
- By retail employees who were hired on or after September 4, 2001, to agree at the time of hire that they will not, with some exceptions, be able to refuse to work on Sundays - O Reg 285/01, s. 10.

Section 1(3) provides that these agreements must be in writing. The written requirement is satisfied if the agreement is in electronic form, as per s. 1(3.1), unless otherwise stipulated. One example of a provision where it is otherwise stipulated is ESA Part VII, s. 20(2), which allows employers and employees to agree, whether or not in writing, that the required 30-minute meal break be broken into two shorter periods that total 30 minutes. See also ESA Part XIV, s. 52.1(1)(b) and ESA Part XVIII.1, s. 74.3) for further examples of where agreements are not required to be in writing.

It is the Program's position that where the Act allows the parties to do something other than what the Act would otherwise require if they agree in writing, and the parties make the agreement but fail to put it in writing, then the agreement is ineffective and the Act's usual rule would apply. In other words, where the Act requires agreements in writing, there is no mechanism for opting for the alternate standard in the absence of a written agreement and the default standard will therefore apply. For example, a verbal agreement to average overtime will not allow for averaging - even in the face of the parties' acknowledgement that there was a verbal agreement to average overtime.

Having agreements in writing serves several valuable purposes:

- It provides tangible evidence of the intent of employers and employees to bind themselves to an agreement;
- It details the precise nature of the agreement;
- It helps the employer and employee be aware of the consequences of their entering into an agreement; and
- It provides a permanent and unaltered record of the agreement.

Several issues can arise regarding the validity of agreements that can be made under the Act. These include:

1. The timing of the agreement in relation to the event being agreed to;
2. Whether signatures are required;
3. The level of specificity of information that needs to be in the agreement;
4. Informed consent;
5. Coerced consent; or
6. Electronic agreements.

These issues are dealt with generally below. Also see the discussion under each provision that provides for agreements for more specific information.

Timing of the Agreement

Agreements are generally effective only with respect to events that take place after the agreement is made. To the extent that an agreement purports to have a retroactive effect, it will not be valid, even if the employee has agreed to make it retroactive.

For example, an employee has been working 50 hours a week since their date of hire on October 1, 2019, but there is no written agreement allowing these excess hours to be worked. On December 1, 2019, the employer and employee agree in writing that the employee will work 50 hours a week. They further agree in writing that the agreement to work excess hours applies retroactively to October 1, either by explicitly stating so in the agreement or by backdating the agreement to October 1. It is Program policy that the agreement applies only from the date it was actually entered into - in this case, December 1 - onward. The agreement will not have the effect of undoing the hours of work violations that occurred between October 1 and December 1, even though the employee has agreed that it would have this retroactive effect.

To allow agreements to have retroactive effect would compromise the intent of the Act. The basic premise of the Act is that the default standards exist unless and until employees and employers agree to suspend them. The provisions of the Act do not contemplate parties being able to retroactively nullify, through their agreements, violations of the Act that have already occurred; they merely allow employers and employees to agree upon a future state of affairs.

This policy against retroactivity is consistent with the approach taken by the Director of Employment Standards when giving averaging approvals or approving permits to work excess hours under the former *Employment Standards Act*. Not recognizing a retroactive application was upheld under the former *Employment Standards Act* where the referee in *750338 Ontario Inc. o/a Hillside Foods v Handley* (March 20, 1990), ESC 2645 (Haefling) held:

[T]o put the matter another way, apart from the facts just outlined, the finding and conclusion I reach in this case is that no legal or binding effect can be given to a written authorization signed after the event, as occurred here, since the result would plainly serve to defeat the clear purpose and intention of the legislation.

In very limited circumstances, however, an agreement may be permitted to have a retroactive effect. For example, an employee is off sick. The employee is subsequently advised that the sick day will be unpaid. They want to take that day off as a paid vacation day, so, pursuant to ESA Part XI, s. 35, they make a written request to do so, and the employer agrees to allow this in writing. The Program's view is that in this situation, the agreement may be permitted because the employee does not lose any entitlements as a result of recognizing a retroactive application of the agreement. The employee was entitled to a vacation day and received the vacation day.

This can be contrasted to a situation where the employee enters into an agreement to retroactively allow for overtime averaging. In this case, the employee has earned overtime prior to entering into the agreement. In giving the agreement retroactive effect, the employee loses an entitlement already earned under the Act.

Signatures

Signatures are usually the best evidence to establish that both parties intended to enter into the agreement. In the absence of signatures, the party seeking to enforce the agreement must provide other evidence of the parties' intent to enter into the agreement.

Where the employer has not signed the agreement, the employer's intent to enter into it may be established by the fact it drafted the agreement, or by the fact that the agreement is drafted on company letterhead. Where the employee has not signed the agreement, their intent to enter into the agreement may be established through evidence such as oral confirmation to the Officer, or through other documents the employee signed in hardcopy or electronically or sent electronically. More detail on the enforceability of electronic signatures is below in the section on electronic agreements. .

Specificity

The terms of any agreement must be sufficiently certain in order to be enforceable; agreements must clearly and explicitly set out what is being agreed upon. For example, parties drawing up overtime averaging agreements under ESA Part VIII, s. 22(2) should specify that the purpose of the averaging is to calculate the employee's entitlement, if any, to overtime pay. See ESA Part VIII, s. 22 for more detailed information on the requirements for averaging agreements. If one of the parties drafted the agreement, and a particular term is ambiguous and the parties disagree about what the term means, the term will be construed against the parties who drafted the agreement - this is called the contra proferentem rule.

Similarly, parties entering into agreements to work hours in excess of those limits contained in ESA Part VII, s. 17 should state that the employee is agreeing to work in excess of eight hours a day or a longer established regular day and/or 48 hours a week, and it should state the specific number of hours up to which the employee is agreeing to work, up to a maximum of 60. This type of agreement should avoid using the word overtime, because overtime is not the same as excess hours. And because the general overtime threshold of 44 hours is different than the general hours of work limits of eight hours a day or a longer regular day established by the employer and 48 hours in a week, an employee could agree to work overtime, i.e., hours in excess of 44 in a week, without necessarily having agreed to work more than 48 hours in a week or more than eight hours in a day or a longer established regular day. See ESA Part VII, s. 17(3) for more detailed information on the requirements for agreements to work excess hours.

An agreement will not be invalid only because it used the wrong term to describe the employment standard, as long it is clear from the context of the agreement that both parties knew exactly what was being agreed to. For example, an agreement to delay the scheduling of a substitute holiday beyond the default three-month deadline might state that the employee agrees to delay for six months the taking of their extra vacation day they earned for working on Canada Day. While the incorrect term was used - vacation day rather than substitute day - it is clear what the parties intended and the agreement would meet the specificity requirement.

This approach to the issue of specificity is consistent with several court and arbitration cases decided under the former *Employment Standards Act*. For example, see:

- *McLeod v Egan*, [1975] 1 SCR 517, 1974 CanLII 12 (SCC), where the Supreme Court of Canada held that a general management rights clause could not be relied upon as consent to override an employee's statutory right to refuse to work beyond eight hours in a day or 48 hours in a week.
- *Re Walker Exhausts and United Steelworkers of America Local 2894*, 1981 CanLII 1837 (ON SC), where the court ruled that in order for an employee's consent to work excess hours to be enforceable, there must be a specific reference to the limits on working hours set out in the Employment Standards Act. The court held that a consent was sufficient "if such consent or agreement relates specifically to the performance of work by employees beyond the normal statutory legal limits."

- *DDM Plastics Inc. v I.A.M. & A.W., Local 2792*, 2000 CanLII 29501 (ON LA), where Arbitrator Bendel commented: *It is my view that the public interest element in [the former] section 20(3) requires a clear and explicit waiver by employees of their right to be free from a work week of more than 48 hours. Accordingly, where an alleged waiver is ambiguous or equivocal, it seems to me that it does not meet the test required by the legislation, even if extrinsic evidence might justify the conclusion that the union had agreed that a 48-hour work week could be exceeded.*
- Ontario Hydro v Power Workers' Union, [1998] LVI 2958-1, 74 LAC (4th) 425, where Arbitrator Burkett determined: *On our reading of McLeod v Egan and Re Walker Exhausts, the courts have ruled that the language relied upon as constituting consent or agreement must evidence a clear intent to relinquish the statutory right of affected employees to refuse work beyond the statutory maximum. This intent may be evidenced by reference to the statute or to the permit or to the specific hours beyond the statutory maximum that are compulsory. Language that simply makes overtime compulsory, where either the daily or weekly hours of work are less than the statutory maximum, is not sufficiently specific and, therefore, is equivocal with respect to whether the intent was to give up the statutory right to refuse work beyond the statutory maximum.*

In essence, an agreement should be specific and clear enough for an independent, objective third party to know what was being agreed to simply by reading it.

Informed Consent

In the absence of informed consent by one of the parties to the agreement, an agreement is invalid. Informed consent will not be established unless each party knows precisely the ramifications of entering into the agreement.

The best evidence that an employee provided their informed consent is where the agreement itself accurately sets out the consequences of the agreement. If the agreement does not provide that information, informed consent can be demonstrated through other means (e.g., the employee was provided with or obtained an ESA 2000 fact sheet or contacted the Ministry of Labour, Training and Skills Development).

Some examples of where there may be an absence of informed consent include:

- The employee cannot read, and the contents of the document were not read to the employee before they agreed to it;
- The employee does not understand the language the agreement was drafted in, and the contents of the document were not read to the employee in a language they understood before they agreed to it;
- Where the employer simply referenced that an employee was bound by an accompanying Employee Handbook without ensuring that the employee had read and understood the provisions contained in the Handbook - see for example *Lukowski v Hatch Associates Ltd.* (1996), 25 CCEL (2d) 17 (Ont Gen Div);
- Where an employee did not read the agreement and was told they must sign the document as a requirement of the job - see for example *O'Shaughnessy v Drake International Inc.* (1986), 14 CCEL 192 (ON SC); and
- Where the employer hides a stringent provision in the fine print of a standard form - see for example *Tilden Rent-A-Car Co. v Clendenning*, 1978 CanLII 1446 (ON CA).

Officers are not required in every case to undertake a review of whether informed consent was provided by each party to a purported agreement. Officers may assume that there is informed consent, but if

something comes to their attention that would contradict this assumption then a review of the conduct of the parties may be undertaken.

Coerced Consent

Agreements may be invalid if a party to the agreement has not voluntarily and freely consented to being bound by its provisions.

In *Cardinal Transportation B.C. Inc. v Canadian Union of Public Employees, Local 561* (1996), 34 CLRBR (2d) 1 (BC LRB), the British Columbia Labour Relations Board defined "coercion" as follows:

In the labour relations context, "coercion" connotes any effort by an employer to invoke some form of force, threat, undue pressure or compulsion for the purpose of controlling or influencing an employee's [decision].
The Ontario Labour Relations Board has also considered the meaning to be attributed to the term coercion in a case where the applicant sought to set aside a settlement made pursuant to ESA Part XXIII, s. 112. The Board cited with approval a decision of the Board in the labour relations context, noting with approval the discussion therein regarding duress, coercion and the requirement that agreements be entered into freely. See Watkins v The Public Services Health and Safety Association, 2015 CanLII 69408 (ON LRB). The discussion in this decision would also be applicable to s. 120 settlements.

There will always be some reason for a party to enter into an agreement. The issue is which reasons are unacceptable, such that they will render the agreement invalid.

Unacceptable reasons include where an employer:

- Intimidates an employee;
- Threatens to dismiss an employee; or
- Imposes or threatens to impose any other penalty on an employee.

Note that these actions may also amount to a violation of ESA Part XVIII, s. 74 which prohibits reprisals.

For example, an agreement would not be effective if the reason the employee entered it is because the employer:

- Threatened to fire them;
- Threatened to reduce their hours or pay; or
- Penalized the employee's co-workers because they had refused to enter into the agreement, and the employee entered into the agreement to avoid being similarly penalized.

On the other hand, it is unlikely that the reason will be considered to be unacceptable where an employee agrees to an arrangement merely to please their employer, to avoid displeasing them, or because they wanted to earn extra money.

Electronic Agreements

Section 1(3.1) sets out that electronic agreements can constitute an agreement in writing under the ESA 2000.

The Courts have recognized that electronic contracts may be binding on the parties that entered into them. See for example *Rudder v Microsoft Corp.*, 1999 CanLII 14923 (ON SC) where the court ruled that an individual was bound to an Internet service providing contract by clicking the "I agree" button that appeared on the user's computer monitor. However, the courts have also ruled that it is essential that electronic contracts retain their original form and that there are mechanisms provided to ensure their integrity (i.e., safeguards to ensure that the parties have actually entered into the agreement, such as passwords).

Consequently, electronic agreements can be valid agreements under the Act, assuming all of the conditions of a valid agreement are met, e.g., specificity, informed consent, etc. However, precautions must be taken to ensure the integrity of electronic agreements. In particular, officers must be able to verify that the employee whom the employer claims to have electronically agreed to the agreement did in fact agree.

There must be a positive act by the employee to demonstrate their agreement; simply not responding to an e-mail that says, for example, "if you don't respond, you will be considered to have agreed to . . ." does not constitute an agreement.

Officers are not required in every case involving an electronic agreement to verify the integrity of the agreement. Officers may assume that the agreement is as it appears to be, but if something comes to their attention that would contradict this assumption then the officer has to decide whether what has been placed before them does in fact accurately represent what the parties agreed to, on the basis of the evidence.

The enforceability of a party's electronic signature requires proof that the party actually affixed its electronic signature to the agreement, and also intended to be bound by the terms and conditions of the agreement. There are many ways to sign a document electronically.

1. Typing the sender's name at the end of an email message;
2. Providing a scanned image of a handwritten signature that is attached to an electronic document;
3. Providing a secret code, password, or PIN to identify the sender to the recipient;
4. Providing a unique biometrics-based identifier, such as a fingerprint, voice print, or a retinal scan;
5. Using a computer mouse to click on an "I agree" button;
6. Creating a sound, such as the sound by pressing "9" on a telephone, to indicate acceptance; and
7. Creating a "digital signature" through the use of public key cryptography.

[Reference: https://www.lowenstein.com/files/Publication/45e0d333-56b6-485f-835c-011eb4f3aa2f/Presentation/PublicationAttachment/9bde51f9-a5d9-455f-9910-06fa785d5996/1-%20Electronic%20Signatures%20Agreements%20and%20Documents_%20The%20Recipe%20For%20Enforceability%20an.pdf]

In accordance with the general principles discussed earlier regarding the validity of agreements, items that parties may wish to consider including in their electronic agreements include:

- The names of the parties;
- The date the agreement was entered into;

- The date the agreement will come into effect;
- The date the agreement will end;
- The default employment standard that the parties are agreeing to replace with another entitlement or protection, and what that other entitlement or protection is; and
- Electronic signatures of each party to the agreement.

In addition:

- Employees must have had a sufficient amount of time to consider the agreement before agreeing to enter into it. What is sufficient will vary depending on the circumstances and the type of agreement.
- Both parties to the agreement must understand it to mean the same thing. Ideally, the agreement would be sufficiently specific so that an independent, objective third party would be able to determine what was being agreed to simply by reading the agreement.
- Both parties must have given informed consent.
- The agreement must have been freely and voluntarily entered into.
- The agreement will generally only be effective from the date of the agreement onward; it will generally not have retroactive effect.

Different types of agreements may have specific requirements. Please refer to the appropriate section of the ESA 2000 for more information.

Revocability of Agreements

Some of the provisions for agreements within the Act and regulations set out specific restrictions or limitations on the ability of the parties to revoke the agreement. For example, agreements to average hours of work for the purpose of determining overtime entitlements may not be revoked before the agreement expires unless both the employee and employer agree to revoke it as per ESA Part VIII, s. 22(6). Likewise, in general, where there is an agreement for an employee to work up to a specified number of hours in excess of the weekly 48 hour maximum, an employee is only able to revoke such an agreement after giving the employer two weeks' written notice and an employer is only able to revoke after giving the employee reasonable notice.

Where the Act does not impose any restrictions on revocability, employees are entitled to revoke their agreement to the alternate standard and revert back to the default standard, and doing so is a protected activity under ESA Part XVIII, s. 74. If an employer penalizes an employee because the employee withdrew their agreement, that will be a violation of s. 74. See Part XVIII for additional discussion on this point.

Section 1(4)

Exception - s. 1(4)

1(4) Nothing in subsection (3) requires an employment contract that is not a collective agreement to be in writing.

It provides that s. 1(3), which requires that agreements that employees and employers enter into under the Act be in writing, does not mean that employment contracts that are not collective agreements have to be in writing.

ESA Part II – Information Concerning Rights and Obligations

Part II (Information Concerning Rights and Obligations) of the ESA 2000 contains provisions dealing with the requirement that employers provide a copy of the poster prepared by the Director of Employment Standards to each of the employer's employees. The poster provides such information about the ESA 2000 and the regulations as the Director considers appropriate.

This Part is intended to help ensure that employers are aware of their obligations and that employees know their rights under the ESA 2000. It requires that important information about the ESA 2000 and the regulations be provided directly to employees.

ESA Part II Section 2 – Director to Prepare Poster

Director to Prepare Poster – s. 2(1)

2(1) The Director shall prepare and publish a poster providing such information about this Act and the regulations as the Director considers appropriate.

Section 2(1) provides that the Director of Employment Standards shall prepare and publish a poster that provides information about the ESA 2000 and its regulations that the Director considers appropriate.

At the time of writing, the poster prepared pursuant to this section is entitled "Employment Standards in Ontario" and is published by Publications Ontario. The poster is available from Publications Ontario and can be downloaded from the Ministry of Labour's website.

Prior to the *Restoring Ontario's Competitiveness Act, 2019,* which received Royal Assent on April 3, 2019, s. 2(1) required the Minister of Labour to prepare and publish the poster.

If Poster Not Up to Date – s. 2(2)

2(2) If the Director believes that the poster prepared under subsection (1) has become out of date, he or she shall prepare and publish a new poster.

This section provides that the Director of Employment Standards shall prepare and publish a new poster if the Director believes that the existing poster is out of date.

Material to Be Posted – s. 2(3) – REPEALED

Subsection 2(3) was repealed effective April 3, 2019 as a result of the *Restoring Ontario's Competitiveness Act, 2019*. Prior to April 3, 2019, employers were required to post the most recent version of the poster in at least one conspicuous place in every workplace. The discussion of this provision is being maintained in this publication since employees may still have a complaint relating to a situation that arose when s. 2(3) was in force.

2(3) Every employer shall post and keep posted in at least one conspicuous place in every workplace of the employer where it is likely to come to the attention of employees in that workplace a copy of the most recent poster published by the Minister under this section.

This section requires employers to post a copy of the poster referred to in s. 2(1) in the workplace where it is likely to come to the attention of all employees.

Where Majority Language Not English – s. 2(4) – REPEALED

Subsection 2(4) was repealed effective April 3, 2019 as a result of the *Restoring Ontario's Competitiveness Act, 2019*. Prior to April 3, 2019, employers were required – in particular circumstances – to post a translation of the most recent version of the poster in at least one conspicuous place in every workplace. The discussion of this provision is being maintained in this publication since employees may still have a complaint relating to a situation that arose when s. 2(4) was in force.

2(4) If the majority language of a workplace of an employer is a language other than English, the employer shall make enquiries as to whether the Minister has prepared a translation of the poster into that language, and if the Minister has done so, the employer shall post and keep posted a copy of the translation next to the copy of the poster.

This section states that where the majority language in a workplace is a language other than English, the employer is required to inquire as to whether the Minister has prepared a translation of the poster into that language. If a translation of the poster into that language has been prepared, the employer is required to post the translation alongside the English poster.

Copy of Poster to Be Provided – s. 2(5)

2(5) Every employer shall provide each of his or her employees with a copy of the most recent poster published by the Director under this section.

The requirement that an employer provide each employee with a copy of the most recent version of the poster came into effect May 20, 2015 as a result of the *Stronger Workplaces for a Stronger Economy Act, 2014*.

Pursuant to ss. 2(7), the poster must be provided within 30 days of the day the employee became an employee of the employer.

Employers are only required to provide each employee with the poster once. There is no requirement to provide employees with the poster every time a new version of the poster is published by the Director

The Program's position is that an employer may provide the poster as a printed copy or as an attachment in an email to the employee. Further, and consistent with the Program's position regarding the provision of written wage statements under s. 12(1) and the information sheets for assignment employees under s. 74.7(3), an employer may provide the poster via a link to the document on an internet database, if the employer ensures the employee has reasonable access to that database (i.e. the employer must ensure the employee has access to a computer (which includes devices such as tablets and smart phones) and is able to access a working link to the document) and ensures the employee has access to a printer and that the employee knows how to use the computer and the printer.

Same – Translation – s. 2(6)

2(6) If an employee requests a translation of the poster into a language other than English, the employer shall make enquiries as to whether the Director has prepared a translation of the poster into that language, and if the Director has done so, the employer shall provide the employee with a copy of the translation.

If an employee asks for a copy of the poster in a language other than English, the employer is required to inquire as to whether the Director has prepared a translation of the poster into that language. If one has been prepared, the employer is required to provide the employee with a copy of the translation. Note this translation must be provided in addition to a copy in English.

When Copy of Poster to Be Provided – s. 2(7)

2(7) An employer shall provide an employee with a copy of the poster within 30 days of the day the employee becomes an employee of the employer.

Subsection (7) requires the employer to provide an employee with a copy of the most recent version of the poster within 30 calendar days of the day the employee is hired by the employer.

Transition – s. 2(8)

2(8) The most recent poster prepared and published by the Minister under subsection (1) as it read immediately before the day the *Restoring Ontario's Competitiveness Act, 2019* received Royal Assent is deemed to have been prepared and published by the Director.

Subsection (8) is a transitional provision relating to the amendment that shifted the obligation to prepare and publish the poster from the Minister to the Director.

This provision establishes that the poster that was in place immediately before the day the *Restoring Ontario's Competitiveness Act, 2019* received Royal Assent which was prepared and published by the Minister – is deemed to have been prepared and published by the Director.

The effect of this provision is to establish that Version 8.0 of the poster (which was prepared and published by the Minister on December 17, 2018) continues to be the correct version of the poster for the purposes of section 2 until such time as the Director prepares and publishes a new version of the poster under subsection 2(2).

Same – s. 2(9)

2(9) Any translation prepared by the Minister under subsection (6), as it read immediately before the day the *Restoring Ontario's Competitiveness Act, 2019* received Royal Assent, is deemed to have been prepared by the Director.

Subsection (9) is a transitional provision relating to the amendment that shifted the obligation to prepare and publish the poster from the Minister to the Director. This provision establishes that translated versions of the poster in place immediately before the day the *Restoring Ontario's Competitiveness Act, 2019* received Royal Assent – which were prepared by the Minister – are deemed to have been prepared by the Director and continue to be the correct translated versions of the poster for the purposes of section 2 (until such time as the Director prepares new translations of a new poster).

ESA Part III - How this Act Applies

Part III (How this Act Applies) contains provisions dealing with the application of the *Employment Standards Act, 2000* and sets out some basic matters that are critical to its operation.

ESA Part III Section 3 – To Whom Act Applies

To Whom Act Applies – s. 3(1)

3(1) Subject to subsections (2) to (5), the employment standards set out in this Act apply with respect to an employee and his or her employer if,

(a) the employee's work is to be performed in Ontario; or

(b) the employee's work is to be performed in Ontario and outside Ontario but the work performed outside Ontario is a continuation of work performed in Ontario.

Section 3(1)(a) indicates that the ESA 2000 applies to all employees whose work is to be performed in Ontario and their employers. However, the fact that some work is performed in Ontario may be insufficient to bring the employee in under the jurisdiction of the ESA 2000. For example, if the employee's work in Ontario is merely a continuation of the work performed in another jurisdiction, then the laws of the other jurisdiction may apply rather than the ESA 2000.

Section 3(1)(b) provides that the ESA 2000 applies to employees whose work is to be performed in Ontario and who also perform work outside of Ontario but only where the work is a continuation of the work performed in Ontario.

Examples of the Implications of s. 3(1)(b):

1. A salesperson, or truck driver (in a provincial jurisdiction operation), who is employed and has a home base in Ontario will fall under the Act's jurisdiction, notwithstanding that they work both in and out of Ontario in the course of their employment. The work performed outside Ontario is a continuation of work performed in Ontario.
2. A bricklayer working for a construction company on a project that is located partly in Ottawa and partly in Hull, Quebec will be subject to Ontario's jurisdiction (even though they may also fall under Quebec' s jurisdiction) because the Quebec work will be considered a continuation of the work in Ontario. Therefore, where the bricklayer worked 40 hours in Ontario and 20 in Quebec in one week, all the work is subject to Ontario jurisdiction and all the hours worked are included for the purposes of the ESA 2000, i.e., the employee would be entitled to overtime pay for 16 of the 60 hours worked in the week.
3. The same approach as in (2) would apply to a service truck driver of that Ottawa construction company, where they drove the truck in Hull to service projects in both cities.
4. An employee works for five years for ABC Company in England, then is transferred to Ontario where they work for ABC for two years. Because the work in England was not a continuation of the work in Ontario, the employee will have two years' employment with ABC for the purpose of determining the employee's entitlements under the ESA 2000.

It should also be noted that, in some situations, there might very well be dual jurisdiction over the matter. For example, a person may be performing work in Newfoundland as a continuation of the work in Ontario, and Ontario would have jurisdiction over the contract of employment, notwithstanding that Newfoundland may have as well.

Factors that are not relevant to the Act's application include where:

- The offer of employment was made or accepted;
- The contract of employment was signed;

- The employee resides;
- The head office of the employer is located;
- The wages are to be paid; and
- The employer is incorporated.

In *Shearing v James Way Construction Inc.,* 2007 CanLII 15197 (ON LRB), the issue was whether the overtime provisions of ESA 2000 applied to work performed in the United States. The employee worked building fast food outlets for a construction business that was based in Kitchener. Occasionally, the employer sent the employee with a loaded truck of building materials to the United States to build similar outlets there, following which the employee would return to Ontario to resume his duties. The Board found that the employee's work in the United States was a continuation of his work in Ontario within the meaning of s. 3(1)(b) and that the overtime provisions applied.

In *Karpowicz v Valor Inc.,* 2016 CanLII 49203 (ON LRB), the Board considered whether the ESA 2000 applied to an employee who performed almost all of his work in the U.S. for an employer with headquarters in Ontario. The employment contract stated that the parties wanted to laws of Ontario, including the ESA 2000, to apply to their employment relationship. However, the employee was based in Michigan, where he performed almost all of his work, even the work that related to clients based in Ontario. He came to Ontario on a few occasions to attend meetings, but the Board determined that this was incidental to his work in Michigan and constituted a continuation of his work outside of Ontario. The Board gave little weight to the intention of the parties and found that the ESA 2000 did not apply because s. 3(1)(b) was inapplicable.

Exception, Federal Jurisdiction – s. 3(2)

3(2) This Act does not apply with respect to an employee and his or her employer if their employment relationship is within the legislative jurisdiction of the Parliament of Canada.

This provision, introduced by the ESA 2000, clarifies that the ESA 2000 does not apply to employees and employers that are federally regulated and who are therefore subject to the *Canada Labour Code* rather than the ESA 2000. Section 3(2) codifies the common law and the Program policy applied under the former *Employment Standards Act*.

Section 2 of the *Canada Labour Code* provides a definition of "federal work, undertaking or business" which fall under federal jurisdiction:

> **(a) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada,**
>
> **(b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province,**
>
> **(c) a line of ships connecting a province with any other province, or extending beyond the limits of a province,**
>
> **(d) a ferry between any province and any other province or between any province and any country other than Canada,**
>
> **(e) aerodromes, aircraft or a line of air transportation,**

(f) a radio broadcasting station,

(g) a bank or an authorized foreign bank within the meaning of section 2 of the Bank Act,

(h) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces,

(i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces, and

(j) a work, undertaking or activity in respect of which federal laws within the meaning of section 2 of the Oceans Act apply pursuant to section 20 of that Act and any regulations made pursuant to paragraph 26(1)(k) of that Act; (entreprises fédérales)

However, despite this definition it is not always clear whether an employer is federally or provincially regulated. Generally, it should be presumed that employment standards are provincially regulated, and therefore fall within the jurisdiction of the ESA 2000. If it is unclear whether an employer is provincially or federally regulated, it is recommend that guidance be sought. Additionally, see the sections below for further information on federal vs provincial jurisdiction in employment.

Constitution Act, 1867

In Canada, law-making functions are divided between the Parliament of Canada and the provincial legislatures by the *Constitution Act, 1867* (formerly called the *British North America Act*). Section 91 of the *Constitution Act, 1867* assigned to the federal government a residual authority to make laws concerning the "Peace, Order and Good Government of Canada" (referred to as the POGG power). The courts have determined that such matters as aeronautics, radio and television broadcasting are within federal jurisdiction under this clause. In addition, s. 91 sets out 31 classes of exclusive federal power. These include such matters as unemployment insurance, the military, criminal law and divorce. Finally, pursuant to s. 91(29), Parliament may make laws concerning any classes of works or undertakings expressly excepted from the subjects assigned to provincial jurisdiction in s. 92.

Section 92 of the *Constitution Act, 1867* assigns jurisdiction to the provinces over such subjects as provincial taxation, municipal institutions within the province, property and civil rights in the province, and the administration of provincial courts. It also establishes exceptions from provincial jurisdiction in ss. 92(10)(a)-(c) for local works or undertakings that connect provinces or extend beyond the province, steamship lines between a province and a foreign country, and those undertakings that are declared to be of national interest. Note that the combined effect of s. 91(29) and s. 92(10)(a) is to provide Parliament with jurisdiction over interprovincial transportation and communications works and undertakings, and the combined effect of s. 91(29) and s. 92(10)(c) is to allow the federal government to declare its jurisdiction over grain elevators and various kinds of mills and warehouses.

As a general rule, the regulation of labour relations and working conditions (which includes employment standards) falls within provincial jurisdiction pursuant to the province's constitutional authority over "Property and Civil Rights in the Province", as per s. 92(13) of the *Constitution Act, 1867*.

It should be noted that notwithstanding this general rule, Parliament has jurisdiction over labour relations and working conditions when such jurisdiction is an integral part of Parliament's jurisdiction over an area of primary federal authority.

Principles of Federal Jurisdiction

The constitutional principles that have been applied in determining whether Parliament has jurisdiction over employment and labour matters were reviewed by the Supreme Court of Canada in *Northern Telecom v Communications Workers*, [1980] 1 SCR 115, 1979 CanLII 3 (SCC) and summarized as follows:

1. *Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial jurisdiction is the rule.*
2. *By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.*
3. *Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment, but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.*
4. *Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law, if the undertaking, service or business is a federal one.*
5. *The question of whether an undertaking, service or business is a federal one depends on the nature of its operation.*
6. *In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of "a going concern," without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.*

As a result, employees are governed in their employment relationships by federal legislation if the enterprise or operation in which they are engaged is a federal work or undertaking as determined through the exercise of the POGG power or as enumerated in s. 91 of the *Constitution Act, 1867*, including matters excepted from provincial jurisdiction under s. 92(10). The employer may also fall under federal jurisdiction if it is found to be integral to a federal undertaking, though this requires, among other things, a high level of operational connection between the local and federal undertakings.

Where a federal undertaking carries on an operation unrelated to federal jurisdiction, that operation will be subject to provincial employment and labour law. In *Canadian Pacific Railway Co. v Attorney-General of British Columbia*, [1948] SCR 373, 1948 CanLII 18 (SCC), also known as the *Empress Hotel* case, the Supreme Court of Canada held that employees of the railway's hotel (as opposed to the employees working on the railway itself) were subject to provincial labour laws because the operation of the hotel was entirely divisible from the operation of the railway and as such was not an integral element of the operation of the railway. In other words, the hotel operation was not a federal work or undertaking, and the employees were governed by provincial law.

In general, employees of a federal work or undertaking, or of a work or undertaking that is integral to a federal undertaking, will fall under federal jurisdiction, and it is assumed in most instances that management of the undertaking in terms of employment and labour matters is essential and vital to the undertaking as a whole. Therefore, such employees will fall under federal employment law.

Examples of Federal Jurisdiction in Employment Matters

The following is a brief review of employees and industries in which employment matters fall under federal jurisdiction.

Federal Government Employees

Each jurisdiction has full and exclusive competence to legislate with regard to its own employees. Therefore, employees of the federal government will fall under federal rather than provincial jurisdiction.

Federal Crown Corporation Employees

Employees of a federal Crown Corporation may or may not fall under federal jurisdiction. Such employees are governed by federal law only where the corporation is engaged in a federal work or undertaking. See the discussion of the *Empress Hotel* case above.

Nuclear Facilities

In *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327, 1993 CanLII 72 (SCC) the Supreme Court of Canada held that jurisdiction over employees working in Ontario Hydro's nuclear operations was federal rather than provincial. Following this decision, the *Canada Labour Code* was amended so as to authorize the federal government to make regulations that effectively made the terms of provincial legislation, instead of what was in the *Canada Labour Code*, apply to these employees. Federal regulations to do this were made and came into force on April 1, 1998. As of that date, Ontario Hydro nuclear operations employees became subject to Ontario's employment standards legislation and are covered (both with respect to the standards and enforcement) under the ESA 2000 just as employees in non-nuclear operations are – see federal regulation SOR/98-181. Note that the federal regulation applies to the Pickering and Darlington nuclear facilities owned and operated by Ontario Power Generation and to the Bruce nuclear facility operated by Bruce Power because the regulation defines a nuclear facility as one other than Ontario Hydro if, on the day on which the regulation came into force (April 1, 1998) or after, the facility was owned and operated by Ontario Hydro.

This federal regulation is supported by s. 94 of the ESA 2000, which makes it clear that the Ontario Labour Relations Board and other persons having power under the Act (such as employment standards officers and the Director of Employment Standards) have the authority to exercise the powers conferred under the federal regulation, i.e., to enforce the employment standards provisions that are incorporated by reference into the *Canada Labour Code*. See ESA Part XXI, s. 94 for a further discussion.

There is one exception to the application of the ESA 2000 to Ontario Power Generation's nuclear energy facilities. Under the ESA 2000, if an employment standards officer wishes to enter (without the consent of the occupier) a place that is used as a dwelling, they are required under ESA Part XXI, s. 91(3) to obtain a search warrant issued under ESA Part XXI, s. 92. However, if (in the unlikely event) the dwelling were a nuclear facility, the officer would be required to obtain the search warrant under s. 487 of the *Criminal Code* because s. 4 of the federal regulation SOR/98-181 specifically refers to the search warrant being obtained under that section of the Criminal Code. Please refer to the discussion of entry into dwellings in ESA Part XXI, s. 92.

Aeronautics

Pursuant to the POGG power, the field of aeronautics was held to be within the federal jurisdiction by the Privy Council in the 1931 decision in *The Attorney-General Canada v The Attorney-General of Ontario and others,* [1931] UKPC 93 (22 October 1931), also known as the *Aeronautics Reference*. The Council stated that aerial navigation was of such importance as to affect the "body politic of the dominion."

Accordingly, all airlines, air transport undertakings, airports and their employees fall under federal jurisdiction and may include:

- Employees of a company engaged in refueling, maintenance and ground handling of private, corporate and commercial aircraft;
- Employees of a maintenance, installation and repair firm where the firm's work is functionally interrelated with an airline; and
- Employees who service, inspect and certify aircraft (for example, an independent contractor hired by Air Canada to service its planes).

However, the following employees may not be necessary, integral or vital to the functioning of an airport, and may not be under federal jurisdiction:

- Baggage porters;
- An airport limousine service's employees (unless they provide transport beyond the borders of the province on a "continuous and regular" basis);
- Airport parking lot employees;
- Maintenance workers at an air traffic controllers' school;
- Employees of a catering company at an airport operating a coffee shop or restaurant, or contracting with an airline to supply in-flight food and beverages; and
- Employees performing duties upon an aircraft that do not relate to the aircraft operation, or to transportation (e.g., aerial surveys, aerial photography or advertising).

Note that the fact that an airport is situated on land owned by the federal government is not determinative of jurisdiction. The Crown in right of Canada owns a variety of property including national ports, Indian reserves, public harbours, roads, canals and airports. It is the nature of the undertaking rather than the ownership of the land that determines where jurisdiction will lie.

Communications

Communications includes radio and television broadcasting, cable television, telecommunications and internet service providers.

Radio and television broadcasting fall under federal jurisdiction pursuant to the POGG power in s. 91 of the *Constitution Act, 1867*. See the Privy Council's decision in *The Attorney General of Quebec (Appeal No. 84 of 1931) v The Attorney General of Canada and others*, (Canada) [1932] UKPC 7 (9 February 1932), also known as the *Radio Reference*.

The sale of antenna time and the production of commercials has been held to be "program production" and not broadcasting and therefore employees engaged in the same fall under provincial jurisdiction rather than federal. See the Supreme Court of Canada's decision in *Canada Labour Relations Board et al. v Paul L'Anglais Inc. et al*, [1983] 1 SCR 147, 1983 CanLII 121 (SCC).

Cable television, telecommunications and other forms of electronic communications including internet service providers (ISPs) fall under federal jurisdiction through the combined effect of s. 91(29) and s. 92(10)(a) of the *Constitution Act, 1867*. Together, these provisions provide Parliament with exclusive jurisdiction over interprovincial communications works and undertakings (and transportation).

In *Island Telecom Inc. et al.*, 2000 CIRB 59, the Canada Industrial Relations Board held that internet service providers ("ISPs") fall within exclusive federal jurisdiction, including employment matters, because they constitute a federal undertaking carrying on an activity that is within the exclusive jurisdiction of Parliament pursuant to s. 91(29) and s. 92(10)(a) of the *Constitution Act, 1867*. The basis for this decision

was that ISPs provide customers with the ability to communicate across Canada and internationally, i.e., internet service providers provide access to local, inter-provincial and international telecommunications through the Internet.

In *Northern Telecom v Communications Workers* the Supreme Court of Canada held that the installation of telephone switching and transmitting equipment was part of the establishment and maintenance of a communications network and employees engaged in such an undertaking were therefore under federal jurisdiction. However, where a company is merely installing telephone receivers, its employees are under provincial jurisdiction. See *Communications Workers of Canada v CTG Telecommunications Systems, Inc. (Canadian Telecommunications Group)*, 1985 CanLII 890 (ON LRB).

Companies such as Bell Mobility Inc. which provide wireless telecommunications services would, as such, fall under federal jurisdiction. Until January 2009, a company called Bell Distribution Inc. ("BDI") owned and operated a number of retail stores selling Bell Mobility products. As a retail operation, the stores and employees fell under provincial jurisdiction in employment matters. However, on January 1, 2009, BDI was amalgamated into Bell Mobility Inc. and since that date the retail stores have been owned operated by Bell Mobility Inc. There are 114 such retail store locations in Ontario, which operate under one of three banners: Bell, Bell World and Virgin Mobile. Where such stores are no longer operating as separate and severable entities from Bell Mobility Inc., the employees in those retails stores would be subject to federal jurisdiction.

Banks

The employees of federally-chartered banks fall under federal jurisdiction as banking is a subject enumerated in s. 91 of the *Constitution Act, 1867*.

However, loan and trust companies, credit unions and insurance companies fall under provincial jurisdiction. This is the case even if they operate in more than one province, perform some "banking functions," or are federally-incorporated. See *Canadian Pioneer Management Ltd. et al v Labour Relations Board of Saskatchewan et al*, [1980] 1 SCR 433, 1979 CanLII 180 (SCC).

Indians and Reserves

As noted earlier, as a general rule, the regulation of employment standards and labour relations falls within provincial jurisdiction pursuant to the province's constitutional authority over Property and Civil Rights in the Province, as per s. 92(13) of the *Constitution Act, 1867*. However, s. 91(24) of the *Constitution Act, 1867* gives the federal government jurisdiction over Indians which has been held to encompass all Aboriginal Peoples, including First Nations, Inuit and Métis Peoples.

Whether any particular workplace is governed by federal legislation is determined on a case-by-case basis after examining the nature, operations and habitual activities of the undertaking. Generally, however, an employer will not be found to be governed exclusively by federal employment standards legislation merely because the business is owned and operated by Aboriginal persons, is located on a reserve or delivers its services in a culturally sensitive manner.

For example, in *NIL/TU,O Child and Family Services Society v B.C. Government and Service Employees' Union*, [2010] 2 SCR 696, 2010 SCC 45 (CanLII), the Supreme Court considered whether an aboriginal child welfare agency, set up pursuant to provincial child welfare legislation, was federally or provincially regulated with respect to their labour relations. A number of features of the child welfare agency suggested that it would be federally-regulated: it was set up collectively by seven First Nations; the child welfare services were provided primarily by First Nations employees to First Nations clients; the services were designed to protect, preserve and benefit the distinct cultural, physical and emotional needs of the

children and families of the First Nations involved; it operated out of offices on a First Nations reserve; and federal funding was provided. The SCC found that the nature of the welfare agency's operation was to provide child and family services, a matter that falls exclusively within provincial jurisdiction and therefore determined that the child welfare agency was provincially regulated.

There are some circumstances, however, where a workplace located on a reserve will be governed by employment standards legislation pursuant to the federal government's jurisdiction with respect to "Indians, and Lands reserved for the Indians" as per s. 91(24) of the *Constitution Act, 1867*. For example, a band council and its employees who are involved in the administration of the reserve are generally subject to the *Canada Labour Code*, and not the ESA 2000, because their primary function is the provision of Aboriginal governance.

However, this does not mean that any employment activity by a band council is necessarily a matter of exclusive federal jurisdiction. Where a federal undertaking carries on an operation unrelated to federal jurisdiction, that operation will be subject to provincial employment and labour law. The difficult question is whether a band council, when employing persons in the exercise of a particular activity, is carrying on a federal activity, operation or function such that the employment standards and labour relations pertaining to that activity must be federally regulated. This question has given rise to divergent cases depending on the particular band activity at issue.

It is recommended that guidance be sought in files involving Aboriginal employers or employees.

Shipping

The owner and employees on a ship engaged in interprovincial or international shipping will fall under federal jurisdiction.

If the owner of a ship falls under federal jurisdiction, but repairs are done to the ship by the employees of another employer while the ship is in drydock, the employees will generally fall under provincial jurisdiction if their employer would otherwise fall under provincial jurisdiction.

The owner of a ship whose ships operate totally within the province of Ontario (e.g., the Toronto Island and Manitoulin Island Ferries) and its employees will be governed by provincial legislation.

Fisheries

Federal jurisdiction over "seacoast and inland fisheries", as set out in s. 91(12) of the *Constitution Act, 1867*, has not been considered to include jurisdiction over the employment relations of any particular fishing business. The jurisdiction is limited to regulating fisheries in a general way: for example, setting limits on catches and establishing seasons. See *United Fishermen and Allied Workers' Union et al v British Columbia Provincial Council*, [1978] 2 SCR 97, 1977 CanLII 205 (SCC).

As a consequence, jurisdiction over employment relations in the fishing industry, including persons employed in fisheries and those working on commercial fishing boats on inland waters, lies with the province. See *Great Lakes Fishermen and Allied Workers' Union v 538391 Ontario Limited (Peralta Foods)*, 1987 CanLII 3081 (ON LRB).

Feed Mills, Flour Mills, Seed Cleaning Mills and Feed Warehouses

Feed mills, flour mills, seed cleaning mills and feed warehouses, wherever located in Ontario, fall under federal jurisdiction. These facilities are under federal jurisdiction as a result of the federal Parliament making a declaration under s. 92(10)(c) of the *Constitution Act, 1867* that they are "for the general advantage of Canada" in s. 55(1.1) of the *Canada Grain Act*, RSC 1985, c G-10. Occasionally farms have

non-commercial seed cleaning mills for their own use. In such cases, it is recommended that advice be sought.

Grain Elevators

The federal Parliament also made a declaration under s. 92(10)(c) of the *Constitution Act, 1867* with respect to certain grain elevators in s. 55(1) of the *Canada Grain Act*, RSC 1985, c G-10. The "elevators" covered by the declaration and that as a result fall under federal jurisdiction are:

1. All elevators in Thunder Bay and west of Thunder Bay;
2. All elevators east of Thunder Bay along Lake Superior, Lake Huron, Lake St. Clair, Lake Erie, Lake Ontario, and canals or other navigable waters connecting those Lakes, or the St. Lawrence River or any tidal waters; and
3. The parts of premises east of Thunder Bay that are used for storing grain which have been designated an elevator under federal regulation.

In other words, pursuant to that declaration, most inland grain elevators east of Thunder Bay fall under provincial jurisdiction. However, it is possible that such an elevator will fall under federal jurisdiction if it is an integral element of a federal operation, e.g., has been purchased and is being operated by a federally regulated employer.

If there is a situation in which this provision potentially arises, it is recommended that advice be sought.

Trucking

The trucking industry is not a subject specifically enumerated in s. 91 of the *Constitution Act, 1867* as falling under federal jurisdiction, and accordingly, provincial employment legislation will generally apply.

Nonetheless, a portion of the industry does fall under federal jurisdiction as a result of ss. 91(29) and 92(10)(a) of the *Constitution Act, 1867*, which bring works or undertakings connecting a province with any other or extending beyond the limits of a province under federal jurisdiction.

The trucking industry provides services in the following ways:

1. Common carriers: carriers that offer their services to the public for compensation.
2. Private carriers: firms whose principal business is something other than trucking but who transport their own goods or supplies, or those firms whose principal business is trucking but are not common carriers in that they perform their services exclusively for a related firm (whose principal business is something other than trucking).
3. Carrier services: firms who lease drivers or vehicles to common carriers but who do not themselves offer the services of a common carrier.

Common Carriers

The courts have held that where a common carrier's extraprovincial activity is "continuous and regular" it will be considered to be a federal work or undertaking and fall under federal jurisdiction. In *R v. Toronto Magistrates, Ex Parte Tank Truck Transport Ltd.,* 1960 CanLII 120 (ON SC), only six per cent of the firm's business consisted of extraprovincial haulings, yet the court found that the extraprovincial aspect of the business was "continuous and regular". The fact that the volume of intraprovincial work exceeded the extraprovincial aspect was not relevant.

In *R v Cooksville Magistrate's Court, Ex parte Liquid Cargo Lines Ltd*., 1964 CanLII 162 (ON SC), only 1.6 per cent of the company's business was extraprovincial, but the court held that:

Viewed from the point of view of the applicant company, it is clear that its customers are provided with extraprovincial service consistently and without interruption whenever they apply to the applicant for such service. The applicant stands ready at any time to engage in hauls outside the boundaries of the Province of Ontario at the instance of any of its customers.... Further, the evidence is clear that it has made such trips frequently....

Therefore, if the trucking firm is willing and able to engage in extraprovincial activity whenever requested, and if it does in fact so engage, the extraprovincial activity will be considered "continuous and regular" and employment matters will be subject to federal jurisdiction.

Consequently, the Program takes the position that if a company operating as a common carrier holds an extraprovincial license it will fall under federal jurisdiction unless:

1. The extraprovincial license is only used on rare occasions (i.e., it is not used on a continuous and regular basis); or
2. The extraprovincial license is held by an organizationally distinct division that is separate from the rest of the operation, in which case only the division holding the extraprovincial licence will fall under federal jurisdiction.

Private Carriers

As a general rule, the delivery operation of a company whose principal operation is manufacturing, processing or selling will not fall under federal jurisdiction, even if the company makes extraprovincial deliveries. This is so even where the extraprovincial trips are regular and continuous. See *Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees (International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 647) v Dominion Dairies Limited*, 1978 CanLII 443 (ON LRB), *Humpty Dumpty Foods Ltd. v U.I.T.B.C.A., Local 333* and *United Steelworkers of America v Pepsi-Cola Canada Ltd.*, 1995 CanLII 9942 (ON LRB).

This is so because it is the principal operation of the undertaking that determines its essential character; if the "pith and substance" is one of manufacturing, processing or selling of goods, and not transportation, then the undertaking does not fall under s. 92(10)(a) of the *Constitution Act, 1867* and is not a federal undertaking.

Unless the nature of the principal operation puts the undertaking within some other head of federal jurisdiction, the entire undertaking, including the extraprovincial hauling is within provincial jurisdiction. See *General Truck Drivers' Union, Local 879 v William R. Barnes Co. Ltd.* and *Re Mason Windows Ltd*.

Carrier Services

Generally, companies that supply only the drivers of vehicles to other companies will not fall under federal jurisdiction, even if the drivers are assigned to work for companies who transport goods across provincial or national borders on a common carrier basis. This is so because it is the normal or habitual activities of a business that define the nature of its operation. In this situation, if the nature of the operation is one akin to a staffing company or temporary employment agency for truck drivers and not transportation, then the undertaking would not fall under s. 92(10)(a) of the *Constitution Act, 1867* and is not a federal undertaking. See *Woodmac Services Ltd. v Macklam* (July 19, 1979), ESC 644 (Saxe).

Likewise, a company that leases vehicles does not fall under federal jurisdiction as a federal undertaking, even if the vehicles are driven beyond the boundaries of the province in which the lease is effected. The

lessor is not operating the vehicles and therefore the leasing company's operation is not considered to be one that connects provinces or extend beyond the limits of a province as per s. 92(10)(a) of the *Constitution Act, 1867*.

However, in some situations, a staffing company or a company that leases vehicles could fall under federal jurisdiction if it is found to be integral to a federal undertaking.

The test that must be applied to find a seemingly provincial undertaking to be integral to a federal undertaking (e.g., a carrier service that crosses provincial or national borders) is rigorous and requires an extensive analysis of the facts.

The Supreme Court of Canada has laid out four general inquiries to help with the analysis of whether a seemingly local undertaking is integral to a federal undertaking:

1. What is the general nature of the local undertaking's operation?
2. What is the nature of the corporate relationship between the local undertaking and the companies that it serves, notably any federal undertaking?
3. What is the importance of the work done by the local undertaking for the federal undertaking as compared with its other customers?
4. What is the physical and operational connection between the local undertaking and the federal undertaking?

The above test (and most particularly the inquiry under four above) has a high threshold. As a result, it is rare that a company leasing drivers and/or vehicles to a common carrier that transports goods across provincial boundaries would be found to be integral to that federal undertaking and thereby fall under federal jurisdiction.

Bus Lines

The same principles apply to bus lines as those set out under trucking. Although a bus line is engaged principally in transporting people as opposed to hauling goods, in pith and substance it may be an undertaking that connects the province with any other or extends beyond the limits of the province. In that event, it would fall under federal jurisdiction.

For example, in *Ontario (Attorney General) v Winner (c.o.b. Mackenzie Coachlines)*, [1954] UKPC 8 (22 February 1954), the Privy Council held that a bus line operating from Boston through Maine and New Brunswick to Nova Scotia that also picked up and set down passengers at intermediate points was an undertaking connecting the province of New Brunswick with that of Nova Scotia, and was therefore within exclusive federal jurisdiction.

In some cases, a municipal bus line or a local school bus service is operated by and functionally integrated with a federally regulated interprovincial bus or transportation company. In particular, the bus service and the rest of the interprovincial transportation company may be subject to common management, control and direction. In such cases, it may be that the bus service which is operating wholly within the province is nonetheless considered to fall under federal jurisdiction.

Courier Companies

The same principles apply to courier companies as those set out under Trucking and Bus Lines above.

A courier company may in pith and substance be an undertaking that connects the province with any other, or extends beyond the limits of the province. In that event, it would fall under federal jurisdiction.

In order for the courier company to fall under federal jurisdiction, the courier company has to transport the items across the border itself, rather than being a freight forwarder (i.e., a middleperson that picks up packages then hands them off to another company to transport over a border). In addition, the transport over a border has to be continuous and regular. For information on the meaning of continuous and regular, see the discussion about Common Carriers under Trucking above.

Sale of a Business Across Jurisdictions

When a business has been sold, ESA Part IV, s. 9 normally applies to provide continuity of employment for any of the vendor's employees hired by the purchaser. Refer to ESA Part IV, s. 9 for further discussion.

Generally, it is Program policy that ESA Part IV, s. 9 does not apply in a cross-jurisdictional sale (i.e., where the sale, lease, transfer or other disposition transforms a federal undertaking into a provincial undertaking or vice-versa.) There cannot be deemed continuity of employment in such a transfer because the *Employment Standards Act, 2000* applies only to those employers who are within the legislative jurisdiction of the province. See *Western Stevedoring Co. v Pulp, Paper & Woodworkers of Canada* and *Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees v Canadian Pacific Ltd. and Marathon Realty Co. Ltd*. For the contrary view, see *Canada (Attorney-General) v Standard Trust Co.*, 1994 CanLII 7516 (ON SC) and *Arthur et al v A.A.S. Telecommunications Services Ltd*. (February 17, 1998), 1262-97-ES (ON LRB).

Of course, a provincial business could be sold to a federal business and still remain under provincial jurisdiction if it was a discrete, severable part of the federal business and thereby retained its provincial character. In that case, ESA Part IV, s. 9 continuity would require the purchaser to give credit for service to those of its employees who had worked for the vendor.

In *Canada (Attorney-General) v Standard Trust Co.*, a decision made under the former *Employment Standards Act,* the court held, contrary to Program policy, that the sale of business provisions do apply in a cross-jurisdictional sale. In that case, the assets of Standard Trust (which operated as a trust company and therefore was under provincial jurisdiction) were sold by the liquidator to Laurentian Bank (which was going to use the assets in a bank operation falling under federal jurisdiction). Most employees of Standard were hired by Laurentian, which voluntarily agreed to recognize the employees" length of employment with Standard. The Court held that as s. 13 of the former *Employment Standards Act,* now ESA Part IV, s. 9(1), provided for continuity of employment where a purchaser hired the employees of the seller and deemed the employment of those employees not to have been terminated, and as there was nothing in the legislation that said the purchaser must be within provincial jurisdiction, former employees of Standard were not entitled to termination and severance pay if they had been hired by Laurentian.

The reasoning in the *Canada (Attorney-General) v Standard Trust Co.* decision was followed by an adjudicator in the *Arthur et al v A.A.S. Telecommunications Services Ltd*. decision. There, Rogers Cantel Paging sold part of its business to A.A.S., which resulted in the transformation of a federal undertaking into a provincial undertaking. Shortly after the sale, A.A.S shut down. Adopting the court's reasoning in the *Canada (Attorney-General) v Standard Trust Co.* decision, the adjudicator rejected the argument that the word employer in s. 13(2) of the former *Employment Standards Act*, now ESA Part IV, s. 9(1), should be read as if it was modified by the words "within the jurisdiction's competence". The adjudicator ruled that s. 13 of the former *Employment Standards Act* applied to the sale and that there was continuity of employment. The adjudicator remarked that the argument for the application of s. 13 of the former *Employment Standards Act* to the sale in this case (federal to provincial) was far stronger than the one in *Canada (Attorney-General) v Standard Trust Co.* because there was no enforcement problem that flows from finding a formerly federally-regulated business subject to a provincial statutory provision.

Program policy is that neither *Canada (Attorney-General) v Standard Trust Co.* nor *Arthur et al v A.A.S. Telecommunications Services Ltd.* should be followed in applying ESA Part IV, ss. 9 and 10. In *Rostrust Investments Inc./Investissements Rostrust Inc. v Doxtater*, 2006 CanLII 41431 (ON LRB), the Ontario Labour Relations Board distinguished *Standard Trust* on the basis that the current act, unlike its predecessor, specifically provides that it does not apply to employers and employees if their employment relationship is within federal labour law jurisdiction.

New Building Service Providers

At issue in *Rostrust Investments Inc. v Doxtater* was whether ESA Part IV, s. 10 applied where the former provider of building services fell under provincial jurisdiction and the new provider fell under federal jurisdiction; since the new provider and any employees it hired would be within federal jurisdiction, the Board held that ESA Part IV, s. 10 did not apply.

While *Rostrust Investments Inc. v Doxtater* was concerned with ESA Part IV, s. 10 and a change of jurisdiction from provincial to federal, its reasoning is equally applicable to ESA Part IV, s. 9 and to changes in jurisdiction from federal to provincial. Accordingly, regardless of whether one is dealing with a change in building services providers or a sale of a business, and regardless of whether the change in jurisdiction is from provincial to federal or federal to provincial, the continuity of employment provisions do not apply.

Examples of Cross-Jurisdictional Sales

Transformation of business from provincial undertaking to federal undertaking

The sale of a provincial business (i.e., engaged in a provincial undertaking and under provincial jurisdiction) to a federal business may result in a transformation of the provincial undertaking to a federal undertaking (i.e., under federal jurisdiction).

For example: The sale of a boat that has been operated as a floating restaurant to a company that uses the boat to regularly ferry passengers to the United States.

In this case, ESA Part IV, s. 9 has no application to the employment relationship once the employer (and consequently the employment relationship) are no longer under provincial jurisdiction. In other words, the federal purchaser in the above example would not be subject to the provisions of the *Employment Standards Act, 2000* and consequently there would be no s. 9(1) liability imposed on the purchaser.

Transformation of business from federal undertaking to provincial undertaking

The sale of a federal business (i.e., engaged in a federal undertaking and under federal jurisdiction) to a provincial business may result in a transformation of the business from a federal undertaking to a provincial undertaking (i.e., it is now engaged in a provincial undertaking and under provincial jurisdiction).

For example: A business operating a Great Lakes ferry that transports passengers to the United States is purchased by a company that uses the boat only as a floating restaurant. Several of the employees who had previously worked on the ferry are hired by the purchaser to work in the restaurant.

In this case, ESA Part IV, s. 9(1) could not be applied so as to recognize as continuous service any period of employment with a business that was, prior to its sale, a federal business. In other words, the employees hired by a purchaser who falls under provincial jurisdiction would not be given any credit for service with their previous federal employer.

Exception, Diplomatic Personnel – s. 3(3)

3(3) This Act does not apply with respect to an employee of an embassy or consulate of a foreign nation and his or her employer.

Section 3(3) provides that an employee of an embassy or consulate of a foreign nation and their employer are not subject to the ESA 2000. The nationality of the employee is irrelevant to the application of this exemption. Employees of an embassy or consulate who also work in locations other than an embassy or consulate of a foreign nation are covered by the Act for the work done at any other location.

Employees of foreign trade offices or foreign government tourist offices are subject to the *Employment Standards Act, 2000*, unless the office is an integral part of the embassy or consulate of the state in question. For a discussion of the distinction between trade offices and consular offices, see *Gilligan v Swedish Trade Council and Swedish Trade Office (Canada) Inc.* (February 2, 1998), ESC 97-91 (Randall).

Employees of a foreign embassy or consulate who have labour or employment complaints should contact the equivalent of the Ontario Ministry of Labour in the country of the embassy or consulate concerned.

s. 3(4) – REPEALED (Exception, employees of the Crown)

Effective January 1, 2018, the partial exception for the Crown, a Crown agency or an authority, board, commission or corporation all of whose members are appointed by the Crown (collectively, "the Crown"), and its employees, that was previously found in subsection 3(4) was repealed by the *Fair Workplaces Better Jobs Act, 2017* (FWBJA). As a result, as of January 1, 2018 Crown employees were no longer covered only by the Parts that were specified in s. 3(4); they were generally covered by all of the ESA. (Note that pursuant to s. 4(4.1), a provision introduced by the FWBJA, the Crown was exempted from the section 4 "related employer" provision effective January 1, 2018.)

Effective March 9, 2018, O Reg 285/01 (When Work Deemed to be Performed, Exemptions and Special Rules) was amended to exempt specified election officials employees from sections 17, 18 and 19 of the ESA 2000.

On October 24, 2018, O Reg 285/01 (When Work Deemed to be Performed, Exemptions and Special Rules) was further amended to exempt the Crown and its employees from Part VII (Hours of Work and Eating Periods) and from Part VIII (Overtime Pay).

Effective January 1, 2019, O Reg 285/01 was again amended and provides that the Crown and its employees are exempt from every provision of the ESA 2000 except those listed in the relevant section. See O Reg 285/01 Section 2.1 for more information.

Other Exceptions – s. 3(5)

3(5) This Act does not apply with respect to the following individuals and any person for whom such an individual performs work or from whom such an individual receives compensation:

1. **A secondary school student who performs work under a work experience program authorized by the school board that operates the school in which the student is enrolled.**
2. **An individual who performs work under a program approved by a college of applied arts and technology or a university.**

2.1 An individual who performs work under a program that is approved by a private career college registered under the Private Career Colleges Act, 2005 and that meets such criteria as may be prescribed.

3. A participant in community participation under the Ontario Works Act, 1997.

4. An individual who is an inmate of a correctional institution within the meaning of the *Ministry of Correctional Services Act*, is an inmate of a penitentiary, is being held in a detention facility within the meaning of the *Police Services Act* or is being held in a place of temporary detention or youth custody facility under the *Youth Criminal Justice Act* (Canada), if the individual participates inside or outside the institution, penitentiary, place or facility in a work project or rehabilitation program.

Note: On a day established by proclamation of the Lieutenant Governor, this paragraph is repealed and the following is substituted:

4. An individual who is an inmate of a correctional institution within the meaning of the *Ministry of Correctional Services Act*, is an inmate of a penitentiary or is being held in a place of temporary detention or youth custody facility under the *Youth Criminal Justice Act* (Canada), if the individual participates inside or outside the institution, penitentiary or place in a work project or rehabilitation program.

Note: On a day established by proclamation of the Lieutenant Governor paragraph 4 is amended by removing the words "*Ministry of Correctional Services Act*" and substituting the words "*Correctional Services and Reintegration Act, 2018*" in their place.

5. An individual who performs work under an order or sentence of a court or as part of an extrajudicial measure under the Youth Criminal Justice Act (Canada).

6. An individual who performs work in a simulated job or working environment if the primary purpose in placing the individual in the job or environment is his or her rehabilitation.

Note: The exclusion in paragraph 6 had been scheduled to be repealed on January 1, 2019, pursuant to the *Fair Workplaces Better Jobs Act, 2017*. However, under the *Making Ontario Open for Business Act, 2018* amendments, the repeal was delayed and it will now be repealed on a day to be named by proclamation of the Lieutenant Governor.

7. A holder of political, religious or judicial office.

8. A member of a quasi-judicial tribunal.

9. A holder of elected office in an organization, including a trade union.

10. A police officer, except as provided in Part XVI (Lie Detectors) or in a regulation made under clause 141(2.1)(c).

11. A director of a corporation, except as provided in Part XX (Liability of Directors), Part XXI (Who Enforces This Act and What They Can Do), Part XXII (Complaints and Enforcement), Part XXIII (Reviews by the Board), Part XXIV (Collection), Part XXV (Offences and Prosecutions), Part XXVI (Miscellaneous Evidentiary Provisions), Part XXVII (Regulations) and Part XXVIII (Transition, Amendment, Repeals, Commencement and Short Title).

12. Any prescribed individuals.

Students in authorized work experience programs – paragraph 1

Often, as part of the education of its students, a school board will establish a program in which the secondary school students will gain practical work experience. Such programs may be called, for example, practicums or co-ops. When a student performs work in such a program, the student and their employer are exempt from the ESA 2000 pursuant to s. 3(5) paragraph 1.

For this exemption to apply, the following criteria must be met:

1. The individual performing work must be a secondary school student;
2. The individual must be performing work under a work experience program authorized by a school board; and
3. The school board that authorized the work experience program must be the same school board that operates the secondary school in which the student is enrolled.

If the person is not a student at the school but is still in the program, or is in a program authorized by another school board, the exemption in s. 3(5)(1) will not apply.

Note that for the purposes of the exemption in s. 3(5), the term "student" is not limited to a person less than 18 years of age. This is in contrast to the use of the word student for the purposes of the student minimum wage provisions; the student minimum wage applies to a student not otherwise exempted from the ESA 2000 pursuant to s. 3(5) who is under the age of 18 years and:

1. Does not work more than 28 hours per week while attending school; or
2. is employed while on school holiday.

For more information on the student minimum wage, see ESA Part IX, s. 23.1.

Only the work in the program is exempt. If the student performs full or part-time work outside of the program (even if it is in the same workplace and for the same employer) the exemption will not apply to that work. For example, if the student performs work at a workplace under a co-op program on certain days of the week, but also performs work at the same workplace on other days, those other days' work would be covered by the ESA 2000 – see s. 3(6) “Dual Roles”.

The exemption will not apply just because an employee obtained their job through an employment or career counselling centre at a school, college or university.

In order for the exemption to apply, the secondary school in which the student is enrolled must be operated by a school board. The Program's position is that this refers to a school board within the meaning of the *Education Act,* RSO 1990, c E.82. Under s. 1 of the *Education Act* "school board" means a district school board or a school authority. The *Education Act* contains the following definitions:

"District school board" means,

a) an English-language public district school board,

b) an English-language separate district school board,

c) a French-language public district school board, or

d) a French-language separate district school board;

"School authority" means,

a) a board of a district school area,

b) a board of a rural separate school,

c) a board of a combined separate school zone,

d) a board of a secondary school district established under section 67,

e) a board established under section 68, or

f) a board of a Protestant separate school;

As a result, the exemption does not apply with respect to students in private, independent schools as they are not operated by a school board.

Programs approved by colleges of applied arts and technology or universities – paragraph 2

Colleges of applied arts and technology and universities often establish programs that permit students, and others, to gain practical work experience. When an individual performs work in such a program, that individual and their employer are exempt from the ESA 2000 in its entirety, with respect to that work, pursuant to s. 3(5) paragraph 2.

For the exemption to apply, the individual must perform work under a work experience program approved by a college or university. Unlike the secondary school student exemption in paragraph 1, it is irrelevant whether the individuals performing work in the work experience program are students at the college or university, that has approved the program, or at any college or university.

The exemption applies only to work performed under programs of *Ontario* colleges of applied arts and technology and Ontario universities. It does not apply to work performed under programs of institutions outside of Ontario.

In determining whether a particular college of applied arts and technology is an Ontario institution, reference can be made to section 2 of O Reg 34/03 under the Ontario Colleges of Applied Arts and Technology Act, 2002. That provision provides a list of institutions designated as colleges in Ontario.

The exemption applies only to work that is performed under the program; see “Dual Roles” at s. 3(6) for details.

Work performed under an apprenticeship program may be covered by this exemption, since such programs can include classroom training and, as such, form part of a program approved by a college or university.

For a more detailed discussion of the application of the ESA 2000 to apprentices please see the definition of employee in ESA Part I, s. 1.

Individuals in program that is approved by private career colleges – paragraph 2.1

The *Fair Workplaces, Better Jobs Act, 2017* added this new provision to the ESA 2000.

Effective January 1, 2018, individuals who perform work under a program that is approved by a private career college registered under the *Private Career Colleges Act, 2005,* SO 2005, c 28, Sched L and their employers are exempt from the ESA 2000 in its entirety, with respect to that work, pursuant to s. 3(5) paragraph 2.1. It is only work that is performed under programs of *Ontario* private career colleges that can fall under this exception. It does not apply to work performed under programs of private career colleges outside of Ontario.

The exemption applies only to work that is performed under the program; see “Dual Roles” at s. 3(6) for details.

The new exclusion for private career colleges is subject to criteria as may be prescribed by regulation. As of the date of writing, there are no prescribed criteria.

Similar to the exemption in paragraph 2, it is irrelevant whether the individuals performing work in the program are students at the private career college.

Work performed under an apprenticeship program may be covered by this exemption, since such programs can include classroom training and, as such, form part of a program approved by a private career college.

For a more detailed discussion of the application of the ESA 2000 to apprentices please see the definition of employee in ESA Part I, s. 1.

Participants in Ontario Works community participation activities – paragraph 3

Social assistance recipients involved in Ontario Works community participation activities, sometimes referred to as Welfare-to-Work programs, are exempt from the ESA 2000 pursuant to s. 3(5) paragraph 3.

The criteria that must be met for this exemption to apply are as follows:

1. The individual must be in receipt of social assistance; and
2. The individual must be participating in community participation activities.

Persons who are merely referred by Ontario Works to a job placement agency or into training, or who are merely placed with an employer, do not fall into the exemption.

Although social assistance recipients are exempt from the ESA 2000 as a whole if they are engaging in the community participation activities, guidelines for participants’ working conditions have been set by Ontario Works. It is the responsibility of the Ministry of Community and Social Services, not the Ministry of Labour, to ensure that the guidelines are adhered to.

Inmates of correctional institutions in work projects or rehabilitation programs – paragraph 4

Note that on a date to be named by proclamation of the Lieutenant Governor, this paragraph will be repealed and substituted with modified wording. These modifications are due to changes to other legislation referenced in this paragraph. For more information, see the legislative section above.

Inmates of correctional institutions and penitentiaries operated by or under the province of Ontario or the federal government and individuals being held in a detention facility under the *Police Services Act,* RSO 1990, c P.15 or youth custody facility under the federal *Youth Criminal Justice Act,* SC 2002, c 1, who participate in work projects or rehabilitation programs, are exempt from the ESA 2000, pursuant to s. 3(5) paragraph 4.

Under s. 25 of the *Ministry of Correctional Services Act*, RSO 1990, c M.22 ("MCSA"), the Minister of Community Safety and Correctional Services who had the powers and duties of the Minister of Correctional Services Act transferred to them by Order in council approved November 24, 2003 may authorize a rehabilitation program under which an inmate may continue to work at their regular employment or obtain new employment. Under s. 26 of the MCSA, the Minister may authorize an inmate

to participate in a work project or a rehabilitation program outside the correctional institution. Finally, under s. 18(1) of RRO 1990, Reg 778, a regulation under the MCSA, an inmate may be required to perform work within an institution.

The requirements that must be met for the exemption in s. 3(5) para. 4 to apply are as follows:

1. The individual must be an inmate or an offender in a provincial or federal correctional institution or penitentiary, or an individual who is being held in a detention facility or youth custody facility; and
2. The individual must be performing work in a work project or a rehabilitation program.

Performing work under court order or sentence or under the *Youth Criminal Justice Act* – paragraph 5

When a person is convicted of an offence, instead of (or as well as) being confined to a detention facility or a place of custody or ordered to pay a fine, the offender (including a young offender) may be ordered to perform a certain amount of work or services, commonly known as community service. When performing this work, the offender is exempt from the subject to the court order is exempt from the ESA 2000 pursuant to s. 3(5) paragraph 5.

Any other employment undertaken by the offender is not exempted by this provision. For example, a person may be working full time as a secretary at a factory but has been ordered by a court to work 10 hours per week at a community centre. The work at the community centre would be exempt from the ESA 2000, but the ESA 2000 would apply to the employment at the factory, subject to other provisions, exemptions and special rules under the ESA 2000.

Individual performing work in simulated job or working environment – paragraph 6

Note: This exclusion was originally scheduled to be repealed on January 1, 2019, pursuant to the *Fair Workplaces Better Jobs Act, 2017*. However, under the *Making Ontario Open for Business Act, 2018* amendments, the repeal was delayed. The provision will now be repealed on a day to be named by proclamation of the Lieutenant Governor.

Under this provision, participants in simulated working environments (for example, a sheltered workshop program) are not covered by the ESA 2000 pursuant to s. 3(5) paragraph 6 if the primary purpose of the workshop is to rehabilitate the participants.

This exemption codifies Program policy and a decision under the former *Employment Standards Act*, *Re Kaszuba and Salvation Army Sheltered Workshop et al.*, 1983 CanLII 1795 (ON SC). In that case, the Ontario Divisional Court, on judicial review, endorsed in slightly amended form the referee's conclusion that:

> *[I]f the substance of the relationship is one of rehabilitation, then the mischief which the Employment Standards Act* [now the Employment Standards Act, 2000] *has been designed to prevent is not present and a finding that there is no employment relationship within the meaning of the Employment Standards Act must be made.*

It is Program policy that in order for the exclusion under s. 3(5) to apply, economic productivity must be a minor and merely incidental aspect of an individual's participation in the work or services performed at a

sheltered workshop. Consequently, not all organizations calling themselves sheltered workshops can consider themselves automatically falling within the exclusion in s. 3(5).

In order to determine whether s. 3(5) applies in a particular instance, consideration might be given to the list of factors set out in Linden J.'s concurring opinion in *Re Kaszuba and Salvation Army*:

1. Hours of work;
2. Method and amount of payment;
3. Profitability of the work;
4. Conditions that must be met at work;
5. Amounts and type of counselling provided;
6. Quantity and quality of recreational and medical facilities; and
7. Any other factors that are relevant in determining whether the relationship is one of employment or if it is a therapeutic exercise.

The above factors may be helpful in determining whether, in the words of s. 3(5), paragraph 6, the primary purpose in placing an individual in a simulated job environment is their rehabilitation.

There is also a type of relationship where a charitable agency places a worker with a “host” business to reintegrate them into the workforce. The relationship typically lasts for a short period, such as eight weeks, and the worker receives payment from the host business. There is no control or training of the worker by the agency, and therefore the agency is not the employer of the worker. Usually, the agency pays the host business, which pays the worker. The agency is in turn reimbursed by a governmental agency such as the Workplace Safety and Insurance Board. Since this is not an arrangement where an individual is placed in a simulated job environment with a view to their rehabilitation, the exclusion in ESA Part III, s. 3(5) would not apply. The issue of whether or not there is an employer-employee relationship between the host business and the worker must be determined based on the relevant common law tests.

Such an arrangement was considered in *379169 Ontario Limited c.o.b.a. Bell Air Conditioning v Prevost* (May 15, 1987), ESC 2242 (Fraser) in which the referee held that the applicant host company was an employer under the former *Employment Standards Act* and that the monies received by the employee pursuant to the former Workers' Compensation Board Vocational Training Program were wages under that Act.

This exemption is also referenced in the definition of employee in ESA Part I, s. 1 see Sheltered Workshop.

Holders of political, religious or judicial office – paragraph 7

Holders of political, religious or judicial office are exempt from the ESA 2000 pursuant to s. 3(5) paragraph 7. This provision reflects the common law position that holders of political, religious or judicial office are not employees.

While it is often obvious whether an individual occupies a religious office, it is not always the case. In *Kashruth Council of Canada v Rand*, 2011 CanLII 71786 (ON LRB), the OLRB ruled on the question of whether this exemption applied to two Mashgiachim (kosher food inspectors). The OLRB held that while the position of a Mashgiach is a religious one, that does not in itself enough mean that a Mashgiach holds a religious office. The OLRB observed that an essential characteristic of office-holder status is

independence. While not ruling out the possibility that there may be situations where a particular Mashgiach is subject to this exemption, it found that the individuals in this case did not have any greater independence than non-religious food inspectors and that the exemption therefore did not apply.

Members of quasi-judicial tribunals – paragraph 8

Members of quasi-judicial tribunals are exempt from the ESA pursuant to s. 3(5) paragraph 8. This provision reflects the common law position that members of quasi-judicial tribunals are not employees.

Holders of elected offices in organizations – paragraph 9

Holders of elected offices in organizations, including trade unions, are exempt from the ESA pursuant to s. 3(5) paragraph 9. This provision reflects the common law position that elected officers in an organization, such as school board trustees, are not employees.

Police officers, except as provided in Part XVI (Lie Detectors) or in a regulation made under clause 141(2.1)(c) – paragraph 10

Pursuant to s. 3(5) paragraph 10, police officers are exempt from the ESA 2000 except for the lie detector provisions contained in Part XVI.

If a regulation was to be made with respect to infectious disease emergencies under s. 141(2.1)(c), police officers would also be subject to the provisions of the ESA as provided for in that regulation. At the time of writing, no such regulation was made.

Clause 141(2.1)(c) provides that the Lieutenant Governor in Council may make regulations:

> "providing that section 50.1 or any provision of it applies to police officers and prescribing one or more terms or conditions of employment or one or more requirements or prohibitions respecting emergency leave for infectious disease emergencies that shall apply to police officers and their employers"

Directors of a corporation – paragraph 11

Under s. 3(5) paragraph 11, directors are exempt from the ESA 2000 except for those Parts concerning the liability of directors and the administration and enforcement of the ESA 2000:

- Part XX Liability of Directors
- Part XXI Who Enforces This Act and What They Can Do
- Part XXII Complaints and Enforcement
- Part XXIII Reviews by the Board
- Part XXIV Collection
- Part XXV Offences and Prosecutions
- Part XXVI Miscellaneous Evidentiary Provisions
- Part XXVII Regulations
- Part XXVIII Transition, Amendment, Repeals, Commencement and Short Title

For a more detailed discussion, see the employee definition in ESA Part I, s. 1.

Any prescribed individuals – paragraph 12

At the time of writing, the only prescribed individuals are those described in O Reg 477/18 – Non-Application of Act, which reads:

ESA Part III Section 3.1 – Crown Bound

3.1 This Act binds the Crown.

This provision was introduced into the ESA 2000 by the *Fair Workplaces, Better Jobs Act, 2017,* SO 2017, c 22 effective January 1, 2018, at the same time that the former s. 3(4) – which provided that only certain provisions of the ESA 2000 applied to the Crown, Crown agencies or an authority, board, commission or corporation, all of whose members were Crown appointees – was repealed.

This section provides that the ESA 2000 binds the Crown. However, it must be read in conjunction with:

- s. 4(4.1), which provides that s. 4(2) – which treats "related" entities as one employer under the ESA 2000 – does not apply to the Crown, Crown agencies, or an authority, board, commission or corporation, all of whose members were Crown appointees, and
- s. 2.1 of O Reg 285/01, which provides that the Crown, Crown agencies, or an authority, board, commission or corporation, all of whose members were Crown appointees is exempt from every provision of the ESA 2000 except for those listed in that provision. See the discussion of s. 2.1 of O Reg 285/01 for details.

ESA Part III Section 4 – Separate Persons Treated as One Employer

Separate Persons Treated as One Employer – s. 4(1)

4(1) Subsection (2) applies if associated or related activities or businesses are or were carried on by or through an employer and one or more other persons.

Section 4 sets out when separate persons may be treated as one employer for the purposes of the ESA 2000.

In law, a person includes a corporation. Further, for purposes of the ESA 2000, person is defined in ESA Part I, s. 1(1) to include a trade union. As a result, corporations, individuals (sole proprietors), partnerships (whether of individuals or corporations), unions and other associations (whether of individuals or corporations) are all potentially within the scope of s. 4.

The definition of employer in ESA Part I, s. 1(1) states:

1(1) "employer" includes,

(a) an owner, proprietor, manager, superintendent, overseer, receiver or trustee of an activity, business, work, trade, occupation, profession, project or undertaking who has control or direction of, or is directly or indirectly responsible for, the employment of a person in it, and

(b) any persons treated as one employer under section 4, and includes a person who was an employer.

In order for separate persons to be treated as one employer, the following requirements must be met:

- Associated or related activities or businesses must be carried on
- Those activities or businesses must be carried on by two or more entities

A detailed discussion of these requirements is below.

Note: On January 1, 2018, the *Fair Workplaces, Better Jobs Act, 2017* SO 2017, c 22 amended s. 4 to remove the requirement that the intent or effect of the arrangement as described in s. 4(1) must be to defeat, either directly or indirectly, the purpose of the ESA 2000 in order for the employer and other persons to be treated as one employer.

Note also that while at one time under the former *Employment Standards Act*, two or more entities could not be treated as related employers unless the employee whose rights were in question was an employee of each of the entities concerned, that requirement was eliminated by amendments made to the former *Employment Standards Act* in 1987. There is nothing in the language of s. 4 to suggest that an employee must be an employee of each of the entities concerned in order for s. 4 to apply.

Associated or Related Activities

In determining whether the associated or related test is met, the employment standards officer should consider the following significant criteria. They are listed in descending order of significance with the most important factor listed first:

- Common management
- Common financial control
- Common ownership
- Existence of common trade name or logo
- Movement of employees between two or more entities
- Use of same assets by two or more entities, or transfer of assets between them
- Common market or customers served by the two or more entities

This list is not exhaustive; there may be other relevant factors in the context of a particular case. It should also be noted that it is not necessary for all of the factors to be present in order for a finding of relatedness or association to be made under s. 4(2). See *Verdun v PlateSpin Canada Inc.*, 2005 CanLII 1637 (ON LRB) for a good discussion of these criteria.

The following is a discussion of each of the criteria.

Common Management

The requirement that two entities be under common control or direction appeared in the pre-June 15, 1987 *Employment Standards Act*. That phrase, however, did not appear in provisions in the former *Employment Standards Act* that came into force on June 15, 1987, and it does not appear in s. 4(1) of the ESA 2000. As a result, it is not always necessary to show common control or direction or common management to make a finding of relatedness. However, it is the policy of the Program that common management will be a highly significant (although not always a necessary) factor in determining relatedness. For example, if Corporation A exercises control on a regular basis over the internal

management of its subsidiary, Corporation B, then the common management test will be satisfied. This form of control may be evident in a number of forms, such as:

1. Management personnel of the subsidiary are appointed, terminated or transferred by the parent company on a regular basis;
2. The Board of Directors of A and its subsidiary B are interlocking or have common members, and decisions of B's Board of Directors are made according to A's and B's interests;
3. Management practices of the subsidiary are determined by the parent corporation.

The concept of a "directing mind" or "controlling mind" is often helpful in determining whether there is common management. For example, if several corporations constitute a comprehensive and integrated business and are under the control of an individual who is the directing mind of the business, the common management test will be satisfied. See *550551 Ontario Ltd. v Framingham (Div. Ct.)*, 1991 CanLII 7388 (ON SC), a decision under the former *Employment Standards Act.*

If there is a common directing or controlling mind, the common management test may be met even though the corporations involved do not have common directors. See *782368 Ontario Inc. o/a Consolidated Security Services v Powers* (December 23, 1990), ESC 2793 (Barnett), another decision under the former *Employment Standards Act*.

Note, however, that an individual who is the controlling or directing mind of a business would not be made personally liable under s. 4(2) unless the individual is operating as a sole proprietor. See *550551 Ontario Ltd. v Framingham (Div. Ct.)* and also *Canada Machinery Corporation v Employees* (September 18, 1991), ESC 2931 (Mitchnik). A sole proprietorship exists where an individual carries on business themselves, as opposed to where a corporation or partnership carries on the business. A sole proprietor might carry on the business under their own name or they may do so under another name. If the sole proprietor carries on business other than under their own name, the sole proprietor is required to file a declaration under the *Business Names Act*, RSO 1990, c B.17. This declaration is required to be filed at the Ministry of Government and Consumer.

The mere fact that entity A owns a majority interest in entity B may not be sufficient in itself to satisfy the common management test. If the ownership is in the nature of an investment only, and A does not manage or actually control the affairs of B, the common management test may not be met. In this regard see *Modern Mold Ltd. v Finnerty* (December 18, 1990), ESC 2802 (Brown), a decision under the former *Employment Standards Act*. However, if A does manage the affairs of B, the common management test will be satisfied and there will be a strong indication that the two entities are related.

The common law cases in the area of wrongful dismissal are also helpful. At common law, a plaintiff in a wrongful dismissal action against his employer may wish to join the employer's parent corporation as a party to the action, because it has a better ability to pay a judgment or is in a jurisdiction in which it is procedurally more advantageous to sue. In such cases, the common management test is often a key one. See, for example, *Manley Inc. v. Fallis* and *Sinclair v Dover Engineering Services Ltd.*, 1987 CanLII 2692 (BC SC).

The common management test may also be satisfied even though Corporation B does not commence operations until after Corporation A ceases to do so. For example, if the sole shareholder and manager of Corporation A discontinues the business and sets up Corporation B, in which she or he is also the sole shareholder and manager, the common management test would be met and a finding of relatedness may be made. See *Refac Industrial Contractors Inc. v Haygood et al* (May 30, 1990) ESC 2703 (Brown), a decision under the former *Employment Standards Act*. Note this example is not intended to imply that the

owner of A must be the owner of B in order for the common management test to be met. If A and B had a common controlling mind, this test will be met.

Common Financial Control

Examples of common financial control would be a centralized payroll, centralized accounting functions and procedures, and consolidated financial statements. For example, if Corporation A performs the payroll functions for both Corporation A and B, the common financial control test will be met, and there is an indication that the corporations may be related. See for example *Laverty Richards Guerrieri Investments Inc. o/a Madame's Mansion Restaurant v McHugh* (June 13, 1988), ESC 2347 (Baum), a decision under the former *Employment Standards Act*.

Common Ownership

The common ownership test would be met where, for example, Corporation A owned more than 50 per cent of the shares of each of Corporations B and C. In such a case, B and C would be under common ownership. The common ownership test by itself will likely not support a finding of relatedness – see *Modern Mold Ltd. v Finnerty*, discussed previously. However, if, in addition to common ownership, one or more of the other factors is present, such as common management, market or customers, then a finding of relatedness may be made.

Existence of a Common Trade Name or Logo

The existence of a common trade name or logo may be supportive of a finding of relatedness or associatedness. For example, if one company is X Ltd. and the other is Y Ltd. carrying on business as X, the common trade name or logo criterion will be satisfied. For an example of a decision under the former *Employment Standards Act*, see *Million Dollar Saloon Inc. v MacDougall* (October 13, 1989), ESC 2576 (Rose). However, franchisees using the same trade name under license from the franchisor will generally not be related to each other or to the franchisor. There may be some cases, though, where they are related, especially where the relationship between the parties goes beyond a pure franchise arrangement. For example, see *Texas Longhorn Café Inc. v Snider et al* (September 1, 1992), ES 142/92 (Wacyk), a decision under the former *Employment Standards Act,* where the arrangement included movement of staff and supplies between two entities as well as overlaps in ownership.

Movement of Employees Between Two or More Entities

The requirement for the employee to have been employed by all of the entities considered related appeared in the pre-June 15, 1987 *Employment Standards Act*. However, neither s. 4(1) nor the corresponding provisions under the former *Employment Standards Act* that came into force on June 15, 1987 contained such a requirement. Nonetheless, the fact that the employee-claimant or other employees have worked for both entities A and B is significant (although no longer necessary) in determining whether the entities are related or associated under s. 4(1).

The transfer of employees may indicate a functional integration between the two entities suggesting that they are related, especially if there is common management or common financial control. For example, see *Million Dollar Saloon Inc. v MacDougall*, a case under the former *Employment Standards Act*. If the entities are covered by the same collective agreement, and there is movement of unionized employees from one entity to the other, it may indicate a possibility that the entities are related. But note that some collective agreements are of a type that is meant to cover several employers who have no connection with each other apart from the fact that they are all in the same industry, e.g., provincial agreements in the industrial, commercial and institutional sector of the construction industry.

Use of Same Assets by Two or More Entities

The use of the same assets by two or more entities or the transfer of assets between them may be an indication that the two entities are associated or related under s. 4(1). For example, if the two entities operate out of the same premises or share the same machinery and equipment, this may be an indication that the entities are related or associated, especially if one of the other more significant factors such as common management or common financial control is present. For example, see *Synform Design Group Inc. v Onorato* (December 25, 1990), ESC 2805 (Baum), a decision under the former *Employment Standards Act*.

If there is a transfer of assets or a transaction between two entities, and the transfer or transaction is not at fair market value, then there is an indication that the entities are not dealing at arm's length, which suggests that the entities are associated or related. For example, where Corporation A, which owns real estate and leases that property at below market rent to Corporation B, the two corporations may be related. See *550551 Ontario Ltd. v Framingham (Div Ct)*, decided under the former *Employment Standards Act*.

Common Market or Customers Served by Two or More Entities

The common market/customer test was adopted in *Refac Industrial Contractors Inc. v Haygood et al*, a decision under the former *Employment Standards Act*. The common market/customers test would be met if, for example, Corporation A sold equipment to its customers and Corporation B serviced that equipment. This test should be used in conjunction with the more significant of the tests.

Another test adopted by the referee in *Refac Industrial Contractors Inc. v Haygood et al* was the "mode and means of production" test. It involves consideration of whether the companies are manufacturing the same type of product in the same manner. The mode and means test is considered by the Program to be overly narrow and not to be determinative in any respect.

Two or More Entities Carrying on Business

This requirement is quite straightforward. There must be more than one entity carrying on the associated or related activities, businesses, etc. It is important to note that the activities need not be carried on at the same time, see s. 4(3). Corporations A and B may be a single employer even if B did not start carrying on business until such time as A ceased to do so. Decisions under the former *Employment Standards Act*, before there was explicit statutory wording to the effect of s. 4(3), include *Refac Industrial Contractors Inc. v Haygood et al*, *782368 Ontario Inc. o/a Consolidated Security Services v Powers* (December 23, 1990), ESC 2793 (Barnett), and *Chatters Restaurant and Tavern Inc. and 791818 Ontario Ltd. o/a T.C. Mellons v Morrissey and Yarmoloy* (July 28, 1992), ES 121/92 (Wacyk).

Separate Persons Treated as One Employer – s. 4(2)

4(2) The employer and the other person or persons described in subsection (1) shall all be treated as one employer for the purposes of this Act.

Section 4(2) provides that if the requirements of s. 4(1) are met, the employment standards officer must treat the associated or related activities or businesses as one employer. It is a deeming provision and does not provide for the exercise of discretion by the employment standards officer.

One effect of the "non-discretionary" nature of the officer's application of s. 4(2) is that employees involved in a civil action against their employer may cite s. 4(2) in the action, arguing that if the

requirements of s. 4(1) are met, the Act requires that the section be applied. An employee may propose this because an associated or related business may be better able to pay a judgment.

Businesses Need Not Be Carried on at Same Time – s. 4(3)

4(3) Subsection (2) applies even if the activities or businesses are not carried on at the same time.

Section 4(3) clarifies that the test set out in s. 4(1) for relatedness may be met even if the activities or businesses are not carried on at the same time. For example, Corporation A operates from January 1, 2002, to January 1, 2003. Corporation B commences operations on February 1, 2003. If Corporation A and B have common directors, if the business of both corporations is identical and if the employees employed by Corporation A move to Corporation B at the time that Corporation B began doing business, a finding of relatedness may be made despite the fact that Corporations A and B did not operate at the same time. See, for example, the following decisions under the former *Employment Standards Act*: *Refac Industrial Contractors Inc. v Haygood et al*, *782368 Ontario Inc. o/a Consolidated Security Services v Powers*, and *Chatters Restaurant and Tavern Inc. and 791818 Ontario Ltd. o/a T.C. Mellons v Morrissey and Yarmoloy*.

Exception, Individuals – s. 4(4)

4(4) Subsection (2) does not apply with respect to a corporation and an individual who is a shareholder of the corporation unless the individual is a member of a partnership and the shares are held for the purposes of the partnership.

Section 4(4) ensures that s. 4(2) is not used to make a finding that Corporation A and the shareholders of Corporation A are related employers. To use s. 4(2) in this way would be to ignore the legal concept of the separate legal identity of corporations.

In law, a corporation is regarded as having a separate existence from the person or persons who own it. Ownership of a corporation is represented by shares. A person who owns more than 50 per cent of the shares is said to own a controlling interest in the corporation.

Section 4(4) establishes the one circumstance in which the legal concept of separate corporate personality (the corporate veil) can be pierced for the purposes of this section. If the shares of a corporation are held by the partners, and the partners, in turn, hold those shares for the purpose of the partnership, s. 4(2) may apply. Section 4(4) effectively prevents a partnership (which at law is not regarded as having a separate existence from the partners who form the partnership) from masquerading as a corporation.

Exception, Crown – s. 4(4.1)

4(4.1) Subsection (2) does not apply to the Crown, a Crown agency or an authority, board, commission or corporation all of whose members are appointed by the Crown.

This provision was introduced by the *Fair Workplaces, Better Jobs Act, 2017* effective January 1, 2018, at the same time that s. 3.1 was added to the Act to provide that the Act binds the Crown. Subsection 4(4.1) states that ss. 4(2), which treats “related” entities as one employer under this Act, does not apply to the Crown, a Crown agency or an authority, board, commission or corporation all of whose members are appointed by the Crown.

The term "Crown" refers to the government of Ontario. More precisely, it refers to the executive branch of government, as the term Crown does not include the Legislative Assembly or the judiciary.

The determination of whether an entity is a Crown agency and therefore exempted from the application of the s. 4 related employer provisions is generally made on the basis of the common law, which looks at the nature and degree of control which the Crown, through its Ministers, exercises over the entity. For example, see Westeel-Rosco Ltd. v Board of Governors of South Saskatchewan Hospital Centre, [1977] 2 SCR 238, 1976 CanLII 185 (SCC).

For a discussion about the meaning of “the Crown, a Crown agency or an authority, board, commission or corporation all of whose members are appointed by the Crown”, and the history of which provisions applied to the Crown, etc. at which point in time, see O Reg 285/01 s. 2.1.

Joint and Several Liability – s. 4(5)

4(5) Persons who are treated as one employer under this section are jointly and severally liable for any contravention of this Act and the regulations under it and for any wages owing to an employee of any of them.

Section 4(5) states that if persons are found to be one employer under s. 4(2), each person will be responsible for all the obligations under the ESA 2000 and regulations of all the other entities, separately and together.

Consider the example of entities A and B and an employee who became entitled to severance pay from entity A. Even if A and B did not become related until sometime after the employee became entitled to severance pay, entity B (as well as entity A) will still be liable for those monies under s. 4(2), if A and B are found to be a single employer under s. 4(2). However, by contrast, if an employee is terminated by employer A, which has a $2.0 million annual payroll, and subsequently A becomes related to employer B, which has a $1.0 million annual payroll, the employee will not be entitled to severance pay from either employer A or B, even though the combined payrolls exceed $2.5 million, the amount that triggers the entitlement to severance pay for an employee with five or more years' employment, under ESA Part XV, s. 64(2). The difference between the two situations is that, in the first situation, employer B is considered to have assumed the pre-existing employment standards obligations of employer A at the time they became related, whereas, in the latter, there was no pre-existing obligation for B to assume.

For a more detailed discussion, see the definition of person in ESA Part I, s. 1.

ESA Part III Section 5 – No Contracting Out

No Contracting Out – s. 5(1)

5(1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.

Section 5(1) prohibits employers, employees and their agents from waiving or contracting out of any employment standard provided by the ESA 2000, and nullifies and voids any such contracting out or waiver.

The prohibition in s. 5(1) is subject to s. 5(2). Accordingly, an employment standard need not be complied with if the employee is receiving a greater right or benefit with respect to that particular standard.

ESA Part I, s. 1 defines employment standard as follows:

"employment standard" means a requirement or prohibition under this Act that applies to an employer for the benefit of an employee.

Accordingly, the prohibition on contracting out applies only with respect to the ESA 2000's provisions that confer a benefit to an employee not with respect to those provisions that confer a benefit on an employer. For example, the ESA 2000 will not prohibit an agreement between an employee and employer to waive the requirement for an employee to provide four weeks' notice of intention to resign at the end of a pregnancy and parental leave.

Numerous referees have dealt with situations in which an employer and employee have come to an arrangement, the effect of which is to waive an employment standard. Such arrangements have been declared void, even in cases where the employee vociferously supported the arrangement. The following decisions under the former *Employment Standards Act* are some examples of arrangements that have been found unacceptable:

In Arpin Trucking Limited v Proud (November 24, 1981), ESC 1108 (Sheppard), the employees agreed to work at a higher hourly rate than previously, but with no overtime premium. The referee decided that they could not waive the employment standard, despite the fact that none of the employees supported the assessment against the employer.

In Canecon Investments Inc., c.o.b. as G.M. Stamm, Economic Research Associates v Gillezeau (December 11, 1981), ESC 1117 (Bigelow), the referee did not accept the employer's argument that the employee had accepted a yearly salary that supposedly allowed for vacation and public holiday pay, as such an arrangement would have been a waiver of the relevant employment standards.

In James Fibre Glass Manufacturing Co. Limited v Lindsay (Wilson) (December 6, 1984), ESC 1752 (Adamson), the referee found that an oral agreement to work extra hours to make up lost time at regular pay was void, as such an arrangement was a waiver of the employee's right to overtime pay.

In London White Trucks Limited v Martel (May 30, 1977), ESC 425 (Picher), the employer told the employee that he was to be dismissed, and suggested that giving him notice ". . . wouldn't be of any value…", The referee held that the employee's agreement with the suggestion was a waiver of an employment standard. Accordingly, the referee declared the agreement void.

In Lindzon v Starr (June 27, 1979), ESC 635 (Picher), the referee held that the employee's written release of her employer from any claims she may have had against him was null and void, with the result that the employer was liable for pay in lieu of notice of termination.

Where an employment contract contains a provision that purports to waive the right to notice of termination under ESA Part XV, s. 57 and 58, this attempted waiver, being null and void, cannot be used to determine the question of whether the employee received reasonable notice at common law. In this regard, see Machtinger v HOJ Industries Ltd., [1992] 1 SCR 986, 1992 CanLII 102 (SCC).

However, the prohibition against contracting out under the ESA 2000 must be distinguished from the settlement of an entitlement under the ESA 2000. For example, under ESA Part III, s. 6, a union could agree to a settlement with respect to entitlements under the ESA 2000, including severance pay. A

settlement is distinguished from an attempt to contract out of the ESA 2000 because it is entered into only with respect to an entitlement that has crystallized or whose crystallization is imminent.

Greater Contractual or Statutory Right – s. 5(2)

5(2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.

Section 5(2) ensures that where an employee has greater rights under an employment contract (which includes a collective agreement) or another statute, such greater rights will prevail over the minimum standards established by the ESA 2000. Such greater rights include a greater hourly rate, lesser hours of work, a greater percentage of vacation pay, longer vacations, higher public holiday pay and a greater number of public holidays.

(Note that prior to April 3, 2019, section 17.2 of the ESA 2000 provided an exception to the application of s. 5(2). Section 17.2 was repealed on April3, 2019 as a result of the *Restoring Ontario's Competitiveness Act, 2019*. Before its repeal, ESA Part VII, s. 17.2 provided that even where a contract gave an employee a greater right than all or part of the hours of work provisions in the ESA 2000, employers were still required to comply with the requirement that existed at the time to obtain the approval of the Director of Employment Standards (or to have an application for approval pending for at least 30 days, as well as meeting certain other conditions) before the employer's employees could work in excess of the weekly limit on hours of work.)

Determining if Greater Right or Benefit Exists

Comparing Apples and Oranges

Consistent with s. 5(2), the Program takes the position that in determining whether the employment contract confers a greater right or benefit, one should not compare apples with oranges, i.e., the fact that a contractual provision or set of contractual provisions relating to the same subject matter as one employment standard provides a greater benefit to employees than that employment standard cannot be used to justify giving employees less than they are entitled to under a different employment standard. For example, the fact that an employee is paid considerably more than the minimum wage does not allow the employer to avoid paying overtime pay.

There is, however, some indication that the Board may take a different view. In Track-Corp Equipment Ltd. v Tremblay, 2007 CanLII 15165 (ON LRB), the employee had agreed to work for a flat rate of $19 per hour, purportedly inclusive of any entitlements to overtime pay, public holiday pay and vacation pay. Following the termination of his employment, he filed a complaint with the ministry. The investigating employment standards officer, finding that the employee was owed overtime pay, public holiday pay and vacation pay, issued an order to pay, which the employer appealed. The Board allowed the appeal. Noting that the employee had been paid over $12,000 during his time with the employer, and that if his rate of pay had been only the minimum wage in effect during that time ($7.45 per hour), his total entitlement, including overtime pay, public holiday pay and vacation pay, would have been just over $5,000, the Board held that:

…as a whole, the terms of [the employee's] verbal contract of employment (the $19.00 flat rate) clearly provided him with a greater right or benefit than the Act's minimum

standards. Indeed, he was paid twice as much as would have been required to comply with the Act. In these circumstances, the contract of employment prevails.

In other words, it seems that the Board, rather than comparing the benefit conferred by the contractual rights pertaining to the same subject as one particular employment standard with the benefit that would be conferred by that standard, compared the total benefit of the entire contract with the total benefit of all employment standards. The Program's position is that this is not an appropriate approach to take as it would have the effect of depriving virtually any employee earning significantly more than minimum wage of all of their other entitlements under the ESA 2000.

The correct approach, in the Program's view, is that which was taken in C. Fasano Food Market v Bouvier (February 20, 1978), ESC 482 (Satterfield), where the referee rejected an employer's argument that it did not have to comply with the former *Employment Standards Act*'s public holiday provisions because certain payments it had made to the employee for time not worked, voluntary cash payments and payment in trade were a greater benefit to the employee than the employment standard. In responding to that argument, the referee stated:

. . .That requires an interpretation of s. 4(2) [the provision in the former Employment Standards Act corresponding to s. 5(2) of the ESA 2000] that an employer's benefits and terms or conditions of employment collectively are of a greater benefit to the employee than those set out in the Employment Standards Act. Section 4(2) of the Act cannot reasonably bear that meaning. Its meaning is quite clear where it reads in part . . . 'that provides in favour of an employee a higher remuneration in money, a greater right or benefit or lesser hours of work than the requirement imposed by an employment standard shall prevail over an employment standard' (emphasis added). Section 1(e) of the [former] Act [corresponding to the definition of "employment standard" in s. 1(1) of the ESA 2000] defines an employment standard as meaning 'a requirement imposed upon an employer in favour of an employee by this Act or the regulations' . The use of the words 'an employment standard' conveys the meaning that for an employer's terms or conditions of employment to prevail, they must confer a greater benefit in respect to a particular employment standard and would only prevail in respect to that standard. In other words, the employer could not rely on a greater benefit in respect to one standard to offset a lesser benefit in respect to another standard. For example, an employer who provided vacations with pay in excess of the minimum standards set up in the Act could not claim relief for paying less than the minimum wage set by the Act.

While the wording of the predecessor greater right or benefit provision is somewhat different than the current provision, the Program is of the view that the differences are not significant and that the approach taken in the C. Fasano Food Market v Bouvier decision is still the appropriate approach to greater right or benefit issues.

Comparing Different Varieties of Apples / Package Approach

Although the Program is of the view that one cannot compare apples with oranges in determining whether a greater right or benefit is being provided, one can compare different varieties of apples. This means that one takes into account the entire package of contractual provisions that relate to the same subject as a particular employment standard. In some cases, this will require a comparison of both monetary and non-monetary aspects. For example, where the issue is whether the employment contract confers a greater right or benefit in relation to holidays than Part X, one would look at several features, including the number of holidays recognized, qualifying conditions, whether there is a right to be off work on a holiday, premium pay entitlements for working on a holiday, etc. A Divisional Court decision under the former

Employment Standards Act, Re Queen's University and Fraser et al, 1985 CanLII 2260 (ON SC), indicated that this was the proper approach.

This approach gives the employer some flexibility where they are giving a contractual right that on balance is better overall for employees than the corresponding statutory standard, notwithstanding that the contractual right is not better in all respects or perhaps not even as good in some. Note that in order for a contractual provision to be found to prevail over an employment standard under s. 5(2), the right or benefit conferred by the provision must be in fact greater and not merely equal.

Rest Periods

It is not a greater benefit for an employee to receive payment in lieu of the required rest periods in ESA Part VII, s. 18 and ESA Part VIII, s. 20. The benefit provided by these required rest periods in the ESA 2000 is time off from work. Therefore, the appropriate comparison to determine whether a greater right or benefit has been provided to an employee with respect to these rest periods is the time off from work. Payment in lieu of time off from work, premium pay for working additional hours or the willingness of the employee to work extra hours are not relevant considerations for the determination of a greater right of benefit for rest periods.

Eating Periods

An employer may provide a greater right or benefit with respect to eating periods than that provided under ESA Part VII, ss. 20 and 21. For example, the contract may provide that the employee will be entitled to an hour long eating period within the time limits set out in ESA Part VII, ss. 20(1) and (2).

It is not a greater benefit for an employee to receive payment in lieu of the required eating period. The benefit provided by the eating period in the ESA 2000 is time off from work. Therefore, the appropriate comparison to determine whether a greater right or benefit has been provided to an employee with respect to the eating period is the time off from work.

In All-Way Transportation Services Ltd v Fountain (June 6, 1979), ESC 627 (Brent) the employer argued that an arrangement that allowed wait staff to continue to earn tips constituted a greater right or benefit. The Board, in rejecting that argument, said:

Working cannot be considered a greater right or benefit than not working just because the employee is getting paid. If that were possible, any employer could refuse to give meal breaks as long as the employee was paid. It is implicit in the Act that the break itself is the benefit.

Overtime

In Falconbridge Nickel Mines Limited v Sudbury Mine, Mill and Smelter Workers' Union, Local 598 (July 13, 1981), ESC 1021 (Egan), a hearing was held on the issues of, first, the meaning of “week” in the overtime provisions in s. 25 of the former *Employment Standards Act*, which corresponds to ESA Part VIII, s. 22, and, second, the meaning of greater right or benefit, collective agreement versus the ESA 2000.

The work week of the employer was established and commenced at 8:00 a.m. Sundays, and was based on a set schedule over a four-week cycle, a series of seven consecutive eight-hour days worked over two work weeks. The union argued that week in former s. 25 referred to any period of seven consecutive days and that, accordingly, overtime was not being paid properly pursuant to the Act's requirement of one and

one-half times the regular rate after 44 hours in the week, notwithstanding that overtime was paid, in accordance with the collective agreement entitlement, after 40 hours in a work week. The referee did not accept the employer's argument that week in s. 25 meant work week, but rather held that it means any period of seven consecutive days. Further, he held that since the overtime provisions of the collective agreement, being a package of rights involving premium pay after 40 hours per week, eight hours per day, on Sundays, and call-in pay, did not specifically relate to the particular s. 25(1) overtime standard in a week (being seven consecutive days), it could not be compared.

On judicial review, the Divisional Court in the unreported decision *Re Falconbridge Nickel Mines Ltd. and Egan et al* (January 18, 1982), (ON SCDC) found that the referee made an incorrect construction of week in s. 25 and of s. 4(2) of the former *Employment Standards Act,* which corresponds to s. 5(2). The Court determined that the employer has established a work week, the reference to week in s. 25 means the seven-day period which coincides with the work week. The Court also ruled that the referee was obligated by s. 4(2) to compare the rights, benefits, terms or conditions of the collective agreement "relative to overtime" with s. 25, which was the entire statutory provision regarding overtime.

In Re Falconbridge Nickel Mines Ltd. and Egan et al., 1983 CanLII 1931 (ON CA), the majority of the Court of Appeal affirmed the Divisional Court's decision on the interpretation of the s. 25(1) week issue, but did not comment on the s. 4(2) holding. However, the Divisional Court relied on this form of package comparison having been acceptable when they confirmed that approach in *Re Queen's University and Fraser et al.*

The fact that a contract of employment may provide for overtime payable after eight hours per day or 40 hours per week does not necessarily render it a greater benefit than that contained in ESA Part VIII, s. 22(1). The entire package must be examined. For example, an employee is paid an hourly rate and an amount for mileage and the collective agreement provides for time and one-half after 40 hours. The collective agreement may at first appear to be providing a greater right or benefit. However, the collective agreement also contains a provision stating that the hours of work in respect of which mileage is paid will not count as hours of work for the purposes of calculating overtime. In the event that pay for mileage plus regular pay plus overtime pay as per the collective agreement is less than the wages otherwise due had ESA Part VIII, s. 22(1) applied, then s. 5(2) would not apply and the ESA 2000's minimum standard would be operative.

Minimum Wage

Where a contract of employment (including a collective agreement) provides for greater remuneration than the minimum wage, that greater remuneration prevails over the minimum wage requirements of the ESA 2000. An employment standards officer can assess and enforce the greater remuneration.

Public Holidays

Where an employee has greater benefits under an employment contract or collective agreement with respect to public holidays, such greater benefits prevail over the minimum requirements in the ESA 2000.

For example, if an employee's employment contract grants the employee more money for a public holiday than does the calculation of public holiday pay under the ESA 2000, the employee is entitled to that higher amount. For example, the calculation for public holiday pay under the ESA 2000 is based on regular wages earned and vacation pay payable, but if that employee's employment contract provides for public holiday pay calculated using *all* wages earned in the four work weeks, the employee is entitled to that higher amount.

Another example is if an employer's requirements for public holiday pay are not as stringent as those in the ESA 2000, an employee is entitled to that pay if they fulfil those less stringent requirements. In Sturdell Industries Limited v Wilson (March 13, 1979), ESC 593 (Johnston), a case decided under the former *Employment Standards Act*, employer policy provided for a paid holiday even if the employee did not work the regularly scheduled day after the holiday, as long as they subsequently made up any lost time. The referee held that the employer could not retroactively "tighten up" the system and attempt to recover holiday pay that it paid, even though the employee would not have been entitled to the pay under the Public Holiday provisions.

In the context of collective agreements, arbitrators have held as follows:

In *Canada Cement Lafarge Ltd. v. C.L.G.W.*, the arbitrator held that a collective agreement under which employees in a continuous operation would receive premium pay of 2 1/2 to 3 1/2 times the regular rate for work on 12 holidays provided a greater benefit than the Act. Accordingly, the agreement prevailed, since the package as a whole was considered to exceed the requirements of the Act.

In Re Queen's University and Fraser et al, the Divisional Court held that no illegality results from the fact that a collective agreement does not treat a particular day (being a public holiday under the ESA 2000) as the holiday, so long as the collective agreement provisions respecting holidays provide a greater right or benefit in total than the provisions of the Act.

Note that while these cases were all decided under the former *Employment Standards Act*, the principles enunciated in the decisions still apply.

Package Approach

Whether dealing with an individual employment contract or a collective agreement, the entire public holiday package, including monetary and non-monetary aspects and the stringency of qualifying conditions, must be reviewed. In order to find that the terms of a contract or collective agreement prevail over the ESA 2000, they must be on balance not just equal to the ESA 2000, but must provide a greater benefit.

The Divisional Court upheld the package approach in *Re Queen's University and Fraser et al*, where Madame Justice Van Camp, speaking for the majority stated, "*One must look at the entirety of the terms in the agreement respecting holidays and not compare each individual item."*

The Program's position is that factors that must be considered when assessing whether a contract provides a greater right or benefit with respect to public holidays include:

- The number of days off;
- The pay the employee receives when taking the day off;
- The pay the employee receives for working on a holiday;
- The qualifying conditions for the days off;
- Whether the employee has a right to refuse work on the holiday;
- Whether and how substitute days off may be arranged; and
- Whether some or all of the holidays provided under the contract are the same as those provided under the ESA 2000.

Historically, one view of the public holiday entitlement has been that such days are intended to be a common day free from work, to facilitate religious or traditional public celebrations or to spend time with family. As one aspect of the entitlement, it should be considered as one of the factors in determining whether the entitlements under the employment contract provide a greater right or benefit.

Consequently, applying the greater right or benefit provisions of the ESA 2000 could result in a finding that an employment contract provides a package related to public holidays that will prevail over the public holiday entitlements in the ESA 2000, even though the package does not treat for example Family Day, or indeed any one or more of the other public holidays under the ESA 2000, as a public holiday.

In order for a non-statutory benefit respecting public holidays to prevail over Part X provisions, the conditions of employment must confer a greater benefit in relation to the statutory public holiday employment standard and they will only prevail in respect of that standard. The employer cannot rely on a greater benefit in respect of one standard to offset a lesser benefit in respect of another standard.

In C. Fasano Food Market v Bouvier (a decision under former *Employment Standards Act*), the referee ordered the employer to pay public holiday pay even though he paid for time not worked (sick leave and personal time-off), voluntary cash bonuses and payment in trade, all of which amounted to a figure well in excess of the amount of the order to pay.

In 22 Employees v Christie's Dairy Limited (July 23, 1981), ESC 1030 (Sheppard) (a decision under the former *Employment Standards Act*), the referee ordered the employer to pay public holiday pay even though he had reduced the employees' work week from a five-day, eight hours per day week (40 hours total) to a four-day, nine hours per day week (36 hours total) with no reduction in salary. He had argued that this new arrangement was a better benefit, so he was justified in not paying premium pay for work on public holidays, especially as the employees had fully consented to the change. The referee did not agree with this argument.

Percentage in Lieu Arrangements

In some cases, the terms of a collective agreement or individual contract of employment provide for an employee to receive, in addition to their regular earnings, a percentage of those earnings in lieu of public holiday pay for public holidays not worked, or more typically, in lieu of a number of entitlements and benefits including public holiday pay. Since in such cases the employer is not adhering to the public holiday requirements per se, the employer cannot be considered to be in compliance with the ESA 2000 unless the percentage in lieu arrangement constitutes a greater right or benefit within the meaning of s. 5.

In order to determine whether a percentage in lieu arrangement constitutes a greater right or benefit, one must compare what the employee receives in lieu of public holiday pay with what the employee would have received had the employer paid public holiday pay in accordance with ESA Part X. Only if the former exceeds the latter can it be said that a greater right or benefit is being provided.

Where the amount paid under the arrangement is solely in lieu of public holiday pay (and not in lieu of other entitlements or benefits as well), the determination is made by comparing the percentage in lieu figure with the percentage that public holiday pay would have represented had the employer paid public holiday pay in accordance with Part X. This latter percentage may vary for a particular employee from holiday to holiday and year to year, depending, for example, on whether the employee was away from work in the four work weeks before the work week in which the public holiday occurred.

Where the amount paid under the arrangement is in lieu of other entitlements or benefits as well as public holiday pay, one must still determine the appropriate bench mark percentage to determine whether a

greater right or benefit is being provided and compare that with the percentage in lieu of public holiday pay provided by the employer.

If the contract or collective agreement breaks down the total percentage in lieu to show how much of it is being provided in lieu of public holiday pay, that is the figure that should be compared with the benchmark.

Where the contract or collective agreement does not break down the total percentage, it will have to be determined whether or not the percentage in lieu is sufficient to fund all the benefits and entitlements it is intended to cover. If it is not sufficient, then the percentage in lieu does not constitute a greater right or benefit than ESA Part X.

In some cases, employees may receive a percentage in lieu for public holidays not worked, but still receive regular wages plus premium pay for any holidays that they do happen to work. Where this occurs, the amount paid for public holiday work may have to be taken into account along with the percentage in lieu in order to determine whether the employee received a greater right or benefit than what they would have received had the employer complied with ESA Part X in all respects. However, if the appropriate benchmark figure is exceeded on the basis of the principles discussed in the preceding paragraphs even without consideration of the amount paid for public holiday work, it is not necessary to take this additional step.

Vacation with Pay

It must be clear from the contract of employment exactly what the greater entitlement is before it is enforced. For example, although a contract may provide a greater benefit of four weeks' vacation time, this does not necessarily mean that a corresponding increase (e.g., to eight per cent) in the percentage of vacation pay can be enforced. However, if a contract of employment does provide a greater percentage for vacation pay, that greater percentage will be enforced even if the employee does not complete the vacation entitlement year, unless the entitlement to the greater percentage is clearly dependent upon that completion.

Leaves of Absence

Pregnancy and Parental Leave

Questions regarding the application of s. 5(2) may arise in the context of pregnancy and/or parental leave when an employee, who has taken time off that exceeds the leave periods under the ESA 2000, seeks the assistance of the Program in returning to work.

In many cases, employers are prepared to allow employees to take additional time off following the statutory leave. In fact, such arrangements are often individually tailored to suit a specific employee's needs rather than appearing as a standard contract entitlement. Nothing in the ESA 2000 prohibits employers from agreeing to allow an employee to take additional time off or otherwise negotiating a discrete, non-statutory leave entitlement as a term of the contract of employment. But, in either case, the terms of that extended period of time off or discrete, non-statutory leave would not be subject to scrutiny or enforcement under the ESA 2000. Most importantly, the rights of reinstatement afforded under the ESA 2000 are not enforceable at the end of the extended period of leave or following a discrete, non-statutory leave.

However, if the leave as provided under the terms of the contract is determined to be a greater right or benefit than the statutory leave entitlement, the terms of the leave under the contract of employment will apply and can be enforced.

In determining whether a contract provides a greater right or benefit with respect to leave, one must examine and compare the entire package of contractual provisions that relate to the package of leave provisions under the ESA 2000. However, one essential element of the package will be reinstatement in some form, as the concept of a leave from work necessarily implies a right to return to work.

It may not be necessary for the rights of reinstatement afforded under the contract provisions to be precisely the same as those afforded under the ESA 2000. For example, the contract provision may allow an employee to take reinstatement at the end of the statutory leave period in accordance with ESA Part XIV, s. 53, but limit the employee's rights to reinstatement following a period of leave that is longer than the statutory requirements, to reinstatement to a comparable job only. An officer would need to review all of the terms and conditions of the contractual provisions before concluding that there was a greater right or benefit but it would be open to an officer to conclude that a contract provides a greater right or benefit, despite the fact the employee seeking reinstatement at the end of the longer period of leave would be entitled only to a comparable job as per the contract.

Further, where an employer provides a greater right or benefit with respect to statutory leave in that the employment contract offers a period of pregnancy or parental leave that is greater than the statutory minimum, it will not necessarily mean that rights collateral to the statutory leave period such as participation in benefit plans and accrual of length of service, employment and seniority will automatically apply to that greater period of leave.

As an example, an employee had a right under her contract to extend her leave for an additional 26 weeks following the 78 week period of combined pregnancy and parental leave under the ESA 2000. However, if she does so, she will not accrue credit for seniority for that 26 week period. All other rights afforded under the statutory leave provisions continue to apply for the additional 26 week period. In that case, an officer may find that the leave provisions in the contract provide a greater right or benefit because the employee has all the rights afforded under the ESA 2000 for the period equivalent to the statutory leave as well as a right to a longer leave, despite the fact the contract provisions do not extend the right to accrue credit for seniority for that period of leave exceeding the statutory entitlement.

[Note: the discussion of the application of the greater right or benefit principle to the now-repealed Personal Emergency Leave standard appears below, following the Bereavement Leave discussion.]

Sick Leave

Determining whether the provisions of an employment contract provide a greater right or benefit than ESA Part XIV, s. 50 in relation to time off work because of personal illness, injury or medical emergency can be a difficult matter. The principle that applies in making the determination is the same principle that governs in any greater right or benefit determination, i.e., do the relevant contractual provisions, taken in their entirety, give the employee a better deal than the corresponding employment standard taken in its entirety.

In order to provide assistance in determining whether the employment contract is providing a greater right or benefit than sick leave under the ESA 2000, the following list of criteria has been developed. In any given case, some criteria might point one way, while some might point the other; bearing in mind,

however, that the question to be answered is whether the contractual leave provisions, taken in their entirety, give the employee a better deal than ESA 2000's sick leave provisions, taken in their entirety. The contractual scheme should be examined in light of all of the criteria and then considered whether, on balance, it is the contract or the ESA 2000 that provides the better deal for the employee. Note, however, that the various criteria are not all of equal significance; while no single criterion is likely to be conclusive in itself, some are much more important than others. The criteria set out below have been listed in the order of their importance.

Note that if an employee who takes what is purported to be leave under the contract has no actual entitlement to return to work, the leave under the contract will NOT be considered to be a greater right or benefit. This is because it is inherent in the concept of a leave that there is an entitlement to return; a supposed leave without such an entitlement is meaningless.

Criteria

Number of Days of Leave

How many days of leave does the contract provide for? If the contract provides for fewer than three days' leave per calendar year, the leave under the contract will NOT be considered to be a greater right, since even only one day less leave under the contract constitutes such a significant reduction in the entitlement. For example, if a contract provides for only two days of sick leave, an employee's entitlement to sick leave would be reduced by a full one-third if that contract were to be considered to be a greater right or benefit. On the other hand, an unlimited leave entitlement, or an entitlement to more than the three days per calendar year that the ESA 2000 provides for, weighs in on the side of concluding that there is a greater right or benefit.

Qualifying Events

Does the contract cover all the different types of events that would entitle an employee to sick leave under ESA Part XIV, s. 50? For example, does the contract allow the employee days for a medical emergency but not for personal injury? If so, it would be a very strong indication that the contract does not provide a greater right or benefit.

Paid or Unpaid

Is the leave under the contract paid leave? None of the days of sick leave are paid under the ESA 2000, so if the leave under the contract is paid leave, this tends to point to the contract providing a greater right or benefit. But as with the other criteria, this criterion is not conclusive in itself; other criteria might tip the balance the other way.

Reinstatement Right

As stated above, if an employee who takes what is purported to be leave under the contract has no actual entitlement to return to work, the leave under the contract will NOT be considered to be a greater right or benefit. This is because it is inherent in the concept of a leave that there is an entitlement to return; a supposed leave without such an entitlement is meaningless.

If the employee takes leave under the contract, are they entitled to return to their original position (assuming it still exists), as they would be if they took sick leave under the ESA 2000? While it is unlikely, as a practical matter, that a short-term absence would result in the employee being moved to another position, it is quite conceivable that an employer might make such a move if there were repeated

absences, and the new position might not even be comparable. If the employee does not have a right to return to their original position if it still exists, or to be placed in a comparable position if it does not, this would be a factor tending to suggest that a greater right or benefit is not being provided.

Negative Consequences

Even if the employee has a right to their original job, can the employee be adversely affected in any other way because they take leave under the contract? For example, the employee might have an entitlement under the contract to take leave and keep the original job, but they might lose out in other ways, e.g., the absence from work may cause them to be ineligible for a perfect attendance bonus, or the absence from work may be included when determining whether the employee has triggered an absence threshold that results in termination. This points in the direction of the contract not providing a greater right or benefit. See the discussion of the impact of statutory leaves on attendance management programs and perfect attendance bonuses at ESA Part XIV, s. 52(1).

Other examples of negative consequences that would point in the same direction include interruption in certain kinds of benefit coverage, deduction of leave time from seniority, and forfeiture of contractual vacation entitlement because the leave results in the vacation being postponed beyond the last allowable date for taking vacation under the contract.

Other Criteria

A number of other criteria, although comparatively minor in importance, could conceivably have some impact on the greater right or benefit determination. These criteria include:

- Whether there is a length of employment requirement that employees must meet in order to be eligible for the leave, and if so, how long it is.
    - The ESA 2000 provides that employees must be employed for two consecutive weeks in order to be eligible for the leave.
- What sort of evidence the employer requires to support the entitlement under the contract
    - Does it go beyond "evidence reasonable in the circumstances", which is what the employer is entitled to ask for under ESA Part XIV, s. 50(6)?
- Whether the contractual right is based on the calendar year or on the individual employee's year of employment
    - The right under the ESA 2000 is based on the former; the latter can impact unfavourably on employees who have only just started with the employer; and
- Whether the employer can deduct a part day of leave from the employee's entitlement as if it were a whole day
    - The ESA 2000 allows the employer to do this, but the contract may be more favourable to the employee.

Although none of these criteria may be greatly important in themselves, they could tip the balance one way or the other in a close case. In some cases these criteria may be more important – for example, if the contract contained a six-month length of employment requirement in order to be eligible for the leave, that criteria would be a factor strongly tending to suggest that a greater right or benefit is not being provided to an employee who has not met the six-month requirement. On the other hand, if a contract does not have any period of employment requirement and provides *everything* the ESA provides (which means, for example, that all of the rights under the General Provisions Concerning Leaves and the anti-reprisal protection would apply to the absences) this would strongly tend to suggest that a greater right or benefit is being provided.

If a contract does provide a greater right or benefit than ESA Part XIV, s. 50 provides, the terms of the contract will apply instead of ESA Part XIV, s. 50. That is, the terms of the contract, not ESA Part XIV, s. 50, will govern how absences are treated how many the employee is entitled to, what situations will trigger an entitlement, what evidence of eligibility may be required, whether or not they are paid, etc.

If a contract does not provide a greater right or benefit than ESA Part XIV, s. 50 provides, ESA Part XIV, s. 50 will apply.

Note that pursuant to ss. 50(7) – (9), where an employee opts to take a contractual leave **that is not a greater right or benefit** than s. 50, in circumstances that would also give rise to an entitlement under s. 50, the Act deems the contractual leave to be a s. 50 sick leave. See the discussion at subsections 50(7) – (9) for more information.

Family Responsibility Leave and Bereavement Leave

Determining whether the provisions of an employment contract provide a greater right or benefit than ESA Part XIV, s. 50.0.1 (family responsibility leave) and s. 50.0.2 (bereavement leave) in relation to time off work because of the death or illness, injury or medical emergency of a relative or an urgent matter concerning a relative can be a difficult exercise. The principle that applies in making the determination is the same principle that governs in any greater right or benefit determination, i.e., do the relevant contractual provisions, taken in their entirety, give the employee a better deal than the corresponding employment standard taken in its entirety.

In order to provide assistance in determining whether the employment contract is providing a greater right or benefit than family responsibility leave or bereavement leave under the ESA 2000, the following list of criteria has been developed. In any given case, some criteria might point one way, while some might point the other; bearing in mind, however, that the question to be answered is whether the contractual leave provisions, taken in their entirety, give the employee a better deal than the ESA 2000's family responsibility leave or bereavement leave provisions, taken in their entirety. Note, however, that the various criteria are not all of equal significance; while no single criterion is necessarily conclusive in itself, some are much more important than others. Whether the employment contract covers all of the types of events referred to in ESA Part XIV, s. 50.0.1 or s. 50.0.2 should be given far more weight than, for example, whether the contract would allow the employee to take family responsibility leave because their spouse's step-grandparent was ill. The criteria set out below have been listed in the order of their importance.

Note that if an employee who takes what is purported to be leave under the contract has no actual entitlement to return to work, the leave under the contract will NOT be considered to be a greater right or benefit. This is because it is inherent in the concept of a leave that there is an entitlement to return; a supposed leave without such an entitlement is meaningless.

Criteria

Number of Days of Leave

How many days of leave does the contract provide for? If the contract provides for fewer than three days' leave per calendar year for family responsibility purposes, or fewer than two days' leave per calendar year for bereavement, the leave under the contract will NOT be considered to be a greater right, since even only one day less leave under the contract constitutes such a significant reduction in the entitlement. For example, if a contract provides for only two days of leave for family responsibility purposes, an employee's entitlement to family responsibility leave would be reduced by a full one-third if that contract

were to be considered to be a greater right or benefit. If the contract provides for only one day of leave for bereavement, an employee's entitlement to bereavement leave would be reduced by one-half if that contract were to be considered a greater right or benefit. On the other hand, an unlimited leave entitlement, or an entitlement to more than the three or two days per calendar year that the ESA 2000 provides for, weighs in on the side of concluding that there is a greater right or benefit.

Qualifying Events

Does the contract cover all the different types of events that would entitle an employee to family responsibility leave under ESA Part XIV, s. 50.0.1? For example, if the contract allows the employee family responsibility leave for the illness of a dependent relative, but not an urgent matter, this is a very strong (though not in itself conclusive) indication that the contract does not provide a greater right or benefit.

Paid or Unpaid

Is the leave under the contract paid leave? Neither family responsibility nor bereavement leave are paid leaves under the ESA 2000. So, if the leave under the contract is a paid leave, this tends to point to the contract providing a greater right or benefit. But as with the other criteria, this criterion is not conclusive in itself; other criteria might tip the balance the other way.

Reinstatement Right

As stated above, if an employee who takes what is purported to be leave under the contract has no actual entitlement to return to work, the leave under the contract will NOT be considered to be a greater right or benefit. This is because it is inherent in the concept of a leave that there is an entitlement to return; a supposed leave without such an entitlement is meaningless.

If the employee takes leave under the contract, are they entitled to return to their original position (assuming it still exists), as they would be if they took family responsibility or bereavement leave under the ESA 2000? While it is unlikely, as a practical matter, that a short-term absence would result in the employee being moved to another position, it is quite conceivable that an employer might make such a move if there were repeated absences, and the new position might not even be comparable. If the employee does not have a right to return to their original position if it still exists, or to be placed in a comparable position if it does not, this would be a factor tending to suggest that a greater right or benefit is not being provided.

Negative Consequences

Even if the employee has a right to their original job, can the employee be adversely affected in any other way because they take leave under the contract? For example, the employee might have an entitlement under the contract to take leave and keep the original job, but they might lose out in other ways, e.g., the absence from work may cause them to be ineligible for a perfect attendance bonus, or the absence from work may be included when determining whether the employee has triggered an absence threshold that results in termination. This points in the direction of the contract not providing a greater right or benefit. See the discussion of the impact of statutory leaves on attendance management programs and perfect attendance bonuses at ESA Part XIV, s. 52(1).

Other examples of negative consequences that would point in the same direction include interruption in certain kinds of benefit coverage, deduction of leave time from seniority, and forfeiture of contractual

vacation entitlement because the leave results in the vacation being postponed beyond the last allowable date for taking vacation under the contract.

Eligible Relationships

With respect to entitlement to leave for death or illness, injury, medical emergency or urgent matters concerning certain relatives, how does the contractual right compare with family responsibility or bereavement leave under the ESA 2000, insofar as scope of coverage is concerned? ESA Part XIV, s. 50.0.1 and s. 50.0.2 provide an entitlement in relation to a fairly broad range of expressly designated relationships, including some that might be considered fairly remote (e.g., foster parent of the employee's spouse); moreover, the entitlement also extends to dependent relatives even if they do not fall into any of the named categories. If the contractual entitlement covers a narrower range of relationships (e.g., members of the employee's immediate family only), this weighs in on the side of concluding that it does not constitute a greater right or benefit. However, if, for example, a contractual entitlement for bereavement leave may be used in relation to any death – Including that of a non-relative – it tends to suggest that this may be a greater right than ESA bereavement leave.

Other Criteria

A number of other criteria, although comparatively minor in importance, could conceivably have some impact on the greater right or benefit determination. These criteria include:

- Whether there is a length of employment requirement that employees must meet in order to be eligible for the leave, and if so, how long it is.
    - The ESA 2000 provides that employees must be employed for two consecutive weeks in order to be eligible for the leaves.
- What sort of evidence the employer requires to support the entitlement under the contract
    - Does it go beyond "evidence reasonable in the circumstances", which is what the employer is entitled to ask for under ESA Part XIV, s. 50.0.1(7) and s. 50.0.2(7)?
- Whether the contractual right is based on the calendar year or on the individual employee's year of employment
    - The right under the ESA 2000 is based on the former; the latter can impact unfavourably on employees who have only just started with the employer; and
- Whether the employer can deduct a part day of leave from the employee's entitlement as if it were a whole day
    - The ESA 2000 allows the employer to do this, but the contract may be more favourable to the employee.

Although none of these criteria may be greatly important in themselves, they could tip the balance one way or the other in a close case. In some cases these criteria may be more important – for example, if the contract contained a six-month length of employment requirement in order to be eligible for the leave, that criteria would be a factor strongly tending to suggest that a greater right or benefit is not being provided to an employee who has not met the six-month requirement. On the other hand, if a contract does not have any period of employment requirement and provides *everything* the ESA provides (which means, for example, that all of the rights under the General Provisions Concerning Leaves and the anti-reprisal protection would apply to the absences) this would strongly tend to suggest that a greater right or benefit is being provided.

If a contract does provide a greater right or benefit than ESA Part XIV, s. 50.0.1 or s. 50.0.2 provides, the terms of the contract will apply instead of the ESA leave provision. That is, the terms of the contract, not

ESA Part XIV, s. 50.0.1 or s. 50.0.2, will govern how absences are treated how many the employee is entitled to, what situations will trigger an entitlement, whether or not they are paid, etc.

Note that pursuant to ss. 50.0.1(8) – (10), where an employee opts to take a contractual leave that is not a greater right or benefit than s. 50.0.1, in circumstances that would also give rise to an entitlement under s. 50.0.1, the Act deems the contractual leave to be a s. 50.0.1 family responsibility leave. The same applies in the bereavement leave context. Pursuant to ss. 50.0.2(8) – (10) , where an employee opts to take a contractual leave that is not a greater right or benefit than s. 50.0.2, in circumstances that would also give rise to an entitlement under s. 50.0.2, the Act deems the contractual leave to be a s. 50.0.2 bereavement leave.

Personal Emergency Leave (in force prior to January 1, 2019)

Personal emergency leave was repealed pursuant to the *Making Ontario Open for Business Act, 2018* effective January 1, 2019. As such, this leave is no longer applicable. However, since employees may still have a complaint relating to personal emergency leave that arose during the period of time when that leave was in force, the discussion about what to consider when assessing whether an employee had a greater right or benefit with respect to personal emergency leave remains as part of this publication. The text appears in red to highlight that s. 50 personal emergency leave has been repealed.

Determining whether the provisions of an employment contract provide a greater right or benefit than ESA Part XIV, s. 50 (personal emergency leave) in relation to time off work because of personal illness, the death or illness of a relative or an urgent matter concerning a relative can be a very difficult exercise. The principle that applies in making the determination is the same principle that governs in any greater right or benefit determination, i.e., do the relevant contractual provisions, taken in their entirety, give the employee a better deal than the corresponding employment standard taken in its entirety.

However, in the case of personal emergency leave, the determination is much more complicated than it is in the case of other employment standards because of the very wide range of events referred to in section 50, the large number of features of the statutory right (e.g., reinstatement right, prohibition against penalization) and the virtually limitless variation in contractual entitlement schemes.

In order to provide assistance in determining whether the employment contract is providing a greater right or benefit than personal emergency leave under the ESA 2000, the following list of criteria has been developed. In any given case, some criteria might point one way, while some might point the other; bearing in mind, however, that the question to be answered is whether the contractual leave provisions, taken in their entirety, give the employee a better deal than the ESA 2000's personal emergency leave provisions, taken in their entirety. The contractual scheme should be examined in light of all of the criteria and then considered whether, on balance, it is the contract or the ESA 2000 that provides the better deal for the employee. Note, however, that the various criteria are not all of equal significance; while no single criterion is likely to be conclusive in itself, some are much more important than others. Whether the employment contract covers all of the types of events referred to in ESA Part XIV, s. 50 should be given far more weight than, for example, whether the contract would allow the employee to take leave because their spouse's step-grandparent was ill. The criteria set out below have been listed in the order of their importance.

Note that if an employee who takes what is purported to be leave under the contract has no actual entitlement to return to work, the leave under the contract will NOT be considered to be a greater right or

benefit. This is because it is inherent in the concept of a leave that there is an entitlement to return; a supposed leave without such an entitlement is meaningless.

Criteria

Qualifying Events

Does the contract cover all the different types of events that would entitle an employee to personal emergency leave under ESA Part XIV, s. 50? For example, if the contract allows the employee personal sick leave and bereavement leave but does not allow any leave for the illness of, or urgent matter concerning, a dependent relative, this is a very strong (though not in itself conclusive) indication that the contract does not provide a greater right or benefit.

Number of Days of Leave

How many days of leave does the contract provide for? Obviously, if the contract provides for something less than 10 days' leave per calendar year, this weighs in on the side of concluding that it does not constitute a greater right or benefit. On the other hand, an unlimited leave entitlement, or an entitlement to more than the ten days per calendar year that the ESA 2000 provides for, weighs in on the side of concluding that there is a greater right or benefit.

Paid or Unpaid

Is the leave under the contract paid leave? Only the first two days of leave are paid under the ESA 2000 and the remaining eight days are unpaid, so if the leave under the contract is paid leave, this tends to point to the contract providing a greater right or benefit. But as with the other criteria, this criterion is not conclusive in itself; other criteria might tip the balance the other way.

Reinstatement Right

If the employee takes leave under the contract, are they entitled to return to their original position (assuming it still exists), as they would be if they took personal emergency leave under the ESA 2000? While it is unlikely, as a practical matter, that a short-term absence would result in the employee being moved to another position, it is quite conceivable that an employer might make such a move if there were repeated absences, and the new position might not even be comparable. If the employee does not have a right to return to their original position if it still exists, or to be placed in a comparable position if it does not, this would be a factor tending to suggest that a greater right or benefit is not being provided.

Negative Consequences

Even if the employee has a right to their original job, can the employee be adversely affected in any other way because they take leave under the contract? For example, the employee might have an entitlement under the contract to take leave and keep the original job, but they might lose out in other ways, e.g., the absence from work may cause them to be ineligible for a perfect attendance bonus, or the absence from work may be included when determining whether the employee has triggered an absence threshold that results in termination. This points in the direction of the contract not providing a greater right or benefit. See the discussion of the impact of statutory leaves on attendance management programs and perfect attendance bonuses at ESA Part XIV, s. 52(1).

Other examples of negative consequences that would point in the same direction include interruption in certain kinds of benefit coverage, deduction of leave time from seniority, and forfeiture of contractual

vacation entitlement because the leave results in the vacation being postponed beyond the last allowable date for taking vacation under the contract.

Eligible Relationships

With respect to entitlement to leave for death or illness of or urgent matters concerning certain relatives, how does the contractual right compare with personal emergency leave under the ESA 2000, insofar as scope of coverage is concerned? ESA Part XIV, s. 50 provides an entitlement in relation to a fairly broad range of expressly designated relationships, including some that might be considered fairly remote (e.g., foster parent of the employee's spouse); moreover, the entitlement also extends to dependent relatives even if they do not fall into any of the named categories. If the contractual entitlement covers a narrower range of relationships (e.g., members of the employee's immediate family only), this weighs in on the side of concluding that it does not constitute a greater right or benefit.

Other Criteria

A number of other criteria, although comparatively minor in importance, could conceivably have some impact on the greater right or benefit determination. These criteria include:

- What sort of evidence the employer requires to support the entitlement under the contract
    - Does it go beyond "evidence reasonable in the circumstances", which is what the employer is entitled to ask for under ESA Part XIV, s. 50(10)?
- Whether the contractual right is based on the calendar year or on the individual employee's year of employment
    - The right under the ESA 2000 is based on the former; the latter can impact unfavourably on employees who have only just started with the employer; and
- Whether the employer can deduct a part day of leave from the employee's entitlement as if it were a whole day
    - The ESA 2000 allows the employer to do this, but the contract may be more favourable to the employee.

Although none of these criteria may be greatly important in themselves, they could tip the balance one way or the other in a close case.

If a contract does provide a greater right or benefit than ESA Part XIV, s. 50 provides, the terms of the contract will apply instead of ESA Part XIV, s. 50. That is, the terms of the contract, not ESA Part XIV, s. 50, will govern how absences are treated how many the employee is entitled to, what situations will trigger an entitlement, whether or not they are paid, etc.

If a contract does not provide a greater right or benefit than ESA Part XIV, s. 50 provides, ESA Part XIV, s. 50 will apply. Any issue as to the application of the contractual leave terms will not be an issue for the employment standards program.

For example, a contract provides for three paid personal sick leave days and three paid bereavement leave days per year. There is no provision for job-protected time off (paid or unpaid) for any other reason listed in s. 50 (e.g., to tend to a sick child or a spouse with an urgent matter). It is the Program's view that this contract does not provide a greater right or benefit than ESA Part XIV, s. 50 provides. Accordingly, s. 50 will apply. An employee will have the right to two days of paid leave and eight days' unpaid leave per calendar year for any of the reasons listed in ESA Part XIV, s. 50. Assume the employee takes 10 days of personal emergency leave for personal illness. The employee will have no further personal emergency leave entitlements under the ESA 2000. The question of whether the personal emergency leave

absences will also draw down against the contractual right of three paid sick days is not a matter for the employment standards program.

Other Leaves

Similar considerations as those listed above apply in the context of family medical leave, family caregiver leave, critical illness leave, domestic or sexual violence leave, crime-related child disappearance leave and child death leave when determining whether a contractual provision provides a greater right or benefit than the provisions of the ESA 2000 as they relate to these six leaves. As with the leaves described above, if an employee who takes what is purported to be leave under the contract has no actual entitlement to return to work, the leave under the contract will not be considered to be a greater right or benefit. This is because it is inherent in the concept of a leave that there is an entitlement to return; a supposed leave without such an entitlement is meaningless.

Termination Notice / Pay and Severance Pay

Where an employee is provided a greater benefit for notice of termination, termination pay or severance pay under an employment contract or collective agreement that directly relate to the employment standard, such greater benefit prevails over the minimum requirements in the ESA 2000.

For example, if an employee's contract of employment provides the employee with two weeks of severance pay per year of employment rather than the minimum set out in the ESA 2000, the employee will be entitled to the higher amount under the contract of employment. However, where an employee's contract grants the employee a lump sum of $5,000 as severance pay and the employee's entitlement under the ESA 2000 is $7,500, the contract of employment will be considered to be void in this regard and the employment standard will prevail. Therefore, the employee would be entitled to severance pay in the amount of $7,500 despite the contract of employment.

In some cases, when terminating an employee, an employer will provide salary continuance for an extended period in order to bridge and/or maximize pension entitlements for the departing employee. Such arrangements may not refer explicitly to a termination date and in some cases, the employee is not expected (or even allowed) to attend at the workplace for the period that they are in receipt of the salary continuance payments. As a result, the Program may view the salary continuance as pay in lieu of notice rather than working notice.

In either case, such payments may exceed the statutory entitlement to notice or pay in lieu and would be a greater right or benefit. Where the employee is also entitled to severance under the ESA 2000, the employer may likewise claim that the salary continuance is a greater right or benefit with respect to severance pay, that is, where the total amount paid under the salary continuance arrangement exceeds both the notice or pay in lieu ***and*** severance obligations under the ESA 2000.

However, for this to be the case, the parties must have clearly turned their minds to the termination ***and*** severance obligations in the ESA 2000 in forging the deal. Even if the package is more generous than the combined entitlements under the ESA 2000, the package must reference severance pay explicitly or it will not be held to satisfy both notice and severance obligations. See *McPherson v Xebec Imaging Services Inc.* (January 25, 1996), ESC 96-17 (Randall). Note that although these arrangements may not comply with the requirements under ESA Part V, s. 11(5) with respect to the timing of the payment of termination pay in lieu of notice or severance pay, they may be considered to be a greater right or benefit in respect of those entitlements despite this technical breach.

In *McDonnell Douglas Canada Ltd. v Topham* (April 22, 1993), ES 93-74 (Randall) the employer argued that a provision in a collective agreement prohibiting termination except for just cause was a greater right or benefit than an individual employee's right to notice of termination under s. 57 of the former *Employment Standards Act* and, therefore, that the employee was not entitled to notice of termination since the greater right or benefit prevailed over the employment standard. In that case, the employee was terminated for innocent absenteeism and an arbitrator had ruled that this was just cause for termination. The referee agreed with the employer, stating that the just cause provision afforded the employee greater job security than the notice provisions in the Act. This decision is contrary to Program policy.

It is the Program's position that to compare a just cause clause with the statutory provision providing for notice of termination is to compare apples and oranges. While both a just cause clause and the statutory notice requirement relate to the termination of employment, they are different things. The focus of the just cause clause is job security. The statutory notice requirement has nothing to do with protecting an employee's job. Its purpose is to provide an employee whose employment is being terminated with a reasonable period of time (or pay in lieu) to seek other employment without undue financial hardship. A just cause provision provides a valuable right to job security, but it does not give an employee any right to notice of termination or pay in lieu. The just cause clause and the notice requirements address two different concerns. It is therefore the Program's view that the only thing that can be a greater right or benefit than notice of termination under ESA XV, ss. 57 or 58 is notice that is of greater length than that required under the ESA 2000.

The Divisional Court considered the issue of greater right or benefit in the termination notice context in the 1984 decision in Fanaken v Bell, Temple, 1984 CanLII 1856 (ON SCDC). The employee in that case was entitled under the former *Employment Standards Act* to four weeks' written notice of termination, but did not receive it. Rather, he was provided with six weeks' oral notice, key assistance in securing another job, together with the freedom not to report to work during the notice period. The court found that situation to be a greater right or benefit than the entitlement to four weeks' written notice. It must be emphasized that the oral notice was not just a casual reference to a likelihood of termination in the future but rather was found to be "clear and unequivocal" notice of a specified termination date. The Fanaken v. Bell, Temple decision does not stand for the proposition that oral notice of equal length to the required written notice under the ESA 2000 is either sufficient notice or a greater right.

Other Issues

Referees have often denied an employer's claim that a greater benefit has been granted. In St. Peter's Hospital o/a St. Peter's Centre v Kee (November 20, 1980), ESC 917 (Egan), the referee held that a six-month pregnancy leave (when the employment standard was 17 weeks) was not to be a greater benefit, because the employer also required one month's notice and three months' compulsory absence prior to the date of delivery. In Michaud v Employee (November 23, 1973), ESC 165 (Bolan), the referee held that a higher rate of pay than the standard in the area and no overtime pay was not a greater benefit. In Oxford Warehousing Limited v Morin et al (October 17, 1980), ESC 891 (Bigelow) the referee held that rehiring terminated employees so the conditions and pay were the same as if they never left and therefore not a greater benefit than termination pay. The cases cited in this paragraph are all decisions under the former *Employment Standards Act*.

Once the employer has given greater benefits to an employee, they cannot subsequently recover them. In Fleet Facts (Canada) Ltd. v Woods (October 16, 1973), ESC 179 (McNish), a decision under the former *Employment Standards Act*, the referee held that an employer cannot give two weeks' termination pay and then, because the employee was entitled to only one week under the ESA 2000, try to deduct one

week's pay from the vacation pay. Further, in David Kirsch Customs Limited v Fenney (March 22, 1983), ESC 1388 (Baum), the referee rejected the employer's argument that the amount of vacation pay paid to the employee in excess of the requirements of the former *Employment Standards Act* should be deducted from the pay in lieu of adequate notice of termination he had been ordered to pay to the employee. This was due to the fact that, among other things, the amount of vacation pay paid in excess of what was required by the former *Employment Standards Act* had been the subject of agreement between the employer and the employee. Since the Act indicated that a greater contractual or statutory right prevailed over a corresponding employment standard, the employer was obliged to pay it.

ESA Part III Section 5.1 – No Treating as if Not Employee

No Treating as if Not Employee – s. 5.1(1)

5.1 (1) An employer shall not treat, for the purposes of this Act, a person who is an employee of the employer as if the person were not an employee under this Act.

This provision was added to the ESA 2000 by the *Fair Workplaces, Better Jobs Act, 2017*, SO 2017, c 22 effective November 27, 2017. It expressly prohibits an employer from treating an employee as if that person were not an employee under the ESA 2000. For example, this provision prohibits an employer from misclassifying or treating an employee as an independent contractor, volunteer or any other type of non-employee, and therefore denying that employee some or all of their ESA 2000 entitlements.

In applying this provision, it must be determined if the individual is in fact an employee. See ESA Part I, s. 1 for a detailed discussion on the definition of employee. See also the discussion of employer-employee relationships and independent contractors in ESA Part I, s. 1.

Note that before the *Fair Workplaces, Better Jobs Act, 2017* added this provision to the ESA 2000, if an employer misclassified an employee for the purposes of the ESA 2000, an officer could only issue an order with respect to specific standards that were contravened. However, with the introduction of this new provision, if an employment standards officer finds that an employer violated s. 5.1(1) as well as other ESA 2000 provisions in relation to that employee, the officer may issue a notice of contravention under ESA Part XXII, s. 113 for s. 5.1(1) and those violations as well. For example, if an employer misclassified an employee as an independent contractor and subsequently denied the individual overtime pay, the officer may issue a notice of contravention for the violation of s. 5.1(1) as well as an order to pay wages under ESA Part XXII, s. 103 for the unpaid overtime pay.

An employer does not contravene this provision simply by contravening another provision of the ESA 2000 (*e.g.*, failing to pay vacation pay). However, if that other contravention stemmed from the employer's misclassification of the employee as a non-employee, that would constitute a contravention of s. 5.1(1).

Knowledge and Intentions of Parties

The key consideration in determining if an employer violated this provision is whether or not an individual is an employee as per the definition in ESA Part I, s. 1 and if an employer-employee relationship exists. It does not matter whether the misclassification and treatment of an employee as a non-employee arose from:

- The parties' honest belief that the employee is an independent contractor, volunteer or any other type of non-employee;

- The parties' lack of knowledge or uncertainty about the difference between an employee and independent contractor, volunteer or any other type of non-employee;
- The parties agreeing that the employee would be classified as a non-employee; or
- The employee requesting to be classified and treated as a non-employee.

Note that an employee's request or agreement to be classified as an independent contractor or any other type of non-employee would be considered contracting out under ESA Part III, s. 5(1). Any such agreement is null and void.

From November 27, 2017 to December 31, 2018, s. 5.1 included a so-called "reverse onus" provision; it placed the burden of proof on the employer or alleged employer if, during the course of an investigation into a complaint, inspection or proceeding, the employer or alleged employer took the position that an individual is not an employee for the purposes of the ESA 2000. The effect of that provision was to require the employer to establish, on a balance of probabilities, that the person was not an employee. Although the onus was on the employer to demonstrate that the worker was not an employee pursuant to that subsection, it was Program practice that employment standards officers would not rely solely on the employer's failure to demonstrate this when making a determination, as officers make their determination based on the best available evidence. In the the investigatory context of the employment standards program, this meant, *and continues to mean* after the repeal of the "reverse onus" provision, that officers actively collect evidence from both parties and make the "employee status" determination on a balance of probabilities standard based on the best available evidence.

ESA Part III Section 6 - Settlement by Trade Union Binding

6 A settlement made on an employee's behalf by a trade union that represents the employee is binding on the employee.

This provision was introduced by the *Employment Standards Act, 2000*. It codifies Program policy as it applied under the former *Employment Standards Act*. Section 6 confirms that a trade union can agree to a settlement on behalf of an employee that the trade union represents. For example, s. 6 could apply to allow a union to enter into a binding settlement regarding severance pay entitlements.

It is important to note that such settlement may be entered into only with respect to an entitlement that has crystallized or where its crystallization is imminent. As a consequence, this section could not, for example, be applied to bind employees to a contract provision that provided for future overtime hours to be paid at the employees' regular hourly rate. This would be considered to be an attempt to contract out of the Act and contrary to s. 5(1). However, where, for example, employees represented by a trade union had not been paid anything with respect to overtime hours contrary to the Act and the collective agreement, the union could enter into a settlement on behalf of the employees that required the employer to pay the employees at their regular rate (as opposed to the overtime rate) for those overtime hours.

ESA Part III Section 7 - Agents

7 An agreement or authorization that may lawfully be made or given by an employee under this Act may be made or given by his or her agent and is binding on the employee as if it had been made or given by the employee.

This provision was introduced by the *Employment Standards Act, 2000*. Section 7 provides that, where the Act allows an employee to enter into an agreement with the employer (such as an agreement to work excess hours or to average overtime), an agent may make such an agreement. Where the agent makes

such an agreement, it is binding on the employee. In *Collins & Aikman Plastics Ltd. v. United Steelworkers, Local 9042* an arbitrator concluded that although the terms of the collective agreement allowed the employer to require an employee to work on a public holiday, those terms could not override the employee's individual statutory rights to choose not to work. This decision is inconsistent with the Program's interpretation of s. 7 of the Act and should not be followed.

The type of agreement that this section governs is limited to agreements made under the Act.

Where the Act requires that the agreement made or given by an employee be in writing, which is in most cases - see ESA Part I, s. 1(3) - the agreement made by the agent must also be in writing.

ESA Part III Section 8 – Civil Proceeding Not Affected

Civil Proceedings Not Affected – s. 8(1)

8(1) Subject to section 97, no civil remedy of an employee against his or her employer is affected by this Act.

Section 8(1) provides that nothing in the *Employment Standards Act, 2000*, subject to s. 97, suspends or affects the right of the employee to sue their employer in court. In particular, the ESA 2000's limitation period provisions do not apply when an employee pursues their ESA 2000 rights by suing in court.

Section 97 states:

97(1) An employee who files a complaint under this Act with respect to an alleged failure to pay wages or comply with Part XIII (Benefit Plans) may not commence a civil proceeding with respect to the same matter.

(2) An employee who files a complaint under this Act alleging an entitlement to termination pay or severance pay may not commence a civil proceeding for wrongful dismissal if the complaint and the proceeding would relate to the same termination or severance of employment.

(3) Subsections (1) and (2) apply even if,

> **(a) the amount alleged to be owing to the employee is greater than the amount for which an order can be issued under this Act; or**
>
> **(b) in the civil proceeding, the employee is claiming only that part of the amount alleged to be owing that is in excess of the amount for which an order can be issued under this Act.**

(4) Despite subsections (1) and (2), an employee who has filed a complaint may commence a civil proceeding with respect to a matter described in those subsections if he or she withdraws the complaint within two weeks after it is filed.

For a detailed discussion of when civil proceedings are not permitted, refer to ESA Part XXII, s. 97.

Notice of Civil Proceedings – s. 8(2)

8(2) Where an employee commences a civil proceeding against his or her employer under this Act, notice of the proceeding shall be served on the Director on a form approved by the Director on or before the date the civil proceeding is set down for trial.

Section 8(2) requires a litigant to give notice to the Director when the litigant relies on the ESA 2000 to support a claim against their employer.

Section 8(2) ensures that the Director and therefore the Ministry will be alerted so that it may seek standing in a proceeding if it is of the view that important issues are being raised or the integrity of the legislation is being challenged. The obtaining of standing will allow an opportunity to present the Ministry's view of the legislation if the lawsuit involves a legislative interpretation or policy issue, and further will ensure that the Director is informed of legal developments affecting the ESA 2000.

Another purpose for this section is to enable an employment standards officer to determine whether the employee is prohibited from filing a claim with the Ministry on the basis of previously having commenced a civil action for the same matter.

The Director need not be notified of the proceeding at its onset, rather, they must be notified when all the parties' pleadings are complete and on or before the date the matter is set down for trial. See ss. 8(3) to (5) for information on the service of the notice. For copies of the approved form please contact the Employment Practices Branch.

Note that the ESA 2000 does not require a client of a temporary help agency to notify the Director if it commences a civil action against a temporary help agency for charging a prohibited fee in contravention of paragraph 8 or 9 of ESA Part XVIII.1, s. 74.8(1).

Service of Notice - s. 8(3)

8(3) The notice shall be served on the Director,

(a) by being delivered to the Director's office on a day and at a time when it is open;

(b) by being mailed to the Director's office using a method of mail delivery that allows delivery to be verified; or

(c) by being sent to the Director's office by fax or email.

This provision must be read in conjunction with ss. 8(4) and 8(5), which establish when the service is deemed to be effected.

Section 8(2) requires that an employee give notice to the Director when they commence a civil proceeding against their employer under the ESA 2000. The notice must be served on a form approved by Director on or before the date the civil proceeding is set down for trial. Section 8(3) establishes the methods by which the notice may be served on the Director:

Delivered to the Director's office when it is open

This would include, for example, personal delivery by the employee or their representative or agent, or delivery by a private courier.

Generally, the Director's office is closed between 5 p.m. and 8:30 a.m. Monday through Friday, on Saturdays, Sundays, the nine public holidays under the ESA 2000 as well as Easter Monday, the August Civic Holiday, and Remembrance Day. See the definition of public holiday in ESA Part I, s. 1 for a list of the public holidays.

Mailed to the Directors office using verifiable mail

It is Program policy that three Canada Post services fall within the meaning of verifiable mail: these are Registered Mail, Xpresspost and Priority Courier. However, it is important to note that Xpresspost and Priority Courier are verifiable only if the "signature upon delivery" option is selected.

On the date of publication, the Directors office is located at the following address:

Ministry of Labour

Employment Practices Branch

400 University Avenue, 9th Floor

Toronto, ON M7A 1T7

Faxed or e-mailed to the Director's office

At the time of writing, the Director's fax number is 416-326-7061. The Director's email address is Director.EmploymentStandards@ontario.ca.

When Service Effective – ss. 8(4), (5)

8(4) Service under subsection (3) shall be deemed to be effected,

(a) in the case of service under clause (3) (a), on the day shown on a receipt or acknowledgment provided to the employee by the Director or his or her representative;

(b) in the case of service under clause (3) (b), on the day shown in the verification;

(c) in the case of service under clause (3) (c), on the day on which the fax or email is sent, subject to subsection (5).

This provision must be read in conjunction with s. 8(3) which sets out the methods by which a notice of a civil proceeding may be served on the Director. Section 8(4) establishes when the service of the notice of civil proceeding is deemed to have taken place.

If the notice was served by delivering it to the Director's office on a day and at a time when the office is open per s. 8(3)(a), service is deemed to have taken place on the day indicated on the receipt or acknowledgement provided by the Director or their representative.

If the notice was served by mailing it to the Director's office using a method of mail delivery that allows the delivery to be verified per s. 8(3)(b), service is deemed to be effective on the day shown in the verification.

If the notice was served by sending it to the Director's office either by email or fax per s. 8(3)(c), service is deemed to have taken place on the day the electronic transmission or fax transmission is sent, unless the transmission is sent on a day that the Director's office is closed or after 5:00 p.m. on any day. In those situations, s. 8(5) provides that the service is deemed to have been effected on the next day the office is open.

Generally, the Director's office is closed between 5 p.m. and 8:30 a.m. Monday through Friday, on Saturdays, Sundays, the nine public holidays under the ESA 2000 as well as Easter Monday, the August Civic Holiday, and Remembrance Day. See the definition of public holiday in ESA Part I, s. 1 for a list of the public holidays.

Same – s. 8(5)

8(5) Service shall be deemed to be effected on the next day on which the Director's office is not closed, if the fax or email is sent,

(a) on a day on which the Director's office is closed; or

(b) after 5 p.m. on any day.

When an employee serves their notice of civil proceeding on the Director via email or by fax after 5:00 p.m. on a regular business day, or at any time on a day when the Director's office is closed, s. 8(5) deems the service to have occurred on the next day the Director's office is open.

Generally, the Director's office is closed between 5 p.m. and 8:30 a.m. Monday through Friday, on Saturdays, Sundays, the nine public holidays under the ESA 2000 as well as Easter Monday, the August Civic Holiday, and Remembrance Day. See the definition of public holiday in ESA Part I, s. 1 for a list of the public holidays.

ESA Part IV - Continuity of Employment

The continuity of employment provisions in Part IV provide that where there is a sale of a business and an employee of the seller is hired by the purchaser, or where there has been a change of contractors for building services and an employee of the replaced provider is hired by the new provider, the employee's length or period of employment with their previous employer is treated as if it had been employment with the new employer with respect to rights under the *Employment Standards Act, 2000* that are determined by length or period of employment, i.e., vacation, pregnancy and parental leave, domestic or sexual violence leave, critical illness leave, crime-related child disappearance leave, child death leave, notice of termination or pay in lieu, severance pay, organ donor leave and reservist leave.

ESA Part IV Section 9 – Sale, etc., of Business

Sale, etc., of Business – s. 9(1)

9(1) If an employer sells a business or a part of a business and the purchaser employs an employee of the seller, the employment of the employee shall be deemed not to have been terminated or severed for the purposes of this Act and his or her employment with the seller shall be deemed to have been employment with the purchaser for the purpose of any subsequent calculation of the employee's length or period of employment.

Section 9(1) provides for continuity of employment for an employee when there is a sale of a business if the purchaser employs an employee of the seller, subject to the s. 9(2) rules regarding a gap between employment with the purchaser and the earlier of: (1) the last day of employment with the seller and (2) the date of the sale. In that case, the employee is deemed not to have had their employment terminated or severed for the purposes of the ESA 2000 and employment with the seller is included in any subsequent calculation of length or period of employment with the purchaser for entitlements to:

1. Vacation – Employees whose period of employment is less than five years are entitled to two weeks of vacation with pay upon completion of each 12-month vacation entitlement year: s. 33(1)(a) and employees whose period of employment is five years or more are entitled to three weeks of vacation with pay upon completion of each 12-month vacation entitlement year;
2. Pregnancy leave – Employees may be entitled to pregnancy leave if they have been employed for at least 13 weeks preceding the expected date of birth: s. 46(1);
3. Parental leave – Employees may be entitled to parental leave if they have been employed at least 13 weeks prior to commencing the leave: s. 48(1);
4. Organ Donor Leave – Employees may be entitled to organ donor leave if they have been employed at least 13 weeks prior to commencing the leave: s. 49.2(3);
5. Reservist Leave – Employees may be entitled to reservist leave if they have been employed at least six consecutive months prior to commencing the leave: s. 50.2(3);
6. Critical Illness Leave – Employees may be entitled to critical illness leave if they have been employed for at least six consecutive months prior to commencing the leave: s. 49.4(2) and (5);
7. Domestic or Sexual Violence Leave – Employees may be entitled to domestic or sexual violence leave if they have been employed for at least 13 consecutive weeks prior to commencing the leave: s. 49.7(2);
8. Crime-Related Child Disappearance Leave – Employees may be entitled to crime-related child disappearance leave if they have been employed for at least six consecutive months prior to commencing the leave: s. 49.6(2);
9. Child Death Leave – Employees may be entitled to child death leave if they have been employed for at least six consecutive months prior to commencing the leave: s. 49.5(2);
10. Written notice of termination or pay in lieu:
    - Employees may be entitled to notice or pay in lieu (including mass notice, s. 58) if they have been continuously employed for at least three months: s. 54;
    - Entitlement to one to eight weeks of notice or pay in lieu depends on length of employment: s. 57;
11. Severance pay:
    - Employees may be entitled to severance pay if they have been employed for at least five years: s. 64;
    - Entitlement to up to 26 weeks of severance pay depends on length of employment: s. 65.

Vacation

Under the former *Employment Standards Act*, it was the Program's position that the effect of s. 13 was to transfer the liability for employees' vacation pay accrued but not yet due at the time of the sale to a purchaser. This position was consistent with several referee decisions which found that, based on the language of s. 13 and based on the clear link between vacation time and vacation pay, a purchaser was liable for accrued vacation pay. Although the language in s. 9(1) is different from the wording in the former provision, the Program's position is that the policy intent remains the same. The Program is of the view that had the Legislature intended to change the rules regarding vacation pay in the context of the sale of a business, it would have dealt with vacation pay explicitly - for example, under s. 76(1) a building service

provider is required to pay accrued vacation pay upon ceasing to provide services at a premises and ceasing to employ an employee, there is no similar provision in s. 9.

The Program's policy is that both the employee's length of service and the vacation pay liability flow through the sale to the purchaser. However, the vacation pay liability only flows through the sale with respect to the accrued vacation pay that did not become due until after the sale. In other words, the seller is liable only for the vacation pay that was both accrued and due to the employee prior to the sale.

An exception to the flow-through rule occurs if the purchaser hires an employee of the seller more than 13 weeks after the earlier of the last day of the employee's employment with the seller and the date of the sale. In this situation, there is no continuity of employment under s. 9 and, therefore, the seller is liable for all vacation pay accrued by the employee to their last day of employment with the seller. In addition, the purchaser is not required to recognize the employee's length of service with the seller for the purposes of determining the employee's entitlements to vacation time under Part XI.

Part XIV Leaves of Absence

Section 9 does not require a purchaser to hire employees of the seller. As a result, the purchaser has no obligation to hire an employee of the seller who is on a statutory leave at the time of the sale. See Gonzalez v IBM Canada Limited, 2014 CanLII 14188 (ON LRB). Where the purchaser does hire the employee, it is the Program's position that the offer of employment may be made on whatever terms and conditions the purchaser chooses and so there is no statutory right to the "balance of the leave" commenced when the employee was employed by the seller, nor is there any obligation with respect to "reinstating" the employee to the same or a comparable job to the one held with the seller. For more information on Part XIV leaves of absence and reinstatement, see ESA Part XIV.

Termination Unrelated to Sale

Where an employee's employment is terminated and severed prior to the sale and for reasons unrelated to the sale, the question may arise as to whether s. 9 would apply.

Because the purpose of s. 9 is to "undo" a common law termination that would otherwise be triggered by the sale, it is the position of the Program that s. 9(1) does not apply where the termination or severance is not related in any way to the sale. For example, if an employee's employment was terminated by the seller for wilful misconduct and the employee was hired by the purchaser, s. 9(1) would not apply.

Inter-Jurisdictional Sale

It is the Program's position that there is no continuity of employment under s. 9 where there is an inter-jurisdictional sale, e.g., where there is a sale of a business from an employer that falls under provincial jurisdiction to an employer that falls under federal jurisdiction and vice versa. For additional information see the discussion at Part III, s. 3 on the sale of a business across jurisdictions.

For information on the Program's policy related to public holiday pay and a sale of business, refer to Part X, s. 24.

Definitions

Section 9(1) applies to a "sale" of all or part of a "business". These terms are broadly defined in s. 9(3) and s. 1(1) respectively as follows:

9(3) In this section,

"sells" includes leases, transfers or disposes of in any other manner, and

"sale" has a corresponding meaning.

1(1) In this Act, "business" includes an activity, trade or undertaking;

Section 9(1) applies to provide continuity of employment if:

1. An employer sells a business or part of a business; and
2. The purchaser of the business employs an employee of the seller, subject to the rules regarding a hiatus or gap in s. 9(2).

Determining Whether a Sale of a Business Has Occurred

Sale of a Business vs. Sale of Assets

It is sometimes difficult to determine whether a transaction involves a sale of a business or just a sale of assets. In a sale of assets, an employer sells items of property that it used in its business, but it does not transfer the actual business to the purchaser, even though it may discontinue its business following the sale. A sale of a business is sometimes described as a sale of a "going concern" or a "functional economic vehicle", but these are imprecise terms which may not provide much help in distinguishing a sale of a business from a sale of assets in practice.

The Ontario Court of Appeal in Abbott v Bombardier Inc., 2007 ONCA 233 (CanLII) considered the application of the going concern test and rejected its use on the basis that it did not accord with the purpose of section 9. The case involved a contracting out of information technology services where there was a significant transfer of assets and the purchaser agreed to make an offer of employment to each of the employees who performed the transferred functions and to recognize the past service of each employee who accepted the offer as if it had been employment with the purchaser. The Court found that the transaction constituted a sale of a part of a business under section 9 on the basis that the outsourced function was an "activity" for purposes of the definition of "business" in s. 1(1).

The Court held that a sale of a business arises ". . . where there was the transfer of a specific bundle of tasks and functions performed by an identifiable group of employees." While this appears to suggest that a mere contracting out transaction or outsourcing of a specific function may constitute a sale of a business, the decision must be considered in the particular context of the case. First, there was another indicator of a sale of a business, a transfer of significant assets - a substantial amount of computer equipment. Secondly, there was an obligation on the part of the purchaser to make offers of employment to the affected employees. Third, the employees were in fact transferred to the purchaser in accordance with the terms and conditions respecting their future employment with the purchaser as provided for in the agreement governing the transaction.

However, the presence of any of the following indicators generally points to a sale of a business:

- The seller has agreed not to compete with the purchaser (in some cases for a specified time or within a specific geographic area);
- The seller has agreed to give up use of its trade or corporate name or the purchaser plans to use or is using the name;
- The seller has given the purchaser client/supplier lists and other records used in its business;

- The purchaser has taken over the seller's outstanding contracts or customer accounts;
- The purchaser is marketing the same products or service as the seller did before the sale;
- The sale agreement specifically assigns the seller's "goodwill" to the purchaser.

While the existence of any of the above-mentioned factors points to a sale of a business, the absence of any of them does not mean that there was only a sale of assets. Further, the fact that the seller or purchaser calls the transaction a sale of assets does not make it one if, in actual fact, a sale of a business has occurred. Often, a seller and a purchaser will call the transaction a sale of assets for tax purposes when, in fact, it is a sale of a business for purposes of s. 9.

The issue as to whether a particular sales transaction involved the sale of a business or a part of a business (in either case, s. 9 would apply) or a sale of assets that may or may not be used in the operation of another employer's business (in which case s. 9 would not apply) has been the focus of many hearings under the former *Employment Standards Act*.

Referee Gorsky in McLaughlin Chevrolet-Oldsmobile Ltd. v Coombs (May 9, 1980), ESC 780 (Gorsky) cited the following test of what constitutes a sale of a business:

In deciding whether a transaction amounted to the transfer of a business, regard must be had to its substance rather than its form, and consideration must be given to the whole of the circumstances, weighing the factors which point in one direction against those which point in another. In the end, the vital consideration is whether the effect of the transaction was to put the transferee in possession of a going concern, the activities of which he could carry on without interruption.

The above is an excerpt from *Kenmin v Frizzell et al*, [1968] 1 All ER 414 (Eng QB) which appeared in an Ontario Labour Relations Board decision, Canadian Union of Public Employees v Metropolitan Parking Inc., 1979 CanLII 815 (ON LRB), from which Referee Gorsky cited at length.

In Mobile Mix Concrete Products (1971) Ltd. v McClain (October 29, 1974), ESC 206 (McNish), Referee McNish concluded that a sale of a business had occurred in light of the fact that the agreement of sale contained covenants by the vendor not to compete with the purchaser after the sale, and to give up the use of its corporate name and to deliver to the purchaser customer lists, salesmen's reports and production records.

Similarly, in 477286 Ontario Food c.o.b. as Vitto Brand Foods v Gilbank (September 18, 1981), ESC 1068 (Davis), Referee Davis ruled the transaction to be a transfer of a going concern and not a mere sale of discrete items of property because the purchaser used the vendor's trade name and packaging materials.

As previously noted, the lack of certain indicia of a sale of a business will not in itself take a transaction out of s. 9 where other indicia of such a sale are present. In Ontario Film Laboratories Ltd. v Pharand et al (July 8, 1980), ESC 814 (Aggarwal) the purchaser operated the same type of business as the vendor in the same premises with the same employees and with some of the vendor's assets. Referee Aggarwal concluded that s. 13(2), which corresponds to s. 9(1) in the ESA 2000, applied, notwithstanding the fact that the purchaser did not adopt the vendor's trade name.

In *McLaughlin Chevrolet-Oldsmobile Ltd. v Coombs*, the vendor's failure to assign outstanding contracts and to deliver up customer lists did not preclude a finding that a sale of a business had taken place where the purchaser had taken over the vendor's premises, employees, equipment and automobile dealer's franchise.

In *Cambridge Stampings Inc. v Harth and Barradell* (November 6, 1980), ESC 909 (Egan) Referee Egan held that the mere fact that the purchase made some post-sale alterations to both the machinery and the

product of the vendor's metal stamping business did not prevent the application of s. 13(2) in the former *Employment Standards Act*, which corresponds to s. 9(1) in the ESA 2000.

In Nathan Hennick & Co. Ltd. v Masci (September 25, 1978), ESC 550 (Davis), where a purchased factory ceased operations for a three-week period following its acquisition, Referee Davis nevertheless determined that a sale of a business had occurred, since the evidence showed that there had been no severance of customer relations after the transaction and since the vendor's past practice had been to close the plant for a similar period for annual vacation purposes.

In Cambridge Stampings Inc. v Harth and Barradell, Referee Egan found that that while the fact that an agreement of purchase and sale which specifically provides for a transfer of goodwill is often cited as evidence that a business has been sold, ". . . the absence of goodwill is not conclusive of the contrary."

In 446816 Ontario Inc. c.o.b. Centreside Dairy v Popplewell (September 23, 1982), ESC 1286 (Fraser), Referee Fraser found that a lack of an express assignment of goodwill does not prevent a determination that there was a de facto transfer. In that case, the vendor had given a 10-year non-competition covenant and the purchaser had assumed all of the vendor's regular customers.

In Revin v Lamantia Garcia Products Ltd., 2008 CanLII 790 (ON LRB), the Board concluded that there had been a sale of a business even though there was no goodwill or even purchaser loyalty that could be transferred. In that case, the vendor assigned the lease of its stall at the Ontario Food Terminal and sold about $80,000 worth of fruit and vegetable inventory in it to the purchaser. The Board cited Abbott v Bombardier Inc. in taking the position that a sale of a business for the purposes of s. 9 of the ESA 2000 did not require the transfer of a going concern. Rather, the Board found that the purchaser had bought a very valuable business asset in the form of the lease of the stall and had purchased all of the vendor's fruit and vegetable inventory pursuant to the *Bulk Sales Act.* It had effectively purchased all that could be purchased of the vendor's business and then expanded its own business into an area previously carried on by the vendor. As such, it amounted to a sale of a business for the purposes of s. 9.

A purchaser who acquires assets such as premises and equipment from a vendor and who employs the vendor's employees does not remove itself from the ambit of s. 9(1) merely because it makes changes in the nature of the business formerly carried on by the vendor; if the purchaser continues on with a part of the vendor's undertaking, s. 9(1) will apply. For example, in Centreside Dairy v Popplewell, the vendor had operated a dairy primarily to process and to distribute milk, but had also manufactured and distributed ice cream. The purchaser of the dairy ceased milk processing altogether to devote the purchased facilities exclusively to the manufacture of ice cream, but it did arrange for the distribution by its delivery men of milk processed by another dairy. The referee held that because the sales operation of the business (as opposed to its production operation) continued unchanged after the purchase, the transaction could be characterized as the acquisition of "a part" of an activity, trade or undertaking, which fell within the definition of business – note that definition is similar to the one now contained in ESA Part I, s. 1(1).

Somewhat similar in effect is Lakehead Rent-Alls Limited v Estate of Karl Kuzik (October 17, 1981), ESC 1048 (Davis), where the purchaser and vendor had both carried on the business of renting and selling equipment from the same premises with the same employees. Referee Davis held that s. 13, which corresponds to s. 9 in the ESA 2000, was applicable despite the fact that the purchaser's marketing strategy was to concentrate on consumer rentals whereas the vendor had emphasized industrial sales.

Sale of a Business vs. Sale of Shares

In law, a corporation is regarded as having a separate existence from the person or persons who own it. Note that ownership of a business corporation is represented by shares. A person who owns more than 50 per cent of the shares is said to have a controlling interest in the corporation.

Therefore, where employees are employed by a corporation and the shares of the corporation change hands, the corporation and hence, the employer, is regarded as being unchanged, notwithstanding that the corporation now has new owners. In other words, the sale of a company's shares will not in itself give rise to a new employment relationship, given that the company, as a legal entity, is not changed by the transfer of its share capital to a new owner. Accordingly, s. 9 has no application to a sale of shares in a corporation. It is not necessary to give the protection of s. 9 in such a case because the accrued length or period of employment of the corporation's employees remains unaffected by a change in the corporation's owners.

Where an employee is employed by Corporation A, the shares of which are subsequently purchased by Corporation B, the employee who moves from A to B is considered to continue to be employed by the same employer, and their accrued length or period of employment with A is recognized without the application of s. 9.

An exception to this principle would occur, however, if the purchaser subsequently moved to wind up the seller corporation, or amalgamate it with another, with the result that the employees of the seller are now employed by another entity. In such cases, a sale transaction would likely be found to have occurred, either at the time of the transfer from the seller or subsequent winding up or amalgamation. In that case, s. 9 would apply. Each case however must be assessed on its own facts.

Receiverships

Where a receiver, acting on the instructions of a secured creditor of a debtor employer, is appointed to assume control of the employer's business, the end result will be either that the business is wound up or that it is sold as a going concern to a purchaser.

If the receiver opts for a wind-up, it may liquidate the assets of the business immediately following its appointment. Sometimes, however, the business will be wound up gradually, so as to maximize recovery for the secured creditor. Typically, loan agreements signed by debtors authorize the secured lender to appoint a receiver if default occurs. Such agreements usually provide that if a receiver is appointed, the receiver will be considered as agent for the debtor in carrying out the wind-up.

Secured creditors can also apply to the court for an order appointing a receiver. In such cases the receiver is acting as an officer of the Court. Any proceeds collected by a court appointed receiver are distributed through court orders.

Obviously, the appointment of a receiver raises many potential issues concerning the application of s. 9. If the debtor employer's employees continue working for the receiver for a time following its assumption of control over the business, the question might arise whether s. 9(1) applies so as to result in continuity of employment following the receiver's appointment. And if the receiver, instead of liquidating the business, sells it as a going concern, and the purchaser retains the employees of the business, the issue of whether the purchaser inherits the employees' accrued seniority would come into play.

Referees have consistently held that the involuntary nature of a disposition does not prevent it from being characterized as a sale within the meaning of s. 13(2), which corresponds to s. 9(1) in the ESA 2000. In Hotel Esquire (St. Catharines) Ltd. v Hands et al (May 31, 1982), ESC 1233 (Roberts) the referee held that the business of mortgagor assumed by mortgagee upon foreclosure. In Nathan Hennick & Co. Ltd. v Masci and Hentschell Clocks Canada (1977) Ltd. v Clarke (April 23, 1981), ESC 987 (Howe), the referees found that the sale of a business as a going concern by receiver. Accordingly, the fact that a business

"changed hands" as a result of the appointment of a receiver does not preclude the application of s. 9(1). However, the appointment of a receiver will not generally constitute a "sale" such that that a receiver will be considered a "purchaser" for the purposes of s. 9 - see Armstrong et al v Coopers & Lybrand Ltd. et al, 1986 CanLII 2621 (ON SC). Rather, where the receiver sells the business, it is the purchaser of the business who may be subject to the continuity of employment provisions. As noted in Brandwood v Renfrew Inn Holdings Ltd. (November 15, 1994), ESC 94-212 (Genge), the receiver in such a case is acting as a conduit between the insolvent business and the purchaser. Employees who resign their employment between the time when the receiver is appointed and when the final sale to a purchaser is completed will not be entitled to termination and severance pay – see Brandwood v Renfrew Inn Holdings Ltd..

It follows from the foregoing that:

1. Where the receiver does not operate or sell the business but rather liquidates the assets, no s. 9(1) issue arises because there has been no sale of a business. It is the Program's position that the debtor employer is liable for any termination and severance pay owing in respect of the employees' service with the employer.
2. Where the receiver operates the business for a time for the purpose of maximizing realization but eventually liquidates the assets instead of selling the business, no s. 9(1) issue arises because there has been no sale of a business. In such a situation, ownership of the business was not transferred, but rather rested legally with the debtor employer to the date the assets were sold. It is the Program's position that the debtor employer will therefore be responsible for any termination pay or severance pay with respect to the employees' employment before the wind-up was finally effected, and that the receiver will not have any personal liability in this respect.
3. Where the receiver sells the debtor employer's business as a going concern and the purchaser hires the debtor's employees, s. 9(1) does apply, subject to the rules concerning a hiatus or gap, s. 9(2). The employees' service with the debtor, including service during the period of the receivership, is regarded as service with the purchaser for the purposes of any subsequent calculation of the employees' length or period of employment, regardless of whether, prior to the sale, the debtor-employer or the receiver gave termination notice or pay in lieu.

Bankruptcies

Trustee Sells Business

Where the employer becomes bankrupt, a trustee is appointed under the *Bankruptcy and Insolvency Act*. If the trustee then sells all or part of the business to a purchaser, who employs employees of the bankrupt employer, s. 9 will apply, subject to the rules concerning a hiatus or gap in s. 9(2). Employees will not be considered to be automatically terminated by the appointment of the trustee if the trustee sells all or part of the business. Furthermore, the purchaser, upon subsequently terminating any of the employees, will have to recognize their length or period employment with the purchaser, plus that with the bankrupt company which includes employment for the period the company's estate was under the trustee's administration.

See for example:

- Bendall v Three Penguins Inc. o/a Sketchley Cleaners (December 3, 1992), ES 215/92 (Randall);
- 359027 Ontario Limited c.o.b. Yolles Furniture v Penny (December 14, 1977), ESC 466 (Burkett);
- The Cambridge Towel Corporation v Kells (June 5, 1980), ESC 815 (Gorsky);

- Schievan et al v Durham Furniture Co. (AprIL 27, 1994), ESC 94-90 (Randall).

Example:

- Employee hired by A Co. - June 30, 1995
- Trustee in bankruptcy appointed for A Co. - June 30, 2002 (Trustee retains employee)
- Trustee sells business of A Co. to B Co. - December 31, 2002 (B Co. hires employee)
- B Co. terminates employee - June 30, 2003

The employee would not be entitled to termination and severance pay until their termination by B Co. At that time, the employee's length of service for purposes of termination and severance pay would be eight years.

Trustee Does Not Sell Business

In a situation such as the above, but with the difference that there is no sale of the business and the employee is terminated/severed (including a deemed termination/severance resulting from a lay-off), the employee is entitled to termination and severance pay based upon their length of employment with the bankrupt employer (which includes employment with the trustee in bankruptcy). The claim is against the estate of the company, and is made by filing a proof of claim.

Vacation Pay Liabilities in 1 and 2 above

Where the trustee does not sell the business, a proof of claim for the vacation pay relating to the employee's employment with the insolvent employer (both accrued and due) would be filed with the trustee if an employee in such a situation worked for the trustee, any vacation pay relating to the period of employment with the trustee would be paid out of the bankrupt company's estate. Note that these expenses are not, in general, a personal liability of the trustee.

Where the trustee sells the business and s. 9 provides continuity of employment, an employer that purchases a bankrupt business from a trustee will be liable for the vacation pay that accrued while the employee was working for the bankrupt employer provided that the vacation pay has not already have become due under the bankrupt employer. Therefore, the officer may issue an order to pay against the purchaser of the business for vacation pay that accrued during employment with the bankrupt company (including employment with the trustee) but did not become due until sometime after the employee had commenced employment with the purchaser.

Example:

- Employee's vacation pay is due 10 months after completion of each 12 months of employment.
- Employee hired by A Co. (vacation year is based on anniversary date) – June 30, 1998
- Trustee in bankruptcy appointed for A Co. (trustee retains employee) – June 30, 2002*
    - * $2400 in V.P. accrued June 30, 2000, to June 2001 - due on April 30, 2002, but unpaid, plus $2400 in V.P. accrued June 30, 2001, to June 30, 2002, accrued but not due until April 30, 2003
- Trustee sells business of A Co. to B. Co. (Proof of claim filed for $2400 in V.P. for period June 30, 2000 to June 30, 2001) – December 31, 2002
- B Co. hires employee – December 31, 2002

- $2400 V.P. accrued June 2001 to June 2002 is due (10 months after June 30, 2002) – April 30, 2003

In the above-noted example, a proof of claim could be filed with the trustee for $2,400 in vacation pay that had accrued in the period June 30, 2000, to June 30, 2001, and was due April 30, 2002 (i.e., due prior to the appointment of the trustee). On April 30, 2003, the officer could issue an order to pay to B. Co. for the $2400 in vacation pay that accrued while the employee was employed by A. Co. from June 30, 2001, to June 30, 2002, but which came due after the employee commenced employment with B. Co. (The purchaser of the business would also be liable for vacation pay accrued between the date the trustee was appointed (June 30, 2002) and the date of the sale December 31, 2002) but only when that vacation pay came due.

In support of Program policy in this regard, see Sis Cronin, a division of Urus Industrial Corporation v Hurdis (March 21, 1994), ESC 94-69 (Randall).

Foreclosures

Occasionally, a secured creditor will exercise whatever rights they have to foreclose on a debtor employer's business. This typically means that the secured creditor takes the business in satisfaction of the debt rather than hiring a receiver to sell the business. Where this occurs, and the creditor continues to operate the business and retains the debtor's employees, s. 9(1) applies – see Hotel Esquire (St. Catharines) Ltd. v Hands et al. In this case, the secured creditor's position is, for the purposes of s. 9(1), tantamount to that of a purchaser of the business.

Landlord's Right of Distraint

When a landlord exercises a right of distraint on the assets of a tenant/employer to recover arrears of rent, it generally does so by securing control of the equipment, inventory and other assets located in the leased premises. This is done with a view to selling the assets to recover arrears of rent. In such cases, s. 9 will typically have no application. However, if the landlord enters the premises and carries on the operation of the business and retains its previous tenant's employees, it may be considered to be a purchaser of the business as per the discussion on secured creditors above.

Franchise Situations

Generally speaking, s. 9(1) will not apply in the franchise or concession type of situation. Such situations by and large do not involve a transfer of a business directly between the old franchisee and the new franchisee, but rather involve two separate transactions in which the franchise rights held by the old franchisee first revert to the franchisor and then are reconveyed by the franchisor to a new franchisee. There may, in a sense, be a transfer of a business from the original franchisee to the franchisor, followed by a second transfer of a business from the franchisor to the new franchisee, but s. 9(1) cannot apply to these transfers individually unless they are accompanied by a parallel movement of employees. Since the franchisor himself does not usually enter into an employment relationship with the original franchisee's employees in the course of the transactions, there is no basis on which s. 9(1) can be applied, even though those employees may ultimately end up working for the new franchisee.

While the treatment of franchises and concessions in labour law is a rather complicated and difficult matter, the following rule should be of assistance in dealing with these kinds of transactions:

Where employer X has a franchise or some other key contract from franchisor Y, and it gives it up or loses it and a third party Z then acquires the franchise or other key contract and hires X's employees, s. 9(1) will not apply, unless:

- X transferred the franchise directly to Z (as opposed to Y taking back the franchise and the reassigning it to Z); or
- Y, when taking back the franchise from X, hired X's employees before reassigning the franchise to Z (who hired the employees in turn).

A typical example of a franchise operation is a service station; the station operator (X) acquires from an oil company (Y) the right to sell its product and to display its name. The oil companies usually will not permit station operators to sell the franchise; instead, the operator will have to give it up, and the oil company itself will sell the franchise to a new franchisee (Z). Generally, the oil company will not enter into an employment relationship with X's employees, and while usually there would be no need for them to do so (since Z will probably take over from X with virtually no interruption in the activity of the service station), the fact that the oil company does not hire X's employees means that there is no basis on which s. 9(1) can be applied.

The opinion of most referees has been that where there is no direct assignment of the contract (franchise) from the original contractor (old franchisee) to the third party (new franchisee), there is no sale of a business to which s. 9(1) can apply, and hence, there is no continuity of employment.

In Burbank Automotive Ltd. v Wilson (March 21, 1978), ESC 493 (Davis), X had carried on business as a service station operator, but retired, terminating both his lease of the station premises from Shell Oil and his product supply and exclusive marketing contracts, also with Shell. Immediately upon termination, Shell gave a new lease to Z and entered into similar supply and marketing agreements with Z, who employed all of X's former employees. The only transaction directly between X and Z was the sale of a truck and some stock in trade. Referee Davis held that this small isolated transaction could not be viewed as a sale of a business between X and Z, and went on to conclude that the business must be seen as having first been transferred from X to Shell and then from Shell to Z. Shell was the owner of the business for a notional instant in time, and the transfer of the business from X to Shell (not having been accompanied by a corresponding transfer of employees to Shell) effected a termination, even if there was, practically speaking, no interruption in employment.

Results similar to those in Burbank Automotive Ltd. v Wilson were obtained in Phil Coutu Limited v Talbot (September 30, 1982), ESC 1294 (Davis) and Cecil B. Carter o/a Shell Service Centre v Walker (February 28, 1981) ESC 957 (Saltman). The only ruling by a referee in which s. 13(2), which corresponds to s. 9(1) in the ESA 2000, was held to be applicable in these circumstances was Joe Hinschberger c.o.b. Joe's Gulf v Spicer (March 4, 1982), ESC 1161 (Hunter), which, for a number of reasons, is not considered by the Branch to be convincing counter-authority to the Burbank Automotive decision.

In conclusion, it is difficult to see how, in its present wording, s. 9(1) can be interpreted to apply to a supposed sale which is actually a two-stage transfer (from X to Y to Z), and in which Y does not employ X's employees, even though they are employed by Z. Accordingly, the current policy of the Program in such cases is that there is no continuity of employment, and when X discontinues its operation of the business, a termination of employment occurs. Note, however, that s. 9(1) will apply where Y does hire X's employees, or where X assigns the key contract directly to Z.

Determining whether Employees of the Seller are Employed by the Purchaser

In addition to the requirement that there be a sale of a business in order for s. 9(1) to operate, there must also be a purchaser who employs an employee of the seller. Subsection 9(1) does not have the effect of

obligating the purchaser of a business to hire the seller's employees. If the purchaser does not hire the employees, s. 9(1) has no application.

It should also be noted that if the purchaser opts to hire the seller's employees, s. 9(1) does not require that the purchaser hire the employees on the same terms and conditions of employment as the seller had offered. Subsection 9(1) would apply to provide the employees with continuity of employment even though the purchaser hired the seller's employees at a wage rate lower than that which they had been earning in the seller's employ.

There are several referee and adjudicator decisions which state that s. 13 of the former *Employment Standards Act* **(**now s. 9) does not apply where the purchaser employs the employees on terms that are "radically different" from those which the employees had with the vendor, e.g., Berdan et al v Dunlop Construction Products Inc. (June 18, 1993) ES 93-117 (Muir). However, these are contrary to Program policy and should not be followed on this particular point.

Program policy is that if the purchaser does employ the employees of the seller, it cannot avoid the application of s. 9(1) by relying on any of the following:

1. The employee signed an application for employment and went through a selection process, including an interview.
2. The employee is working under entirely new terms and conditions of employment.
3. The employee has acknowledged, in writing or otherwise, that this is a new contract of employment with no seniority carried forward.

The provision of continuity of employment for certain purposes of the ESA 2000, and the purchaser's obligation to honour it, is an employment standard which cannot be contracted out of or waived by either the employee or employer or their representatives.

As previously mentioned, the fact that an employee is employed by the purchaser in a different position than they held with the vendor does not prevent s. 9(1) from operating. In T.A.S. Investments Limited v Kleinert (April 20, 1978), ESC 508 (Springate), continuity was held to flow through regardless of the fact that the employee was employed by the vendor as a store manager but was only employed by the purchaser to maintain the store's financial and payroll records. Likewise, if the purchaser employed the employee on a "term or task" basis, there will still be continuity of employment under s. 9(1). Note that there is one adjudicator's decision to the contrary on that point – see *Penrose et al v Maher Inc. in Bankruptcy c/o Ernst & Young Inc.* (August 24, 1994), ESC 94-155 (Wacyk).

On the other hand, there is nothing that obliges the employee to accept employment with the purchaser, even if that employment is exactly the same position with identical terms and conditions of employment. The employee always has the option of rejecting the purchaser's offer of employment, and treating the vendor's sale of the business as a termination and severance of employment.

Referee Davis in *Galante c.o.b. as Fredy's Barber Shop v Shaw* (January 13, 1982) ESC 1125 (Davis) upheld this option, although with no express reference to s. 13(2) of the former *Employment Standards Act***,** which corresponds to s. 9 in the ESA 2000. In that case, the owner of a business had decided to sell it but did not inform his employees of the impending sale. He planned to announce it to them at the closing, at which time he was going to give them termination pay. As he was about to make the announcement, one of the employees, who had heard that there was to be a sale and felt that the purchaser of the business would be unlikely to hire him, lamented that there would be no work for him and announced that he was "leaving". The employer argued that he was not liable for termination pay because the employee had quit, but the referee held that the employee lacked this intention and had left because he had concluded that his employment was being terminated by the sale. The employer's

contention that he should not be ordered to pay termination pay, because the employee's abrupt departure had precluded him from putting forward employment alternatives (such as employment by the purchaser or by the vendor at a different location) for the employee's consideration, was rejected on the grounds that these alternatives represented not a continuation of the existing employment relationship, but the formation of a new employment relationship.

In order for there to have been "employment by the purchaser", it is not necessary for the purchaser of a business to make an express statement offering employment to the seller's employees. It is enough that the purchaser knowingly allows the employees to continue working in the business following the sale. However, this rule should not be applied too narrowly. Where, for example, a sale of a business occurs during an employee's shift, the purchaser will not be considered to have employed the employee for the purposes of s. 9(1) merely because the employee works through to the end of his shift, if the business is such that termination at the precise moment of the sale would be impractical and if the employee never enters into any agreement with the purchaser and performs no further work for them. See the decision of Agincourt Motor Hotel Limited v Flannigan et al (August 19, 1982), ESC 1272 (Davis).

Other Issues

Purported Termination by Seller

In Ontario (Employment Standards Officer) v Equitable Management Ltd. (Div Ct), 1990 CanLII 6973 (ON SC) the Divisional Court held that s. 13(2) of the former *Employment Standards Act,* which corresponds to s. 9 in the ESA 2000, applied even if the seller gave notice of termination. This decision accords with the intent of the continuity provisions, which is to ensure that credit for an employees' past employment with the seller is not lost when they are hired by the purchaser, subject to the rules regarding a gap between employment with the seller and employment with the purchaser in s. 9(2). It is Program policy that the employee also retains credit of their past employment with the seller where the seller, instead of giving notice of termination, gives pay in lieu of notice.

Termination and Severance Liabilities where Purchaser Does Not Employ Employee of Seller

In the case of a sale of a business where an employee terminated by the seller is not hired by the purchaser within the 13-week period set out in s. 9(2), the seller must comply with Part XV, that is, must provide proper notice of termination or pay in lieu thereof, and severance pay, where applicable.

It is important to note that s. 9:

1. Does not obligate the purchaser of the business to hire the seller's employees; and
2. Allows the employee to reject an offer of employment from the purchaser and to instead treat the sale of the business as a termination by the seller.

The purchaser is not obligated to hire the seller's employees whether they are currently working, on lay-off, sick leave, a leave of absence or workers' compensation.

The employee is under no obligation under the ESA 2000 to accept employment with the purchaser and their refusal does not disentitle them to termination notice, or pay in lieu or severance pay. This is so even if the purchaser is offering the same terms of employment or reasonable alternative employment.

It sometimes happens that the sale contract between the seller and the purchaser will contain a provision obligating the purchaser to offer employment to some or all of the seller's employees. However, if the seller, relying on the contract, does not provide notice of termination to its employees but the purchaser does not end up making an offer after all, it is the seller who is responsible for the termination pay and

severance pay, since it is the one who terminated and severed its employees' employment. There is no basis in the ESA 2000 for holding the purchaser liable, despite what was in the sale contract, although the seller may be able to sue the purchaser civilly.

Termination and Severance Liabilities where Purchaser Employs Seller's Employees and Terminates/Severs

Where a purchaser does employ the seller's employees following a sale in accordance with s. 9 but later terminates their employment, there is no pro rata division of liability for termination pay between the seller and purchaser. The subsequent responsibility for complying with Part XV requirements based on length of employment with both the seller and the purchaser lies solely with the purchaser.

Further, the purchaser is not entitled to any credit for termination pay or notice of termination that was previously paid or provided by the seller at the time of the sale. However, if the seller had paid severance pay at the time the employees lost their employment with it, that amount may be offset against the purchaser's subsequent liability as a contractual payment based on length of employment or seniority per paragraph 3 of s. 65(8).

Exception – s. 9(2)

9(2) Subsection (1) does not apply if the day on which the purchaser hires the employee is more than 13 weeks after the earlier of his or her last day of employment with the seller and the day of the sale.

While in many sale situations, the employee's first day of employment with the purchaser will follow immediately after their last day of employment with the seller, there will also be situations where there are short interruptions in employment. Section 9(2) provides, in effect, that s. 9(1) will apply only if no more than 13 weeks separates the first day of employment with the purchaser and the earlier of:

1. The employee's last day of employment with the seller; or
2. The day of the sale.

The term "last day of employment with the seller" simply means the last day on which the employee is employed by the seller for purposes of the ESA 2000. Bearing in mind that both active and inactive employment counts as employment for purposes of ESA Part XV, s. 59(1) and ESA Part XV, s. 65(2), this includes time spent on lay-off up to the point at which a termination or severance is triggered. Note that for purposes of s. 9(2), the first day of the lay-off is not considered the last day of employment with the seller. While some might argue that it should be so considered because of s. 56(5), which deems the first day of a lay-off that ends in termination to be the day on which the employee's employment is terminated, this argument ignores the fact that s. 9(2) refers to the last day of employment, not the day on which the employee's employment was deemed terminated; it also ignores the fact that s. 9(2) applies for all rights under the ESA 2000 that depend on how long an employee has been employed and not just for purposes of notice of termination or termination pay in lieu.

If an employee on lay-off is potentially entitled to both termination pay and severance pay, their last day of employment will be considered, for purposes of s. 9(2), to be the later of: (1) the day on which a termination is triggered, and (2) the day on which a severance is triggered. For example, if an employee who is potentially entitled to both termination pay and severance pay is put on lay-off and benefits are not maintained and none of the other conditions described in ESA Part XV, ss. 56(2)(b) or (c) are met, their employment is considered terminated once more than 13 weeks have passed, and severed once 35 weeks had passed. For purposes of s. 9(2), therefore, their last day of employment is considered to be

the final day of the 35th week; if the purchaser hired the employee within 13 weeks of the earlier of that day and the day of the sale, there would be continuity insofar as any subsequent calculation of length of employment or period of employment was concerned.

If the employee did not have a potential entitlement to severance pay, for example, because they would not have accumulated five years of employment with the employer in total as of the end of 35 weeks of lay-off, or because their employer did not have a payroll of at least $2.5 million, the last day of employment would be considered to be the final day of the 13th week of lay-off; if the purchaser hired the employee within 13 weeks of the earlier of that day and the day of the sale, there would be continuity insofar as any subsequent calculation of length of employment or period of employment was concerned.

Example 1:

- If an employee were laid off one week before the date of the sale and the lay-off ceased to be temporary 13 weeks later (and assuming the seller had no severance obligations with respect to the employee), the employee's last day of employment would be 12 weeks after the date of the sale.
- In this case, employee continued to be employed (i.e., was on a temporary lay-off) with the seller of the date of the sale. In order to trigger the continuity of employment obligations in s. 9, the purchaser would have to hire the seller's employee within 13 weeks of the sale date.

Example 2:

- Employee A is placed on temporary lay-off 20 weeks before the date of the sale and ceased to be on temporary lay-off for notice of termination purposes seven weeks before the date of the sale but continued to be on lay-off for severance purposes until 15 weeks after the sale date.
- In this case, the employee continued to be employed (i.e., was on a lay-off that had not yet resulted in severance) with the seller as of the date of the sale. In order to trigger the continuity of employment obligations in s. 9, the purchaser would have to hire the seller's employee within 13 weeks of the sale date.

It should also be noted that the deemed termination date as set out in ESA Part XV, s. 56(5) has no application with respect to any subsequent liability a purchaser may have for notice or termination pay where there is continuity of employment under s. 9, because under s. 9(1), the employment would be deemed not to have been terminated at the time of the sale, even if the employee was not hired by the purchaser until after the lay-off had exceeded the period of a temporary lay-off.

Example:

- Employer A sells business to employer B on June 14, 2012.
- A's employee is laid off on June 7, one week before the sale date.
- Temporary lay-off for notice of termination purposes ends September 6, the day on which the employee has been on lay-off for more than 13 weeks, 12 weeks after the sale date.
- Pursuant to s. 56(5), the employee's employment would be deemed to be terminated on June 7, the first day of lay-off.
- However, for the purposes of s. 9, A's last day of employment is considered to be September 6.

- Section 9(1) applies because employer B hired the employee on or before September 13, the date that is 13 weeks after the earlier of (1) the last day of employment with the seller and (2) the day of the sale.
- Employer B subsequently terminates the employee's employment.
- Under s. 9(1), the employee's employment was deemed not to have been terminated by employer A and the employee's employment with employer A is attributed to employer B.

Definitions – s. 9(3)

9(3) In this section, "sells", includes leases, transfers or disposes of in any other manner, and "sale" has a corresponding meaning.

This is an inclusive definition, giving sale a broader meaning than it has in normal usage. For example, a sale would not normally include a transfer of a business by way of a gift or inheritance. However, since this section defines a sale to include "transfers or any other manner of disposition", such a transfer would be considered a sale for the purposes of s. 9.

However, a "contracting out" (or "contracting in") of services, without more, is not usually considered a sale, even within the meaning of the expanded definition in s. 9. The contracting in/out of services is distinguished from a sale of business because the former typically involves simply a change in the way in which some function ancillary to the business is carried out rather than anything that could be said to amount to the transfer of a business or a part of a business. For example, if a retail employer had in the past provided its security staff with in-house self-defence training and subsequently engaged a private company to provide that training; it would be characterized as a "contracting out of services" rather than a sale.

It is important to note that determining whether what has taken place is a sale of business (or part of a business) or is instead merely a contracting out or contracting in is very much a fact-specific determination. See, for example, the discussion of the Abbott v Bombardier Inc.

Predecessor Acts – s. 9(4)

9(4) For the purposes of subsection (1), employment with the seller includes any employment attributed to the seller under this section or a provision of a predecessor Act dealing with sales of businesses.

Section 9(4) ensures the flow-through of length or period of employment attributed to a seller under the provisions of the current ESA 2000 or former *Employment Standards Act*.

Example:

- Employee hired by Corporation A - September 1, 1990
- Corporation A sells business to Corporation B – January 1, 1994
- Employee is hired by Corporation B – January 1, 1994
- Corporation B sells business to Corporation C – January 1, 2002
- Employee is hired by Corporation C – January 1, 2002
- Corporation C sells business to Corporation D – January 1, 2006

- Employee hired by Corporation D – January 1, 2006

In this example, pursuant to s. 9(4), the employee's employment with corporations A, B and C will be treated as if it was employment with corporation D for purposes of those rights under the ESA 2000 that depend on period or length of employment.

This is because under the former *Employment Standards Act*, the sale from A to B and B's hiring of the employee resulted in the employee's employment with A being attributed to B. The sale from B to C and C's hiring of the employee occurred after the current Act had come into force, and it resulted in the employment with B – including employment with A that was attributed to B under the former *Employment Standards Act* – being attributed to C. Likewise, the sale from C to D and D's hiring of the employee resulted in the employment with C – including employment with A and B that was attributed to C – being attributed to D.

ESA Part IV Section 10 - New Building Services Provider

New Building Services Provider – s. 10(1)

10(1) This section applies if the building services provider for a building is replaced by a new provider and an employee of the replaced provider is employed by the new provider.

This provision is similar to ss. 13.1(2) and 13.1(3) in the former *Employment Standards Act*. It defines the circumstances in which s. 10 will provide continuity of employment when a provider of building services is replaced by a new provider and the new provider employs any of the replaced provider's employees (subject to the rules regarding a hiatus or gap, s. 10(3)).

Definitions

The terms "building services" and "building services provider" are defined in s. 1(1) of the ESA 2000 as follows:

Building Services

1(1) "building services" means services for a building with respect to food, security and cleaning and any prescribed services for a building;

The definition of building services must be read in conjunction with s. 1 of O Reg 287/01, which prescribes additional "building services":

The following are prescribed as services for a building for the purposes of the definition of "building services" in s. 1 (1) of the Act:

1. Services that are intended to relate only to the building and its occupants and visitors with respect to,

i. a parking garage or parking lot, and

ii. a concession stand.

2. Property management services that are intended to relate only to the building.

Building Services Provider

1(1) "building services provider" or "provider" means a person who provides building services for the premises and includes the owner or manager of a premises if the owner or manager provides building services for premises the person owns or manages.

These terms are discussed in more detail in ESA Part I, s. 1 and O Reg 287/01 of the Manual with respect to the termination and severance obligations of building services providers in Part XIX of the ESA 2000 (Building Service Providers) when employees of a replaced provider are not hired by the new provider.

Section 10(1) applies to provide continuity of employment if the following criteria are met:

1. The former building services provider is replaced by a new provider; and
2. An employee of the replaced provider is employed by the new provider.
    - This criterion is met if any employee of the replaced provider is employed by the new provider, including, for example, employees such as office managers who worked only at the replaced provider's head office. In other words, s. 10 is not restricted in its application only to those employees who were engaged in actually providing building services.
    - This is to be contrasted with s. 75, which establishes a special rule regarding termination pay and severance pay liabilities where there is job loss in the context of a change in building service provider: s. 75 applies only to an "employee of the replaced provider who is engaged in providing services at the premises and whom the new provider does not employ." See Betts v Brookfield Lepage Johnson Controls Facility Management Services Ltd., 2007 CanLII 12199 (ON LRB).

Application

1. The Former Building Services Provider is Replaced

Section 10 applies where a building services provider stops providing services to a building and is "replaced" by a new provider. In order to "replace" the former building services provider, the two providers must be providing the same general category of building services at the premises. If, for example, a building owner discontinued its food service contract with A and contemporaneously entered into a security services contract with B, it would be difficult to see how B could be said to be "replacing" A at the premises.

2. An Employee of the Replaced Provider is Employed by the New Provider

As noted above, s. 10 will apply to create continuity of employment only if the new provider hires an employee of the replaced provider (subject to the time limits in s. 10(3)). One issue that arises is how s. 10 applies if either the replaced provider or the new providers falls under federal jurisdiction:

i. If the new provider is under federal labour jurisdiction, e.g., a bank, and contracts in services that were previously contracted out, does s. 10 apply?

Section 10 does not apply. The ESA 2000 only applies to employees and their employers (both replaced and new providers) who are provincially regulated, s. 3(2). Therefore, the new provider would not be required to consider the employee's length or period of employment with the replaced provider.

ii. What happens if the replaced provider is under federal labour jurisdiction and contracts the work out to a new provider under provincial labour jurisdiction?

Again, s. 10 does not apply because employment with an employer under federal jurisdiction would not be attributable to the new provider. This may arise as the reverse of the situation described above, e.g., where a bank (which is under federal labour jurisdiction) uses its own in-house staff to perform security services, but then contracts out those services to a security company.

See *Rostrust Investments Inc./Investissements Rostrust Inc. v Doxtater*, 2006 CanLII 41431 (ON LRB) in which the Board concluded that the continuity of employment provisions in the ESA 2000 did not apply where the former provider (Rostrust Investments Inc.) fell under provincial jurisdiction and the new provider (Public Works and Government Services Canada) fell under federal jurisdiction on the basis that s. 3(2) of the ESA 2000 specifically provides that the ESA 2000 does not apply if the employment relationship is within the jurisdiction of the federal government.

No Termination or Severance – s. 10(2)

10(2) The employment of the employee shall be deemed not to have been terminated or severed for the purposes of this Act and his or her employment with the replaced provider shall be deemed to have been employment with the new provider for the purpose of any subsequent calculation of the employee's length or period of employment.

Section 10(2) provides for "continuity of employment" for an employee when there is a change in the provider of building services at a building if the new provider employs an employee of the replaced provider (subject to the s. 10(3) rules regarding a gap between employment with the new provider and the earlier of: (1) the last day of employment with the replaced provider and (2) the date the new provider began servicing the premises). In that case, the employee is deemed not to have had his or her employment terminated or severed for the purposes of the Act and employment with the replaced provider is included in any subsequent calculation of length or period of employment with the new provider for entitlements to:

1. Vacation: Employees whose period of employment is less than five years are entitled to two weeks of vacation with pay upon completion of each 12-month vacation entitlement year - s. 33(1)(a) and employees whose period of employment is five years or more are entitled to three weeks of vacation with pay upon completion of each 12-month vacation entitlement year;
2. Pregnancy leave: An employee may be entitled to pregnancy leave if their due date is at 13 weeks after the date they commenced employment – s. 46(1);
3. Parental leave: Employees may be entitled to parental leave if they have been employed at least 13 weeks prior to commencing the leave – s. 48(1);
4. Organ donor leave: Employees may be entitled to organ donor leave if they have been employed at least 13 weeks prior to commencing the leave – s. 49.2(3);
5. Reservist leave: Employees may be entitled to reservist leave if they have been employed at least six consecutive months prior to commencing the leave – s. 50.2(3);
6. Critical Illness Leave: Employees may be entitled to critical illness leave if they have been employed for at least six consecutive months prior to commencing the leave – s. 49.4(2) and (5);
7. Domestic or Sexual Violence Leave: Employees may be entitled to domestic or sexual violence leave if they have been employed for at least 13 consecutive weeks prior to commencing the leave: s. 49.7(2);

8. Crime-Related Child Disappearance Leave: Employees may be entitled to crime-related child disappearance leave if they have been employed for at least six consecutive months prior to commencing the leave – s. 49.6(2);
9. Child Death Leave: Employees may be entitled to child death leave if they have been employed for at least six consecutive months prior to commencing the leave – s. 49.5(2);
10. Written notice of termination or pay in lieu:
    - Employees may be entitled to notice or pay in lieu (including mass notice, s. 58) if they have been employed for at least three months – s. 54; [See the discussion in the Manual at section 9.2.1 regarding the impact of s. 10 on eligibility for termination entitlements];
    - Entitlement to one to eight weeks of notice or pay in lieu depends on length of employment – s. 57;
11. Severance pay:
    - Employees may be entitled to severance pay if they have been employed for at least five years – s. 64;
    - Entitlement to up to 26 weeks of severance pay depends on length of employment – s. 65.

Vacation

The Program's policy is that the employee's length of service, for vacation with pay purposes, flows through from the replaced provider to the new provider. However, the liability for accrued vacation pay does not. This is because s. 76 of the Act requires building services providers who cease providing services at a premises, and who terminate the employment of an employee, to pay the employee all his or her accrued vacation pay (whether it was otherwise due or not) no later than the later of seven days after the termination of employment or on what would have been the employee's next pay day.

An exception to the flow-through rule, as it applies to length of service, occurs if the new building services provider for a building hires the employee more than 13 weeks after the earlier of the employee's last day of employment with the replaced provider and the day on which the new provider began servicing the premises. In this situation, the new provider is not required to recognize the employee's length of service with the replaced provider, for the purposes of determining the employee's entitlements to vacation under Part XI.

For a detailed discussion of the application of s. 76 see Part XIX, s. 76.

Part XIV Leaves of Absence

In addition to the information above regarding statutory leaves, it is important to note that there is nothing in s. 10 that would require a new building service provider to hire any employee of the replaced provider, including an employee of the replaced provider who was on a statutory leave at the time the new provider began providing services at the premises. In most cases however, where the new provider does not make a reasonable offer of employment to employees of the replaced provider, the new provider must comply with the notice and severance obligations under the Act with respect to those employees – see ESA Part XIX, s. 75. This would apply equally to employees who were on a statutory leave at the time. See ESA Part XIV, s. 53 for a discussion of rights to notice for employees who are legitimately terminated while on leave.

Termination Unrelated to Change in Providers

Where an employee's employment is terminated and severed prior to the change of providers and for reasons unrelated to that change, the question may arise as to whether s. 10 would apply. Because the purpose of s. 10 is to "undo" a common-law termination that would otherwise be triggered by the change of providers, it is the position of the Program that s. 10(2) does not apply where the termination or severance is not related in any way to the change. Thus, for example, if an employee's employment was terminated by the replaced provider for wilful misconduct but they were hired by the new provider, s. 10(2) would not apply.

Exception – s. 10(3)

10(3) Subsection (2) does not apply if the day on which the new provider hires the employee is more than 13 weeks after the earlier of his or her last day of employment with the replaced provider and the day on which the new provider began servicing the premises.

While in many "change of provider" situations, the employee's first day of employment with the new provider will follow immediately after his or her last day of employment with the replaced provider, there will also be situations where there are short interruptions in employment. Section 10(3) provides, in effect, that s. 10(2) will apply only if no more than 13 weeks separate the first day of employment with the new provider and the earlier of:

1. The employee's last day of employment with the replaced provider; and
2. The day on which the new provider began servicing the premises.

The term "last day of employment with the replaced provider" simply means the last day on which the employee is employed by the replaced provider for purposes of the ESA 2000. Bearing in mind that both active and inactive employment counts as employment for purposes of the ESA 2000 [see s. 59(1) and s. 65(2)], this will include time spent on lay-off up to the point at which a termination or severance would be triggered.

Note that for purposes of s. 10(3), the first day of the lay-off would not be considered the last day of employment with the seller. While some might argue that it should be so considered because of s. 56(5), which deems the first day of a lay-off that ends in termination to be the day on which the employee's employment is terminated, this argument ignores the fact that s. 10(3) refers to "the last day of employment", not "the day on which the employee's employment was deemed terminated"; it also ignores the fact that s. 10(2) applies for all rights under the Act that depend on how long an employee has been employed and not just for purposes of notice of termination or termination pay in lieu.

If an employee on lay-off is potentially entitled to both termination pay and severance pay, his or her last day of employment will be considered, for purposes of s. 10(3), to be the later of (a) the day on which a termination would be triggered and (b) the day on which a severance would be triggered. For example, if an employee potentially entitled to both termination pay and severance pay is put on lay-off and benefits are not maintained and none of the other conditions described in clauses 56(2)(b) or (c) of the Act are met, his or her employment would be considered terminated once more than 13 weeks had passed, and severed once 35 weeks had passed. For purposes of s. 10(3), therefore, his or her "last day of employment with the replaced provider" would be considered to be the final day of the 35th week; if the new provider hired the employee within 13 weeks of the earlier of that day and the day of the sale, there would be continuity insofar as any subsequent calculation of length of employment or period of employment was concerned.

If the employee did not have a potential entitlement to severance pay (say, because they would not have accumulated five years of employment with the employer in total as of the end of 35 weeks of lay-off, or because his or her employer did not have a payroll of at least $2.5 million) the "last day of employment" would be considered to be the final day of the 13th week of lay-off; if the new provider hired the employee within 13 weeks of the earlier of that day and the day on which the new provider began servicing the premises there would be continuity insofar as any subsequent calculation of length of employment or period of employment was concerned.

Example 1:

- If an employee were laid off one week before the changeover date and the lay-off ceased to be temporary 13 weeks later (and assuming the replaced provider had no severance obligations with respect to the employee), the employee's last day of employment would be 12 weeks after the changeover date.
- In this case, employee continued to be employed (i.e., was on a temporary lay-off) with the replaced provider as of the changeover date. In order to trigger the continuity of employment obligations in s. 10, the new provider would have to hire the employee of the replaced provider within 13 weeks of the changeover date.

Example 2:

- Employee A is placed on temporary lay-off 20 weeks before the changeover date and ceased to be on temporary lay-off for notice of termination purposes seven weeks before the changeover date but continued to be on lay-off for severance purposes until 15 weeks after the changeover date.
- In this case, the employee continued to be employed i.e., was on a lay-off that had not yet resulted in severance) with the replaced provider as of the changeover date. In order to trigger the continuity of employment obligations in s. 10, the new provider would have to hire the employee of the replaced provider within 13 weeks of the changeover date.

It should also be noted that the deemed termination date as set out in s. 56(5) has no application on any subsequent liability a new provider may have for notice or termination pay where there is continuity of employment under s. 10, because under s. 10(2), the employment would be deemed not to have been terminated, even if the employee was not hired by the new provider until after the lay-off had exceeded the period of a temporary lay-off. For example:

- Employer A loses contract for building services to employer B.
- Changeover date is June 14, 2002.
- A's employee is laid off one week before the changeover date (June 7). Temporary lay-off for notice of termination purposes ends September 6 (the point at which the employee has been on lay-off for more than 13 weeks), 12 weeks after the changeover date). Pursuant to s. 56(5) the employee's employment would be deemed to be terminated on first day of lay-off (June 7).
- However, A's last day of employment is considered to be September 6 for the purposes of s. 10.
- Section 10(2) applies because employer B hired the employee on or before September 13, the date that is13 weeks after the earlier of (1) the last day of employment with the replaced provider and (2) the changeover date).

- Employer B subsequently terminates the employee. Under s. 10(2), the employee was deemed not to have been terminated by employer A and the employee's employment with employer A is attributed to employer B.

Predecessor Acts – s. 10(4)

10(4) For the purposes of subsection (2), employment with the replaced provider includes any employment attributed to the replaced provider under this section or under a provision of a predecessor Act dealing with building services providers.

This provision was introduced with the ESA 2000. Section 10(4) ensures the flow-through of length or period of employment attributed to a replaced provider under the provisions of the ESA 2000 or the former *Employment Standards Act*. (The first continuity of employment provision in the context of building service providers was proclaimed into force on January 1, 1993, but it applied in respect of changes in providers that occurred after June 4, 1992.)

Example:

- Provider A hires employee on September 1, 1990
- Provider B takes over contract, and hires employee on January 1, 1994
- Provider C takes over contract and hires employee on January 1, 2002
- Provider D takes over contract and hires employee on January 1, 2006

In this example, pursuant to s. 10(4), the employee's employment with contractors A, B and C will be treated as if it was employment with contractor D for purposes of those rights under the Act that depend on length or period of employment.

Note: Under the former *Employment Standards Act*, the change in providers from A to B and B's hiring of the employee resulted in the employee's employment with A being attributed to B, because the change occurred after June 4, 1992. The changeover from B to C and C's hiring of the employee occurred after the current Act had come into force, and it resulted in the employment with B, including employment with A that was attributed to B under the former Act, being attributed to C. Likewise, the changeover from C to D and D's hiring of the employee resulted in the employment with C, including employment with A and B that was attributed to C, being attributed to D.

ESA Part V - Payment of Wages

Part V of the *Employment Standards Act, 2000* (Payment of Wages) is intended to ensure that employees receive wages for work performed. This Part regulates the payment, manner and place of payment of wages, deductions from wages, and the priority of wage claims over other unsecured creditors. It also establishes obligations with respect to the provision of statements of wages and outlines the information required on such statements.

The provisions regarding vacation statement obligations previously contained in s. 12(1)(d) of this Part of the ESA 2000 were repealed by the *Government Efficiency Act, 2002,* SO 2002, c 18, which came into force on November 26, 2002. They were replaced with new vacation statement obligations set out in s. 41.1 of Part XI (Vacation with Pay).

Lastly, a new requirement to provide a statement of wages paid when employment ends was added by the GEA 2002 (s. 12.1 (new)).

ESA Part V Section 11 – Payment of Wages

Payment of Wages - s. 11(1)

11(1) An employer shall establish a recurring pay period and a recurring pay day and shall pay all wages earned during each pay period, other than accruing vacation pay, no later than the pay day for that period.

Subsection 11(1) requires employers to:

- Establish regular pay periods and pay days, and
- Pay all wages earned in each pay period no later than the pay day associated with the pay period.

The regular pay day could be weekly, bi-weekly, semi-monthly, monthly or any specified period. An employer may establish different recurring pay days for different employees, and for different components of the wage package, e.g., sales commissions, overtime.

Floating Pay Days

The question has arisen as to whether an employer is in compliance with s. 11 where the contract establishes a recurring pay day but further provides that if that recurring day should fall on a weekend or a statutory holiday that the following business day is considered the recurring pay day. The Program's position is that s. 11 requires the establishment of a fixed period of time and a fixed date upon which an employee can expect to receive wages earned within the fixed period of time. The contract provision described above has the effect of creating a floating pay day that puts employees at a disadvantage as they are required to wait in certain cases for a longer period of time before receiving the wages earned in the pay period. As a consequence, Program policy is that such a contract is not in accord with the requirement in s. 11 to create a recurring pay day.

Payment Under an Overtime Averaging Arrangement

The question has arisen as to how an employer is required to pay wages to an employee who is subject to an overtime averaging arrangement: is the employer required to pay the employee straight time for every hour worked within the pay period - including those over 44 - and postpone paying only the extra "half" of any overtime pay owing until the averaging period has ended? Or is the employer required to pay straight time only up to 44 hours a week and can postpone paying the entire time-and-a-half for any overtime pay owing until after the averaging period has ended?

It is Program policy that the employer is required to pay the employee straight time for each hour worked within the pay period, including those hours over 44 and then pay the extra half of any overtime pay owing after the averaging period has ended.

For example, pursuant to ESA Part VIII, s. 22, an employee's hours of work are averaged over four work weeks and works the following hours:

- Week 1 - 56 hours

- Week 2 - 43 hours
- Week 3 - 35 hours
- Week 4 - 46 hours

Assume the employee has a weekly pay period and is subject to an overtime threshold of 44 hours.

The employee worked, on average, one hour of overtime in each week.

The employer is required to pay the employee:

- For the pay period that covers week 1: 56 hours at straight time;
- For the pay period that covers week 2: 43 hours at straight time;
- For the pay period that covers week 3: 35 hours at straight time;
- For the pay period that covers week 4: 46 hours at straight time and 4 hours at 0.5 of the employee's regular rate.

Changing the Pay Day

The requirement to establish a recurring pay period and pay day does not prevent the employer from subsequently establishing a new and different pay period or associated pay day. It should be noted, however, that in some situations such a change, if it is a substantial change in the terms and conditions of employment or a breach of a fundamental term of the employment contract, may constitute a constructive dismissal and thus potentially be a termination and a severance of employment.

Monetary Entitlements under the Employment Contract

If a contract establishes an entitlement that falls within the definition of wages, that entitlement can be enforced through s. 11, even if there would otherwise be no entitlement under the ESA 2000. For example, if an employee was exempt from overtime pay under the ESA 2000 but the contract provided for overtime pay (e.g., a premium rate to be paid once the employee worked a certain number of hours), any unpaid contractual overtime pay would be enforceable as unpaid wages under s. 11.

It is essential, for assessment or enforcement purposes, to review the terms of employment to ensure that the wages in question are earned during the pay period. For example, in the area of sales commissions or bonuses, innumerable variations exist on when in fact they are considered to have been earned and therefore due to be paid.

OHSA-related Meetings

In *Ingersoll Machine & Tool Co. Ltd. v Griffin et al* (August 9, 1982), ESC 1263 (Picher), Referee Picher ruled that where the former *Occupational Health and Safety Act* required the employer to pay employees for attendance at joint health and safety committee meetings under that Act, such payment could be enforced as wages under the predecessor provision to s. 11(1) in the former *Employment Standards Act*, on the basis that rights under statutes other than the Act were incorporated into the contract of employment. Note that the current *Occupational Health and Safety Act,* RSO 1990, c O.1 continues to provide employees with the right to be paid for time associated with such meetings and therefore such wages are likewise recoverable under the ESA 2000.

Payment for Time for Voting

Under the *Municipal Elections Act, 1996,* SO 1996, c 32, and the *Election Act*, RSO 1990, c E.6, an employee who is qualified to vote has the right to three consecutive hours for the purpose of voting during the period the polls are open. Those acts do not require the employer to give employees three hours off during working hours, but if an employee's working hours are such that the employee does not have three consecutive hours outside of their shift during the period the polls are open, the employer must give the employee time off to ensure that they do have three consecutive hours to vote. Both statutes require the employer to pay the employee for such time off work. Under ESA Part I, s. 1, wages are defined to include "monetary remuneration payable by an employer to an employee under the terms of an employment contract, oral or written, express or implied." The Program's position is that the right to any paid time off to vote is a statutory term of the employment contract and that payment can accordingly be enforced as wages under s. 11.

Method of Payment – s. 11(2)

11(2) An employer shall pay an employee's wages,

- **a) by cash;**
- **b) by cheque payable only to the employee; or**
- c) by direct deposit in accordance with subsection (4); or
- **d) by any other prescribed method of payment.**

This section requires payment of all wages in cash, by cheque, direct deposit in accordance with s. 11(4) and any other prescribed method of payment.

Payment of wages is to be made in cash (legal tender in Canada) or by cheque that is negotiable for legal tender. If payment is made by cheque, the cheque must be payable only to the employee. If payment is made by direct deposit, the payment must be made to an account in the employee's name to which only the employee and persons authorized by the employee have access. In addition, the account must be in an office or facility of a financial institution that is a reasonable distance from the employee's workplace unless otherwise agreed to by the employee, see s. 11(4). There are currently no additional methods of payment prescribed by regulation.

There is nothing to prevent an employment contract providing for additional non-wage forms of compensation, e.g., food, bus or subway tickets or merchandise to an agreed value, provided the employment standards (e.g., minimum wage standards) have been met. However, note that benefits such as transportation, food, bonuses or other assistance could not replace the required payment of wages by cash, by cheque or by direct deposit. See *Peter Muscat General Contracting v Buttigieg* (September 7, 1978), ESC 543 (Davis). Also note that the enforcement of non-wage payments of this nature would lie beyond the Program's jurisdiction.

Place of Payment by Cash or Cheque - s. 11(3)

11(3) If payment is made by cash or cheque, the employer shall ensure that the cash or cheque is given to the employee at his or her workplace or at some other place agreeable to the employee.

Section 11(3) requires that wages paid by cash or cheque must be given to the employee at the workplace or an alternate location agreed upon by the employee. Such an agreement must be in writing

as required under ESA Part I, s. 1(3). In the absence of such an agreement, payment must be made at the workplace.

Under ESA Part III, s. 7, an employee's agent (e.g., trade union) may agree on behalf of the employee to an agreement under this provision to designate some other place for the payment of wages.

Direct Deposit - s. 11(4)

11(4) An employer may pay an employee's wages by direct deposit into an account of a financial institution if,

(a) the account is in the employee's name;

(b) no person other than the employee or a person authorized by the employee has access to the account; and

(c) unless the employee agrees otherwise, an office or facility of the financial institution is located within a reasonable distance from the location where the employee usually works.

Under s. 11(4), an employer choosing a direct deposit payment arrangement may only deposit wages to an account at a financial institution:

- If the account is in the employee's name;
- Provided that only the employee or a person authorized by the employee has access to the account; and
- If an office or facility of the financial institution is located within a reasonable distance from the workplace, unless the employee agrees in writing otherwise.

In order to make payments by direct deposit, it is necessary that the employee have an account at a financial institution to which only they (or person authorized by the employee) have access. An employer may make having such an account a condition of hire and where an employee is subsequently directed to open an account and refuses, the employer may terminate the employee without running afoul of the reprisal provisions of the ESA 2000. This is because in such a case, the employee is not engaging in any activity that is protected by the anti-reprisal provisions. In particular, there is no right under the Act to not open an account or to not be paid by direct deposit. The employer would of course be required to comply with the notice of termination and severance provisions in ESA Part XV.

As noted, unless otherwise agreed to by the employee, the selected financial institution must have an office or facility located within a reasonable distance to the workplace where the employee generally works. If the employer wishes to make direct deposits to a financial institution that does not have an office or facility within a reasonable distance to the workplace, the employee's agreement is required. The agreement must be in writing as required under ESA Part I, s. 1(3). No agreement is required where an office or facility of the financial institution is within a reasonable distance of the employee's workplace.

Where a complaint is filed asserting that an employer has unilaterally chosen a financial institution that does not have an office or facility within a reasonable distance from the employee's place of work, an employment standards officer will make a determination based on such factors as travel time, available modes of travel and the actual distance.

Section 11(4)(c) refers to an office or facility of the financial institution. It is the Program's view that office or facility refers to a location that can facilitate an employee's routine banking transactions related to receiving wages. As routine banking transactions can be made at an automated teller machine (ATM), this would be an acceptable facility provided it is the chosen financial institution's ATM and it is within a reasonable distance from the workplace. A loans or investment office of the selected financial institution that did not have the capability of handling routine banking transactions would not be considered an acceptable office or facility.

If Employment Ends - s. 11(5)

11(5) If an employee's employment ends, the employer shall pay any wages to which the employee is entitled to the employee not later than the later of,

(a) seven days after the employment ends; and

(b) the day that would have been the employee's next pay day.

Under s. 11(5), any wage entitlements owing to an employee whose employment has ended must be paid out no later than the later of seven days after employment has ended and the next regular pay day. In allowing the employer to choose the later of seven days after the employment ended and the regular pay day following the date the employment ended, the employer has some flexibility to use regular processes (e.g., the employer's computerized payroll system rather than having to cut a manual check) to make the final payment to the employee.

In this regard it should be noted that the pay day referred to in paragraph (b) is not necessarily the pay day that covers the period to the date of termination, but is rather the very next pay day to fall after the date employment ends.

Example:

- Employee's employment is terminated on January 22
- Employee is paid on January 31 for the wages earned in the pay period January 1 to 15, and paid on February 15 for the wages earned in the pay period January 16 to 31 (i.e., the pay day for the pay period that would have included January 22 would be February 15)
- Employee is entitled to payment of any outstanding wages on the date that is the later of:
    - Seven days after the termination date - January 29 (seven days after January 22) and
    - The next pay day - January 31

The employee in this example will therefore be entitled to payment of any outstanding wages on January 31, not February 15.

Finally, it should also be noted that s. 11(5) does not relieve the employer in any way of its obligation to pay the wages earned in any given pay period on the regular pay day for that pay period as per s. 11(1).

Example:

- Pay day for the pay period September 12 to 25 is October 2

- Employee’s employment is terminated on September 30 (i.e., after the pay period is completed but prior to the pay day for that pay period)

Under s. 11(1), the employer must still issue a pay cheque as usual on October 2 for the wages earned in the pay period ending on September 25.

And, in addition, s. 11(5) will require payment of any other outstanding wages to which the employee was entitled on termination (e.g., the wages earned September 26 to 30, any termination pay in lieu of notice, severance pay, vacation pay and public holiday pay for a substitute holiday that had not been taken) on October 7, the day that is the later of seven days after the termination, or October 2, the next pay day following the termination.

ESA Part V Section 12 - Statement Re Wages

Statement Re Wages - s. 12(1)

12. (1) On or before an employee's pay day, the employer shall give to the employee a written statement setting out,

(a) the pay period for which the wages are being paid;

(b) the wage rate, if there is one;

(c) the gross amount of wages and, unless the information is provided to the employee in some other manner, how that amount was calculated;

(d) REPEALED;

(e) the amount and purpose of each deduction from wages

(f) any amount with respect to room or board that is deemed to have been paid to the employee under subsection 23(2); and

(g) the net amount of wages being paid to the employee.

Section 12 creates a requirement that ensures an employee receives, at the time wages (other than vacation pay) are paid, a detailed statement that demonstrates how his or her gross and net wages have been calculated. It is not necessary that all the information required in s. 12 be contained in a single document; the written statement may consist of one or more documents. The *Government Efficiency Act, 2002*, SO 2002, c 18 ("GEA 2002") repealed s. 12(1)(d), which set out the vacation statement obligations. Those obligations are now set out in ESA Part XI, s. 41.1.

Even though an employee may be aware in one way or another of the details concerning his or her pay and despite the fact that the details may remain unchanged from pay period to pay period, a written wage statement is required on or before each pay date.

Tips and other gratuities do not fall within the definition of wages. Therefore, the ESA does not require employers to include information about tips and other gratuities on wage statements.

It is Program policy that an employer can provide the written statement by way of a secure internet accessible database and be in compliance with s. 12(1), even though an individual wage statement is not personally sent in any format to the employee, if the employees have a reasonable opportunity to access

the database and a printer (and know how to use them) on or before their payday. If the employee works at a location other than the employer's workplace (for example, an employee of a temporary help agency who is providing services at a client's office), the employer may comply with s. 12(1) if the employee is provided with access to a computer and printer at the client's place of business.

The written statement must contain the following information:

Pay period for which the wages are being paid

Pursuant to s. 12(1)(a), the written statement must state the pay period for which the wages are being paid. This requirement is satisfied if the statement identifies, in a way understandable to the employee, the pay period to which the statement pertains. This would typically be by showing the start and end dates of the pay period, but other ways of identifying the pay period might also be used, such as, for example, by indicating that the pay period is period #2 in the 26 pay periods for this year.

Wage rate, if there is one

Under s. 12(1)(b), the written statement must contain the wage rate, if there is one. This would include all "special" rates of pay, e.g., overtime rate, premium rate or shift rate in addition to the "regular" rate.

Gross amount of wages andhow that amount was calculated

Under s. 12(1)(c), the written statement must contain the gross amount of wages and, unless the information is provided in some other manner, how that amount was calculated. This requirement is satisfied if the wage statement shows:

- The amount of the gross wages earned; and
- The formula for the calculation of gross wages earned. If the information regarding the calculation of gross wages earned is provided in some other manner, the employer is obliged to establish evidence to show how this has been done.

Amount and purpose of each deduction from wages

Under s. 12(1)(e), the written statement must contain a description of each deduction and the amount.

Any amount with respect to room or board that is deemed to have been paid to the employee under s. 23(2)

Under s. 12(1)(f), the written statement must contain any amount with respect to room or board that is deemed to have been paid to the employee under ESA Part X, s. 23(2). Where this clause applies, the prescribed amount of room and board is deemed to be wages paid to the employee. See O Reg 285/01, s. 5(4), s. 19(2) and s. 25(5) for the prescribed amount.

Net amount of wages being paid

Under s. 12(1)(g), the written statement must contain the net amount of wages bein paid to the employee.

Same - s. 12(2) REPEALED - GEA, 2002, November 26, 2002

12(2) The statement need not include the information described in clause (1)(d) if the employer pays vacation pay in accordance with subsection 36(3).

Prior to the repeal of s. 12(2) and s. 12(1)(d) by the GEA 2002, which came into force on November 26, 2002, s. 12(2) provided that the information regarding vacation pay detailed in the former s. 12(1)(d) did not need to appear in the wage statement for a pay period in which one or more vacation days were taken, if the employer was paying vacation pay in accordance with ESA Part XI, s. 36(3) as it read prior to amendment by the GEA 2002.

Section 12(2) was replaced with ESA Part XI, s. 41.1(5). Section 41.1(5) similarly provides that the vacation statement obligations set out in ESA Part XI, s. 41.1 do not apply if the employer is paying vacation pay that accrues in each pay period on the pay day for that pay period, and provides a statement of wages that sets out vacation pay separately from the other wages being paid or provides the employee with a separate statement setting out the amount of vacation pay being paid in accordance with s. 36(3) as amended by the GEA 2002.

Electronic Copies - s. 12(3)

12(3) The statement may be provided to the employee by electronic mail rather than in writing if the employee has access to a means of making a paper copy of the statement.

Section 12(3) permits an employer to provide a wage statement to an employee using a confidential electronic mail system to convey the information, instead of a paper document. However, an employer may only provide a statement by electronic mail where the employee has "access to the means of making" a paper copy of the document.

Under s. 12, it is the employer's responsibility to ensure that a wage statement is provided. Where the employee's "access to a means of making a paper copy" is outside the employer's control, the employer will not be able to ensure the provision of a statement; therefore, "access to a means" must be interpreted to mean "at the workplace".

Some examples of situations where this section's requirements will not be met include:

- The employee has no access to computer equipment and software at the workplace to print a copy of the document;
- The employee is unable to access computer equipment and software necessary at the workplace on the day that the wage statement is due under s. 12(1);
- The employee is not provided with an electronic mail account at the workplace;
- The employee has access to the necessary equipment at the workplace, but is not trained to use it;
- The employee must request another individual at the workplace, other than the employee's manager, to produce a copy of the document.

Confidentiality will be a reasonable expectation with regard to the employee's ability to make a copy of his or her own wage statement under s. 12(3).

See the discussion above at s. 12(1) for a discussion of wage statements that are provided via a secure internet accessible database.

ESA Part V Section 12.1 - Statement Re Wages on Termination

12.1 On or before the day on which the employer is required to pay wages under subsection 11(5), the employer shall provide the employee with a written statement setting out,

(a) the gross amount of any termination pay or severance pay being paid to the employee;

(b) the gross amount of any vacation pay being paid to the employee;

(c) unless the information is provided to the employee in some other manner, how the amounts referred to in clauses (a) and (b) were calculated;

(d) the pay period for which any wages other than wages described in clauses (a) or (b) are being paid;

(e) the wage rate, if there is one;

(f) the gross amount of any wages referred to in clause (d) and, unless the information is provided to the employee in some other manner, how that amount was calculated;

(g) the amount and purpose of each deduction from wages;

(h) any amount with respect to room or board that is deemed to have been paid to the employee under subsection 23(2); and

(i) the net amount of wages being paid to the employee.

This section was added to the *Employment Standards Act, 2000* by the *Government Efficiency Act, 2002,* SO 2002, c 18, which came into force on November 26, 2002. Section 12.1 requires employers to provide a statement with respect to wages (including vacation pay) paid on termination of employment on or before the day on which the employer is required to pay wages under s. 11(5). It also requires the employer to provide information in the statement as to how the gross amounts of termination pay, severance pay, vacation pay and any other wages in addition to those amounts was calculated, unless that information is provided in some other way by the employer.

ESA Part V Section 13 - Deductions, etc.

Deductions, etc. - s. 13(1)

13(1) An employer shall not withhold wages payable to an employee, make a deduction from an employee's wages or cause the employee to return his or her wages to the employer unless authorized to do so under this section.

Section 13(1) establishes a general rule prohibiting an employer from:

- Withholding wages that an employee has earned;
- Making a deduction from an employee's wages;
- Causing the employee to return their wages to the employer, except where the employer is permitted to do so under this section.

For the balance of this chapter, reference will generally be made only to deductions, but the discussion should be understood as covering an employer's withholding of wages and an employer causing wages to be returned to the employer as well.

Note that pursuant to O Reg 285/01, s. 3.1, s. 13 of the *Employment Standards Act, 2000* does not apply to an employer who participates in an Ontario Municipal Employees Retirement System ("OMERS") pension plan under the *Ontario Municipal Employees Retirement System Act, 2006,* SO 2006, c 2, but only with respect to the fees that a by-law made under s. 28 of that Act requires the employee to pay. See

The purpose of s. 13(1) is to protect the employee from improper interference with their earnings by ensuring that an employer who owes wages is not in the position of being both a claimant against the employee and an arbiter of the validity of the claim. The exceptions to the general prohibition against deductions in s. 13(1), as set out in ss. 13(2) and 13(3), underline this principle by permitting deductions where a statute of Ontario or Canada, a court order, or the employee's written authorization permit the deduction. In such cases, someone other than the employer, such as a legislature, a court, or the employee, has determined that the employee owes the money to be deducted.

It is important to note that what s. 13(1) prohibits is deductions from wages, i.e., deductions from the monetary remuneration that an employee is entitled to under their employment contract. The contract may provide a formula for calculating an employee's wage entitlement and that formula may involve a deduction being made at some point in calculating what the employee's wage entitlement is; however, such a deduction is not a deduction from wages, but rather a step taken in calculating what wages are due. For example, an employment contract may provide that the employee will be entitled to a yearly bonus that is calculated as $X amount per unit of productivity minus the amount of shrinkage and shortages that take place during the year. While the bonus constitutes wages within the meaning of the definition in the Act, no deduction is being made from wages in this case; rather, the deduction is part of the calculation that is necessary to determine the amount of wages. The distinction between a deduction from wages and a deduction that is a step in the calculation of what wages are owing is a longstanding one. See *Sagar v Ridehalgh & Sons Ltd*., [1931] 1 Ch 310*,* Becker Milk Company of Canada Limited v Ure (December 14, 1985), ESC 2002 (Egan) and Fruitman v Stephenson's Rent All Inc., 2000 CanLII 3317 (ON LRB).

However, it should also be noted that a deduction made in the course of calculating what wages are due, unlike a valid deduction from wages, must not produce a result that is less than the minimum wage or, where overtime hours are worked, less than an employee's overtime pay entitlement under the ESA 2000.

Thus, if the employment contract provides a formula that involves a deduction in order to calculate what the employee's wages are, it would be a violation of the minimum wage provisions if the employee ends up receiving less than the minimum wage. Note, however, that compliance with the minimum wage is determined on a pay period basis, not on a per hour basis.

Also note that compliance with the limits on hours of work must be determined on the basis of actual hours of work, and not on provisions in the employment contract that might in some circumstances deem the employee to have worked less time than they in fact did.

Examples

An employee has a regular work week of nine hours per day, five days per week, with shifts beginning at 9 a.m. each day. Their regular rate is $17.00 per hour. However, under the terms of the employment contract, if they punch in more than five minutes but less than 15 minutes late, the wages with respect to the first scheduled hour of work (9 a.m. to 10 a.m.) are calculated as if they had worked only 45 minutes,

even if the employee worked, for example, 54 minutes in that hour. If the employer pays the employee $767.13 for the week in accordance with the contract (based on 44 hours and 45 minutes, with the 45 minutes paid at the rate of one and a half times the regular rate), there will be an overtime pay violation; as there were actually 54 minutes of overtime worked, the employee should have been paid $770.95.

Consider the slightly different example of an employee with a regular work week of eight hours a day, five days a week, and a regular rate of $17 per hour. If the employment contract provides that the employee will be paid for only 45 minutes if they punch in more than five minutes but less than 15 minutes late, and the employee punches in six minutes late, there will be no violation if the employee receives only $675.75 for the week. While the employee was paid for only 45 minutes even though they actually worked 54 minutes out of the first scheduled hour on the day they were late, they received all the monetary remuneration that was due to them under the contract and the calculation of wages under the contract does not result in any violation of the hours of work, overtime or minimum wage provisions of the Act. Note that $675.75 when divided by 39.9, the number of actual hours worked in the week, produces $16.94, which is in excess of the minimum wage.

What if the employee in the preceding example was just being paid minimum wage, which at the time of writing was $15.00? If the employer treats the employee as having worked only 39.75 hours in the week in question and pays the employee $596.25 for the week, there will be a violation of the minimum wage requirements, because $596.25 divided by 39.9 (the employee's total hours for the week) equals $14.94, which is less than the minimum wage. The employer should have paid the employee $598.50 (39.9 x 15).

Deductions for overpayment of wages

In addition, referees under the former *Employment Standards Act* have held that the employer may deduct wages paid in error in the past from an employee's pay cheque. As the referee pointed out in All-Way Transportation Services Ltd v Fountain (June 6, 1979), ESC 627 (Brent) when an employee is overpaid, they were never entitled to the amount that the employer seeks to deduct, so it cannot be regarded as wages payable in the first place.

In some cases, an overpayment may have arisen from a failure to make an authorized deduction. For example, an employee may have provided the employer with a written authorization to deduct a specific sum from each pay cheque in respect of the company benefit plan. Where the employer inadvertently fails to make the deduction, resulting in an overpayment to the employee, the employer may recover the monies paid out in error without obtaining any additional authorization to do so.

In cases where the employer has made an overpayment, it can recover those monies from the employee's wages, whether they are regular wages, vacation pay or termination pay.

Note that although ESA Part XV, s. 60(1)(b) requires the employee to be paid no less than their regular wages during the notice period that this provision is intended to protect the employee’s right to continue to earn their regular wages - it does not conflict with the employer’s right to recover an overpayment of wages.

Note, however, that where an employer intentionally pays an employee more than the Act entitles the employee to, this is not an overpayment but rather a payment that they are entitled to under their contract of employment. Such an amount would, therefore, fall within the definition of wages. The employer cannot deduct the amount of such a payment from subsequent earnings without a written authorization for deduction by the employee. Further, if there is a written authorization for deduction, but it refers only to deductions for overpayments, the authorization cannot be used, as the payment was not in fact an overpayment. See Ozorak v Econome and 802710 Ontario Inc. (April 20, 1999), 4320-97-ES (ON LRB)

where the employer intentionally paid an employee for a public holiday that the employee was not entitled to under the former *Employment Standards Act*.

An advance payment of wages may be deducted. In 473321 Ontario Limited, c.o.b. Malkat Peking v Cohen (April 3, 1984), ESC 1602 (Swan) the referee noted that just as amounts that are due and actually paid by an employer before termination may be taken into account in determining the payment due on termination, so may amounts that were expressly paid as an advance on amounts to become due in the future. 431650 Ontario o/a Eglinton Fine Foods v Lombardo (April 9, 1985), ESC 1821 (Egan) should also be noted. The claimant was given four weeks' notice when he was entitled to eight weeks. He obtained another job immediately after this four-week period. The applicant argued that the earnings of the employee from the new employer during the second four-week period of notice to which he was entitled by statute should discharge his obligation for payment in lieu of notice to the extent of those earnings. Citing s. 8 of the former *Employment Standards Act*, the referee rejected this argument, holding that none of the enabling factors in the regulations applied.

Tips and other gratuities are excluded from the definition of wages. Therefore, s. 13(1) does not apply to deductions from tips and other gratuities. Please see the discussion at ESA Part V.1, s. 14.2(1) for information on deductions from tips and other gratuities.

Statute or Court Order - s. 13(2)

13(2) An employer may withhold or make a deduction from an employee's wages or cause the employee to return them if a statute of Ontario or Canada or a court order authorizes it.

Section 13(2) sets out the exceptions to s. 13(1) that permit an employer to make deductions against an employee's wages where the deduction is authorized by a statute of Ontario or Canada, or a court order. Section 13(2) is subject to s. 13(4).

Tips and other gratuities are excluded from the definition of wages. Therefore, s. 13(2) does not apply to deductions from tips and other gratuities made pursuant to statute or court order. See the discussion on ESA Part V.1, s. 14.3 for more information on deductions from tips and other gratuities made pursuant to statute or court order.

Deductions authorized by statute

The most frequently encountered deductions authorized by statute are for income tax, Canada Pension Plan (“CPP”) contributions and employment insurance (“EI”) premiums.

In addition to authorizing deductions for EI premiums, the *Employment Insurance Act*, SC 1996, c 23, requires a deduction from wages payable to an employee as a result of a court order or arbitration award made against the employer where the employer has reason to believe that the employee received EI benefits for the same period to which the order or award relates. The deducted amount must be remitted to the Receiver General.

An employment standards officer should check with the Canada Revenue Agency if an employee alleges that deductions made by the employer in purported compliance with income tax, CPP or EI legislation were not authorized.

It sometimes occurs that an employer who failed to deduct amounts for income tax, CPP contributions or EI premiums (because, for example, the employer incorrectly treated the employee as an independent contractor), seeks to catch up by deducting the amounts that should have been deducted in the past all at once (sometimes going back several years) from the employee's current regular wages or termination

pay. Both s. 21(4) of the *Canada Pension Plan,* RSC 1985, c C-8 and s. 82(6) of the *Employment Insurance Act* the EI legislation address this situation by limiting the catch-up to one additional deduction for each pay period (i.e., the deduction that would currently be required for the pay period plus one further pay period's deductions) and prohibiting any catch-up for amounts that should have been deducted more than 12 months previously.

These limitations equally apply to the employee's final pay cheque at the end of an employment relationship, even though it means that there will be no further opportunity for the employer to "make up" for the missed deductions. See Firlotte v Angus operating as Blythe Farm (May 30, 1995), ESC 95-101 (Wacyk).

One question that might arise is whether a deduction authorized pursuant to a regulation would be permitted under s. 13(2). For example, in the context of the *Employment Protection for Foreign Nationals Act, 2009*, employers are generally prohibited from recovering or attempting to recover from a foreign national any cost incurred by the employer in the course of arranging to become or attempting to become an employer of the foreign national. This prohibition does not apply with respect to costs that are prescribed. Ontario Regulation 348/15 prescribes such costs; it permits employers who employ a foreign national in Ontario under an employment contact made pursuant to the federal government's Seasonal Agricultural Worker Program ("SAWP") to recover from the foreign national costs of air travel and of work permits, if the contract allows these deductions. If these permitted costs were deducted from wages, it would not constitute a violation of s. 13 since the regulation specifically authorizes the employer's cost recovery.

Deductions authorized by court order

Section 13(2) allows deductions pursuant to a court order.

This provision states that an employer may make a deduction from an employee's wages "if a . . . court order authorizes it." It is Program policy that a deduction is allowed under s. 13(2) only if a court order explicitly states that a deduction may be made from wages. This can include wages held in trust where an employer has filed an application for review under ESA Part XXIII, s. 116. It is not enough that the employer is in possession of a court judgment declaring that the employee owes a debt to their employer; there must be a court order specifically providing that the debt can be satisfied by way of a deduction from wages.

Note that Program policy previously provided that there was no requirement for the court to specifically authorize a deduction from wages; however, in accordance with more recent decisions, it is now Program policy that there must be a specific authorization. See for example, Minnema Farms Ltd v Demaat, 2014 CanLII 668 (ON LRB).

Many (though not all) deductions that are lawful under s. 13(2) involve court ordered garnishment of wages. Note however, that under s. 7 of the *Wages Act*, RSO 1990, c C.44, 80 per cent of an employee's net wages (i.e., gross wages less tax, EI and CPP) are exempt from garnishment. If the garnishment is for the enforcement of a support order, only 50 per cent of net wages are exempt. A judge issuing a garnishment order has discretion to decrease or decrease the percentage of the net wages that are exempt. Program staff should not attempt to provide advice concerning the *Wages Act*, which is administered by the Ministry of the Attorney General. Persons with enquiries about that Act should be directed to the Crown Law Office-Civil Division of that Ministry.

Employee Authorization - s. 13(3)

13(3) An employer may withhold or make a deduction from an employee's wages or cause the employee to return them with the employee's written authorization.

Section 13(3) permits an employer to withhold wages, make a deduction from wages or have an employee return wages if the employee has provided a written authorization to do so. Note that ss. 13(4) and 13(5) set out specific exceptions to s. 13(3).

As provided in s. 13(3), an authorization must be in writing to be valid; an oral authorization is not sufficient. The following decisions under the former *Employment Standards Act* are relevant: 509245 Ontario Ltd. c.o.b.a. Yates Electric v Groulx and Heighington (November 21, 1985), ESC 1987 (Brown) and Crick c.o.b. Keith's Restaurant v Popko et al (December 14, 1982), ES 1344 (Egan).

However, in Consolidated Press Company Limited v Leko (November 10, 1983), ESC 1511 (Aggarwal), also a decision under the former *Employment Standards Act*, a deduction was allowed in the absence of a written authorization. The claimant had verbally agreed to a monthly deduction for parking, and had accepted cheques marked on that basis for three years. The referee noted that according to *Black's Law Dictionary*, a written instrument is merely evidence of a contract. He found, therefore, that where a clear, express, bona fide contract establishing the employee's obligation to pay through payroll deductions existed, and had been implemented for a long time, the mere absence of a formal written authorization should not make such deductions illegal. Apparently, the referee was concerned that the claimant was attempting to use the section as an instrument of fraud, rather than as a shield against fraud by the employer, which is its intent. The case, however, is contrary to Program policy and should not be followed.

It should be noted that in another case under the former *Employment Standards Act*, Tavares and Sgromo c.o.b. Mr. Submarine, Thunder Bay, Ontario v Coppola et al (April 13, 1982), ESC 1197 (Aggarwal), the same referee held that the similar acceptance of a pay cheque every two weeks without objection with full knowledge and understanding that the deductions had been made for cash shortages did not amount to written authorization.

A written authorization must in fact specify that a deduction from wages is authorized. For example, in 555149 Ontario Limited c.o.b.a. Discount Car and Truck Rentals v Mason (March 20, 1985), ESC 1809 (Davis), the employee signed the following statement: "I ... agree to pay Discount Car Rentals the amount of 5,000.00 in monthly instalments of 200.00 ... per month for the damage of the car." The referee held that while this document was an acknowledgement of a debt and an undertaking to liquidate it by monthly instalments, it did not authorize the employer to make a deduction from wages. A similar finding regarding an agreement to pay for damages done to the employer's car was made in Windsor Wholesale Produce Limited v Donnelly et al (August 30, 1984), ESC 1712 (Gorsky). Both of these cases were decided under the former *Employment Standards Act*. Note that had the referees in either case concluded that there was an authorization to deduct from wages, the exception in s. 13(5) may have applied to prohibit the deduction in any event. That subsection makes an exception to allowing deductions that are authorized in writing if the wages are being deducted for faulty work.

Terms and conditions outlined in a policy manual do not constitute a written authorization. Such a manual might create a liability, but it is not an authorization by the employee to deduct from wages. See the following decisions under the former *Employment Standards Act*: Highbury Ford Sales Ltd. v Richards (May 5, 1986), ESC 2101 (Bryant) and 307855 Ontario Limited o/a the 54 Restaurant v Vlahovich (January 27, 1986), ESC 2031 (Adamson).

Employees sometimes enter into wage assignments in which the employee agrees that their wages may be paid over to another party. Such assignments are generally prohibited under the *Wages Act*. A wage assignment is therefore not generally considered a valid authorization to deduct wages under the ESA.

However, there is an exception to this prohibition found in s. 7(8) of the *Wages Act* which provides that wage assignments by employees to credit unions to which the *Credit Unions and Caisses Populaires Act*, RSO 1990, c C.44, applies are valid. As a result, if an employee enters into an agreement with such a credit union, whereby the credit union is authorized in writing to garnish the employee's wages if they default on a loan, and the employee does default, the employer may honour the assignment to the credit union. The wage assignment will, in that case, be considered a valid written authorization and the employer will not be in contravention of s. 13(1) if it abides by the wage assignment and forwards a portion of the employee's wages to the credit union. Note, however, that the *Wages Act* provision that exempts 80% of an employee's net wages from garnishment also applies to wage assignments to credit unions. That percentage can be increased or decreased by court order.

A second exception to the prohibition against wage assignments arises where the assignee is the Crown because the *Wages Act* doesn't apply to the Crown. As a result, assignments made under the *Ontario Disability Support Program Act, 1997,* SO 1997, c 25, Sch B are not prohibited by the *Wages Act* because the payee under that Program is Her Majesty the Queen in right of Ontario as represented by the Minister of Community and Social Services (i.e., the Crown). An assignment made under that Program would therefore be considered a valid written authorization for a deduction from wages. Note that what is determinative is whether the Program is a provincial government program. For example, an assignment made under the *Ontario Works Act, 1997,* SO 1997, c 25, Sch A, in which the assignment is made in favour of either a municipality or another delivery agent, would be prohibited under the *Wages Act* because the assignee is not the Crown.

A written authorization from an employee allowing a deduction from wages if the employee quits would not be valid where the employee resigns but is regarded by law as having been constructively dismissed. Despite the fact that the employee has quit, the law treats such a quit as if it were a termination by the employer. A constructive dismissal may be found to have occurred where:

1. The employer makes a substantial adverse change in the terms and conditions of employment without the employee's consent;
2. The employer breaches a fundamental term of the employment contract;
3. The employer tries to force the employee to quit by "making life miserable" for them; or
4. The employer gives the employee an ultimatum, offering the "choice" of either quitting or being fired.

For the purposes of the Act, the employee in these circumstances would not be found to have quit, but rather to have been constructively dismissed. Thus, the situation is not covered by the terms of the deduction authorization.

Finally, under Program policy, such issues as inequality of bargaining power of the parties at the time the authorization was given, or the fact that the employer may be attempting to redress what they consider to be a shortcoming in the legislation as it is currently written, are not relevant to a consideration of the validity of a written authorization. Further, it is considered of no importance that:

1. The authorization may require the employee to provide more notice of termination than the employer must give under the Act;
2. The employee must give notice during the first three months of employment, when the employer is not required to do so under the Act;
3. Some of the deduction to be made will come from vacation pay monies; or

4. The employee may not receive at least minimum wage after the deduction: compliance with minimum wage must be determined by consideration of gross wages, prior to any deduction allowable under the Act.

Exception - s. 13(4)

13(4) Subsections (2) and (3) do not apply if the statute, order or written authorization from the employee requires the employer to remit the withheld or deducted wages to a third person and the employer fails to do so.

Section 13(4) provides that where a deduction may be made from wages under s. 13(2) or s. 13(3) as required by statute, court order or as allowed by an employee's written authorization and such statute, order or authorization requires the employer to remit the wages deducted or withheld to a third person, and the employer fails to do so, the deduction will not be valid.

For example, an employer may make statutory deductions for income tax, CPP or EI, but fail to remit the funds on the employee's behalf to the Canada Revenue Agency. Where it is found that funds were withheld or deducted from the employee's wages but not remitted to the third party, this will be a violation of s. 13(4) and the officer may, in addition to other enforcement action under the Act, issue an order to pay under ESA Part XXII, s. 103, to effectively return the unremitted funds to the employee.

Exception - s. 13(5)

13(5) Subsection (3) does not apply if,

(a) the employee's authorization does not refer to a specific amount or provide a formula from which a specific amount may be calculated;

(b) the employee's wages were withheld, deducted or required to be returned,

- **i. because of faulty work,**
- **ii. because the employer had a cash shortage, lost property or had property stolen and a person other than the employee had access to the cash or property, or**
- **iii. under any prescribed conditions; or**

(c) the employee's wages were required to be returned and those wages were the subject of an order under this Act.

Section 13(5) prohibits an employer from withholding wages, making deductions from wages or causing an employee to return wages in certain circumstances, even though the employer has a written authorization from the employee to make the deduction in accordance with s. 13(3).

Written authorization does not refer to a specific amount or formula

Under s. 13(5)(a) the written authorization must set out either the specific amount to be withheld, deducted or returned, or provide a formula that enables the employee to calculate the specific amount.

In Superior Service Station Maintenance Ltd. v Edward et al (November 2, 1977), ESC 457 (Springate), a decision under the former *Employment Standards Act*, a job application form contained an authorization for deductions. However, the referee held that it constituted a blanket authorization for deduction of

unliquidated damages obtained by the employer as a condition precedent to employment, and as such was unenforceable.

In fact, other referees have held, and it is consistent with the policy of the Program, that any blanket authorization under which an employee purports to authorize deductions of unspecified amounts is invalid. However, if the employee has affirmed the applicability of the authorization to a particular deduction, that is, when the employee can better appreciate its specific nature and order of magnitude, it may be valid for the purposes of s. 13(5)(b)(i) and (ii). See Georgetown Motors Ltd. v Coleman (December 12, 1986), ESC 2203 (Adamson) and Ronyx Corporation Limited v Ritenburg (March 19, 1984), ESC 1593 (Sheppard). For example, if an employee signs a blanket authorization for the deduction of the price of merchandise that the employee purchases from the employer, the authorization will be valid provided that the employee subsequently acknowledges purchasing merchandise for the amount in question.

Another issue is the validity of an authorization purporting to allow an amount to be deducted from wages if the employee does not provide the employer with notice in the event that they quit. Program policy is that if the authorization is specific as to the amount of notice required of the employee and as to the amount to be deducted if that notice is not provided, it will meet the requirements of the Act, and will be valid.

Accordingly, an authorization to deduct for failure to give sufficient notice or simply notice, without an actual amount of notice specified, will not be valid. Further, a reference to a deduction for damages or any amounts owing at the time of resignation will be insufficient for lack of specificity. Although an actual dollar figure is not required, the authorization must clearly demonstrate the employee's agreement to the deduction of a precise amount (e.g., one week's pay, the first week's pay or the last week's pay) would be sufficiently specific, as would final vacation pay, even if the amount is not precisely quantifiable when the authorization is signed.

Also, a written authorization respecting failure to give notice of resignation would be invalid if the amount to be deducted constituted a penalty rather than a genuine attempt to pre-estimate damages. For example, an amount that would be a penalty rather than a genuine pre-estimate is the following:

An employee works as a security guard. The employer has employees on-call to fill in for the employee when he is unable to work. The employee signs a written authorization that he will forfeit his last two weeks' wages and all his vacation pay if he resigns without giving four weeks' written notice. In that situation, the amount to be withheld is clearly all out of proportion with the damages that the employer might reasonably be expected to suffer if the employee resigned without notice or with less than four weeks' notice. The employer has an ample pool of employees on call from which it can quickly obtain a replacement.

Deduction is made for faulty work

Section 13(5)(b)(i)prevents employers from making deductions from an employee's wages because of the employee's mistakes, even if the employee has authorized the deduction in writing. Without such protection, an employee could be charged by way of wage deduction for every item or piece of work spoiled or rejected. Employers who want to recover damages due to employees' faulty work may choose to sue for damages in court, but they cannot make deductions from the employees' wages. Referees in decisions under the former *Employment Standards Act* have held that no deduction could be made in the following circumstances on grounds that they constituted faulty work:

1. The claimant continued to drive a company car that was overheated, thus causing severe damage - see *Hughended Holdings Limited o/a Metro Courier Express v Morrison et al* (April 14, 1986), ESC 2090 (Adamson);
2. The claimant damaged a vehicle when moving it at the employer's place of business - see Cavalcade Ford Mercury Sales Ltd. v Crewson (June 7, 1979), ESC 628 (Johnston);
3. A salesperson damaged a car while backing it into the showroom - see Georgetown Motors Ltd. v Coleman.

The Program has also taken the position that:

- No deductions can be made from the wages of an employee who executes credit card transactions improperly, thus causing revenue loss to the employer. Bungled credit card transactions are considered faulty work rather than cash shortages.
- No deductions can be made as part of a safety financial penalty system policy wherein a deduction is made - whether from the employee involved or from all employees - if an employee is injured in a workplace incident and as a result incurs medical aid expenses or a loss of work time.

The Program also takes the position that the prohibition against wage deductions for faulty work in s. 13(5)(b)(i) applies not to just past or present faulty work, but to anticipated future faulty work as well. For example, employers are prohibited from making a wage deduction and putting the amount of the deduction towards an indemnity fund to pay for any damages or deductible owing due to the employee's anticipated future mistakes.

Further, the Program takes the position that the prohibition extends to prohibit deductions from one employee for the faulty work of another employee. For example, employers are prohibited from making wage deductions and putting the amount of the deduction towards an indemnity fund to pay for damages arising from any employee's faulty work.

Deduction is for cash shortages/loss of property/property stolen

Under s. 13(5)(b)(ii), an employer is prohibited from withholding wages, making a deduction from wages or requiring an employee to return wages for cash shortages, loss of property or stolen property where any person other than the employee had access to the cash or property, even if the employee has authorized the deduction in writing. This could include situations where a customer leaves a restaurant without paying the bill or where a customer leaves a gas station without paying the bill after pumping gas for their car. The "dine and dash" or “gas and dash” can be considered a cash shortage and, in such cases, the customer, not the restaurant employee or gas station employee, had exclusive control over the cash in question.

If another employee had access to the cash register at the same time as a claimant, no withholding, deduction or return of wages can be made. Therefore, if another employee had access to the cash register at times other than the claimant's shift and only the claimant had access during their shift, a deduction can be made. As the referee in Fraser o/a Becker's Milk v Oliver (January 24, 1980), ESC 694 (Bigelow) explained, under the former *Employment Standards Act*, the phrase "where a person other than the employee has access to the cash or property" should be interpreted to mean "where a person other than the employee has access to the cash or property during the employee's tour of duty as custodian of the cash or property". This intent has not changed under the ESA 2000.

Deduction was made under prescribed conditions

Section 13(5)(b)(iii) prohibits an employer from withholding wages, making deductions from wages, or requiring wages to be returned even with the employee's written authorization under any conditions prescribed by regulations. At the time of writing, no regulations prescribing conditions had been made.

Wages that were the subject of an order under the Act were required to be returned

Under s. 13(5)(c), a written authorization from an employee purporting to authorize the return to the employee's employer wages that were the subject of an order to pay would not be valid.

ESA Part V Section 14 - Priority of Claims

Priority of Claims - s. 14(1)

14(1) Despite any other Act, wages shall have priority over and be paid before the claims and rights of all other unsecured creditors of an employer, to the extent of $10,000 per employee.

This provision is similar in effect to s. 14 of the former *Employment Standards Act*. It should be noted that the *Employment Standards Act, 2000* increased the maximum amount of wages that are given priority from $2,000 to $10,000 per employee.

Section 14(1) prevails over other provincial acts to the extent that they purport to grant a different level of priority for the employee wages, or to grant priority over wages to some competing claim.

For example, s. 3 of the *Wages Act,* RSO 1990, c W.1, states that wages have priority over the claims of other execution creditors to the extent of three months' wages per employee. Section 14 prevails over that provision. It is important to note that "wages" under the *Wages Act* means "wages or salary" in a strict sense, as opposed to the broader definition of "wages" contained in s. 1 of the ESA 2000.

In matters of insolvency, s. 14(1) gives wages, as defined in s. 1, priority over all unsecured creditors of the employer (including the Crown) to the extent of $10,000 for each employee.

Section 14(1) does not give wages priority over the claims of secured creditors, such as trade creditors or suppliers. A secured creditor is one with an interest in the debtor's property to secure payment or performance of an obligation. The instrument that creates the security may take the form of a debenture, mortgage, assignment of book debts or accounts receivable, or a general security agreement ("GSA"). See *Re Campeau Corporation and Provincial Bank of Canada et al.*, 1975 CanLII 429 (ON SC), where the court held that it was not the intention of the legislature, in enacting s. 14 of the former *Employment Standards Act*, to interfere with the rights of secured creditors. This intention has not changed under the ESA 2000.

Section 14(1) does not, by itself, create any lien or charge upon an employer's assets as do the "deemed trust" provisions for vacation pay contained in s. 40. The decision in *Beecroft v. Watt* (1986), 1 RFL 3(d) 231 (Ont Prov Ct), cited to support this principle, refers to ss. 14 and 15 of the former *Employment Standards Act*, the wording of which is very similar to s. 14(1) of the ESA 2000.

It should also be noted that because "wages" under the ESA 2000 includes vacation pay, the amount of vacation pay deemed to be held in trust under s. 40(1) will be included in the $10,000 amount that is given priority under s. 14(1). However, the deemed trust status under s. 40(1) confers a greater priority

over other creditors with respect to the vacation pay component of the $10,000 than the priority afforded under s. 14(1). See ESA Part XI, s. 40(1) for a discussion of the deemed trust under s. 40(1).

Exception - s. 14(2)

14(2) Subsection (1) does not apply with respect to a distribution under the *Bankruptcy and Insolvency Act* (Canada) or other legislation enacted by the Parliament of Canada respecting bankruptcy or insolvency.

Section 14(2) states that the priority of wage claims provided in s. 14(1) over claims of other unsecured creditors of an employer does not apply to distributions made under federal bankruptcy and insolvency legislation.

ESA Part V.1 – Employee Tips and Other Gratuities

Part V.1 prohibits employers from withholding their employees' tips or other gratuities, making a deduction from their employees' tips or other gratuities, and causing their employees to return or give their tips or other gratuities to the employer, except in specified circumstances.

ESA Part V.1 Section 14.1 – Definition – REPEALED

ESA Part V.1 Section 14.2 – Prohibition re Tips or Other Gratuities

Prohibition re Tips or Other Gratuities - s. 14.2(1)

14.2(1) An employer shall not withhold tips or other gratuities from an employee, make a deduction from an employee's tips or other gratuities or cause the employee to return or give his or her tips or other gratuities to the employer unless authorized to do so under this Part.

Scheme of Part V.1

Part V.1 prohibits, an employer from withholding an employee's tips or other gratuities, making a deduction from them, or causing the employee to return or to give them to the employer, with the following exceptions:

- a statute of Ontario or Canada or a court order authorizes it (s. 14.3), or
- the employer collects and redistributes tips or other gratuities among some or all of the employer's employees (s. 14.4)

Where an employer contravenes this prohibition, the remedy is set out in s. 14.2(2): the employer must pay the amount that was unlawfully withheld/deducted/returned/given. This payment is to be made in favour of the employee(s) to whom the customer intended to give the tip. The amount owing is enforceable under the ESA as if it were wages owing to the employee(s).

Note that the employment standard established by Part V.1 provides protection only with respect to an employer withholding an employee's tips and other gratuities, making deductions from an employee's tips or other gratuities or causing an employee to return or give tips or other gratuities to the employer. See subsection 1(1) for the definition of "tip or other gratuity" for a discussion on the test for determining whether a payment is an employee's "tip or other gratuity." **Part V.1 does not empower Employment Standards Officers to enforce the terms of an employer's tip pool**; it does not create statutory entitlements for other employees who may share in the proceeds of a redistribution of a tip pool but claim they did not receive what they may have been entitled to under the terms of the tip pool.

To illustrate: s. 14.4 allows employers to withhold or make a deduction from an employee's tips or other gratuities or cause the employee to return or give them to the employer if the employer collects and redistributes tips or other gratuities among some or all of its employees, subject to certain exceptions established under that subsection. Take an example where an employer has a tip pool policy that provides for a portion of waiters' tips to be distributed to all kitchen staff. One night, the employer withheld a percentage of the waiters' tips as per usual but only redistributed them to the cooks and kept the amount that otherwise would have gone to the dishwashing employees. Assuming this employer does not have the right to participate in the tip pool, the employer has contravened s. 14.2(1). The contravention does not stem from the fact the employer did not adhere to the terms of its tip pool. It

stems from the fact that the employer, having withheld the waiters' tips, did not redistribute some of them in accordance with s. 14.4. In this example, the employer did not have the right to participate in the tip pool and as such would have had to distribute all of the withheld tips to employees in order to fit itself within the s. 14.4 exception and avoid a contravention of s. 14.2(1). The remedy is as per s. 14.2(2): the amounts unlawfully withheld from each waiter (i.e. the amount the employer kept) is a debt owing to each waiter and the amounts owing are enforceable under the Act as if the debts were "wages". The dishwashing employees do not have an enforceable claim under the ESA for any amounts they may have otherwise received if the tips were redistributed in accordance with the tip pool policy.

Employers are not required under the ESA to provide employees with written statements regarding tips or other gratuities.

Subsection 14.2(1)

This provision prohibits employers from withholding an employee's tips or other gratuities, making a deduction from employees' tips or other gratuities, or causing employees to return or to give their tips or other gratuities to the employer unless authorized to do so under Part V.1.

For the balance of this chapter, reference is generally made only to an employer withholding employees' tips or other gratuities, but the discussion should be understood as also addressing an employer making a deduction from employees' tips or other gratuities as well as an employer causing employees' tips or other gratuities to be returned or to be given to the employer.

See s. 1(1) for the definition of the term "tips or other gratuities".

The only circumstances in which an employer may withhold an employee's tips or other gratuities as authorized under Part V.1 are:

- a statute of Ontario or Canada or a court order authorizes it (s. 14.3), or
- the employer collects and redistributes tips or other gratuities among some or all of the employer's employees (s. 14.4)

Outside of these circumstances, employers are prohibited under the Act from withholding their employees' tips or other gratuities. Among other things, this means that employers are prohibited from withholding their employees' tips or other gratuities for things such as breakage, spillage, losses or damage. Employees cannot provide written authorization or any other form of consent to have their tips or other gratuities withheld. (Note that, in this respect, the prohibition against withholding tips or other gratuities is different than the prohibition against deductions that applies to wages in s. 13 of the Act.)

Enforcement - s. 14.2(2)

14.2(2) If an employer contravenes subsection (1), the amount withheld, deducted, returned or given is a debt owing to the employee and is enforceable under this Act as if it were wages owing to the employee.

This provision states that where an employer contravenes s. 14.2(1) (i.e. by withholding an employees' tips or other gratuities in circumstances other than the two that are permitted by s. 14.3 or s. 14.4), the amount of the unlawfully withheld tips or other gratuities is a debt owing to the employee(s) and is to be treated as if it were "wages" under the ESA for purposes of enforcement. Treating the debt in this context as if it were "wages" is necessary for enforcement purposes because tips and other gratuities are not "wages" as per the s. 1(1) definition of "wages". Without this treatment, the tips or other gratuities owing to the employee would not enforceable under the ESA.

As stated above under "Scheme of Part V.1", only the employee whose tips or other gratuities were withheld, deducted, returned or given has a remedy under the ESA (i.e e. the employee(s) to whom the customer made or left a tip). **There is no remedy under the ESA for other employees who may be on the receiving end of a distribution of a tip pool and who, for example, do not receive tip redistribution in accordance with the tip pool.**

Although tips and other gratuities are to be treated as if they were wages owing to the employee for the purposes of enforcement, they are not to be treated as wages for any other purposes under the ESA. Accordingly, an order to pay wages for tips and other gratuities owing to an employee will not attract vacation pay.

ESA Part V.1 Section 14.3 – Statute or Court Order

Statute or Court Order - s. 14.3(1)

14.3(1) An employer may withhold or make a deduction from an employee's tips or other gratuities or cause the employee to return or give them to the employer if a statute of Ontario or Canada or a court order authorizes it.

This provision allows employers to withhold or make a deduction from an employee's tips or other gratuities or cause the employee to return or give them to the employer if a statute of Ontario or Canada or a court order authorizes it.

This provision must be read in conjunction with the exception in s. 14.3(2), which states that this provision does not apply if the statute or order requires the employer to remit the withheld, deducted, returned or given tips or other gratuities to a third person and the employer fails to do so.

Statute of Ontario or Canada

The most frequently encountered deductions authorized by statute are for income tax, Canada Pension Plan (CPP) contributions and employment insurance (EI) premiums. An Employment Standards Officer should check with the Canada Revenue Agency if an employee alleges that deductions made by the employer in purported compliance with income tax, CPP or EI legislation were not authorized.

Court Order

This provision states that an employer may withhold or make a deduction from an employee's tips or other gratuities "if a . . . court order authorizes it." It is Program policy that a withholding or deduction is allowed under s. 14.3(1) only if a court order explicitly authorizes it. It is not enough that the employer is in possession of a court judgment declaring that the employee owes a debt to his or her employer.

Exception - s. 14.3(2)

14.3(2) Subsection (1) does not apply if the statute or order requires the employer to remit the withheld, deducted, returned or given tips or other gratuities to a third person and the employer fails to do so.

Section 14.3(2) provides that the authority in subsection (1) for an employer to withhold or make a deduction from an employee's tips or other gratuities if a statute or court order authorizes it does not

apply if the statute or court order requires the employer to remit the amounts to a third person and the employer fails to do so.

For example, an employer may make statutory deductions for income tax, CPP or EI but fail to remit the funds on the employee's behalf to the Canada Revenue Agency as required. 1), Where the employer fails to remit the deducted tips or other gratuities, the requirement in ss. 14.3(2) is not met and the deduction is not permitted pursuant to ss. 14.3(1). As such, the employer is in violation of s. 14.2(1) since the deduction was not authorized under this Part. Per s. 14.2(2) the amount deducted is a debt owing to the employee and is enforceable under the ESA as if it were wages owing to the employee.

ESA Part V.1 Section 14.4 – Pooling of Tips or Other Gratuities

Pooling of Tips or Other Gratuities - s. 14.4(1)

14.4(1) An employer may withhold or make a deduction from an employee's tips or other gratuities or cause the employee to return or give them to the employer if the employer collects and redistributes tips or other gratuities among some or all of the employer's employees.

employees' tips or other gratuities if the employer collects and redistributes them among some or all of the employer's employees. (This is commonly referred to as a "tip pool".)

Tip pools include what is referred to as "tip outs", which are payments made from a tip-earning employee to a non tip-earning employee pursuant to their employer's policy. For example, an employer's policy may require a waiter to "tip out" a certain percentage of the waiter's tips or sales to the bartender who prepared drinks for the waiter.

This provision must be read in conjunction with subsections 14.4 (2) - (5), which place some restrictions on the ability of employers, directors and shareholders to participate in the redistribution under subsection 14.4(1).

The question may arise as to how much time the employer has to redistribute the tips or other gratuities before it can be said that the employer has failed to do so and is therefore in contravention of s. 14.2. There is no requirement in the Act for employers to establish a recurring period and day for the distribution of tips and other gratuities to employees. It is Program policy that the employer has a reasonable period of time to distribute the tips. What is reasonable will depend on the circumstances.

The criteria in this provision are not met unless "the employer collects and redistributes tips or other gratuities **among some or all of the employer's employees"**. This means, for example, that where the only person to share in the tip pool is the sole proprietor who owns the business, there will be a violation of s. 14.2(1) because the tips that were withheld were not redistributed among some or all of the sole proprietor's employees.

Other than the limitations on participation in the tip pool that are established in subsections 14.4 (2) - (5) for the purposes of determining whether the withholding of tips is authorized under subsection 14.4(1), the Act does not regulate tip pools. For example, the Act:

- does not require a tip pool to be in the workplace,
- does not regulate who will participate in a tip pool,
- does not address the specific distribution within the tip pool (e.g., the percentage or amount received by employees),
- does not regulate how and when an employer can change the tip pool arrangement,
- does not require that tip pool arrangements be in writing,

- does not require that there be written agreements from employees in order for an employer to withhold an employee's tips for purposes of redistributing them as part of a tip pool.

It is Program policy that in order to be redistributing tips or other gratuities under this subsection, employers are required to distribute tips and other gratuities to employees in the form of cash, cheque or direct deposit (including *Interac* e-transfer). It is Program policy that providing prepaid credit cards to employees does not constitute a redistribution of tips or other gratuities within the meaning of this section.

Exception to Pooling of Tips or Other Gratuities - s. 14.4(2)

14.4(2) An employer shall not redistribute tips or other gratuities under subsection (1) to such employees as may be prescribed.

As of the publication date, no employees are prescribed.

Employer, etc. Not to Share in Tips or Other Gratuities - s. 14.4(3)

14.4(3) Subject to subsections (4) and (5), an employer or a director or shareholder of an employer may not share in tips or other gratuities redistributed under subsection (1).

Subject to ss. 14.4(4) and (5), employers, or directors or shareholders of an employer, are prohibited from sharing in the proceeds of a tip pool redistribution.

However, the Act does not prohibit employers, or directors or shareholders of an employer from keeping any tips or other gratuities that they earn themselves (e.g., tips or other gratuities that a customer intended them to receive). For example, a director of a company that operates a bar often works as a bartender at the bar. The Act does not prohibit the director from keeping tips that were left by a customer in such circumstances that a reasonable person would be likely to infer were intended for the director.

Exception - Sole proprietor, Partner - s. 14.4(4)

14.4(4) An employer who is a sole proprietor or a partner in a partnership may share in tips or other gratuities redistributed under subsection (1) if he or she regularly performs to a substantial degree the same work performed by,

(a) some or all of the employees who share in the redistribution; or

(b) employees of other employers in the same industry who commonly receive or share tips or other gratuities.

Subsection 14.4(3) prohibits employers from sharing in the proceeds of a tip pool redistribution, subject to the exception set out in this subsection.

This subsection provides that an employer who is a sole proprietor or a partner in a partnership may share in the proceeds of a tip pool redistribution if the sole proprietor or partner regularly performs to a substantial degree the same work that is performed by:

- some or all of the employees who share in the redistribution, or

- employees of other employees in the same industry who commonly receive or share tips or other gratuities.

“Regularly Performs to a Substantial Degree”

"Regularly" implies that the performance of the work is routine and predictable.

"[T]o a substantial degree" implies that the performance of the work takes up a considerable amount of the sole proprietor or partner's time.

The issue of whether a sole proprietor or a partner in a partnership regularly performs to a substantial degree the same work is determined on a case-by-case basis considering all of the relevant factors, including how routinely they perform the work and the predictability of its performance.

For example, if a sole proprietor who works eight hours per day waited tables every day for five hours during the lunch rush and the dinner rush, the Program would take the position that the sole proprietor was regularly performing those duties to a substantial degree.

However, if a partner acted as a bartender only when there was an unexpected rush of customers or when an employee called in sick and if neither of those events were a regular occurrence, the performance of these duties may not be considered regular because they are performed on an irregular and unpredictable basis. Similarly, if a partner who works 10 hours per day acted as a bartender for one hour per shift, these duties may not be considered performed to a substantial degree.

The Same Work Performed by Some or All of the Employees Who Share in the Redistribution

A sole proprietor or partner may share in the tip pool if they regularly perform to a substantial degree the same work as some or all of their employees who share in the tip pool.

For example, if the employees who receive a portion of the tip pool are hosts, servers, cooks and dishwashers, a sole proprietor or partner could share in the tip pool if they regularly performed the duties of hosts, servers, cooks or dishwashers, or a combination thereof, to a substantial degree.

The Same Work Performed by Employees of Other Employers Who Commonly Receive Tips or Share in Tip Redistribution

A sole proprietor or partner who does not regularly perform to a substantial degree the same work performed by some or all of the employees who share in the tip pool may nevertheless share in it if they regularly perform to a substantial degree the same work performed by employees of other employers in the same industry who commonly receive or share tips or other gratuities.

For example, a sole proprietor operates a restaurant in which the sole proprietor is the only bartender. Every day the sole proprietor spends six out of ten working hours bartending. The sole proprietor would be able to share in the tip pool because the sole proprietor regularly performs to a substantial degree the work of a bartender and bartenders in other restaurants commonly receive tips or share in the redistribution of tips or other gratuities.

Exception - Director, Shareholder - s. 14.4(5)

14.4(5) A director or shareholder of an employer may share in tips or other gratuities redistributed under subsection (1) if he or she regularly performs to a substantial degree the same work performed by,

(a) some or all of the employees who share in the redistribution; or

(b) employees of other employers in the same industry who commonly receive or share tips or other gratuities.

Subsection 14.4(3) prohibits directors and shareholders of an employer from sharing in the proceeds of a redistribution of a tip pool, subject to the exception set out in this subsection.

This subsection provides that a director or shareholder of an employer may share in the proceeds of a redistribution of a tip pool if the director or shareholder regularly performs to a substantial degree the same work that is performed by:

- some or all of the employees who share in the redistribution or
- employees of other employers in the same industry who commonly receive or share tips or other gratuities.

“Regularly Performs to a Substantial Degree”

"Regularly" implies that the performance of the work is routine and predictable.

"[T]o a substantial degree" implies that the performance of the work takes up a considerable amount of the director or shareholder's time. The issue of whether a director or a shareholder regularly performs to a substantial degree the same work is to be determined on a case-by-case basis considering all of the relevant factors, including how routinely they perform the work and the predictability of its performance.

For example, if a shareholder who works eight hours per day waited tables every day for five hours during the lunch rush and the dinner rush, the Program would take the position that the shareholder was regularly performing those duties to a substantial degree.

However, if a director acted as a bartender only when there was an unexpected rush of customers or when an employee called in sick and if neither of those events were a regular occurrence, the performance of these duties may not be considered regular because they are performed on an irregular and unpredictable basis. Similarly, if a director who works 10 hours per day acted as a bartender for one hour per shift, these duties may not be considered performed to a substantial degree.

The Same Work Performed by Some or All of the Employees Who Share in the Redistribution

A director or shareholder may share in redistribution of the tip pool if they regularly perform to a substantial degree the same work as some or all of their employees who are part of the tip pool.

For example, if the employees who receive a portion of the tip pool are hosts, servers, cooks and dishwashers, a director or shareholder could share in the tip pool if they regularly perform the duties of hosts, servers, cooks or dishwashers, or a combination thereof to a substantial degree.

The Same Work Performed by Employees of Other Employers Who Commonly Receive Tips or Share in their Redistribution

A director or shareholder who does not regularly perform to a substantial degree the same work performed by some or all of the employees who share in the tip pool may nonetheless share in it if they regularly perform to a substantial degree the same work performed by employees of **other employers in the same industry** who commonly receive or share tips or other gratuities.

For example, a director works at a restaurant in which the director is the only bartender. Every day the director spends six of ten working hours bartending. The director would be able to share in the tip pool because the director is regularly performing to a substantial degree the work of a bartender and bartenders in other restaurants commonly receive tips or other gratuities.

ESA Part V.1 Section 14.5 – Transition – Collective Agreements

Section 14.5 establishes transitional rules for situations where a collective agreement that was in effect when Part V.1 came into force contains provisions re: tips and other gratuities that conflict with Part V.1.

Part V.1 came into force on June 10, 2016.

Transition - Collective Agreements - s. 14.5(1)

14.5(1) If a collective agreement that is in effect on the day section 1 of the *Protecting Employees' Tips Act, 2015* comes into force contains a provision that addresses the treatment of employee tips or other gratuities and there is a conflict between the provision of the collective agreement and this Part, the provision of the collective agreement prevails.

This subsection states that a term of a collective agreement that was in force on June 10, 2016 that addresses the treatment of employee tips or other gratuities will prevail over Part V.1 if there is a conflict.

For example, if a collective agreement that was ratified in June 2013 and in force on June 10, 2016 contained a provision that required employees to give half of all tips earned to the employer for the employer to keep, that provision would prevail even though such an arrangement would otherwise be prohibited under Part V.1.

Same - Expiry of Agreement - s. 14.5(2)

14.5(2) Following the expiry of a collective agreement described in subsection (1), if the provision that addresses the treatment of employee tips or other gratuities remains in effect, subsection (1) continues to apply to that provision, with necessary modifications, until a new or renewal agreement comes into effect.

This subsection states that where a collective agreement described in subsection (1) expires but the collective agreement provision addressing the treatment of employee tips or other gratuities remains in effect, subsection (1) (which allows that collective agreement provision to prevail over Part V.1 if there is a conflict) continues to apply with necessary modifications until a new or renewal collective agreement comes into effect.

For example, a collective agreement was ratified in June 2013 and in force June 1, 2016 that contained a provision that required employees to give half of all tips earned to the employer for the employer to keep. The collective agreement expired on August 1, 2016 and the provisions that address the treatment of tips or other gratuities remained in effect until the new agreement came into effect on October 1, 2016. That provision prevailed over Part V.1 until October 1, 2016 even though such an arrangement would otherwise be prohibited under Part V.1.

Same - Renewed or New Agreement - s. 14.5(3)

14.5(3) Subsection (1) does not apply to a collective agreement that is made or renewed on or after the day section 1 of the *Protecting Employees' Tips Act, 2015* comes into force.

This subsection provides that subsection (1), which allows provisions in a collective agreement that conflict with Part V.1 to prevail, does not apply to collective agreements made or renewed on or after June 10, 2016.

In other words, terms of collective agreements that came into effect on or after June 10, 2016 that address the treatment of employee tips or other gratuities must comply with Part V.1 of the Act.

ESA Part VI - Records

Part VI of the Act (Records) imposes certain obligations on employers to create detailed records pertaining to the employment of each employee, and to retain those records over specified periods of time. These records may serve as evidence in the event of a complaint under the Act. The obligations with respect to keeping records of vacation time and pay in paragraph 6 of s. 15(1) and paragraph 5 of s. 15(5) of the Act were repealed and replaced by those set out in a new section (s. 15.1) by the *Government Efficiency Act, 2002*, SO 2002, c 18 ("GEA 2002") which came into force on November 26, 2002. In addition, the GEA 2002 amended the record-keeping obligations to add a requirement to keep records of the information provided in statements to employees upon the termination of employment in accordance with s. 12.1 (new).

ESA Part VI Section 15 – Records

Records – s. 15(1)

15(1) An employer shall record the following information with respect to each employee, including an employee who is a homeworker:

1. The employee's name and address.

2. The employee's date of birth, if the employee is a student and under 18 years of age.

3. The date on which the employee began his or her employment.

3.1 The dates and times that the employee worked.

3.2 If the employee has two or more regular rates of pay for work performed for the employer and, in a work week, the employee performed work for the employer in excess of the overtime threshold, the dates and times that the employee worked in excess of the overtime threshold at each rate of pay.

4. The number of hours the employee worked in each day and each week.

5. The information contained in each written statement given to the employee under subsection 12 (1), section 12.1, subsections 27 (2.1), 28 (2.1), 29 (1.1) and 30 (2.1) and clause 36 (3) (b).

Section 15(1) sets out the specific information that an employer is required to record and keep concerning the employment of each employee. This provision was amended by the *Fair Workplaces, Better Jobs Act, 2017*, SO 2017 c 22 amended this provision by adding new record keeping obligations in paragraphs 3.1 and 3.2.

The employer can choose their format for records, as the ESA 2000 does not provide specific formatting requirements. Instead, the ESA 2000 sets out what information must be captured and the time periods during which it must be maintained and kept readily available for inspection.

Accurate and complete records may provide evidence of compliance with other parts of the ESA 2000, although they are not necessarily conclusive. Where an employer has not made and kept complete records, the employment standards officer will be required to make a determination with respect to such issues as the employee's rate of pay and hours worked, etc., on the best evidence available.

In *W.G. Wilson Transportation Inc. o/a Modern Cab v Aubertin* (August 25, 1987), ESC 2259 (Aggarwal) Referee Aggarwal determined that where an employer fails to keep accurate records of hours worked by an employee, a record kept by the employee may provide the basis for calculating hours worked. The employer's argument that the employee's records are "self-serving" should be disregarded.

The employer's obligations in s. 15(1) are clear and specific. They shall record the following information with respect to all employees, including homeworkers:

1. Name and address
2. Date of birth, if employee is a student and under 18 – note that age is relevant under the ESA 2000 for the purposes of student minimum wage – see ESA Part IX, s. 23.1
3. Date employment commenced (start date)

3.1 The dates and times that the employee worked subject to the exception in s. 15(3)

- Section 15(3) – the requirement in s. 15(1), para. 3.1 does not apply to salaried employees if:
    - the employer records the number of excess hours in a regular work week and the number of hours in excess of eight hours per day; or
    - the number of hours in excess of the regular number of hours in the employee's regular work day;

3.2. If the employee has two or more regular rates of pay in a work week and performs work in excess of the overtime threshold, the dates and time the employee worked in excess of the overtime threshold at each rate of pay.

4. Number of hours worked by the employee in each day and each week subject to the following exceptions:
    - Section 15(3) – the requirement in s. 15(1), para. 4 does not apply to salaried employees if:
        - the employer records the number of excess hours in a regular work week and
        - the number of hours in excess of 8 hours per day; or the number of hours in excess of the regular number of hours in the employee's regular work day

          or

        - ESA Part VII, ss. 17 to 19 and ESA Part VIII (Overtime Pay) do not apply to the employee.
    - Section 11(3) of O Reg 285/01: an employer does not have to keep records of the number of hours worked in each day and each week by homemakers who are paid in accordance with O Reg 285/01, s. 11(2).
    - Section 23 of O Reg 285/01: an employer does not have to keep records of the number of hours worked in each day and each week by residential care workers.
5. The information contained in each employee's wage statement under ESA Part V, ss. 12(1) and 12.1, statements with respect to substitute public holidays under ESA Part X, ss. 27(2.1), 28(2.1), 29(1.1) and 30(2.1), and/or separate vacation pay statement as required under ESA Part XI, s. 36(3)(b).

Note the ESA does not require employers to keep records regarding tips and other gratuities. Furthermore, because tips and other gratuities do not fall within the definition of wages, there is no obligation for an employer to include information regarding tips and other gratuities on wage statements.

Homeworkers – s. 15(2)

15. (2) In addition to the record described in subsection (1), the employer shall maintain a register of any homeworkers the employer employs showing the following information:

1. The employee's name and address.

2. The information that is contained in all statements required to be provided to the employee described in clause 12(1)(b).

3. Any prescribed information.

This provision applies to employers of homeworkers. Under s. 15(2), an employer must maintain a register of any homeworker tthey employ. In addition to the requirements for records under s. 15(1), this register must contain the following information:

1. Homeworker's name and address
2. Wage rate (if there is one), and
3. Any information prescribed by the regulations (as of the time of writing, there is no prescribed information.)

Exception – s. 15(3)

15(3) An employer is not required to record the information described in paragraph 3.1 or 4 of subsection (1) with respect to an employee who is paid a salary if,

(a) the employer records the number of hours in excess of those in his or her regular work week and,

- **i. the number of hours in excess of eight that the employee worked in each day, or**
- **ii. if the number of hours in the employee's regular work day is more than eight hours, the number in excess; or**

(b) sections 17 to 19 and Part VIII (Overtime Pay) do not apply with respect to the employee.

Section 15(3) relieves an employer from the requirement to record the dates and times the employee worked and all daily and weekly hours worked by employees who are paid a salary as defined in s. 15(4) if:

1. The employer records the employee's weekly and daily excess hours of work; or
2. The provisions for overtime pay in ESA Part VII, ss. 17 to 19 (the provisions regarding maximum hours of work, time free from work and exceptional circumstances) and ESA Part VIII (Overtime Pay) do not apply to the employee.

Meaning of Salary – s. 15(4)

15(4) An employee is considered to be paid a salary for the purposes of subsection (3) if,

(a) the employee is entitled to be paid a fixed amount for each pay period; and

(b) the amount actually paid for each pay period does not vary according to the number of hours worked by the employee, unless he or she works more than 44 hours in a week.

This provision defines "salary" for the purposes of the record-keeping requirements of s. 15(3).

Where an employee receives a fixed payment for each pay period for services rendered to the employer, and where the payment does not vary by the number of hours the employee works (unless the hours are in excess of 44 hours per week), they are considered under s. 15(4) to be in receipt of a salary.

Section 15(4)(a) does not mean, however, that the pay per pay period can never change. For example, an employee would still be deemed to be a "salaried" employee where the employee receives a raise resulting from a change to the employment contract. In other words, an employee will be considered to be paid a salary, even though the salary may change, provided the change is long term rather than a consequence of a weekly fluctuation in hours worked.

Retention of Records – s. 15(5)

15(5) The employer shall retain or arrange for some other person to retain the records of the information required under this section for the following periods:

1. For information referred to in paragraph 1 or 3 of subsection (1), three years after the employee ceased to be employed by the employer.

2. For information referred to in paragraph 2 of subsection (1), the earlier of,

- **i. three years after the employee's 18th birthday, or**
- **ii. three years after the employee ceased to be employed by the employer.**

3. For information referred to in paragraph 3.1, 3.2, or 4 of subsection (1) or in subsection (3), three years after the day or week to which the information relates.

4. For information referred to in paragraph 5 of subsection (1), three years after the information was given to the employee.

Under s. 15(5), an employer must retain records or arrange for another person to retain them for stipulated three-year periods. Note that the retention periods with respect to vacation time and pay records is five years and are set out in s. 15.1.

It should also be noted that it is the responsibility of the employer to record and retain information for record-keeping purposes. Where an employer makes an arrangement for another person, such as a bookkeeper or accountant, to retain the records, the employer's responsibility to create the records is not removed. Further, an employer must also ensure that the records are readily available for inspection by an employment standards officer even where another person retains them – see the discussion at ESA Part VI, s. 16.

A manager's claim for wages cannot be disallowed simply because one of his duties was to properly complete records, including his own. In *634429 Ontario Limited c.o.b.a. Great Scott's Restaurant v Mayo et al* (January 2, 1987), ESC 2204 (Bryant), a decision under the former *Employment Standards Act,*

Referee Bryant stated "Under section 11 of the ... Act the employer is responsible for maintaining accurate records relating to the employee's performance of work." See also *Village of West Lorne v Orchard* (February 15, 1985), ESC 1787 (Brown).

Employment standards officers should note that any information they give to an employer regarding the retention periods of records must be limited to the requirements of the ESA 2000. Some records may be required by other legislation, either federal or provincial, (e.g., the federal *Income Tax Act*) for longer time periods.

Occasionally, enquiries are received as to whether the Program or Director of Employment Standards will authorize the destruction of records after the stipulated three-year periods. The response should be that the ESA 2000 requires records to be maintained for certain periods and is not contravened if records are not kept beyond the expiry of those time periods. The ESA 2000, however, does not empower the Director to authorize the destruction of records.

Register of Homeworkers – s. 15(6)

15(6) Information pertaining to a homeworker may be deleted from the register three years after the homeworker ceases to be employed by the employer.

This provision permits an employer to remove information concerning the employment of a homeworker in their employ, from the register, three years after the homeworker's employment has ended.

Retain Documents Re Leave – s. 15(7)

15(7) An employer shall retain or arrange for some other person to retain all notices, certificates, correspondence and other documents given to or produced by the employer that relate to an employee taking pregnancy leave, parental leave, family medical leave, organ donor leave, family caregiver leave, critical illness leave, child death leave, crime-related child disappearance leave, domestic or sexual violence leave, sick leave, family responsibility leave, bereavement leave, emergency leave during a declared emergency or an infectious disease emergency or reservist leave for three years after the day on which the leave expired.

This provision was amended effective March 19, 2020 as a result of the *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020* to include a reference to infectious disease emergency leave.

It was previously amended effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018* to reflect new Part XIV Leaves of Absence that replaced personal emergency leave – sick leave, family responsibility leave and bereavement leave.

Section 15(7) requires an employer to retain (or arrange for some other person to retain) all notices, certificates, correspondence and other documents relating to any leave taken by an employee under ESA Part XIV Leaves of Absence. The documents must be retained for a period of three years after the end of the leave. The employer must also ensure that these documents are readily available for inspection by an employment standards officer, upon request, in keeping with ESA Part VI, s. 16.

The documents that must be retained include the following:

Pregnancy Leave:

- Section 46(4)(a): written notice to take pregnancy leave
- Section 46(4)(b): medical certificate stating due date, if requested
- Section 46(5): written notice to change pregnancy leave start date
- Section 46(6)(a): written notice of the day pregnancy leave began or is to begin because of a complication, birth, still-birth or miscarriage
- Section 46(6)(b)(i): medical certificate if requested: unable to work, due date
- Section 46(6)(b)(ii): medical certificate if requested: due date, actual date of birth, still-birth or miscarriage
- Section 47(2): written notice to end pregnancy leave early
- Section 47(3): written notice to change end date of pregnancy leave
- Section 47(4): written notice to resign from employment on or before end of pregnancy leave

Parental Leave:

- Section 48(4): written notice to take parental leave
- Section 48(5): written notice to change parental leave start date
- Section 48(6): written notice provided after commencing parental leave where the child comes into the employee's custody, care and control for the first time earlier than expected
- Section 49(2): written notice to end parental leave early
- Section 49(3): written notice to change parental leave end date
- Section 49(4): written notice to resign from employment on or before end of parental leave

Family Medical Leave:

- Section 49.1(8): written notice to take family medical leave
- Section 49.1(9): written notice provided after commencing family medical leave
- Section 49.1(10): medical certificate if requested: individual has a serious medical condition with a significant risk of death occurring within a period of 26 weeks
- Section 52.1: written agreement (if there was one) of the employer allowing an employee to return to work during a week they took leave (note: a s. 52.1 agreement does not have to be in writing)

Organ Donor Leave:

- Sections 49.2(14): medical certificate(s), if requested
- Section 49.2(11): written notice to end organ donor leave early
- Section 49.2(12): written notice to take or extend organ donor leave
- Section 49.2(13): written notice provided after commencing or extending organ donor leave

Family Caregiver Leave:

- Section 49.3(6): written notice to take family caregiver leave
- Section 49.3(7): written notice provided after commencing family caregiver leave
- Section 49.3(8): copy of medical certificate, if requested

Critical Illness Leave:

- Section 49.4(17): written notice to take leaveand a written plan indicating the weeks in which the leave will be taken
- Section 49.4(18): written notice provided after commencing leaveand a written plan indicating the weeks in which the leave will be taken
- Section 49.4(19): written request to change when leave will be taken and employer's written permission, or employee's written notice of the change
- Section 49.4(20): copy of medical certificate, if requested

Sick Leave:

- Sections 50(3) and (4): any documents advising employer that sick leave will be, is being or has been taken
- Section 50(6): any document provided to the employer as evidence to support employee's entitlement to the leave

Family Responsibility Leave:

- Sections 50.0.1(4) and (5): any documents advising employer that family responsibility leave will be, is being or has been taken
- Section 50.0.1(7): any document provided to the employer as evidence to support employee's entitlement to the leave

Bereavement Leave:

- Sections 50.0.2(4) and (5): any documents advising employer that bereavement leave will be, is being or has been taken
- Section 50.0.2(7): any document provided to the employer as evidence to support employee's entitlement to the leave

Personal Emergency Leave (repealed – in effect prior to January 1, 2019):

- Previous sections 50(3) and (4): any documents advising employer that personal emergency leave will be, is being or has been taken
- Previous section 50(12): any document provided to the employer as evidence to support employee's entitlement to the leave

Declared Emergency Leave:

- Sections 50.1(2) and (3): any documents advising employer that declared emergency leave will be, is being or has been taken
- Section 50.1(4): any document provided to the employer as evidence to support employee's entitlement to leave

Infectious Disease Emergency Leave:

- Sections 50.1(2) and (3): any documents advising employer that infectious disease emergency leave will be, is being or has been taken
- Section 50.1(4.1): any document provided to the employer as evidence to support employee's entitlement to leave

Reservist Leave:

- Sections 50.2(5) and (6): written notice advising the employer that reservist leave will be or is being taken, see also s. 50.2(1) for the requirement for notice to be in writing
- Section 50.2(7): any document provided to the employer as evidence to support employee's entitlement to the leave
- Section 50.2(9): written notice of intention to end the leave, see also s. 50.2(1) for the requirement for notice to be in writing

Child Death Leave:

- Sections 49.5(7) and (8): written notice that child death leave will be, is being or has been taken and a written plan indicating the weeks in which the leave will be taken
- Section 49.5(9): written request to change when leave will be taken and employer’s written permission or employee’s written notice of the change
- Section 49.5(10): any document provided to the employer as evidence to support employee's entitlement to the leave

Crime-Related Child Disappearance Leave:

- Sections 49.6(11) and (12): any documents advising employer that crime-related child disappearance leave will be, is being or has been taken
- Section 49.5(13):written request to change when leave will be taken and employer’s written permission or employee’s written notice of the change
- Section 49.5(14): any document provided to the employer as evidence to support employee's entitlement to the leave

Domestic or Sexual Violence Leave

- Sections 49.7(10) and (11): any documents advising employer that domestic or sexual violence leave per s.49.7(4)(a) (the 10 day entitlement) will be, is being or has been taken (note that the employee is not required to provide notice in writing under this subsection)

- Sections 49.7(13) and (14): written notice that domestic or sexual violence leave per s.49.7(4)(b) (the 15 week entitlement) will be, is being or has been taken
- Section 49.7(15): any document provided to the employer as evidence to support employee's entitlement to the leave
- Further, note that per s. 49.7(17), the employer is required to protect the confidentiality of records either given to the employer by the employee or produced by the employer. The release of these records is subject to the limits of s. 49.7(14).

All Leaves (Excluding Reservist Leave except where noted):

- Section 51(1): written election to opt out of benefit plan(s) during leave
- Section 51(3): written notice of employee's intention not to pay employee's contribution(s) to benefit plan(s) - includes Reservist Leave during period of postponement under s. 53(1.1)
- Sections 51.1(1), (2): any written agreement regarding deferral of vacation - includes Reservist Leave

Retention of Agreements Re Excess Hours – s. 15(8)

15(8) An employer shall retain or arrange for some other person to retain copies of every agreement that the employer has made with an employee permitting the employee to work hours in excess of the limits set out in subsection 17(1) for three years after the last day on which work was performed under the agreement.

Section 15(8) requires employers to retain copies of agreements to work excess daily or weekly hours for three years after the last day on which work was performed under the agreement. The employer must retain or arrange for another person to retain these records. The employer must also ensure that the copies are readily available for inspection by an employment standards officer, upon request, in keeping with the requirements of ESA Part VI, s. 16.

Retention of Disconnecting From Work Policies – s. 15(8.1)

15 (8.1) An employer shall retain or arrange for some other person to retain copies of every written policy on disconnecting from work required under Part VII.0.1 for three years after the policy ceases to be in effect.

Subsection 15(8.1) was added to the ESA effective December 2, 2021. This provision requires employers to retain copies of every written policy on disconnecting from work required under Part VII.0.1 for three years after the policy ceases to be in effect. The employer must retain or arrange for another person to retain these records. The employer must also ensure that the copies are readily available for inspection by an employment standards officer, upon request, in keeping with the requirements of ESA Part VI, s. 16.

Retention of Averaging Agreements – s. 15(9)

15(9) An employer shall retain or arrange for some other person to retain copies of every averaging agreement that the employer has made with an employee under clause 22(2)(a) for three years after the last day on which work was performed under the agreement.

Section 15(9) requires employers to retain copies of agreements to average hours of work that were made under ESA Part VIII, s. 22(2)(a) for the purpose of calculating overtime pay entitlements for three years after the last day on which work was performed under the agreement. The employer must retain or arrange for another person to retain these records. The employer must also ensure that the copies are readily available for inspection by an employment standards officer, upon request, in keeping with the requirements of ESA Part VI, s. 16.

ESA Part VI Section 15.1 - Record Re Vacation Time and Vacation Pay

Record Re Vacation Time and Vacation Pay - s. 15.1(1)

15.1(1) An employer shall record information concerning an employee's entitlement to vacation time and vacation pay in accordance with this section.

The *Fair Workplaces, Better Jobs Act, 2017*, SO 2017 c 22, effective January 1, 2018, amended this provision to add record keeping obligations with respect to the vacation pay earned in each vacation entitlement period. Section 15.1 should be read together with ESA Part XI, s. 41.1, which sets out employees' rights to a statement of the information recorded under this section.

Content of Record - s. 15.1(2)

15.1(2) The employer shall record the following information:

1. The amount of vacation time, if any, that the employee had earned since the start of employment but had not taken before the start of the vacation entitlement year.

2. The amount of vacation time that the employee earned during the vacation entitlement year.

3. The amount of vacation time, if any, taken by the employee during the vacation entitlement year.

4. The amount of vacation time, if any that the employee had earned since the start of employment but had not taken as of the end of the vacation entitlement year.

4.1 The amount of vacation pay that the employee earned during the vacation entitlement year and how that amount was calculated.

5. The amount of vacation pay paid to the employee during the vacation entitlement year.

6. The amount of wages on which the vacation pay referred to in paragraph 5 was calculated and the period of time to which those wages relate.

Section 15.1(2) sets out the record keeping requirements for both vacation time and pay with respect to each completed vacation entitlement year as follows:

- Vacation time earned since the date of hire but not taken before the start of the vacation entitlement year
- Vacation time earned during the vacation entitlement year
- Vacation taken during the vacation entitlement year
- Balance of vacation time remaining at the end of the vacation entitlement year
- Vacation pay earned during vacation entitlement year and how the amount was calculated (effective January 1, 2018 - see s. 15.1(7) for transitional provisions)
- Vacation pay paid during the vacation entitlement year, and
- The amount of wages on which the vacation pay paid during the vacation entitlement year was calculated and the period of time to which those wages relate.

Additional Requirement, Alternative Vacation Entitlement Year - s. 15.1(3)

15.1(3) If the employer establishes an alternative vacation entitlement year for an employee, the employer shall record the following information for the stub period:

1. The amount of vacation time that the employee earned during the stub period.

2. The amount of vacation time, if any, that the employee took during the stub period.

3. The amount of vacation time, if any, earned but not taken by the employee during the stub period.

3.1 The amount of vacation pay that the employee earned during the stub period and how that amount was calculated.

4. The amount of vacation pay paid to the employee during the stub period.

5. The amount of wages on which the vacation pay referred to in paragraph 4 was calculated and the period of time to which those wages relate.

Section 15.1(3) establishes the recordkeeping obligations with respect to vacation time and pay earned and taken in a stub period as follows:

- Vacation time earned during the stub period
- Vacation time taken during the stub period
- Amount of vacation time earned but not taken during the stub period
- Vacation pay earned during stub period and how that amount was calculated (effective January 1, 2018 - see s. 15.1(7) for transitional provisions)
- Vacation pay paid to the employee during the stub period, and
- The amount of wages on which the vacation pay paid during the stub period was calculated and the period of time to which those wages relate.

When Information to Be Recorded - s. 15.1(4)

15.1(4) The employer shall record information under this section by a date that is not later than the later of,

a) seven days after the start of the next vacation entitlement year or the first vacation entitlement year, as the case may be; and

b) the first pay day of the next vacation entitlement year or of the first vacation entitlement year, as the case may be.

Section 15.1 (4) requires the employer to make a record of the information regarding vacation time and pay for each vacation entitlement year and stub period no later than seven days after the completion of the vacation entitlement year or stub period, or the first pay day following the completion of the vacation entitlement year or stub period, whichever is later.

Retention of Records - s. 15.1(5)

15.1(5) The employer shall retain or arrange for some other person to retain each record required under this section for five years after it was made.

Similar to the record retention obligations established under s. 15(5), it is the employer's responsibility to retain the information recorded under s. 15.1. The *Fair Workplaces, Better Jobs Act, 2017*, SO 2017 c 22, effective January 1, 2018, amended this provision to increase the record retention period for records made under this section from three years to five years after they are made. The records may be retained by either the employer or some other person as arranged by the employer.

Note that if the employer does arrange for some other person to retain the records, this does not relieve the employer of the requirement to create the records.

Exception - s. 15.1(6)

15.1(6) Paragraphs 5 and 6 of subsection (2) and paragraphs 4 and 5 of subsection (3) do not apply with respect to an employee whose employer pays vacation pay in accordance with subsection 36(3).

Section 15.1(6) exempts employers from the obligation to record vacation pay paid during the vacation entitlement year and stub period, the amount of wages on which vacation pay were calculated and the period to which those wages relate, if the employer pays vacation pay in accordance with ESA Part XI, s. 36(3) (as amended). Under s. 36(3) an employer and employee may agree that the vacation pay that accrues over each pay period will be paid on the pay day for that pay period. In that case, the employer is required to provide the employee with a statement of the vacation pay paid either as part of the statement of wages provided under ESA Part V, s. 12(1), as per s. 36(3)(a), or separately as per s. 36(3)(b).

However, s. 15(1), paragraph 5 states that the employer is required to record the information provided to the employee in a statement given to the employee under s. 12(1) or s. 36(3)(b). An employer pays vacation pay in accordance with s. 36(3) if the statement of wages provided under s. 12(1) includes the amount of vacation pay paid or the employer provides a separate statement of vacation pay as per s. 36(3)(b).

As a result, where the employer pays vacation pay in accordance with s. 36(3), the employer is relieved by s. 15.1(6) of the requirement to make a record with respect to vacation pay paid and the wages on which it was calculated and the period to which those wages relate for a vacation entitlement year or stub period, but the employer must still record the vacation pay information provided on each pay day for each pay period either as part of the s. 12(1) statement of wages or on a separate statement as per s. 36(3)(b) in accordance with paragraph 5 of s. 15(1).

Transition – s. 15.1(7)

15.1(7) Subsections 15.1 (2) and (3), as they read immediately before the day section 9 of Schedule 1 to the *Fair Workplaces, Better Jobs Act, 2017* came into force, continue to apply with respect to vacation entitlement years and stub periods that began before that day.

The *Fair Workplaces, Better Jobs Act, 2017* SO 2017, c 22 added this provision, effective January 1, 2018. Section 15.1(7) is the transitional provision for the application of the new record keeping obligations for vacation pay earned during a vacation entitlement year in para 4.1 of s. 15.1(2) and the vacation pay earned during a stub period in para 3.1 of s. 15.1(3).

It provides that these new record keeping obligations do not apply to any vacation entitlement year or stub period that began before January 1, 2018.

ESA Part VI Section 16 - Availability

16 An employer shall ensure that all of the records and documents required to be retained under sections 15 and 15.1 are readily available for inspection as required by an employment standards officer even if the employer has arranged for another person to retain them.

Section 16 is intended to prevent unnecessary delays in the production of an employer's records during an investigation under the Act. An employer is expected to produce records made under ss. 15 and 15.1 promptly upon request by an employment standards officer, whether the employer is in possession of the records, or has arranged for another person to retain them.

Where an employer has arranged for another person to retain the records at a location other than the workplace, it remains the employer's responsibility to produce them, within a reasonable period of time, upon the request of an employment standards officer.

ESA Part VII - Hours of Work and Eating Periods

The original limits on working hours of women and children and youths created in 1884 were motivated by health and safety concerns. Although the 1944 legislation retained the health and safety emphasis, a greater emphasis was placed on job creation and the desire to spread work as the armed forces returned to the civilian labour force. The hours of work provisions in the *Employment Standards Act, 2000* allow workplace parties, with some Ministry oversight, to arrange work schedules to suit their needs. The amendments that came into force on March 1, 2005 contain measures that increase employee and employer awareness of their hours of work rights and obligations. Provisions that ensure that employees receive hours free from work in between shifts and on a daily and weekly or bi-weekly basis continue to apply.

ESA Part VII Section 17 – Limit on Hours of Work

Section 17 was amended and sections 17.1, 17.2 and 17.3 were repealed effective April 3, 2019 as a result of the *Restoring Ontario's Competitiveness Act, 2019* (ROCA), which removed the requirement to obtain approval of the Director of Employment Standards to exceed the limit on weekly hours of work.

The discussion of these provisions as they existed prior to April 3, 2019 has been maintained in this publication since employees may still file a complaint relating to a situation that arose prior to the ROCA amendments. That text appears at the end of this section, in red, to highlight that the discussion reflects the pre-April 3, 2019 language of sections 17, 17.1, 17.2 and 17.3.

Limit on Hours of Work – s. 17(1)

17(1) Subject to subsections (2) and (3), no employer shall require or permit an employee to work more than,

(a) eight hours in a day or, if the employer establishes a regular work day of more than eight hours for the employee, the number of hours in his or her regular work day; and

(b) 48 hours in a work week.

Section 17(1) sets out the daily and weekly maximum hours that an employer may require or allow an employee to work:

- Daily maximum: eight hours per day or, if there is an established work day that is longer than eight hours, the number of hours in that work day.
- Weekly maximum: 48 hours per work week.

This provision allows employees to refuse to work hours in excess of eight per day, or in excess of the number of hours in a longer established regular work day, and 48 hours in a work week.

The limits on hours of work in s. 17(1) are subject to the following exceptions:

- Section 17(2), which allows employees to agree in writing to work hours in excess of the s. 17(l)(a) daily limit;
- Section 17(3), which allows employees to agree in writing to work hours in excess of the s. 17(1)(b) weekly limit;

- Where there are exceptional circumstances as set out in s. 19.

Note also that the limit on daily hours of work contained in s. 17(1)(a) does not apply to certain employees hired before September 4, 2001, who entered into arrangements to work hours in excess of those in their regular work day. See O Reg 285/01, s. 32.1.

Regular Work Day of More than Eight Hours

The daily maximum number of hours of work an employer can require or allow an employee to work is eight or, if the employer establishes a regular work day of more than eight hours for the employee, the number of hours in their regular work day.

While the ESA 2000 does not explicitly set out the maximum number of hours a regular work day can be, the ability to establish a regular work day longer than eight hours remains subject to the weekly hours of work limit in s. 17(1)(b), as well as the requirement for daily rest contained in ESA Part VII, s. 18.

"Regular work day" is defined in ESA Part I, s. 1(1) to mean "with respect to an employee who usually works the same number of hours each day, means a day of that many hours". Because the word "usually" is used, an employee does not have to work the same number of hours every work day to establish a regular work day. A regular work day can be established so long as an employee ordinarily works a set number of hours.

An employer may establish a schedule where employees work different numbers of hours on different days of the week. For example, employees work 10 hours Mondays to Thursdays and eight hours on Fridays. It is Program policy that the regular work day from Monday to Thursday is 10 hours and eight hours on Friday. Note that the employer will have to pay overtime pay for four hours in this example (assuming the employee has a 44-hour overtime threshold).

Changing What the Regular Work Day Is

The ESA 2000 does not prohibit an employer from adjusting the regular work day on occasion. That is, so far as the ESA 2000 is concerned, the employer may establish a different regular work day than what it had previously established.

For example, consider an employer that has the following schedule:

- Monday: 10 hours
- Tuesday: 10 hours
- Wednesday: 10 hours
- Thursday: 8 hours
- Friday: 8 hours

The employer wishes to establish the following amended schedule:

- Monday: 11 hours
- Tuesday: 11 hours
- Wednesday: 10 hours
- Thursday: 8 hours
- Friday: 8 hours

The ESA 2000 does not prohibit the employer from establishing a new regular work day of 11 hours for Mondays and Tuesdays.

Furthermore, the employer may want to return to the original schedule after, for example, several months. Nothing in the ESA 2000 prohibits this further change to the schedule.

However, the definition of regular work day contemplates that the employee *usually* works a specific number of hours on a particular day. The more frequently the employer changes the schedule in relation to a particular day of the week, the less likely it is that the employee could be said to have a usual number of hours on a particular day of the week. In other words, the facts may reveal that there is no regular work day, in which case the daily limit in s. 17(1)(a) for that employee will be eight – subject to the exceptions to this limit set out in s. 17(2) and s. 19.

Note also that while the ESA 2000 does not prohibit the employer from changing the regular work day, there may be restrictions against doing so in an employee's employment contract. In this case, it may amount to a breach of the employment contract for the employer to change the regular work day, which may give rise to a constructive dismissal under the ESA 2000 or at common law.

"Work Week"

ESA Part I, s. 1 defines "work week" as:

(a) a recurring period of seven consecutive days selected by the employer for the purpose of scheduling work, or

(b) if the employer has not selected such a period, a recurring period of seven consecutive days beginning on Sunday and ending on Saturday.

In ascertaining the recurring period of seven consecutive days established by the employer for the purpose of scheduling work, if any, an employment standards officer may consider such information as work schedules, time cards and pay periods, although these are not necessarily the same as the work week. In the absence of the employer having established a recurring period of seven consecutive days for the purpose of scheduling work, a default work week of Sunday to Saturday will apply.

Determining the Number of Hours Worked by an Employee – O Reg 285/01, s. 1.1

O Reg 285/01, s. 1.1 sets out the circumstances in which work is deemed to be performed or not deemed to be performed. This provision is essential in determining the number of hours of work under this Part. Note that O Reg 285/01, s. 22 sets out special rules regarding when work is not deemed to be performed for residential care workers.

O Reg 285/01, s. 1.1 provides as follows:

1.1(1) Subject to subsection (2), work shall be deemed to be performed by an employee for the employer,

(a) where work is,

(i) permitted or suffered to be done by the employer, or

(ii) in fact performed by an employee although a term of the contract of employment expressly forbids or limits hours of work or requires the employer to authorize hours of work in advance; or

(b) where the employee is not performing work and is required to remain at the place of employment,

(i) waiting or holding himself or herself ready for call to work, or

(ii) on a rest or break-time other than an eating period.

1.1(2) Work shall not be deemed to be performed for an employer during the time the employee,

(a) is entitled to,

(i) take time off work for an eating period,

(ii) take at least six hours or such longer period as is established by contract, custom or practice for sleeping and the employer furnishes sleeping facilities, or

(iii) take time off work in order to engage in the employee's own private affairs or pursuits as is established by contract, custom or practice; or

(b) is not at the place of employment and is waiting or holding himself or herself ready for call to work.

See the detailed discussion of these provisions in O Reg 285/01, s. 1.1.

Exception: Hours in a Day – s. 17(2)

17(2) An employee's hours of work may exceed the limit set out in clause (1)(a) if the employee has made an agreement with the employer that he or she will work up to a specified number of hours in a day in excess of the limit and his or her hours of work in a day do not exceed the number specified in the agreement.

Section 17(2) permits employers and employees to agree, in writing, that the employee will work up to a specified number of hours in excess of the daily limit set out in s. 17(1)(a) – see ESA Part 1, s. 1(3) and s. 1(3.1) for a discussion of agreements in writing.

Section 17(2) must be read in conjunction with s. 17(5), which provides that s. 17(2) agreements are not valid unless:

- The employer, *before* the agreement is made, gives the employee a copy of a document prepared by the Director of Employment Standards that describes the rights of employees and obligations of employers under the hours of work and overtime pay provisions. The document must be the most recent version published by the Director;

  and

- The agreement contains a statement by the employee acknowledging receipt of the document. The statement must indicate that the employer represented that the document is the most recent version published by the Director.

In addition, the agreement must clearly set out what is being agreed upon. It must be written with sufficient clarity for the parties to know precisely what they are agreeing to. If one of the parties drafted

the agreement, and a particular term is ambiguous and the parties disagree about what the term means, the term will be construed against the parties who drafted the agreement – this is called the contra proferentem rule. The parties must have entered into the agreement voluntarily. Please see ESA Part I, s. 1(3) for a more detailed discussion of the issue of voluntary consent.

Agreements to work excess daily hours can specify the exact number of hours that the employee is agreeing to work, the exact number of hours over and above the daily limit, or they can specify an upper limit (e.g., "up to 10 hours a day").

This section contemplates both "one-off" agreements, where the employee agrees in writing to work excess daily hours on a single occasion, and more open-ended "as required" agreements, where the employee agrees in writing to work a specified number of excess daily hours whenever required by the employer. For example, a retail employer preparing for the busy Christmas season may ask an employee to agree to "with two days' notice, work up to 12 hours a day during the months of November and December of this year."

Agreements under s. 17(2) to work excess daily hours and agreements under s. 17(3) to work excess weekly hours are two separate agreements, although they can be embodied in the same document.

Note that there may be some circumstances in which what appears to be a single agreement with respect to excess daily hours by necessary implication includes an agreement with respect to excess weekly hours, and vice versa. For example, an employee regularly works nine hours a day, five days a week. On the fifth day of the week, the employee agrees in writing to exceed the daily limit and work four additional hours. By necessary implication, the employee has also agreed to work in excess of 48 hours in that work week, and the employee will be permitted to work those excess hours. Or the same employee, who regularly works nine hours a day, whose employer operates only five days a week, enters into an agreement to work up to 60 hours per work week when required – in these circumstances, the employee, by necessary implication, has also agreed to work excess daily hours.

In attempting to facilitate opportunities to work excess hours, employers have inquired as to whether a signature on a sign-up sheet for additional hours might be considered a valid written agreement under s. 17(2). The Program's view is that such a document would be valid if all of the following conditions are met:

- The employee has been given the most recent information document prepared by the Director of Employment Standards;
- The sign-up sheet clearly states that the employee has been given what they are told is the most recent such document;
- The sign-up sheet clearly states that the employee is agreeing to work a specified number or up to a specified number of excess hours;
- The employee initials or signs the sheet; and
- The employee in so initialing or signing understands that they were signifying their assent to the statements on the sign-up sheet.

The requirement regarding the Director's information document in s. 17(5) does not apply to employees who are represented by a trade union – see s. 17(9)(b). Furthermore, different rules regarding the Director's information document apply to employers who entered into agreements with employees to work excess daily hours under the provisions of the ESA 2000 before March 1, 2005, the date on which the

amendments made by the *Employment Standards Amendment Act (Hours of Work and Other Matters), 2004,* SO 2004, c 21 came into force. In particular, because the agreements were entered into under a scheme when the requirement of s. 17(5) was not in force, the conditions for a valid agreement in s. 17(5) do not apply to such employers. See s. 17(9). (Pursuant to a now-repealed provision – ss. 17(10) – the employer was required to provide the information document to employees by June 1, 2005.)

In the absence of a valid written agreement, the daily limit on hours of work in s. 17(1)(a) applies, and the employer may not require or even permit an employee to work excess daily hours, unless exceptional circumstances within the meaning of ESA Part VII, s. 19 are present.

Agreements to work excess daily hours can generally be revoked by employees with two weeks' written notice and generally with reasonable notice by employers – see ss. 17(6) and (7), respectively. It is, however, the Program's position that in situations where an agreement to work excess hours is made pursuant to a collective agreement, the ability to revoke the agreement to work excess hours must be made in accordance with the terms of the collective agreement and the *Labour Relations Act, 1995,* SO 1995, c 1, Sch A, where applicable. Generally, this means that unilateral revocation is not possible during the operation of the collective agreement.

Employers are required to retain a copy of every excess daily (and weekly) hours agreement it has made with its employees for three years after the last day on which work was performed under each agreement – see ESA Part VI, s. 15(8).

Exception: Hours in a Work Week – s. 17(3)

17(3) An employee's hours of work may exceed the limit set out in clause (1)(b) if the employee has made an agreement with the employer that he or she will work up to a specified number of hours in a work week in excess of the limit and his or her hours of work in a work week do not exceed the number of hours specified in the agreement.

Subsection 17(3) was amended effective April 3, 2019 by the *Restoring Ontario's Competitiveness Act, 2019* (ROCA). The ROCA removed the previous requirement to obtain approval of the Director of Employment Standards to exceed the limit on weekly hours of work.

Section 17(3) permits employees' hours of work to exceed the weekly limit of 48 hours in a work week if the employee enters into an agreement with the employer providing that the employee will work up to a specified number of hours in a work week, and the employees' hours of work do not exceed the number of hours specified in the agreement. The agreement must be in writing to be valid – see ESA Part I, s. 1(3) and (3.1) for a discussion of agreements in writing.

In a non-unionized workplace, each employee has the right on an individual basis to enter into agreements to work excess weekly hours. For employees represented by a trade union, the written agreement may be embodied in the collective agreement, a memorandum of agreement or an addendum to an agreement. All bargaining unit members are bound by such an agreement. In this regard, see the discussion of ESA Part III, s. 7.

This section must be read in conjunction with s. 17(5), which provides that s. 17(3) agreements are not valid unless:

- The employer, *before* the agreement is made, gives the employee a copy of a document prepared by the Director of Employment Standards that describes the rights of employees and

obligations of employers under the hours of work and overtime pay provisions. The document must be the most recent version published by the Director.

and

- The agreement contains a statement by the employee acknowledging receipt of the document. The statement must indicate that the employer represented that the document is the most recent version published by the Director.

In addition, the agreement must clearly set out what is being agreed upon. It must be written with sufficient clarity for the parties to know precisely what they are agreeing to. The parties must have entered into the agreement voluntarily. Please see ESA Part I, s. 1(3) for a more detailed discussion of the issue of voluntary consent.

Agreements to work excess weekly hours can specify the exact number of hours that the employee is agreeing to work, the exact number of hours over and above the weekly limit, or they can specify an upper limit (e.g., "up to 60 hours a week").

This section contemplates both "one-off" agreements, where the employee agrees in writing to work excess weekly hours on a single occasion, and more open-ended "as required" agreements, where the employee agrees in writing to work a specified number of excess weekly hours whenever required by the employer. For example, a retail employer preparing for the busy Christmas season may ask an employee to agree to "with two days' notice, work up to 60 hours a week during the months of November and December of this year."

Agreements under s. 17(2) to work excess daily hours and agreements under s. 17(3) to work excess weekly hours are two separate agreements, although they can be embodied in the same document.

Note that there may be some circumstances in which what appears to be a single agreement with respect to excess daily hours by necessary implication includes an agreement with respect to excess weekly hours, and vice versa. For example, an employee regularly works nine hours a day, five days a week. On the fifth day of the week, the employee agrees in writing to exceed the daily limit and work four additional hours. By necessary implication, the employee has also agreed to work in excess of 48 hours in that work week, and the employee will be permitted to work those excess hours. Or if the same employee, who regularly works nine hours a day and whose employer operates only five days a week, enters into an agreement to work up to 60 hours per work week when required, that employee by necessary implication, has also agreed to work excess daily hours.

In attempting to facilitate opportunities to work excess hours, employers have inquired as to whether a signature on a sign-up sheet for additional hours might be considered a valid written agreement under s. 17(3). The Program's view is that such a document would be valid if all of the following conditions are met:

- The employee has been given the most recent information document prepared by the Director of Employment Standards;
- The sign-up sheet clearly states that the employee has been given what they are told is the most recent such document;
- The sign-up sheet clearly states that the employee is agreeing to work a specified number or up to a specified number of excess hours;
- The employee initials or signs the sheet; and

- The employee in so initialing or signing understands that they were signifying their assent to the statements on the sign-up sheet.

The requirement regarding the Director's information document in s. 17(5) does not apply to employees who are represented by a trade union – see s. 17(9)(b). Furthermore, different rules regarding the Director's information document apply to employers who entered into agreements with employees to work excess weekly hours before March 1, 2005, the date the amendments to the ESA 2000 requiring that the Director's information document be given to employees came into force – see s. 17(9).

In the absence of a valid written agreement, the weekly limit on hours of work in s. 17(1)(b) applies, and the employer may not require or even permit an employee to work excess weekly hours, unless exceptional circumstances within the meaning of s. 19 are present.

Agreements to work excess weekly hours can generally be revoked by employees with two weeks' written notice – see s. 17(6). Agreements to work excess weekly hours can generally be revoked by employers with reasonable notice – see s. 17(7).

The general right to revoke agreements is limited where the agreement is made between a union and the employer. It is the Program's position that in situations where an agreement to work excess hours is made pursuant to a collective agreement, the ability to revoke the agreement to work excess hours must be made in accordance with the terms of the collective agreement and the *Labour Relations Act, 1995* where applicable. Generally, this means that unilateral revocation is not possible during the operation of the collective agreement.

Employers are required to retain a copy of every excess weekly and daily hours agreement it has made with its employees for three years after the last day on which work was performed under each agreement – see ESA Part VI, s. 15(8).

Transition: *Restoring Ontario's Competitiveness Act, 2019* – Impact on pre-existing Director Approvals

Effective April 3, 2019, the excess weekly hours scheme was changed as a result of the *Restoring Ontario's Competitiveness Act, 2019* (ROCA). Prior to the ROCA amendments, the weekly maximum of 48 hours could be exceeded only if there was a written agreement between the employee and employer *and* the employer had received the approval of the Director of Employment Standards (or, pursuant to a limited exception, in situations where Director approval was pending and certain conditions were met).

As of April 3, 2019, the Director's approval is no longer necessary; excess weekly hours can be worked if the employee and employer entered into a valid written agreement to exceed the limit on weekly hours of work and meet the other required conditions.

One question that might arise is what effect the ROCA amendments had on Director's approvals that were issued pre-ROCA with a post-ROCA expiry date that were in force on April 3, 2019. As of April 3,2019, the Director's approval ceased to have any effect and the valid written agreement between the employer and the employee became determinative of the arrangement.

There may be circumstances where the terms of the agreement between the employee and the employer differ from those that were contained in the Director approval. For example, take the situation of an employee and employer who entered into a written agreement stating that the employee would work up to 65 hours per week but, the Director of Employment Standards provided an approval only for up to 60 hours per week. Prior to April 3, 2019, the employee would have been permitted to work no more than 60

hours per week. On April 3, 2019, the day the ROCA received Royal Assent, the Director's approval ceased to have any effect and the agreement between the parties is what determines the arrangement. As such, the employee in this example would be permitted to work up to 65 hours per week as of April 3, 2019. (Note, of course, that there must continue to be compliance with all hours of work requirements, including those for daily and weekly rest contained in Part VII of the ESA 2000.)

Note also that employees may revoke a written agreement to work excess weekly (or daily) hours by providing two weeks' written notice to the employer. The employer may revoke such agreements by giving reasonable notice to the employee. See ss. 17(6) and (7) for more information.

s. 17(4) – REPEALED

Document Re Employee Rights – s. 17(5)

17(5) An agreement described in subsection (2) or (3) is not valid unless,

(a) the employer has, before the agreement is made, provided the employee with a copy of the most recent document published by the Director under section 21.1; and

(b) the agreement contains a statement in which the employee acknowledges that he or she has received a document that the employer has represented is the most recent document published by the Director under section 21.1.

Section 17(5) provides that an employee's agreement to work excess daily hours or excess weekly hours is not valid unless two conditions are met. These are intended to ensure and provide assurance to the Ministry that employees know their rights before signing agreements to work excess hours. Note that the conditions are in addition to the general requirements regarding agreements, i.e., that they be in writing, pursuant to ESA Part 1, s. 1(3) and s. 1(3.1), and that they meet the requirements regarding issues such as voluntariness and specificity.

The two conditions are that an employee's agreement to work excess daily hours pursuant to s. 17(2) or excess weekly hours pursuant to s. 17(3) is not valid unless:

- The employer, before the agreement is made, gives the employee a copy of the most recent document prepared by the Director of Employment Standards that describes the rights of employees and obligations of employers under the hours of work and overtime provisions. The copy provided to the employee may be either a paper copy or an electronic copy. See ESA Part VII, s. 21.1 for information regarding this information document. This condition will not be met if the employer gives the information document to the employee after the agreement is signed.

  and

- The agreement contains a statement by the employee acknowledging receipt of the document. The statement must indicate that the employer represented that the document is the most recent version published by the Director.

These two conditions do not apply to employees who are represented by a trade union – see s. 17(9)(b) below.

Different rules regarding the Director's information document apply to employers who entered into agreements with employees to work excess weekly hours under the ESA 2000 as it stood before the

amendments made by the *Employment Standards Amendment Act (Hours of Work and Other Matters), 2004* came into force on March 1, 2005. Because these agreements were entered into before s. 17(5) was in force, the conditions in s. 17(5) do not apply to such employers. See s. 17(9). However, employers who had such agreements were required by now-repealed s. 17(10) to provide the information document to employees by June 1, 2005.

If either of the conditions in s. 17(5) are not met, the agreement to work excess daily or weekly hours is not valid. And because a valid written agreement is required in order for an employer to require or even permit an employee to work excess hours, if either condition is not met, the employer will be in violation of the ESA 2000 if any excess hours are worked (unless, of course, "exceptional circumstances" within the meaning of s. 19 are present).

Agreements under s. 17(2) to work excess daily hours and agreements under s. 17(3) to work excess weekly hours are two separate agreements, although they can be contained within the same document. If they are in the same document and the conditions in s. 17(5) are not met, both agreements are invalid, and the employee cannot be required or permitted to work either excess daily hours or excess weekly hours. If the agreements are separate, both agreements must contain the statement described in s. 17(5)(b). If, for example, only the excess daily hours agreement contains the statement, then the excess weekly hours agreement will not be valid.

The Director's information document needs to be provided only once, even if the excess daily hours agreement and the excess weekly hours agreement are made at different times, provided that the Director did not publish a revised information document after the earlier agreement was made but before the later agreement was made.

Example:

An employer gives the most recent Director's information document to an employee on May 1, 2017, and the employee provides a written agreement to work excess daily hours on May 2, 2017. The agreement states that the employee was told by the employer that the information document she was provided with is the most recent one published. One month later, the employer asks the employee if she would be willing to work excess weekly hours and she indicates that she would. No revised information document has been published, and the employer tells the employee that the document provided to her on May 1, 2017 is still the most recent document published by the Director. The employee then provides a written agreement to work excess weekly hours; it states that the employee has been given an information document that the employer told her was the most recent one published. Since there was no new information document published between May 1, 2017 and the making of the excess weekly hours agreement one month later, and the agreement contains an acknowledgement that the employee has received what the employer has represented is the most recent document, the condition in s. 17(5)(b) is met.

As mentioned above, the two conditions contained in s. 17(5) are in addition to the other requirements regarding agreements. One of these requirements is there must be informed consent by the employee. There may be circumstances where, despite the conditions in s. 17(5) being met, there is not informed consent. For example, if the employee cannot read or understand the information document, was not given an explanation, and was not otherwise aware of their rights, then even though the conditions of s. 17(5) have been met, the agreement will not be valid because the element of informed consent is absent. Accordingly, the employee will not be permitted to work the excess hours.

Revocation by Employee – s. 17(6)

17(6) An employee may revoke an agreement described in subsection (2) or (3) two weeks after giving written notice to the employer.

This section requires that an employee provide an employer with at least two weeks' written notice before withdrawing from an agreement made under s. 17(2) to work excess daily hours or from an agreement made under s. 17(3) to work excess weekly hours. Note that special rules on revocability apply to agreements to work excess daily hours under O Reg 285/01, s. 32 and arrangements regarding daily hours under O Reg 285/01, s. 32.1.

The employee must give the notice in writing; verbal notice will not meet the requirement of this section. Note that where the agreement has been made by the union on behalf of the employee, that the employee has no individual right to revoke the agreement. See the discussion at section 7.

Further, it is the Program's position that in situations where an agreement to work excess hours is made pursuant to a collective agreement, the ability to revoke the agreement to work excess hours must be made in accordance with the terms of the collective agreement and the *Labour Relations Act, 1995* where applicable. Generally, this means that unilateral revocation is not possible during the operation of the collective agreement.

Where employees are able to revoke an agreement and provide the employer with the proper notice, the hours of work limits in s. 17(1) will again apply once the two-week notice period to revoke the agreement to work excess hours has expired, and the employer will no longer be able to require or permit an employee to work beyond those limits subject to exceptional circumstances as set out in ESA Part VII, s. 19.

Section 32 of O Reg 285/01, s. 32 provides:

32. (1) Despite subsection 17(6) of the Act, an agreement under subsection 17(2) of the Act that was made at the time of the employee's hiring and that has been approved by the Director is irrevocable unless both the employer and the employee agree to its revocation.

(2) The Director may impose conditions in granting an approval.

ESA Part XXVII, ss. 141(9) and (10) provide:

141. (9) An employer may not require an employee who has made an agreement approved by the Director under a regulation made under paragraph 9 of subsection (1) to work more than 10 hours in a day, except in the circumstances described in section 19.

(10) If an employee has agreed to work hours in excess of those referred to in clause 17(1)(a) and hours in excess of those referred to in clause 17(1)(b), the fact that the Director has approved the agreement in accordance with a regulation made under paragraph 9 of subsection (1) does not prevent the employee from revoking, in accordance with subsection 17(6), that part of the agreement dealing with the hours in excess of those referred to in clause 17(1)(b).

Together these sections provide that despite s. 17(6), employees who were hired on or after September 4, 2001, and who agreed in writing at the time of hiring to work hours in excess of the daily maximum cannot unilaterally withdraw from the agreement, even with two weeks' notice, if the Director of Employment Standards approved the agreement. The agreement can be revoked only if the employer and employee both agree, in writing, to revoke it.

Note that this exception to the revocability of agreements applies only to agreements to work excess daily hours. These employees retain the right under s. 17(6) to revoke, with two weeks' written notice, agreements to work excess weekly hours.

Note also that employees who are party to these approved agreements to work excess daily hours cannot be required to work more than 10 hours a day except in exceptional circumstances as set out in ESA Part VII, s. 19 – see ESA Part XVII s. 141(9).

Revocation by Employer – s. 17(7)

17(7) An employer may revoke an agreement described in subsection (2) or (3) after giving reasonable notice to the employee.

This section requires an employer to provide an employee with reasonable notice if it wishes to withdraw from an agreement regarding excess daily hours made under s. 17(2) or from an agreement regarding excess weekly hours made under s.17(3). Note that agreements under O Reg 285/01, s. 32 and arrangements under O Reg 285/01, s. 32.1 can be revoked only if both the employer and employee wish to revoke them.

The notice is not required to be in writing. Unlike the notice requirement in s. 17(6), verbal notice will suffice, although employers may wish to put the notice in writing in order to avoid misunderstandings.

Whether the notice provided by an employer is reasonable will depend upon the circumstances of each case. The Program does not view reasonable notice in the context of revoking an excess hours agreement under the ESA 2000 to be the same as reasonable notice as that term is used in the context of notice of termination under the common law, and, as such, the principles applied at common law are not necessarily applicable here.

Factors for consideration when determining whether the length of notice is reasonable may include:

- How long the agreement has been in effect;
- How much in advance of the agreed upon expiry date (if any) the revocation will take effect; and
- The reason for the revocation: did the employer lose a contract for work, suffer equipment breakdowns or a shortage of materials needed to perform the work? Was the agreement withdrawn in favour of a different agreement?

It is the Program's position that in situations where an agreement to work excess hours is made pursuant to a collective agreement, the ability to revoke the agreement to work excess hours must be made in accordance with the terms of the collective agreement and the *Labour Relations Act, 1995* where applicable. Generally, this means that unilateral revocation is not possible during the operation of the collective agreement.

Once an excess hours agreement is revoked, the hours of work limits in s. 17(1) will once again apply, and the employer will no longer be able to require or permit an employee to work beyond those limits, subject to exceptional circumstances as set out in ESA Part VII, s. 19.

It is the Program's view that an agreement to work excess hours under s. 17(2) or s. 17(3) does not require an employer to provide employees with excess hours; it only *allows* for excess hours be worked, permitting an employer to require an employee to work any excess hours the employer chooses to provide. An agreement under s. 17(2) or s. 17(3) is in no way a guarantee of wages and there is no

basis for a claim by an employee of a violation of the ESA 2000 (e.g., insufficient notice of a constructive dismissal) if excess hours are not provided.

Transition: Certain Agreements – s. 17(8)

17(8) For the purposes of this section,

(a) an agreement to exceed the limit on hours of work in a day set out in clause (1)(a) of this section as it read on February 28, 2005 shall be treated as if it were an agreement described in subsection (2);

(b) an agreement to exceed the limit on hours of work in a work week set out in clause (1)(b) of this section as it read on February 28, 2005 shall be treated as if it were an agreement described in subsection (3); and

(c) an agreement to exceed the limit on hours of work in a work week set out in clause (2)(b) of this section as it read on February 28, 2005 shall be treated as if it were an agreement described in subsection (3).

Section 17(8) is a transitional provision relating to amendments that were made to the hours of work provisions effective March 1, 2005.

This provision establishes how agreements to work excess hours that were entered into under the provisions of the ESA 2000 before the amendments made by the *Employment Standards Amendment Act (Hours of Work and Other Matters), 2004* came into force on March 1, 2005 are to be treated.

On February 28, 2005, the relevant provisions read as follows:

Section 17 of the ESA 2000:

(1) Subject to subsection (2), no employer shall require or permit an employee to work more than,

(a) eight hours in a day or, if the employer establishes a regular work day of more than eight hours for the employee, the number of hours in his or her regular work day; or

(b) 48 hours in a work week.

(2) An employer may permit an employee to work up to a specified number of hours in excess of an amount set out in subsection (1) if,

(a) the employee agrees to work those hours; and

(b) the employee will not work more than 60 hours or such other number of hours as are prescribed in a work week.

Section 31 of O Reg 285/01:

(1) An employer may permit an employee to work up to a specified number of hours in excess of the limit on hours of work set out in clause 17(2)(b) of the Act if,

(a) the employee agrees to work those hours; and

(b) the Director approves the agreement.

(2) The Director's approval under clause (1)(b) may be granted with respect to an employer or with respect to a class of employers.

Accordingly:

- Valid agreements to work in excess of the daily hours limit made under the pre-March 1, 2005 hours of work rules that have not expired or been revoked continue to be valid agreements to work hours in excess of the daily limit.
- Valid agreements to work in excess of the weekly hours limit, to a maximum of 60 hours in a week, made under the pre-March 1, 2005 hours of work rules that have not expired or been revoked continue to be valid agreements to work hours in excess of the weekly limit.
- Valid agreements to work in excess of 60 hours in a week made under the pre-March 1, 2005 hours of work rules that have not expired or been revoked continue to be valid agreements to work hours in excess of the weekly limit.

While the agreements that were entered into under the authority of s. 17(2) and O Reg 285/01, s. 31 as they read on February 28, 2005 ("old agreements") are treated as if they are agreements made under the current s. 17 ("new agreements"), thereby negating the need for employers to enter into another agreement with employees when the amendments to the ESA 2000 came into force, the rules regarding the Director's information document are different. See the discussion of s. 17(9) below, and note that now-repealed s. 17(10) required employers who were party to such an agreement to provide the information document to employees by June 1, 2005. Otherwise, agreements entered into pre- or post-March 1, 2005 were treated the same. Prior to the *Restoring Ontario's Competitiveness Act, 2019* (ROCA) amendments, all employers who had agreements with employees (regardless of the date the agreement was entered into) had to seek approval from the Director before the employee could work more than 48 hours per work week.

For information on transitions with regards to excess weekly hour agreements and Director approvals in place on April 3, 2019 when the ROCA amendments to the ESA came into force, please see the discussion at s. 17(3)

Document Re Employee Rights – Exceptions – s. 17(9)

17(9) Subsection (5) does not apply in respect of,

(a) an agreement described in subsection (8); or

(b) an agreement described in subsection (2) or (3) in respect of an employee who is represented by a trade union.

This section sets out two exceptions to the application of s. 17(5). Section 17(5) provides that agreements to work excess daily or weekly hours are not valid unless:

- The employer, before the agreement is made, gives the employee a copy of a document prepared by the Director of Employment Standards that describes the rights of employees and obligations of employers under the hours of work and overtime pay provisions. The document given to the employee must be the most recent version of the document.

  and

- The agreement contains a statement by the employee acknowledging receipt of the document. The statement must indicate that the employer represented that the document is the most recent version published by the Director.

See above for a discussion of s. 17(5).

Section 17(9) provides that the s. 17(5) requirement does not apply to:

An agreement described in s. 17(8)

The agreements described in s. 17(8) are those agreements that were entered into under the provisions of the ESA 2000 before the amendments made by the *Employment Standards Amendment Act (Hours of Work and Other Matters), 2004* came into force on March 1, 2005. Because the agreements were entered into at a time when the requirement of s. 17(5) was not in force, the conditions for a valid agreement in s. 17(5) do not apply.

Note however that now-repealed s. 17(10) required employers who were party to an agreement described in s. 17(8) to provide the information document to employees by June 1, 2005.

Excess daily or weekly hours agreements that are entered into by employees who are represented by a union

The two conditions for a valid agreement that are set out in s. 17(5) do not apply to agreements made in respect of employees who are represented by a trade union.

s. 17(10) – REPEALED

s. 17(11) – REPEALED

The *Restoring Ontario's Competitiveness Act, 2019* (ROCA) amended the excess weekly hours scheme effective April 3, 2019 by removing the requirement for the Director's approval of agreements to exceed the limit on weekly hours of work. The provisions that are currently in force are discussed in the section above. The text below, which appears in red, is the legislative text and the associated operational policy as it applied prior to April 3, 2019. This discussion is being maintained in this publication since employees may still file a complaint relating to a situation that arose when the below provisions were in force. The text appears in red to highlight that the below sets out the pre-April 3, 2019 language of sections 17, 17.1, 17.2 and 17.3 and is not current as of April 3, 2019.

ESA Part VII Section 17 – Limit on Hours of Work

Limit on Hours of Work – s. 17(1)

17(1) Subject to subsections (2) and (3), no employer shall require or permit an employee to work more than,

(a) eight hours in a day or, if the employer establishes a regular work day of more than eight hours for the employee, the number of hours in his or her regular work day; and

(b) 48 hours in a work week.

Section 17(1) sets out the daily and weekly maximum hours that an employer may require or allow an employee to work:

- Daily maximum: eight hours per day or, if there is an established work day that is longer than eight hours, the number of hours in that work day.
- Weekly maximum: 48 hours per work week.

This provision allows employees to refuse to work hours in excess of eight per day, or in excess of the number of hours in a longer established regular work day, and 48 hours in a work week.

The limits on hours of work in s. 17(1) are subject to the following exceptions:

- Section 17(2), which allows employees to agree in writing to work hours in excess of the s. 17(l)(a) daily limit;
- Section 17(3), which allows employees to work hours in excess of the s. 17(1)(b) weekly limit if they agree to do so in writing and the employer has received an approval from the Director of Employment Standards;
- Section 17(4), which allows employees to work hours in excess of the s. 17(1) weekly limit - but only up to the lesser of 60 hours, the number of hours specified in the agreement, or the number of hours specified in the application pending the disposition of the application for approval, if certain conditions are met;
- Where there are exceptional circumstances as set out in s. 19.

Note also that the limit on daily hours of work contained in s. 17(1)(a) does not apply to certain employees hired before September 4, 2001, who entered into arrangements to work hours in excess of those in their regular work day. See O Reg 285/01, s. 32.1 for a discussion of the details of this exemption.

Regular Work Day of More than Eight Hours

The daily maximum number of hours of work an employer can require or allow an employee to work is eight or, if the employer establishes a regular work day of more than eight hours for the employee, the number of hours in their regular work day.

Employers can establish a regular work day in excess of eight hours without the approval of the Director of Employment Standards. While the ESA 2000 does not explicitly set out the maximum number of hours a regular work day can be, the ability to establish a regular work day longer than eight hours remains subject to the weekly hours of work limit in s. 17(1)(b), as well as the requirement for daily rest contained in ESA Part VII, s. 18.

"Regular work day" is defined in ESA Part I, s. 1(1) to mean "with respect to an employee who usually works the same number of hours each day, means a day of that many hours". Because the word "usually" is used, an employee does not have to work the same number of hours every work day to establish a regular work day. A regular work day can be established so long as an employee ordinarily works a set number of hours.

An employer may establish a schedule where employees work different numbers of hours on different days of the week. For example, employees work 10 hours Mondays to Thursdays and eight hours on Fridays. It is Program policy that the regular work day from Monday to Thursday is 10 hours and eight hours on Friday. Note that the employer will have to pay overtime pay for four hours in this example.

Changing What the Regular Work Day Is

The ESA 2000 does not prohibit an employer from adjusting the regular work day on occasion. That is, so far as the ESA 2000 is concerned, the employer may establish a different regular work day than what it had previously established.

For example, consider an employer that has the following schedule:

- Monday: 10 hours
- Tuesday: 10 hours
- Wednesday: 10 hours
- Thursday: 8 hours
- Friday: 8 hours

The employer wishes to establish the following amended schedule:

- Monday: 11 hours
- Tuesday: 11 hours
- Wednesday: 10 hours
- Thursday: 8 hours
- Friday: 8 hours

The ESA 2000 does not prohibit the employer from establishing a new regular work day of 11 hours for Mondays and Tuesdays.

Furthermore, the employer may want to return to the original schedule after, for example, several months. Nothing in the ESA 2000 prohibits this further change to the schedule.

However, the definition of regular work day contemplates that the employee usually works a specific number of hours on a particular day. The more frequently the employer changes the schedule in relation to a particular day of the week, the less likely it is that the employee could be said to have a usual number of hours on a particular day of the week. In other words, the facts may reveal that there is no regular work day, in which case the daily limit in s. 17(1)(a) for that employee will be eight – subject to the exceptions to this limit set out in s. 17(2) and s. 19.

Note also that while the ESA 2000 does not prohibit the employer from changing the regular work day, there may be restrictions against doing so in an employee's employment contract. In this case, it may amount to a breach of the employment contract for the employer to change the regular work day, which may give rise to a constructive dismissal under the ESA 2000 or at common law.

Pre-*Employment Standards Act, 2000* Schedules

Employers who had established a regular work day that is longer than eight hours prior to proclamation of the ESA 2000, and that was in effect upon proclamation of the ESA 2000, are considered by the Program to have established a regular work day of more than eight hours for the purposes of s. 17(1)(a). Employers who wish to establish a regular work day of more than eight hours after proclamation of the ESA 2000, as noted above, are not prohibited by the ESA 2000 from doing so, although they may be constrained from doing so by considerations such as constructive dismissal, collective agreements, etc.

Work Week

ESA Part I, s. 1 defines “work week” as:

(a) a recurring period of seven consecutive days selected by the employer for the purpose of scheduling work, or

(b) if the employer has not selected such a period, a recurring period of seven consecutive days beginning on Sunday and ending on Saturday.

In ascertaining the recurring period of seven consecutive days established by the employer for the purpose of scheduling work, if any, an employment standards officer may consider such information as work schedules, time cards and pay periods, although these are not necessarily the same as the work week. In the absence of the employer having established a recurring period of seven consecutive days for the purpose of scheduling work, a default work week of Sunday to Saturday will apply.

Determining the Number of Hours Worked by an Employee – O Reg 285/01, s. 6

O Reg 285/01, s. 6 sets out the circumstances in which work is deemed to be performed or not deemed to be performed. This provision is essential in determining the number of hours of work under this Part. Note that O Reg 285/01, s. 22 sets out special rules regarding when work is not deemed to be performed for residential care workers.

O Reg 285/01, s. 6 provides as follows:

6(1) Subject to subsection (2), work shall be deemed to be performed by an employee for the employer,

(a) where work is

(iii) permitted or suffered to be done by the employer, or

(iv) in fact performed by an employee although a term of the contract of employment expressly forbids or limits hours of work or requires the employer to authorize hours of work in advance;

(b) where the employee is not performing work and is required to remain at the place of employment,

(iii) waiting or holding himself or herself ready for call to work, or

(iv) on a rest or break-time other than an eating period.

6(2) Work shall not be deemed to be performed for an employer during the time the employee,

(a) is entitled to,

(iv) take time off work for an eating period,

(v) take at least six hours or such longer period as is established by contract, custom or practice for sleeping and the employer furnishes sleeping facilities, or

(vi) take time off work in order to engage in the employee's own private affairs or pursuits as is established by contract, custom or practice;

(b) is not at the place of employment and is waiting or holding himself or herself ready for call to work.

Exception: Hours in a Day – s. 17(2)

17(2) An employee's hours of work may exceed the limit set out in clause (1)(a) if the employee has made an agreement with the employer that he or she will work up to a specified number of hours in a day in excess of the limit and his or her hours of work in a day do not exceed the number specified in the agreement.

Section 17(2) permits employers and employees to agree, in writing that the employee will work up to a specified number of hours in excess of the daily limit set out in s. 17(1)(a) – see ESA Part 1, s. 1(3) and s. 1(3.1) for a discussion of agreements in writing

Section 17(2) must be read in conjunction with s. 17(5), which provides that s. 17(2) agreements are not valid unless:

- The employer, before the agreement is made, gives the employee a copy of a document prepared by the Director of Employment Standards that describes the rights of employees and obligations of employers under the hours of work and overtime pay provisions. The document must be the most recent version published by the Director;

  and

- The agreement contains a statement by the employee acknowledging that they received the document. The statement must indicate that the employer represented that the document is the most recent version published by the Director.

In attempting to facilitate opportunities to work excess hours, employers have inquired as to whether a signature on a sign-up sheet for additional hours might be considered a valid written agreement under s. 17(2). The Program's view is that such a document would be valid if all of the following conditions are met:

- The employee has been given the most recent information document prepared by the Director of Employment Standards;
- The sign-up sheet clearly states that the employee has been given what they are told is the most recent such document;
- The sign-up sheet clearly states that the employee is agreeing to work a specified number or up to a specified number of excess hours;
- The employee initials or signs the sheet; and
- The employee in so initialing or signing understands that they were signifying their assent to the statements on the sign-up sheet.

The requirement regarding the Director's information document in s. 17(5) does not apply to employees who are represented by a trade union - see s. 17(9)(b). Furthermore, different rules regarding the Director's information document apply to employers who entered into agreements with employees to work excess daily hours under the provisions of the ESA 2000 before March 1, 2005, the date on which the amendments made by the *Employment Standards Amendment Act (Hours of Work and Other Matters), 2004,* SO 2004, c 21 came into force. In particular, because the agreements were entered into under a

scheme when the requirement of s. 17(5) was not in force, the conditions for a valid agreement in s. 17(5) do not apply to such employers. Instead, they are required to provide the information document to employees by June 1, 2005. See ss. 17(9) and (10).

In the absence of a valid written agreement, the daily limit on hours of work in s. 17(1)(a) applies, and the employer may not require or even permit an employee to work excess daily hours, unless exceptional circumstances within the meaning of ESA Part VII, s. 19 are present.

Agreements to work excess daily hours can generally be revoked by employees with two weeks' written notice and generally with reasonable notice by employers - see ss. 17(6) and (7), respectively. It is, however, the Program's position that in situations where an agreement to work excess hours is made pursuant to a collective agreement, the ability to revoke the agreement to work excess hours must be made in accordance with the terms of the collective agreement and the *Labour Relations Act, 1995,* SO 1995, c 1, Sch A, where applicable. Generally, this means that unilateral revocation is not possible during the operation of the collective agreement.

Agreements to work excess daily hours can specify the exact number of hours that the employee is agreeing to work, the exact number of hours over and above the daily limit, or they can specify an upper limit (e.g., "up to 10 hours a day").

This section contemplates both "one-off" agreements, where the employee agrees in writing to work excess daily hours on a single occasion, and more open-ended "as required" agreements, where the employee agrees in writing to work a specified number of excess daily hours whenever required by the employer. For example, a retail employer preparing for the busy Christmas season may ask an employee to agree to "with two days' notice, work up to 12 hours a day during the months of November and December of this year."

Agreements under s. 17(2) to work excess daily hours and agreements under s. 17(3) to work excess weekly hours are two separate agreements, although they can be embodied in the same document.

Note that there may be some circumstances in which what appears to be a single agreement with respect to excess daily hours by necessary implication includes an agreement with respect to excess weekly hours, and vice versa. For example, an employee regularly works nine hours a day, five days a week. On the fifth day of the week, the employee agrees in writing to exceed the daily limit and work four additional hours. By necessary implication, the employee has also agreed to work in excess of 48 hours in that work week, and, assuming that the employer had already received an excess weekly hours approval from the Director of Employment Standards that applies to the employee or that the pending approval rules in s. 17(4) apply to the employee, the employee will be permitted to work those excess hours. Or the same employee, who regularly works nine hours a day, whose employer operates only five days a week, enters into an agreement to work up to 60 hours per work week when required **and** the employer has an excess weekly hours approval from the Director that applies to the employee, or is operating under the "pending approval" rules in s. 17(4), the employee, by necessary implication, has also agreed to work excess daily hours.

The Ministry has produced a list of items employers and employees may wish to consider when drafting agreements. These materials can be found Ministry of Labour's web page Applications for Approval of Excess Hours or for Averaging Hours of Work as well as in the Hours of Work and Overtime Tool on the Ministry of Labour website.

Also see section ESA Part I, s. 1(3) and ESA Part 1, s. 1(3.1) for a discussion of agreements in writing.

Employers are required to retain a copy of every excess daily (and weekly) hours agreement it has made with its employees for three years after the last day on which work was performed under each agreement – see ESA Part VI, s. 15(8).

Exception: Hours in a Work Week – s. 17(3)

17(3) An employee's hours of work may exceed the limit set out in clause (1)(b) if,

(a) the employee has made an agreement with the employer that he or she will work up to a specified number of hours in a work week in excess of the limit;

(b) the employer has received an approval under section 17.1 that applies to the employee or to a class of employees that includes the employee; and

(c) the employee's hours of work in a work week do not exceed the lesser of,

(i) the number of hours specified in the agreement, and

(ii) the number of hours specified in the approval.

Section 17(3) permits employees' hours of work to exceed the weekly limit of 48 hours in a work week if three conditions are met:

- The employee has made an agreement with the employer that they will work up to a specified number of hours in a work week in excess of the limit;
- The employer has received an approval from the Director of Employment Standards under s. 17.1 that applies to the employee or to a class of employees that includes the employee; and
- The employee's hours of work in a work week do not exceed the lesser of,
    - The number of hours specified in the agreement, and
    - The number of hours specified in the approval.

Each of these conditions is discussed below. Employee made agreement that they will work up to specified number of hours in excess of limit

Pursuant to s. 17(3)(a), the first condition that must be met before an employee is allowed to work more than 48 hours in a work week is the employee must have entered into an agreement with the employer that they will work the excess hours. The agreement must be in writing to be valid – see ESA Part I, s. 1(3) and (3.1) for a discussion of agreements in writing, as well as the list of necessary and other elements of agreements at the end of that section. Also see the Ministry of Labour's web page Applications for Approval of Excess Hours or for Averaging Hours of Work for a list of items employers and employees may wish to consider when drafting agreements, as well as the Hours of Work and Overtime Tool on the Ministry of Labour website.

In a non-unionized workplace, each employee has the right on an individual basis to enter into agreements to work excess weekly hours. For employees represented by a trade union, the written agreement may be embodied in the collective agreement, a memorandum of agreement or an addendum to an agreement. All bargaining unit members are bound by such an agreement. In this regard, see the discussion of ESA Part III, s. 7.

This section must be read in conjunction with s. 17(5), which provides that s. 17(3) agreements are not valid unless:

- The employer, before the agreement is made, gives the employee a copy of a document prepared by the Director of Employment Standards that describes the rights of employees and obligations of employers under the hours of work and overtime pay provisions. The document must be the most recent version published by the Director.

  and

- The agreement contains a statement by the employee acknowledging that they received the document. The statement must indicate that the employer represented that the document is the most recent version published by the Director.

In attempting to facilitate opportunities to work excess hours, employers have inquired as to whether a signature on a sign-up sheet for additional hours might be considered a valid written agreement under s. 17(3). The Program's view is that such a document would be valid if all of the following conditions are met:

- The employee has been given the most recent information document prepared by the Director of Employment Standards;
- The sign-up sheet clearly states that the employee has been given what they are told is the most recent such document;
- The sign-up sheet clearly states that the employee is agreeing to work a specified number or up to a specified number of excess hours;
- The employee initials or signs the sheet; and
- The employee in so initialing or signing understands that they were signifying their assent to the statements on the sign-up sheet.

See the discussion of s. 17(5) below for more information.

The requirement regarding the Director's information document in s. 17(5) does not apply to employees who are represented by a trade union – see s. 17(9)(b). Furthermore, different rules regarding the Director's information document apply to employers who entered into agreements with employees to work excess weekly hours before March 1, 2005, the date the amendments to the ESA 2000 requiring that the Director's information document be given to employees came into force – see s. 17(9).

In the absence of a valid written agreement, the weekly limit on hours of work in s. 17(1)(b) applies, and the employer may not require or even permit an employee to work excess weekly hours, even if the Director of Employment Standards has issued an approval that applies to the employee, unless exceptional circumstances within the meaning of s. 19 are present.

Agreements to work excess weekly hours can generally be revoked by employees with two weeks' written notice even if the Director of Employment Standards has issued an approval that applies to the employee – see s. 17(6). Agreements to work excess weekly hours can generally be revoked by employers with reasonable notice – see s. 17(7).

The general right to revoke agreements is limited where the agreement is made between a union and the employer. It is the Program's position that in situations where an agreement to work excess hours is made pursuant to a collective agreement, the ability to revoke the agreement to work excess hours must

be made in accordance with the terms of the collective agreement and the *Labour Relations Act, 1995* where applicable. Generally, this means that unilateral revocation is not possible during the operation of the collective agreement.

Further, an individual employee has no right to revoke an agreement made on their behalf by the union, with or without the agreement of the employer – see the discussion in ESA Part III, s. 7.

Agreements to work excess weekly hours can specify the exact number of hours that the employee is agreeing to work, the exact number of hours over and above the weekly limit, or they can specify an upper limit (e.g., "up to 60 hours a week").

This section contemplates both "one-off" agreements, where the employee agrees in writing to work excess weekly hours on a single occasion, and more open-ended "as required" agreements, where the employee agrees in writing to work a specified number of excess weekly hours whenever required by the employer. For example, a retail employer preparing for the busy Christmas season may ask an employee to agree to "with two days' notice, work up to 60 hours a week during the months of November and December of this year."

Agreements under s. 17(2) to work excess daily hours and agreements under s. 17(3) to work excess weekly hours are two separate agreements, although they can be embodied in the same document.

Note that there may be some circumstances in which what appears to be a single agreement with respect to excess daily hours by necessary implication includes an agreement with respect to excess weekly hours, and vice versa. For example, an employee regularly works nine hours a day, five days a week. On the fifth day of the week, the employee agrees in writing to exceed the daily limit and work four additional hours. By necessary implication, the employee has also agreed to work in excess of 48 hours in that work week, and, assuming that the employer had already received an excess weekly hours approval from the Director of Employment Standards that applies to the employee, or that the pending approval rules in s. 17(4) apply to the employee, the employee will be permitted to work those excess hours. Or if the same employee, who regularly works nine hours a day and whose employer operates only five days a week, enters into an agreement to work up to 60 hours per work week when required and the employer has an excess weekly hours approval from the Director that applies to the employee, or is operating under the pending approval rules in s. 17(4), the employee, by necessary implication, has also agreed to work excess daily hours.

Employers are required to retain a copy of every excess weekly and daily hours agreement it has made with its employees for three years after the last day on which work was performed under each agreement – see ESA Part VI, s. 15(8).

Employer received approval that applies to employee or class of employees

Pursuant to s. 17(3)(b), the second condition that must be met before an employee may work more than 48 hours in a work week is the employer must be in receipt of an approval by the Director of Employment Standards under ESA Part VII, s. 17.1 that applies to the employee or to a class of employees that includes the employee.

ESA Part VII, s. 17.1 describes how employers apply for an excess weekly hours approval.

This section must be read in conjunction with ESA Part VII, s. 17.1(9), which states:

17.1(9) An approval applies to the employee or class of employees specified in the approval, and applies to every employee in a specified class whether or not the employee was employed by the employer at the time the approval was issued.

Accordingly, where an employer already has an approval from the Director of Employment Standards, an employee who falls within the class of employees set out in the approval may begin working the excess weekly hours immediately upon entering into the agreement to do so (assuming that all of the requirements for a valid agreement are met) — the employer will not be required to apply for another approval. For example, an employee will be allowed to work excess weekly hours without the employer having to obtain another approval where the employee who provides the valid written agreement:

- Was not an employee of the employer at the time the approval was issued;
- Was an employee in the class of employees the approval applies to at the time the approval was issued, but at that time had not agreed to work the excess hours; or
- Was an employee of the employer at the time the approval was issued but at that time was not working in a position the approval applies to.

This section must also be read in conjunction with s. 17(4), which allows employees to work more than 48 hours in a work week (but only up to the lesser of 60 hours, the number of hours specified in the agreement, or the number of hours specified in the application) if the employer does not receive either an approval or a refusal from the Director within 30 days of the application being served, if certain conditions are met.

Employee's Hours of Work Do Not Exceed Number of Hours in Agreement or Approval

Pursuant to s. 17(3)(c), the third condition that must be met before an employee is allowed to work more than 48 hours in a work week is that the employee's hours of work in excess of 48 will be lawful only if the excess hours do not exceed the number of hours specified in the employee's agreement or the number of hours specified in the Director's approval, whichever is less.

For example, an employee agreed to work 70 hours in a work week, but the Director issued an approval for only 60 hours. The employee can work only up to 60 hours in a work week, and the employer will be in violation of the ESA 2000 if the employee works more than 60 hours.

Conversely, an approval was issued for 65 hours that applies to a particular class of employees. Some employees in that class agreed to work up to 65 hours. Those employees are permitted to work up to 65 hours. One employee in that class agreed to work only up to 55 hours. Pursuant to s. 17(3)(c), that employee is permitted only to work up to 55 hours.

Another example is where an employee agreed to work up to 65 hours in a work week, and the employer has an approval allowing that employee to work up to 65 hours in a work week. The employee changes their mind and provides the employer with two weeks' written notice revoking that agreement, and simultaneously enters into an agreement to work up to only 50 hours in a work week. After the two-week notice period expires, that employee is, pursuant to s. 17(3)(c), permitted to work only up to 50 hours in a work week.

Same, Pending Approval – s. 17(4)

17(4) Despite subsection (3), an employee's hours of work may exceed the limit set out in clause (l)(b) even though the employer has not received the approval described in clause (3)(b), if,

(a) the employee has made an agreement described in clause (3) (a) with the employer;

(b) the employer has served on the Director an application for an approval under section 17.1;

(c) the application is for an approval that applies to the employee or to a class of employees that includes the employee;

(d) 30 days have passed since the application was served on the Director;

(e) the employer has not received a notice that the application has been refused;

(f) the employer's most recent previous application, if any, for an approval under section 17.1 was not refused;

(g) the most recent approval, if any, received by the employer under section17.1 was not revoked;

(h) the employer has posted and kept posted a copy of the application in at least one conspicuous place in the workplace where the employee works, so that it is likely to come to the employee's attention; and

(i) the employee's hours of work in a work week do not exceed any of,

- **(i) the number of hours specified in the application,**
- **(ii) the number of hours specified in the agreement, and**
- **(iii) 60 hours.**

This section provides an exception to the requirement in s. 17(3) that the employer have received an excess weekly hours approval from the Director before an employee is permitted to work excess weekly hours. It permits an employee to work more than 48 hours in a work week — up to a maximum of the least of 60 hours, the number of hours specified in the agreement, or the number of hours specified in the application — if the Director has not issued either an approval or a refusal of the application within 30 days of the date the application was served and other conditions are met.

This section permits excess hours to be worked pending the Director issuing an approval or a refusal if certain conditions are met. It does not "deem" an approval to have been granted. If the application is ultimately refused, the excess hours must cease when the notice of refusal is received. If the application is ultimately approved, s. 17(3), and any conditions contained in the approval, will dictate the conditions under which excess hours can be worked from that point forward.

The employee will be permitted to work more than 48 hours in a work week pending the disposal of the application only if all nine conditions set out in s. 17(4) — including the condition that the employee works no more than the least of 60 hours, the number of hours specified in the agreement, and the number of hours specified in the application - are met. If any of the nine conditions are not met, the employee will not be permitted to work more than 48 hours in a work week pending the disposition of the application.

Each of the nine conditions is discussed below.

Employee made an agreement with the employer

Pursuant to s. 17(4)(a), the first condition is the employee must have made an agreement described in s. 17(3)(a) with the employer to work excess weekly hours. In particular, note that for agreements made on or after March 1, 2005, the agreement is not valid unless the employer provided the employee with the information document described in s. 17(5) before the employee entered into the agreement, and the agreement contains a statement by the employee acknowledging that they received the document.

Employer served on the Director an application for approval

Pursuant to s. 17(4)(b), the second condition is the employer must have served the application for an approval of excess weekly hours on the Director of Employment Standards under ESA Part VII, s. 17.1 – see in particular the discussion of the issue of when an application is considered to be served if the approval application is not properly completed.

Application applies to the employee or class of employees

Pursuant to s. 17(4)(c), the third condition is the application for approval to work excess weekly hours that has been served on the Director must apply to the individual employee at issue, or to a class of employees that includes the employee.

Thirty days have passed since application was served

Pursuant to s. 17(4)(d), the fourth condition is at least 30 days must have passed since the employer served the Director with the excess weekly hours approval application. Day means a calendar day.

Note that ESA Part VII, ss. 17.1(4) and (5) contain rules regarding when service is deemed to be effective, and, accordingly, when the 30-day period begins.

Note also that s. 17(11) contains a special rule regarding when the 30-day period expires if the application is filed before March 1, 2005.

Employer has not received notice that application has been refused

Pursuant to s. 17(4)(e), the fifth condition is the employer not have received a notice from the Director that the application to work excess weekly hours has been refused.

Employer’s most recent previous application was not refused

Pursuant to s. 17(4)(f), the sixth condition is the employer's most recent previous excess weekly hours application must not have been refused. If the employer previously submitted an application that was refused for any reason, and that application was the most recent application, the employer will not be permitted to rely on s. 17(4), and the employees that are the subject of the current application cannot begin to work excess weekly hours unless and until the current application is approved. This is so whether or not the most recent previous application that was refused applied to the same employees who are the subject of the current application.

Employer’s Most Recent Approval Was Not Revoked

Pursuant to s. 17(4)(g), the seventh condition is the most recent approval (if any) that was granted by the Director must not have been revoked. Pursuant to ESA Part VII, s. 17.1(16), the Director can revoke an approval.

Employer posted a copy of the application

Pursuant to s. 17(4)(h), the eighth condition is the employer must post and keep posted a copy of the application for approval of excess weekly hours. It must be posted in at least one conspicuous place in the workplace where each employee who is going to begin working excess weekly hours pending the disposal of the application works.

Note that the application should already be posted, as posting is one requirement of the application process – see ESA Part VII, s. 17.1(6).

Employee's hours of work do not exceed number of hours in application, agreement or 60 hours

Pursuant to s. 17(4)(j), the ninth condition sets an upper limit on the number of hours per work week an employee can work pending the disposal of the application. It means that the employee cannot work more than the least of any of the following amounts:

- The number of hours specified for that employee in the application;
- The number of hours the employee agreed to; or
- 60 hours.

Because of s. 17(4)(i)(iii), the absolute limit on the number of hours per work week an employee can work pending the disposal of the application is 60, even if the employee agreed to work more than 60 hours and/or the application asks for an approval for the employee to work more than 60 hours. For example, an employee agreed to work up to 65 hours per work week, and the application asks for an approval for the class of employees to which the employee belongs to work 65 hours. While the application is pending (assuming the other conditions are met, including the 30-day wait period), the employee will be permitted to work only up to 60 hours.

Another example of the application of the ninth condition is an employee agreed to work up to 55 hours, and the application asks for an approval for the employee to work 55 hours. While the application is pending (assuming the other conditions are met, including the 30-day wait period), the employee will be permitted to work only up to 55 hours.

Document Re Employee Rights – s. 17(5)

17(5) An agreement described in subsection (2) or in clause (3)(a) is not valid unless,

(a) the employer has, before the agreement is made, provided the employee with a copy of the most recent document published by the Director under section 21.1; and

(b) the agreement contains a statement in which the employee acknowledges that he or she has received a document that the employer has represented is the most recent document published by the Director under section 21.1.

Section 17(5) provides that an employee's agreement to work excess daily hours or excess weekly hours is not valid unless two conditions are met. These are intended to ensure and provide assurance to the Ministry that employees know their rights before signing agreements to work excess hours. Note that the conditions are in addition to the general requirements regarding agreements, i.e., that they be in writing,

pursuant to ESA Part 1, s. 1(3) and s. 1(3.1), and that they meet the requirements regarding issues such as voluntariness and specificity.

The two conditions are that an employee's agreement to work excess daily hours pursuant to s. 17(2) or excess weekly hours pursuant to s. 17(3)(a) is not valid unless:

- The employer, before the agreement is made, gives the employee a copy of the most recent document prepared by the Director of Employment Standards that describes the rights of employees and obligations of employers under the hours of work and overtime provisions. The copy provided to the employee may be either a paper copy or an electronic copy. See ESA Part VII, s. 21.1 for information regarding this information document. This condition will not be met if the employer gives the information document to the employee after the agreement is signed.

  and

- The agreement contains a statement by the employee acknowledging that they received the document and that the employer represent it as the most recent document the Director published.

These two conditions do not apply to employees who are represented by a trade union – see s. 17(9)(b) below.

Different rules regarding the Director's information document apply to employers who entered into agreements with employees to work excess weekly hours under the ESA 2000 as it stood before the amendments made by the *Employment Standards Amendment Act (Hours of Work and Other Matters), 2004* came into force on March 1, 2005. Because these agreements were entered into before s. 17(5) was in force, the conditions in s. 17(5) do not apply to such employers. However, employers who had such agreements were required to provide the information document to employees by June 1, 2005. See the discussions of ss. 17(9) and (10) below.

If either of the conditions in s. 17(5) are not met, the agreement to work excess daily or weekly hours is not valid. And because a valid written agreement is required in order for an employer to require or even permit an employee to work excess hours, if either condition is not met, the employer will be in violation of the ESA 2000 if any excess hours are worked (unless, of course, "exceptional circumstances" within the meaning of s. 19 are present). This is so even if the Director has issued an approval that applies to the employee in question.

Agreements under s. 17(2) to work excess daily hours and agreements under s. 17(3) to work excess weekly hours are two separate agreements, although they can be contained within the same document. If they are in the same document and the conditions in s. 17(5) are not met, both agreements are invalid, and the employee cannot be required or permitted to work either excess daily hours or excess weekly hours. If the agreements are separate, both agreements must contain the statement described in s. 17(5)(b). If, for example, only the excess daily hours agreement contains the statement, then the excess weekly hours agreement will not be valid.

The Director's information document needs to be provided only once, even if the excess daily hours agreement and the excess weekly hours agreement are made at different times, provided that the Director did not publish a revised information document after the earlier agreement was made but before the later agreement was made.

Example:

An employer gives the most recent Director's information document to an employee on May 1, 2005, and the employee provides a written agreement to work excess daily hours on May 2, 2005. The agreement states that the employee was told by the employer that the information document they were provided with is the most recent one published. One month later, the employer asks the employee if they would be willing to work excess weekly hours and they indicate that they would. No revised information document has been published, and the employer tells the employee that the document provided to her on May 1, 2005 is still the most recent document published by the Director. The employee then provides a written agreement to work excess weekly hours; it states that the employee has been given an information document that the employer told her was the most recent one published. Since there was no new information document published between May 2, 2005 and the making of the excess weekly hours agreement and the agreement contains an acknowledgement that the employee has received what the employer has represented is the most recent document, the condition in s. 17(5)(b) is met.

As mentioned above, the two conditions contained in s. 17(5) are in addition to the other requirements regarding agreements. One of these requirements is there must be informed consent by the employee. There may be circumstances where, despite the conditions in s. 17(5) being met, there is not informed consent. For example, if the employee cannot read or understand the information document, was not given an explanation, and was not otherwise aware of what their rights are, then even though the conditions of s. 17(5) have been met, the agreement will not be valid because the element of informed consent is absent. Accordingly, the employee will not be permitted to work the excess hours.

Revocation by Employee – s. 17(6)

17.(6) An employee may revoke an agreement described in subsection (2) or in clause (3)(a) two weeks after giving written notice to the employer.

This section requires that an employee provide an employer with at least two weeks' written notice before withdrawing from an agreement made under s. 17(2) to work excess daily hours or from an agreement made under s. 17(3)(a) to work excess weekly hours. Note that special rules on revocability apply to agreements to work excess daily hours under O Reg 285/01, s. 32 and arrangements regarding daily hours under O Reg 285/01, s. 32.1.

The employee must give the notice in writing; verbal notice will not meet the requirement of this section. Note that where the agreement has been made by the union on behalf of the employee, that the employee has no individual right to revoke the agreement. See the discussion at s. 7.

Further, it is the Program's position that in situations where an agreement to work excess hours is made pursuant to a collective agreement, the ability to revoke the agreement to work excess hours must be made in accordance with the terms of the collective agreement and the *Labour Relations Act, 1995* where applicable. Generally, this means that unilateral revocation is not possible during the operation of the collective agreement.

Where employees are able to revoke an agreement and provide the employer with the proper notice, the hours of work limits in s. 17(1) will again apply once the two-week notice period to revoke the agreement to work excess hours has expired, and the employer will no longer be able to require or permit an employee to work beyond those limits, even if the Director has issued an approval to work the excess hours, subject to exceptional circumstances as set out in ESA Part VII, s. 19.

Section 32 of O Reg 285/01, s. 32 provides:

32. (1) Despite subsection 17(6) of the Act, an agreement under subsection 17(2) of the Act that was made at the time of the employee's hiring and that has been approved by the Director is irrevocable unless both the employer and the employee agree to its revocation.

(2) The Director may impose conditions in granting an approval.

ESA Part XXVII, ss. 141(9) and (10) provide:

141. (9) An employer may not require an employee who has made an agreement approved by the Director under a regulation made under paragraph 9 of subsection (1) to work more than 10 hours in a day, except in the circumstances described in section 19.

(10) If an employee has agreed to work hours in excess of those referred to in clause 17(1)(a) and hours in excess of those referred to in clause 17(1)(b), the fact that the Director has approved the agreement in accordance with a regulation made under paragraph 9 of subsection (1) does not prevent the employee from revoking, in accordance with subsection 17(6), that part of the agreement dealing with the hours in excess of those referred to in clause 17(1)(b).

Together these sections provide that despite s. 17(6), employees who were hired on or after September 4, 2001, and who agreed in writing at the time of hiring to work hours in excess of the daily maximum cannot unilaterally withdraw from the agreement, even with two weeks' notice, if the Director of Employment Standards approved the agreement. The agreement can be revoked only if the employer and employee both agree, in writing, to revoke it.

Note that this exception to the revocability of agreements applies only to agreements to work excess daily hours. These employees retain the right under s. 17(6) to revoke, with two weeks' written notice, agreements to work excess weekly hours.

Note also that employees who are party to these approved agreements to work excess daily hours cannot be required to work more than 10 hours a day except in exceptional circumstances as set out in ESA Part VII, s. 19 – see ESA Part XVII s. 141(9).

Revocation by Employer – s. 17(7)

17(7) An employer may revoke an agreement described in subsection (2) or in clause (3)(a) after giving reasonable notice to the employee.

This section requires an employer to provide an employee with reasonable notice if it wishes to withdraw from an agreement regarding excess daily hours made under s. 17(2) or from an agreement regarding excess weekly hours made under s.17(3)(a). Note that agreements under O Reg 285/01, s. 32 and arrangements under O Reg 285/01, s. 32.1 can be revoked only if both the employer and employee wish to revoke them.

The notice is not required to be in writing. Unlike the notice requirement in s. 17(6), verbal notice will suffice, although employers may wish to put the notice in writing in order to avoid misunderstandings.

Whether the notice provided by an employer is reasonable will depend upon the circumstances of each case. The Program does not view reasonable notice in the context of revoking an excess hours agreement under the ESA 2000 to be the same as reasonable notice as that term is used in the context of notice of termination under the common law, and, as such, the principles applied at common law are not necessarily applicable here.

Factors for consideration when determining whether the length of notice is reasonable may include:

- How long the agreement has been in effect;
- How much in advance of the agreed upon expiry date (if any) the revocation will take effect; and
- The reason for the revocation: did the employer lose a contract for work, suffer equipment breakdowns or a shortage of materials needed to perform the work? Was the agreement withdrawn in favour of a different agreement?

It is the Program's position that in situations where an agreement to work excess hours is made pursuant to a collective agreement, the ability to revoke the agreement to work excess hours must be made in accordance with the terms of the collective agreement and the *Labour Relations Act, 1995* where applicable. Generally, this means that unilateral revocation is not possible during the operation of the collective agreement.

Once an excess hours agreement is revoked, the hours of work limits in s. 17(1) will once again apply, and the employer will no longer be able to require or permit an employee to work beyond those limits, subject to exceptional circumstances as set out in ESA Part VII, s. 19.

It is the Program's view that an agreement to work excess hours under s. 17(2) or s. 17(3)(a) does not require an employer to provide employees with excess hours; it only allows for excess hours be worked, permitting an employer to require an employee to work any excess hours the employer chooses to provide, assuming, of course, in the case of excess weekly hours that an approval has been granted. An agreement under s. 17(2) or s. 17(3)(a) is in no way a guarantee of wages and there is no basis for a claim by an employee of a violation of the ESA 2000 (e.g., insufficient notice of a constructive dismissal) if excess hours are not provided.

Transition: Certain Agreements – s. 17(8)

17(8) For the purposes of this section,

(a) an agreement to exceed the limit on hours of work in a day set out in clause (1)(a) of this section as it read on February 28, 2005 shall be treated as if it were an agreement described in subsection (2);

(b) an agreement to exceed the limit on hours of work in a work week set out in clause (1)(b) of this section as it read on February 28, 2005 shall be treated as if it were an agreement described in clause (3)(a); and

(c) an agreement to exceed the limit on hours of work in a work week set out in clause (2)(b) of this section as it read on February 28, 2005 shall be treated as if it were an agreement described in clause (3)(a).

Section 17(8) is a transitional provision. It establishes how agreements to work excess hours that were entered into under the provisions of the ESA 2000 before the amendments made by the *Employment Standards Amendment Act (Hours of Work and Other Matters), 2004* came into force are to be treated.

On February 28, 2005, the relevant provisions read as follows:

Section 17 of the ESA 2000:

(1) Subject to subsection (2), no employer shall require or permit an employee to work more than,

(a) eight hours in a day or, if the employer establishes a regular work day of more than eight hours for the employee, the number of hours in his or her regular work day; or

(b) 48 hours in a work week.

(2) An employer may permit an employee to work up to a specified number of hours in excess of an amount set out in subsection (1) if,

(a) the employee agrees to work those hours; and

(b) the employee will not work more than 60 hours or such other number of hours as are prescribed in a work week.

Section 31 of O Reg 285/01:

(1) An employer may permit an employee to work up to a specified number of hours in excess of the limit on hours of work set out in clause 17(2)(b) of the Act if,

(a) the employee agrees to work those hours; and

(b) the Director approves the agreement.

(2) The Director's approval under clause (1)(b) may be granted with respect to an employer or with respect to a class of employers.

Accordingly:

- Valid agreements to work in excess of the daily hours limit under the pre-March 1, 2005 hours of work rules that have not expired or been revoked continue to be valid agreements to work hours in excess of the daily limit for purposes of the new post-February 28, 2005 hours of work rules.
- Valid agreements to work in excess of the weekly hours limit, to a maximum of 60 hours in a week, under the pre-March 1, 2005 hours of work rules that have not expired or been revoked continue to be valid agreements to work hours in excess of the weekly limit for purposes of the post-February 28, 2005 hours of work rules.
- Valid agreements to work in excess of 60 hours in a week under the pre-March 1, 2005 hours of work rules that have not expired or been revoked continue to be valid agreements to work hours in excess of the weekly limit for purposes of the post-February 28, 2005 hours of work rules.

While the agreements that were entered into under the authority of s. 17(2) and O Reg 285/01, s. 31 as they read on February 28, 2005 ("old agreements") are treated as if they are agreements made under the current s. 17 ("new agreements"), thereby negating the need for employers to enter into another agreement with employees when the amendments to the ESA 2000 came into force, the rules regarding the Director's information document are different. See the discussions of ss. 17(9) and (10) below. Otherwise, old agreements and new agreements are treated the same. In particular, employers who have old agreements with employees must seek approval from the Director before the employee can work more than 48 hours per work week.

Document Re Employee Rights – Exceptions – s. 17(9)

17(9) Subsection (5) does not apply in respect of,

(a) an agreement described in subsection (8); or

(b) an agreement described in subsection (2) or in clause (3) (a) in respect of an employee who is represented by a trade union.

This section sets out two exceptions to the application of s. 17(5). Section 17(5) provides that agreements to work excess daily or weekly hours are not valid unless:

- The employer, before the agreement is made, gives the employee a copy of a document prepared by the Director of Employment Standards that describes the rights of employees and obligations of employers under the hours of work and overtime pay provisions. The document given to the employee must be the most recent version of the document.

  and

- The agreement contains a statement by the employee acknowledging that they received the document that the employer has represented is the most recent document the Director published.

See above for a discussion of s. 17(5).

Section 17(9) provides that the s. 17(5) requirement does not apply to:

An agreement described in s. 17(8)

The agreements described in s. 17(8) are those agreements that were entered into under the provisions of the ESA 2000 before the amendments made by the *Employment Standards Amendment Act (Hours of Work and Other Matters), 2004* came into force on March 1, 2005. Because the agreements were entered into at a time when the requirement of s. 17(5) was not in force, the conditions for a valid agreement in s. 17(5) do not apply.

Note however that s. 17(10) requires employers who are party to an agreement described in s. 17(8) to provide the information document to employees by June 1, 2005. See the discussion of s. 17(1) below.

Excess daily or weekly hours agreements that are entered into by employees who are represented by a union

The two conditions for a valid agreement that are set out in s. 17(5) do not apply to agreements made in respect of employees who are represented by a trade union.

Transition: Document Re Employee Rights – s. 17(10)

17(10) On or before June 1, 2005, an employer who made an agreement described in subsection (8) with an employee who is not represented by a trade union shall provide the employee with a copy of the most recent document published by the Director under section 21.1.

This provision applies to employers who entered into agreements with employees described in s. 17(8), i.e., old agreements entered into under the provisions of the ESA 2000 before amendments made by the *Employment Standards Amendment Act (Hours of Work and Other Matters), 2004* came into force on March 1, 2005.

Section 17(9) provides that the two conditions in s. 17(5) regarding the Director's information document that must be satisfied before written agreements are valid do not apply to old agreements - see s. 17(9)

above. However, s.17(10) requires employers who are a party to these old agreements to provide the employees concerned (unless represented by a union) with the most recent information document no later than June 1, 2005.

A failure by an employer who was party to an old agreement to provide the information document by June 1, 2005, while it constitutes a violation of the ESA 2000, does not invalidate the agreement, as contrasted with the result where an employer does not provide the document when an excess hours agreement is entered into on or after March 1, 2005 - see s. 17(5). However, the general proposition that agreements are not valid unless the employee gave their informed consent still applies to these old agreements. See the discussion of the requirements of written agreements at ESA Part I, s. 1(3) and s. 1(1.3).

Transition: Application for Approval Before Commencement – s. 17(11)

17(11) If the employer applies for an approval under section 17.1 before March 1, 2005, the 30-day period referred to in clause (4)(d) shall be deemed to end on the later of,

(a) the last day of the 30-day period; and

(b) March 1, 2005

This is a transitional provision. Pursuant to ESA Part VII, s. 17.1(22), employers can apply for approval of excess weekly hours agreements as of December 9, 2004, the day that the *Employment Standards Amendment Act (Hours of Work and Other Matters), 2004* received Royal Assent, even though the amendments that require approvals for excess weekly hours are not effective until March 1, 2005. Applications are permitted prior to March 1, 2005 in order to facilitate a seamless transition between the old rules and the new rules.

Section 17(4) permits, in certain circumstances, an employee to work more than 48 hours a work week (up to a maximum of 60) if the employer has not received either an approval or a refusal of an excess weekly hours application within 30 days of the date the application was served. By virtue of s. 17(11), where an employer applies for an approval for excess weekly hours prior to March 1, 2005, the 30-day wait period will expire on March 1, 2005 at the earliest.

For example, an employee agreed in writing to work up to 55 hours per week for an indefinite period back in July 2003. The employer served an application for an excess weekly hours approval on the Director on January 28, 2005. As of March 1, 2005, the Director had not issued either an approval or a refusal of the application. This employee:

- Was permitted to work 55 hours a week up to and including February 28, 2005, pursuant to the provisions of the ESA 2000 that were then in force; and
- On and after March 1, 2005, continues to be permitted to work up to 55 hours per work week pursuant to the pending approval rules of s. 17(4), assuming all of the conditions in s. 17(4) are met by the employer.

ESA Part VII Section 18 – Hours Free From Work

Hours Free From Work – s. 18(1)

18(1) An employer shall give an employee a period of at least 11 consecutive hours free from performing work in each day.

This provision requires that an employee be free from performing work for a particular employer for a period of at least 11 consecutive hours in each day. This requirement is subject to s. 18(2) (employees on call) and s. 19 (exceptional circumstances).

The requirement for 11 consecutive hours off work in each day operates simultaneously with the other provisions in Part VII of the ESA 2000. For example, an employee may agree in writing to work two eight-hour shifts in a row without any break in between them, thus complying with s. 18(3), but if that results in the employee receiving less than 11 consecutive hours off in a day, the schedule will be in violation of s. 18(1) and, therefore, will not be permitted. In other words, an employee cannot agree to work hours that would result in the employee getting less than the 11 consecutive hours free from work required under s. 18(1). See *Independent Paperworkers of Canada v Norampac Inc.*

A Period of at Least 11 Consecutive Hours

The period of 11 hours free from work must be consecutive. That is, it must be a single period, continuous and unbroken. The word "consecutive" was added to s. 18(1) by the *Government Efficiency Act, 2002*, SO 2002, c 18, effective November 26, 2002. The amendment codified Program policy in this respect.

Each Day

A "day" in this context means a 24-hour period; it does not have to be a calendar day. The Program uses the following interpretation of day in the context of s. 18(1):

- The first day for an employee:
    - Begins at the beginning of the employee’s first shift in the work cycle*; and
    - Ends 24 hours after it began.
- The second day:
    - Begins with the first moment of work that is performed after the end of the first day. This may be immediately after the end of the first day (for example, in regular eight-hour or 12-hour shift schedules or when a day ends partway through a shift), or it may be some time after the end of the first day, depending on the type of shift schedule; and
    - Ends 24 hours after it began.
- The third and each subsequent day begins and ends in the same manner as described above with respect to the second day.

This interpretation of day means that the days do not have to be consecutive. That is, there can be gaps of time in between the end of one day and the beginning of the next day, but only if the employee did not work during that time.

This interpretation of day also means that days cannot overlap with other days for that employee. That is, the beginning of a day cannot be any earlier than the end of the previous day.

Note that the Program's policy regarding the interpretation of the word day in this section has been supported in an arbitrator's decision - see *Independent Paperworkers of Canada v Norampac Inc.* on the principle that it appropriately refers to the employee's actual work pattern (actual "time on" and "time off")

as opposed to a calendar day or even a day as defined in a collective agreement. The arbitrator took the position that the Program's interpretation was:

. . . [C]onsistent with the evident purpose of s. 18 which is to guarantee a minimum period of time off for recreation, rest and recuperation before having to go back to work again - and to make sure that such break from work is available even when an employee is on some rotating shift system, requiring him to change periodically from days, to evenings, to night shift, and back again.

Given the vagaries and variety of scheduling systems and of individual employee circumstances, making the employment standard "employee specific" in this way, is the only way to consistently make sure that the employee gets the required amount of time off during the 24-hour period.

. . . This interpretation of "day" is not perhaps be (sic) the most obvious one. But it is one that most comprehensively and flexibly and liberally meets the statutory objective: to ensure that the employee will achieve his 11-hour break under shifting circumstances.

* A new work cycle begins after every rest period of 24 hours or longer. It is not necessarily the same period as a "work week" as defined in ESA Part 1, s. 1.

3. Examples

Example 1: Illustration Where There is a Regular Eight-Hour Shift Schedule

Employee’s schedule:

- Sunday: Off
- Monday: 8:00 am to 4:00 pm
- Tuesday: 8:00 am to 4:00 pm
- Wednesday: 8:00 am to 4:00 pm
- Thursday: 8:00 am to 4:00 pm
- Friday: 8:00 am to 4:00 pm
- Saturday: Off

The days in this employee's work cycle are:

- Day 1: Monday 8:00 am to Tuesday 8:00 am
    - Number of consecutive hours off: 16
- Day 2: Tuesday 8:00 am to Wednesday 8:00 am
    - Number of consecutive hours off: 16
- Day 3: Wednesday 8:00 am to Thursday 8:00 am
    - Number of consecutive hours off: 16
- Day 4: Thursday 8:00 am to Friday 8:00 am
    - Number of consecutive hours off: 16
- Day 5: Friday 8:00 am to Saturday 8:00 am

    - Number of consecutive hours off: 12

There are at least 11 consecutive hours off in each day. As such, this schedule meets the requirements of s. 18(1).

Example 2: Illustration Where There is a Regular 12-Hour Shift Schedule

Employee's schedule:

- Sunday: Off
- Monday: 6:00 am to 6:00 pm
- Tuesday: 6:00 am to 6:00 pm
- Wednesday: 6:00 am to 6:00 pm
- Thursday: 6:00 am to 6:00 pm
- Friday: Off
- Saturday: Off

The days in this employee's work cycle are as follows:

- Day 1: Monday 6:00 am to Tuesday 6:00 am
    - Number of consecutive hours off: 12
- Day 2: Tuesday 6:00 am to Wednesday 6:00 am
    - Number of consecutive hours off: 12
- Day 3: Wednesday 6:00 am to Thursday 6:00 am
    - Number of consecutive hours off: 12
- Day 4: Thursday 6:00 am to Friday 6:00 am
    - Number of consecutive hours off: 12

There are at least 11 consecutive hours off in each day. As such, this schedule meets the requirements of s. 18(1).

Note that while an employee with this kind of shift schedule may agree in writing to work more than twelve hours a day, thereby complying with s. 17 of the ESA 2000, their ability to do so is restricted by s. 18. For example, an employee with this kind of shift schedule may agree in writing to work an extra four hours after their regular 12-hour shift because a co-worker did not show up. While the requirements of s. 17 (which permits employees to work in excess of their regular established work day that is longer than eight hours if they agree in writing to do so) and s. 18(3) (which permits employees to work successive shifts that together total more than 13 hours if they agree in writing to do so) are met, the requirements of s. 18(1) will not be met. The employee would have worked 16 hours in a day, resulting in there being only eight consecutive hours free from work in that day.

Example 3: Illustration Where There Is an Irregular Schedule

Employee's schedule:

- Sunday: Off

- Monday: 8:00 am to 4:00 pm
- Tuesday: 12:00 pm to 8:00 pm
- Wednesday: 8:00 am to 4:00 pm
- Thursday: 2:00 pm to 10:00 pm
- Friday: 12:00 pm to 8:00 pm
- Saturday: Off

The days in this employee's work cycle are:

- Day 1: Monday 8:00 am to Tuesday 8:00 am
    - Number of consecutive hours off: 16 (from 4:00 pm Monday to 8:00 am Tuesday)
- Day 2: Tuesday 12:00 pm to Wednesday 12:00 pm (Note: The hours off between Tuesday 8:00 am and Tuesday 12:00 pm are not included in any day.)
    - Number of consecutive hours off: 12 (from 8:00 pm Tuesday to 8:00 am Wednesday)
- Day 3: Wednesday 12:00 pm to Thursday 12:00 pm (Note: Because the second day ended partway through a shift, the third day starts immediately after the end of the second day, i.e., partway through the same shift.)
    - Number of consecutive hours off: 20 (from 4:00 pm Wednesday to 12:00 pm Thursday)
- Day 4: Thursday 2:00 pm to Friday 2:00 pm (Note: The hours off between Thursday 12:00 pm and 2:00 pm are not included in any day.)
    - Number of consecutive hours off: 14 (from 10:00 pm Thursday to 12:00 pm Friday)
- Day 5: Friday 2:00 pm to Saturday 2:00 pm
    - Number of consecutive hours off: 18 (from 8:00 pm Friday to 2:00 pm Saturday)

There are at least 11 consecutive hours off in each day. As such, this schedule meets the requirements of s. 18(1).

Example 4: The "Short Shift Change"

a) Example of a Prohibited Short Shift Change

Employee’s schedule:

- Sunday: Off
- Monday: 8:00 am to 4:00 pm
- Tuesday: 8:00 am to 4:00 pm
- Wednesday: 8:00 am to 4:00 pm
- Thursday: 12:00 am to 8:00 am
- Friday: 12:00 am to 8:00 am
- Saturday: 12:00 am to 8:00 am

In this example, the employee moves from working the 8 am to 4 pm shift to working the midnight to 8 am shift in the same cycle.

The days in this employee's work cycle are as follows:

- Day 1: Monday 8:00 am to Tuesday 8:00 am
    - Number of consecutive hours off: 16
- Day 2: Tuesday 8:00 am to Wednesday 8:00 am
    - Number of consecutive hours off: 16
- Day 3: Wednesday 8:00 am to Thursday 8:00 am
    - Number of consecutive hours off: 8
- Day 4: Friday 12:00 am to Saturday 12:00 am (Note: The hours off between Thursday 8:00 am and Friday 12:00 am are not included in any day)
    - Number of consecutive hours off: 16
- Day 5: Saturday 12:00 am to Sunday 12:00 am
    - Number of consecutive hours off: 16

There is no period of 11 consecutive hours off in the third day, which is Wednesday 8:00 am to Thursday 8:00 am. During that day, which is when the short shift change occurred, the employee worked 8:00 am to 4:00 pm, was off from 4:00 pm to 12:00 am (eight hours) and then went back to work from midnight to 8:00 am. The employee received only eight consecutive hours off. This schedule does not meet the requirements of s. 18(1).

b) Example of a Permitted Short Shift Change

Employee’s schedule:

- Sunday: Off
- Monday: 8:00 am to 4:00 pm
- Tuesday: 8:00 am to 4:00 pm
- Wednesday: 8:00 am to 4:00 pm
- Thursday: 4:00 am to 12:00 pm
- Friday: 4:00 am to 12:00 pm
- Saturday: Off

In this example, the employee moves from working the 8 am to 4 pm shift to working the 4:00 am to 12:00 pm shift in the same work cycle.

The days in this employee's work cycle are as follows:

- Day 1: Monday 8:00 am to Tuesday 8:00 am
    - Number of consecutive hours off: 16
- Day 2: Tuesday 8:00 am to Wednesday 8:00 am

    - Number of consecutive hours off: 16
- Day 3: Wednesday 8:00 am to Thursday 8:00 am
    - Number of consecutive hours off: 12
- Day 4: Thursday 8:00 am to Friday 8:00 am (Note: because the third day ended partway through a shift, the fourth day starts immediately after the end of the third day, i.e., partway through the same shift)
    - Number of consecutive hours off: 16
- Day 5: Friday 8 am to Saturday 8 am
    - Number of consecutive hours off: 20

There are at least 11 consecutive hours off in each day. As such, this schedule meets the requirements of s. 18(1).

Example 5: Back-to-Back Shifts

Example of a Prohibited Back-to-Back Shift in a Regular Eight-Hour Shift Schedule

Employee's schedule:

- Sunday: Off
- Monday: 8:00 am to 4:00 pm
- Tuesday: 8:00 am to 4:00 pm
- Wednesday:
    - First shift: 8:00 am to 4:00 pm
    - Second shift: 4:00 pm to 12:00 am
- Thursday: 8:00 am to 4:00 pm
- Friday: 8:00 am to 4:00 pm
- Saturday: Off

In this example, the employee normally works 8 am to 4 pm, Monday to Friday. On Wednesday, the employee is asked to stay on and work an extra eight hour shift. The employee agrees in writing to receive less than eight hours off in between successive shifts that total more than 13 hours, as required by s. 18(3). However, the resulting schedule does not meet the s. 18(1) requirement to have at least 11 consecutive hours off each day.

The days in this employee's work cycle are as follows:

- Day 1: Monday 8:00 am to Tuesday 8:00 am
    - Number of consecutive hours off: 16
- Day 2: Tuesday 8:00 am to Wednesday 8:00 am
    - Number of consecutive hours off: 16
- Day 3: Wednesday 8:00 am to Thursday 8:00 am

    - Number of consecutive hours off: 8
- Day 4: Thursday 8:00 am to Friday 8:00 am
    - Number of consecutive hours off: 16
- Day 5: Friday 8:00 am to Saturday 8:00 am
    - Number of consecutive hours off: 16

There is no period of 11 consecutive hours off in the third day, which is day is Wednesday 8:00 am to Thursday 8:00 am. During that day, which is when the back-to-back shift occurred, the employee worked 8:00 am to 4:00 pm, then again from 4:00 pm to 12:00 pm, and was off from midnight to 8:00 am (eight hours). The employee received only eight consecutive hours off. This schedule does not meet the requirements of s. 18(1).

Exception – s. 18(2)

18(2) Subsection (1) does not apply to an employee who is on call and called in during a period in which the employee would not otherwise be expected to perform work for his or her employer.

This provision provides an exception to the requirement in s. 18(1) that an employee be given at least 11 consecutive hours free from work each day. The exception applies to an employee who is on call and is called in during a period the employee would not otherwise have been expected to work.

This "on call" exception is an exception only to the 11 consecutive hours free from work each day requirement ins. 18(1). It is not an exception to any other hours of work provisions, e.g., limits on hours of work, requirement for time off between shifts, the weekly or bi-weekly free time requirement. This means, for example, that if the hours worked while on call will result in the s. 17(1) limits on hours of work being exceeded, the employer must first get the employee's written agreement to work the excess hours.

The phrase "called in during a period in which the employee would not otherwise be expected to perform work" has been held not to include situations where the employee was asked to remain at work following the conclusion of their regular shift. In *Imperial Tobacco v Bakery, Confectionary and Tobacco Workers International Union, Local 323T*, (2002), 111 LAC (4th) 434 (Ont Arb Bd), although the union argued that such post-shift work was described in the collective agreement overtime provisions as "call-in" work, the arbitrator disagreed and in any case held that this could not override the meaning of the phrases "on call" and "called in to work" as used in s. 18(2). As a consequence, the exception in s. 18(2) did not apply and the parties were subject to the 11-hour daily rest requirement.

Similarly, the Program does not consider an employee who had been asked to work a "relief" shift (e.g., to pick up a shift for an employee who had called in sick) to be an employee who is on call.

The Program considers "on call" employees to refer, for example, to an employee who is required to be accessible by pager, phone or e-mail to respond to call(s) to perform work. The work so performed may include work done over the phone or by e-mail as well as work done at the employer's workplace.

Free From Work Between Shifts – s. 18(3)

18(3) An employer shall give an employee a period of at least eight hours free from the performance of work between shifts unless the total time worked on successive shifts does not exceed 13 hours or unless the employer and the employee agree otherwise.

This section requires employers to provide employees with a minimum period free from work of eight hours between successive shifts, with two exceptions. First, an employee may work successive shifts without the eight-hour free period if the total number of hours worked on the successive shifts is 13 or less. Second, the employer and employee can agree, in writing, to forego the eight hour period entirely or reduce its length – see ESA Part I, subsections 1(3) and (3.1) for more information on agreements in writing.

"Successive shifts" are two shifts following one after another, whether or not there is time off in between the shifts. It includes "split shifts", "back-to-back" shifts, as well as ordinary daily shifts. Section 18(3) may also apply when an employee is on an "on call" shift. In that case, the employee is not at the workplace but is holding himself or herself ready for a call to work - see the discussion of this term in subsection (2) above. Note that when employees are on call the first point in an "on call period" in which the employee actually performs work will mark the commencement of a successive shift and any time actually worked while the employee is on call will count towards the maximum 13 hours of work that may be performed.

The requirement for rest in between shifts operates simultaneously with the other provisions in Part VII of the ESA 2000. For example, an employee may agree in writing to work two eight-hour shifts in a row without any break in between them, thus complying with s. 18(3), but if that results in the employee receiving less than 11 consecutive hours off in a day as required by s. 18(1), the schedule will be in violation of s. 18(1) and, therefore, will not be permitted.

On a similar note, the other provisions in Part VII continue to apply even if one of the two exceptions to the application of s. 18(3) apply. For example, an employee may work their regular six-hour shift, then be asked by the employer to stay on for another six-hour shift. While the requirement for the eight-hour period free from work between shifts will not apply (because the time worked on successive shifts is 13 hours or less), the hours of work limit in s. 17(1), for example, do apply and the employer must get the employee's written agreement to work excess daily hours.

Some have argued that s. 18(3) is redundant of s. 18(1), in that it does not require any rest period that s. 18(1) does not already require. The following example demonstrates how that is not the case:

Section 18(1) requires 11 hours off per day. Section 18(3) requires eight hours off between shifts when consecutive shifts exceed 13 hours.

Employee’s schedule:

- Monday:
    - First shift: 6:00 am to 10:00 am
    - Second shift: Monday 9:00 pm to Tuesday 7:00 am
- Tuesday: 2:00 pm to 6:00 am

Days in employee’s work cycle:

- Day 1: Monday 6:00 am to Tuesday 6:00 am
    - Number of consecutive hours off: 11 hours
- Day 2: Tuesday 6:00 am to Wednesday 6:00 am
    - Number of consecutive hours off: 7 hours (between 7:00 am and 2:00 pm) and 11 hours (between Tuesday 6:00 pm to Wednesday 6:00 am)

Day 1 and day 2 comply with s. 18(1) because the employee has at least 11 hours off each day. Day 2 does not comply with s. 18(3), because the total number of hours worked during the 10 hour shift (which started on day 1 and finished on day 2) and the following four hour shift exceeds 13 hours, yet there are only seven hours off between the two shifts. Unless there is a written agreement as per s. 18(3), there will be a violation of s. 18(3). Section 18(3) is not concerned with what happens in a day, it only deals with time off between shifts, regardless of which day those shifts fall on.

Weekly or Bi-weekly Free Time Requirements – s. 18(4)

18(4) An employer shall give an employee a period free from the performance of work equal to,

(a) at least 24 consecutive hours in every work week; or

(b) at least 48 consecutive hours in every period of two consecutive work weeks.

Section 18(4) of the Act establishes weekly or bi-weekly free time requirements for employees. The free time periods must be at least either:

- 24 consecutive hours in every work week; or
- 48 consecutive hours in every two consecutive work weeks.

Every period of two consecutive "work weeks"

The reference to two consecutive work weeks indicates a "rolling" two work week period. Program policy originally viewed each period of two work weeks as separate and distinct with no overlap. However, the language of the section indicates that free time is to be "in every period of two work weeks". Program policy now is that in each and every period of two work weeks, the employer must provide an employee a period free from the performance of work of at least 48 consecutive hours. For example, if an employer provides employees with a period free from the performance of work on a bi-weekly basis, there must be a period of at least 48 consecutive hours in which the employee is free from work in work weeks 1 and 2, in work weeks 2 and 3, in work weeks 3 and 4, and so forth.

Any time an employee is free from the performance of work can be used to satisfy the requirement of s. 18(4). For example, time an employee is off work because they are off on a public holiday, on sick, family responsibility or bereavement leave, on short-term disability, or on vacation can all be used to satisfy this requirement.

A "work week" is defined in s. 1(1) of the ESA 2000 as:

"work week" means,

(a) a recurring period of seven consecutive days selected by the employer for the purpose of scheduling work, or

(b) if the employer has not selected such a period, a recurring period of seven consecutive days beginning on Sunday and ending on Saturday.

See ESA Part I, s. 1 for a discussion of the definition of "work week".

There is no provision for employees to agree to forego their required weekly or bi-weekly free time. However, the right to the free time can be overridden in s. 19 exceptional circumstances.

Switching between Compliance with the Weekly and Bi-weekly Free Time Requirements

The issue has arisen as to whether an employer is permitted under this section to switch back and forth from complying with the weekly free time requirement in some weeks to complying with the bi-weekly free time requirement in other weeks, and vice versa.

Nothing in this subsection prohibits the practice of "switching". However, the manner in which the switch must be effected in order to be in compliance with s. 18(4) will result in a schedule that provides the employee with, on average, no less than 24 hours free from the performance of work in every work week.

For example:

The employer starts its schedule by complying with the bi-weekly free time requirement:

- Week 1: 0 hours off
- Week 2: 48 hours off
- Week 3: 0 hours off

The employer then wants to switch to comply with the weekly free time requirement. It creates this schedule:

- Week 4: 24 hours off
- Week 5: 24 hours off
- Week 6: 24 hours off

This schedule is NOT in compliance with s. 18(4). As stated above, the reference in s. 18(4)(b) to "every two consecutive work weeks" is a rolling two work week period; every two work weeks must contain at least 48 hours of free time in order to comply with the biweekly free time requirement. In this example, Week 1 and Week 2 and Week 3 are all subject to the biweekly free time requirement. This means that:

- With respect to Week 1: there must be at least 48 hours free from work in the weeks of Week 1 and Week 2. The requirement is met in the example.
- With respect to Week 2: there must be at least 48 hours free from work in the weeks of:
    - Week 1 and Week 2, and
    - Week 2 and Week 3.

The requirement is met in the example.

- With respect to Week 3: there must be at least 48 hours free from work in the weeks of:
    - Week 2 and Week 3, and
    - Week 3 and Week 4.

Because only 24 hours free time were provided in the two-week period of Week 3 and Week 4, the employer has not complied with s. 18(4) in this example. In order to effect the switch from complying with the biweekly free time requirement to the weekly free time requirement after Week 3, the employer must schedule at least 48 hours off in Week 4.

ESA Part VII Section 19 - Exceptional Circumstances

Exceptional Circumstances - s. 19

19 An employer may require an employee to work more than the maximum number of hours permitted under section 17 or to work during a period that is required to be free from performing work under section 18 only as follows, but only so far as is necessary to avoid serious interference with the ordinary working of the employer's establishment or operations:

1. To deal with an emergency.

2. If something unforeseen occurs, to ensure the continued delivery of essential public services, regardless of who delivers those services.

3. If something unforeseen occurs, to ensure that continuous processes or seasonal operations are not interrupted.

4. To carry out urgent repair work to the employer's plant or equipment.

This provision allows employers to require employees to work more daily or weekly hours than are permitted under s. 17 or to work during a free period (daily, in between shifts and weekly or bi-weekly) as required by s. 18, in any of the four specified circumstances, but only so far as is necessary to avoid serious interference with the ordinary working of the employer's establishment or operations.

Hours worked pursuant to s. 19 while s. 19 is in operation are not counted towards the normal limits in s. 17, nor are they taken into account when determining whether the requirements for free periods under s. 18 have been met. (Note, however, that hours worked while s. 19 is in operation will count for the purposes of determining whether any overtime pay is owing.)

Emergency

An employer may require an employee to work hours in excess of those permitted under s. 17 or during a free period required under s. 18 to deal with an emergency, but only so far as is necessary to avoid serious interference with the ordinary working of the employer's establishment or operations.

For example, a fire in the workplace or a natural disaster may constitute an emergency.

Unforeseen Occurrence Affecting Public Services

An employer may require an employee to work hours in excess of those permitted under s. 17 or during a free period required under s. 18, but only so far as is necessary to avoid serious interference with the ordinary working of the employer's establishment or operations, if:

- An unforeseen event occurs; and
- The unforeseen event threatens to disrupt the continued delivery of essential public services.

The phrase "essential public services" refers to services that are provided to the public at large and which may be considered "essential" because they are necessary for an employer to prevent situations that could result in, for example:

- Danger to life, health or safety;

- The destruction or serious deterioration of machinery, equipment or premises;
- Serious environmental damage; or
- Disruption of the administration of the courts.

An example of an essential public service would include the provision of an uninterrupted public power supply if a disruption could result in any of the situations listed above. For example, if a power disruption would threaten patient care at hospitals and nursing homes, an uninterrupted supply of power would be considered an essential public service since it is necessary to prevent danger to the life, health and safety of patients.

This exception applies "regardless of who delivers those [essential public] services". As such, this provision could apply to employees who work for private companies that deliver public services (for example, privately run ambulance or road-clearing services, or a business that provides food to hospitals).

Unforeseen Occurrence Affecting Continuous Processes or Seasonal Operations

An employer may require an employee to work hours in excess of those permitted under s. 17 or during a free period required under s. 18, but only so far as is necessary to avoid serious interference with the ordinary working of the employer's establishment or operations if:

- An unforeseen event occurs; and
- The unforeseen event threatens to disrupt continuous processes or seasonal operations.

Urgent Repair to Plant or Equipment

An employer may require an employee to work hours in excess of those permitted under s. 17 or during a free period required under s. 18, but only so far as is necessary to avoid serious interference with the ordinary working of the employer's establishment or operations, if the employee is needed to carry out urgent repair work to the employer's plant or equipment.

An example of such a situation may be where management determines, whether or not in the course of routine maintenance, that repairs are urgently required to be done to machinery and a delay in carrying out the repairs will result in serious damage.

When Section 19 Will Not Apply

Section 19 is intended to allow employers to require employees to work hours in excess of the usual limits or during required rest periods only in exceptional circumstances. It is not intended to allow employers to require extra work of employees to address, for example, problems that arise because of inadequate business planning, or changes in business cycles (e.g., a fluctuation in the level of demand for the employer's product).

ESA Part VII Section 20 - Eating Periods

Eating Periods - s. 20(1)

20(1) An employer shall give an employee an eating period of at least 30 minutes at intervals that will result in the employee working no more than five consecutive hours without an eating period.

This section imposes an obligation upon an employer to provide an eating period of at least 30 minutes timed so that no employee works longer than five consecutive hours without receiving an eating period. This requirement is subject to the exception set out in s. 20(2).

Unless the employee receives an uninterrupted 30 minutes, he or she is not considered to have received his or her entitlement under s. 20(1). However, note that under s. 6(2)(a)(i) of O Reg 285/01, work performed during the time employees are entitled to take time off work for an eating period (i.e., where the employee decides on his or her own initiative to work during the eating period even though he or she is entitled to the time off to eat) is deemed not to be performed. See O Reg 285/01, s. 6 for a discussion of this provision.

It is the Program's policy that s. 20 of the *Employment Standards Act, 2000* and s. 6 of O Reg 285/01 allows employers to require employees to take their eating periods in a designated place (e.g., on the employer's premises) and to be "on call" (i.e., available to return to work) while on the eating period. Unless the employee is actually required to work during the eating period (i.e., he or she is interrupted by a work demand before the period is completed), the employee will be considered to have received the eating period entitlement for the purposes of s. 20.

Further, it is the Program's policy that the Act does not require employers to schedule a particular time for the employee to take as the eating period. For example, in a retail shop that has only one employee working during a shift, the employer may tell the employee to take his/her eating period when there are no customers for a stretch of time. If the employee has an uninterrupted period of 30 minutes during the requisite five-hour period, there will be compliance with s. 20. If an employee is interrupted at any point during the 30-minute period, the eating period is considered not to have been provided, and a new uninterrupted 30-minute period must be given during the requisite five-hour period. See subsection (2) below for a discussion on splitting up the eating period under s. 20(2).

It should also be noted that there is no obligation upon an employer under the Act to provide any break (e.g., coffee breaks) in addition to the eating period requirement of s. 20(1).

Exception - s. 20(2)

20(2) Subsection (1) does not apply if the employer and the employee agree, whether or not in writing, that the employee is to be given two eating periods that together total at least 30 minutes in each consecutive five-hour period.

This section provides an exception to the eating period requirement in s. 20(1). It provides that instead of the requirement in s. 20(1), an employer and employee may agree to an alternative eating period arrangement whereby the employee receives two eating periods that together total at least 30 minutes within a period of five consecutive hours. Agreements under this section need not be in writing. Unlike the requirement in s. 20(1), the eating periods must be completed before the five-hour period expires (under s. 20(1), the eating period can begin at the five-hour mark). For example, an employer and employee may agree that an employee will receive two 15-minute eating periods within the 5-hour period. Consistent with the Program's interpretation of s. 20(1), it is the Program's position that the employer is not required to schedule particular times for the employee to take the eating periods as long as it is within the time period specified in s. 20(2). Additionally, the employer can require the employee to take the two 15-minute periods in a designated place and to be "on call" while on the break. For employees to be

considered to have received their entitlement under s. 20(2), the two eating periods must be uninterrupted. (However, note that under s. 6(2)(a)(i) of O Reg. 285/01, work performed during the time employees are entitled to take time off work for an eating period (i.e., where the employee decides on his or her own initiative to work during the eating period(s) even though he or she is entitled to the time off to eat) is deemed not to be performed. See O Reg. 285/01, s.6 for a discussion of this provision.

Agreements under s. 20(2) can specify the length of the two shorter periods, or they can be open-ended, providing that the two shorter periods will be of unspecified lengths that together total 30 minutes. For example, there is a one-person workplace where the employee is required to remain at the workplace "on call", and the employer does not schedule a particular time for the employee to take the eating period. The employer and employee may enter into an agreement that provides that the eating period will be split into two shorter periods of unspecified length as may be necessary to deal with customers. In this case, if, for example, the employee had 20 uninterrupted minutes before a customer came in, there will be compliance with s. 20(2) so long as the employee subsequently has an uninterrupted 10-minute period within the requisite five-hour period.

There is no provision for an employer and an employee to agree to take the eating period in more than two instalments, to eliminate eating periods altogether or to extend the time in which an eating period must be given (e.g., to six or seven hours).

ESA Part VII Section 21 - Payment Not Required

21 An employer is not required to pay an employee for an eating period in which work is not being performed unless his or her employment contract requires such payment.

This provision states that employers are not obliged to pay employees for time spent on eating periods where work is not being performed, unless the terms of the employee's employment contract stipulate otherwise.

In the event that an employee is required to work during the eating period, the eating period counts as hours of work and must be paid for only to the extent of the actual interruption. (In such a case, there may also be a violation of the s. 20 requirement to provide the employee with an eating period.) The rules are different for breaks other than eating periods, e.g., coffee breaks. See O Reg 285/01, s. 6.

ESA Part VII Section 21.1 – Director to Prepare Document

Director to Prepare Document – s. 21.1(1); If Document Not Up to Date – s. 21.1(2)

21.1(1) The Director shall prepare and publish a document that describes such rights of employees and obligations of employers under this Part and Part VIII as the Director believes an employee should be made aware of in connection with an agreement referred to in subsection 17(2) or (3).

(2) If the Director believes that a document prepared under subsection (1) has become out of date, he or she shall prepare and publish a new document.

These provisions are to be read in conjunction with s. 17(5) of the ESA 2000. Section 17(5) provides that employees' written agreements to work excess daily or weekly hours are, with some exceptions, invalid

unless, among other things, the employer gives the employee a copy of the Director's information document described in s. 21.1 before the employee enters into the agreement.

Note that pursuant to s. 17 (9), this requirement does not apply in respect of excess hours agreements made before March 1, 2005, the date that the amendments made by the *Employment Standards Amendment Act (Hours of Work and Other Matters), 2004,* SO 2004, c 21 came into force, or in respect of excess hours agreements relating to an employee represented by a union [whenever made], although in the case of the former the employer was (pursuant to another subsection – s. 17(10)) – that has since been repealed) required to provide a copy of the information document to the employee concerned by June 1, 2005.

These provisions provide that the Director of Employment Standards will prepare and publish an information document that describes rights of employees and obligations of employers under Part VII (Hours of Work and Eating Periods) and Part VIII (Overtime Pay). The rights and obligations that are to be contained in the document are those that the Director believes an employee should be made aware of in connection with excess hours agreements. If the Director believes that the document is out of date, the Director will prepare and publish a new document.

ESA Part VII.0.1 - Written Policy on Disconnecting from Work

Part VII.0.1 was added to the ESA 2000 by the *Working for Workers Act, 2021* (WFWA), effective December 2, 2021.

Part VII.0.1 of the ESA requires employers that employ 25 or more employees on January 1st of any year to have a written policy in place before March 1st of that year for all employees with respect to disconnecting from work. The policy must include the date it was prepared and the date any changes were made to the policy. The employer also has certain obligations with respect to providing a copy of the written policy to its employees and with respect to the retention of its disconnecting from work policies (see subsection 15(8) for more information on the record-keeping obligations).

A transitional provision sets out different timeframes that apply when the Part first takes effect; employers are to use January 1, 2022 (which is the January 1st immediately preceding the date that is six months after the WFWA receives Royal Assent) as the point-in-time to establish whether they meet the “25-employee threshold” and, if they do, they must have a written policy in place for all employees with respect to disconnecting from work by June 2, 2022 (which is six months after the day the WFWA received Royal Assent). After 2022, the transition provision will no longer have any effect and the time periods apply as set out in subsection 21.1.2(1).

The phrase “disconnecting from work” is defined to mean not engaging in work-related communications, including emails, telephone calls, video calls or the sending or reviewing of other messages, so as to be free from the performance of work.

Part VII.0.1 applies to all employees and employers covered by the ESA, except the Crown, a Crown agency or an authority, board, commission or corporation all of whose members are appointed by the Crown and any employees of such an employer. See section 2.1 of O. Reg. 285/01 for information.

ESA Part VII.0.1 Section 21.1.1 – Interpretation

Interpretation - s. 21.1.1

In this Part,

“disconnecting from work” means not engaging in work-related communications, including emails, telephone calls, video calls or the sending or reviewing of other messages, so as to be free from the performance of work.

This provision was added to the ESA by the *Working for Workers Act, 2021* effective December 2, 2021. Section 21.1.1 defines the phrase “disconnecting from work” for the purposes of Part VII.0.1 of the Act. As such, this definition applies to the requirement set out in section 21.1.2 providing that, where the relevant criteria are met, an employer must – within the required timeframe - ensure it has a written policy in place for all employees with respect to disconnecting from work.

“Disconnecting from work” is defined to mean not engaging in work-related communications, including emails, telephone calls, video calls or the sending or reviewing of other messages, so as to be free from the performance of work.

The definition provides an inclusive list of some types of work-related communications: emails, telephone calls, video calls, sending and/or reviewing of other messages. As this list is inclusive, and not exhaustive, other types of work-related communications could equally fall under this definition.

Per the definition, “disconnecting from work” means not engaging in work-related communications and, as such, the employee would consequently “be free from the performance of work” during the time the employee is “disconnected”. Note that per the ESA’s rules on when work is deemed to be performed, if an employee performs work, for example engages in reviewing or drafting emails, the time the employee spends doing those activities is generally considered to be “working time” under the ESA. This is the case even if the employee does so, for example, from home after the employee’s day shift is over and where a “disconnecting from work” policy that says employees are not to work from home is in place. See s. 1.1 of O. Reg. 285/01 for more information.

ESA Part VII.0.1 Section 21.1.2 – Written Policy on Disconnecting from Work

Written Policy on Disconnecting from Work - s. 21.1.2(1)

21.1.2(1) An employer that, on January 1 of any year, employs 25 or more employees shall, before March 1 of that year, ensure it has a written policy in place for all employees with respect to

disconnecting from work that includes the date the policy was prepared and the date any changes were made to the policy.

Subsection 21.1.2(1) was added to the ESA 2000 by the *Working for Workers Act, 2021*, effective December 2, 2021.

Section 21.1.2 creates certain obligations on employers to put in place and distribute to their employees a written policy about "disconnecting from work". This section does not establish a right for employees to disconnect from work. Employees' rights under the ESA to not perform work are established in other Parts of the Act, particularly the Hours of Work and Eating Periods, Vacation With Pay, and Public Holiday Parts of the Act, in conjunction with the "When Work Deemed to be Performed" provision in O. Reg. 285/01. However, an employer's policy may amount to a greater right or benefit than an employment standard under the Act or may otherwise be contractually binding, and therefore the policy may itself establish a right that applies instead of the employment standard.

Subsection 21.1.2(1) provides that an employer that employs 25 or more employees on January 1st of any year must, before March 1 of that same year, ensure that a written policy is in place for all employees with respect to disconnecting from work. Disconnecting from work is defined in section 21.1.1. The policy must include the date the policy was prepared and the date any changes were made to the policy.

Note that this provision must be read in conjunction with subsection (5) , which is a transition provision that applies when the Part first takes effect. Subsection (5) modifies both the reference date for determining whether the 25-employee threshold is met (to January 1, 2022) and the timeframe within which a written policy with respect to disconnecting from work must be in place to June 2, 2022 (which is six months after Royal Assent). After 2022, the transition provision will no longer have any effect and the time periods apply as set out in subsection 21.1.2(1).

In order to better understand the provision, the key elements have been broken down and discussed individually below.

An employer that employs 25 or more employees on January 1 of any year

In order for an employer to be required to have a written policy in place for all employees with respect to disconnecting from work under the ESA, the employer must employ 25 or more employees on January 1st of any year. This is a point-in-time assessment. In other words, in order to determine whether this criterion is met, the employer must take a "snapshot" of the number of employees it employs on January 1st.

If on January 1st, the employer employs fewer than 25 employees, then the ESA does not impose a requirement that the employer have a written policy in place with respect to disconnecting from work. This is the case even if the employer's employee count increases at a later point in the same calendar year. For example, if an employer employs 20 employees on January 1st (and hence the requirement does not apply) and later hires five more employees in June of that same year, the employer continues to not be subject to the requirements to have a written policy in place for all employees with respect to disconnecting from work. However, if all 25 employees remain employed by that employer, the employer will have obligations under this Part in the following year when the "snapshot" assessment is again undertaken on the following January 1st. In this example, the employer will have 25 employees on that January 1st date and will therefore be required to have a written policy in place for all employees with respect to disconnecting from work before March 1st of that year.

Conversely, if an employer employs 25 employees or more on January 1st (and hence the requirement applies) and that employer's employee count decreases at a later point in the same calendar year, the employer is still obligated to have a written policy in place with respect to disconnecting from work. This is the case until the "snapshot" assessment of the "25-employee threshold" is again undertaken on the following January 1st. If the employer employs fewer than 25 employees on January 1, the ESA requirement to have a written policy in place no longer applies to that employer.

There are a number of issues that may arise in determining whether the "25-employee" threshold is met:

i.Related Employers

If two or more employers are treated as one employer by virtue of s. 4 of the Act, then all employees employed by these two or more employers are included when determining whether the "25-employee" threshold has been met. This is because of the definition of "employer" in s. 1 of the Act, which reads:

"employer" includes,

(b) any persons treated as one employer under section 4, and includes a person who was an employer.

ii. Multiple Locations

Where a single employer has multiple locations, all employees employed at each of the locations in Ontario are to be included when determining whether the "25-employee" threshold has been met. For example, an employer owns three sandwich shops with 12 employees employed in each shop on January 1st. This employer employs 36 employees. The employer must have a written policy in place for all employees with respect to disconnecting from work, even though there are fewer than 25 employees employed at each individual shop.

iii. Which Employees are Included in the Count?

All workers who meet the definition of "employee" are included when determining whether the 25-employee threshold has been met. See the discussion of the definition of "employee" in ESA Part I, s. 1 of the Manual. Included in the definition of "employee" are:

- Homeworkers;
- Probationary employees;
- Some trainees;
- Officers of a corporation who perform work or supply services for wages;
- Employees on definite term or specific task contracts of **any** length;
- Employees who are on lay-off, so long as the employment relationship has not been terminated and severed pursuant to Part XV of the Act;
- Employees who are on a leave of absence, including leaves of absence under Part XIV of the ESA
- Employees who are on strike or who are locked-out. Persons on strike or lock-out are employees under common law and are also considered to be employees under the inclusive definition of "employee" in the Act; and
- Employees who are exempted from the application of all or part of the Act. Employees do not lose their status as employees merely by virtue of being exempt from all or part of the Act. Note, however, that the individuals exempted from the application of the Act in s. 3(5) of the Act are not "employees", and therefore are not included in the count.

Employees of temporary help agencies are employees of the agency, so are included in the count only for the purpose of determining whether **the agency** has met the 25-employee threshold, not for the purpose of determining whether the client the employee is placed with has met the 25-employee threshold. Note that the agency's count must include all of its assignment employees, whether active or inactive on January 1st.

When this “count” is being done, it is the number of employees that are counted, and not the number of "full-time equivalents". This means that part-time employees each count as one employee, regardless of the number of hours they may work. For example, an employer that employs 26 part-time employees who each work halftime has 13 full-time equivalents, but employs 26 employees for the purpose of this provision.

The question is not whether there are at least 25 employees scheduled to work or working on January 1. The question is whether the employer has an employment relationship with at least 25 employees on January 1.

The policy must be in writing and must be in place before March 1st

The employer’s policy with respect to disconnecting from work must be in writing, which includes being electronic. Note that subsections (2) and (3) impose requirements on the employer with respect to providing a copy of the written policy to employees.

The policy must be in place before March 1st. In other words, the latest day the policy can take effect in order for the employer to be in compliance with the provision is the last day of February. (Note this is not the case during the time when the transition provisions in subsection (5) apply.)

While compliance with this provision requires the employer to have a written policy with respect to disconnecting from work in place by March 1st - and to provide a copy of the written policy to employees within the set timeframes - note that there is no contravention of Part VII.0.1 simply because the employer doesn’t put into practice what has been described in its policy.

All employees must be covered by a written policy

All employees must be covered by the employer’s written policy. In other words, the employer would not be in compliance with this provision if its policy applied to only a portion of its employees – for example, if the policy applied only to the employer’s sales staff but not its managerial staff. However, this doesn’t mean that the employer is required to have the **same** policy for all of its employees. It is Program policy that the employer’s policy can be comprised of different policies (either in a single document or in multiple documents) for different individuals or different groups/classes of employees or it could be a single policy that applies to its employees across-the-board. The written policy with respect to disconnecting from work may be a stand-alone document, or it may be part of another document (e.g. a comprehensive workplace HR policies and procedures manual).

The written policy must be with respect to disconnecting from work

The written policy that is in place must be with respect to disconnecting from work. Section 21.1.2 does not specify what type of information the policy must contain, though subsection (4) provides that the policy must contain any information that is prescribed by regulation (no such regulations were prescribed at the time of writing).

“Disconnecting from work” is defined in section 21.1.1.

> **“disconnecting from work” means not engaging in work-related communications, including emails, telephone calls, video calls or the sending or reviewing of other messages, so as to be free from the performance of work.**

In order to be in compliance with section 21.1.2, the topic of the employer’s policy must therefore be employees not engaging in work-related communications, so as to be free from the performance of work.

This provision does not create a “right to disconnect from work” for employees. In other words, it does not impose obligations on an employer to allow employees to “disconnect from work” and to be free from the

obligation to engage in work-related communications. However, it does require that the employer's policy around "disconnecting from work" be stated in writing and provided to employees per subsections (2) and (3).

Some examples of what a "disconnecting from work" policy may address:

- The employer's expectations, if any, of employees to read or to reply to work-related emails or to answer phone calls after their shift is over.
    - The policy may set out different expectations for different situations. For example, the policy may contain different expectations depending on the time of day of the communication, the subject matter of the communication, or who is contacting the employee – e.g. the client, a supervisor, or a colleague.

- The employer's requirements in relation to employees turning on out-of-office notifications and/or changing their voicemail messages when they are not scheduled to work to signal that they will not be responding until the next scheduled work day.

Note that per the ESA's rules on when work is deemed to be performed, if an employee performs work, for example engages in reviewing or drafting emails, the time the employee spends doing those activities is generally considered to be "working time" under the ESA. This is the case even if the employee does so, for example, from home after the employee's day shift is over and where a "disconnecting from work" policy that says employees are not to work from home is in place. See s. 1.1 of O. Reg. 285/01 for more information.

Note also that the **content** of an employer policy with respect to disconnecting from work may amount to a greater right or benefit than an employment standard under the Act, per ss. 5(2) and may be enforceable under the ESA. Even if the policy does not amount to a greater right or benefit, it may otherwise be contractually binding.

The written policy includes the date it was prepared and the date of any changes made to the policy.

The employer's written policy must include the date it was prepared and if any changes are made to the policy after that time, the date(s) of any those change must also be included. See subsection (2) for information about the employer's obligation to provide a copy of the written policy to all employees within 30 days of the policy being prepared or changed.

Note that per s. 15(8.1) employers have an obligation to retain a copy of every written policy on disconnecting from work that was required under this Part for three years after the policy ceases to be in effect

Copy of Policy - s. 21.1.2(2), (3)

21.1.2(2) An employer shall provide a copy of the written policy with respect to disconnecting from work to each of the employer's employees within 30 days of preparing the policy or, if an existing written policy is changed, within 30 days of the changes being made.

(3) An employer shall provide a copy of the written policy with respect to disconnecting from work that applies to a new employee within 30 days of the day the employee becomes an employee of the employer.

Subsections 21.1.2(2) and 21.1.2(3) were introduced into the ESA by the Working for Workers Act, 2021 on December 2, 2021. These provisions establish rules about when the written policy must be provided to employees.

Pursuant to ss. 21.2.2(2), the employer must provide a copy of the written policy with respect to disconnecting from work to each of its employees within 30 days of the policy having been prepared or, if an existing policy was changed, within 30 days of the changes being made. Subsection 21.2.2(3) requires an employer to provide a copy of the written policy with respect to disconnecting from work that applies to a new employee within 30 days of that individual becoming an employee of the employer. "Days" in these subsections means calendar days.

Note that a copy of the written policy does not need to be provided to employees annually if the policy has not changed from the previous year. This is because the obligation arises only within 30 days of the policy being prepared or changed.

Where an employer has different policies for different employees or employee groups, it is Program policy that the obligation is to provide only a copy of the policy that applies to that particular employee.

It is the Program's position that an employer may provide the policy as a printed copy or as an attachment in an email to the employee. Further, and consistent with the Program's position regarding the provision of written wage statements under s. 12(1) and the information sheets for assignment employees under s. 74.7(3), an employer may provide the written policy via a link to the document on an internet database, if the employer ensures the employee has reasonable access to that database (i.e. the employer must ensure the employee has access to a computer - which includes devices such as tablets and smart phones - and is able to access a working link to the document) and ensures the employee has access to a printer and that the employee knows how to use the computer and the printer.

Prescribed Information - s. 21.1.2(4)

21.1.2(4) A written policy required under subsection (1) shall contain such information as may be prescribed.

An employer's written policy with respect to disconnecting from work that is required under ss. 21.1.2(1) must contain any information that is prescribed. At the time of writing, no information is prescribed. As such, the only information the policy must include is the date it was prepared as well as the dates any changes were made to the policy, as per subsection (1). There is no other specified information that must be contained I the employer's written policy.

Transition – s. 21.1.2(5)

(5) Despite subsection (1), an employer shall,

> **(a) have until the date that is six months after the day the *Working for Workers Act, 2021* receives Royal Assent instead of March 1 to comply with the requirements of subsection (1); and**
>
> **(b) determine whether it employs 25 employees or more as of the January 1 immediately preceding the date described in clause (a).**

This provision was added by the *Working for Workers Act, 2021* (WFWA). It is a transition provision that modifies the January 1st and March 1st dates set out in subsection (1) for when the WFWA receives Royal Assent and Part VII.0.1 first comes into force (note this occurred on December 2, 2021). It provides that:

- Employers have until six months after the WFWA receives Royal Assent, which is June 2, 2022, instead of March 1st to have a written policy with respect to disconnecting from work in place for all its employees, and
- In determining whether the "25-employee threshold" is met, which establishes whether the employer has an obligation to have a written policy in place, the employer is to look at the number of employees it employed on the January 1st immediately preceding the date that is six months after the WFWA received Royal Assent. In other words, given that June 2, 2022 is six months after the WFWA received Royal Assent, the employer will determine the number of employees it employed on January 1, 2022 to establish if the "25-employee" criterion is met.

Subsection 21.1.2(5) no longer has any effect after the transition period. In other words, after 2022, the timelines set out in subsection (1) will apply: employers will take a "snapshot" of the number of employees they employ on January 1, beginning in 2023, to determine if the "25-employee threshold" is met and, if it is, they are required to have a written policy in place before March 1 of that year.

ESA Part VII.1 Section 21.2 – Three Hour Rule

Three hour rule – s. 21.2(1)

21.2 (1) If an employee who regularly works more than three hours a day is required to present himself or herself for work but works less than three hours, despite being available to work longer, the employer shall pay the employee wages for three hours, equal to the greater of the following:

1. The sum of,

i. the amount the employee earned for the time worked, and

ii. wages equal to the employee's regular rate for the remainder of the time.

2. Wages equal to the employee's regular rate for three hours of work.

Section 21.2 was added to the ESA 2000 effective January 1, 2019.

Prior to January 1, 2019, a different version of the three hour rule was set out in s. 5(7) of O Reg 285/01. That provision was revoked effective January 1, 2019 – for information about that rule, see the discussion under s. 5(7) of O Reg 285/01, which is being retained for transitional purposes.

Subsection 21.2(1) provides that, under certain circumstances, employees must be paid at least three hours' pay at the employee's regular rate of pay, even though the employee has worked less than three hours. Note that employees in the women's coat and suit industry and the women's dress and sportswear industry have special rules that apply instead of s. 21.2 – see O Reg 291/01, s. 3.

Circumstances in which s. 21.2(1) applies:

In order for section 21.2 (1) to apply:

The employee regularly works more than three hours per day

- The three hour rule has no application if the employee regularly works three hours a day or regularly works less than three hours a day.

The employee is required to present himself or herself for work

- This section will not apply where the employee has reported to work when directed **not** to do so by the employer, even on a day that is normally a workday.

The employee works less than three hours, despite being available to work longer

- The wording “despite being available to work longer” clarifies that in order for s. 21.2 to apply, the employee must be available to work for more than three hours. Therefore, if the employee presents themselves for work and leaves early, for example due to illness or due to pre-arranged time-off, the employee cannot rely on this provision to seek wages for three hours of work.

It is immaterial whether the hours are worked on a regular work day or on a day on which the employee does not usually work, provided that the employee was required to present themselves for work that day. In other words, the three hour rule may also apply when the employee is called in to work on a day that is not a regular workday, if the employee works less than three hours that day.

If the employee's schedule includes regularly working more than three hours a day and regularly working three hours a day or less, the application of the three hour rule will depend on whether the day is one where the employee would regularly work more than three hours or one where the employee would regularly work three hours or less.

As an example, assume an employer occasionally schedules staff to attend Saturday morning meetings. Assuming that the employees regularly work 8 hours a day, Monday through Friday, the three hour rule would apply to these occasional Saturday staff meetings. However, if the employer was found to regularly schedule the employees for one-hour Saturday morning staff meetings, it would be the Program's position that the three hour rule would **not** apply to those Saturday shifts/meetings. That is because it is the Program's view that s. 21.2(1) was not intended to prohibit an employer from having a regular shift schedule that incorporates shifts of less than three hours.

As another example, an employer could establish a shift schedule that has the employee working four-hour shifts on Mondays, Wednesdays and Fridays and two-hour shifts on Tuesdays and Thursdays. The regularly scheduled Tuesday and Thursday shifts would not trigger the application of the three hour rule because the employee regularly works less than three hours on those days. Note though that if the employee was not provided with at least three hours of work on a Monday, Wednesday or Friday, the rule would apply.

Calculating Entitlement

Where the provision applies, an employee will be entitled to be paid at least three hours at their regular rate of pay (though the amount owing could be more). The employer must pay the employee wages for three hours equal to the **greater** of the following:

1. The sum of,

i. the amount the employee earned for the time worked, and

ii. wages equal to the employee's regular rate for the remainder of the time.

OR

2. Wages equal to the employee's regular rate for three hours of work.

Paragraph 1

Under subparagraph 1(i) of s. 21.2(1) the employee is entitled to be paid for the time worked. This amount includes all wages the employee was entitled to receive for the time worked — this might be wages at the employee's regular rate or, in some circumstances, might be wages earned at a different rate, including overtime or premium pay.

Once the calculation is complete for the wages the employee earned for the time worked under subparagraph (i), the employee would then be entitled to be paid their regular rate for the remaining time per subparagraph (ii). For example if an employee works for one hour and is entitled to be paid one and a half times their regular rate of pay for that hour (because, for example, it was a public holiday), they are also entitled to receive an additional 2 hours of pay at their regular rate pursuant to subparagraph (ii) of paragraph 1.

Paragraph 2

The employee's wages for three hours of work at their regular rate would be calculated.

Comparison

The results from the calculation under paragraphs 1 and 2 would be compared. The calculation that results in the greatest amount of wages owing is the employee's entitlement.

Example 1:

Employee:

- Regularly works more than three hours per day and is required to present themselves for work;
- Regular rate is $28.00/hour;
- Works for one hour and is then directed by the employer to leave;
- Is paid their regular rate of $28.00 for one hour's work.

Entitlement is the greater of:

1. **The sum of, the amount the employee earned for the time worked, and wages equal to the employee's regular rate for the remainder of the time.**

   ($28.00 + (2 X $28.00)) = $84.00

Or

2. **Wages equal to the employee's regular rate for three hours of work.**

   $28.00 X 3 = $84.00

In this example, the employee is entitled to $84.00 per s. 21.2(1).

Example 2:

Apply the same facts as in the first example, but assume the employee earned overtime pay (at 1.5x their regular rate) for the one hour she worked.

Entitlement is the greater of:

1. **The sum of, the amount the employee earned for the time worked, and wages equal to the employee's regular rate for the remainder of the time.**

   $42.00 + (2 X $28.00) = $98.00

Or

2. **Wages equal to the employee's regular rate for three hours of work.**

   $28.00 X 3 = $84.00

In this example, the employee is entitled to $98.00 per s. 21.2(1).

Exception – s. 21.2(2)

21.2 (2) Subsection (1) does not apply if the employer is unable to provide work for the employee because of fire, lightning, power failure, storms or similar causes beyond the employer's control that result in the stopping of work.

Subsection 21.2(2) establishes that the three hour rule in s. 21.2(1) does not apply when certain types of circumstances that are beyond the control of the employer prevent it from providing work to an employee who reports for work.

For this provision to apply, the circumstances described in the section must be responsible for the complete stoppage of an employee's work. If the circumstances only reduce the demand for the employee's services, this provision will not apply and the three hour rule will apply. For example, a severe electrical storm could result in an employer being unable to provide a construction employee with any work and s. 21.2(2) would therefore apply. If the same storm only reduced the volume of work for an employee who works in a car wash, then s. 21.2(2) would not apply.

ESA Part VIII - Overtime Pay

The intent of Part VIII (Overtime Pay) is to compensate an employee for the additional time he or she must work when overtime is required and to provide workplace parties with the ability to negotiate more flexible work schedules. The overtime provisions are also intended to discourage employers from requiring overtime by imposing an economic cost on them when overtime is demanded.

ESA Part VIII Section 22 – Overtime Threshold

Section 22 was amended and sections 22.1 and 22.2 were repealed effective April 3, 2019 as a result of the *Restoring Ontario's Competitiveness Act, 2019* (ROCA), which removed the requirement to obtain the approval the Director of Employment Standards to average overtime and imposed a limit of four weeks on the length of overtime averaging arrangements. The discussion of these provisions as they existed prior to April 3, 2019 has been maintained in this publication since employees may still file a complaint relating to a situation that arose prior to the ROCA taking effect. That text appears at the end of this section, in red, to highlight that the discussion reflects the pre-April 3, 2019 language of sections 22, 22.1, and 22.2.

Overtime Threshold – s. 22(1); Same, Two or More Regular Rates – s. 22(1.1)

22(1) Subject to subsection (1.1), an employer shall pay an employee overtime pay of at least one and one-half times his or her regular rate for each hour of work in excess of 44 hours in each work week or, if another threshold is prescribed, that prescribed threshold.

(1.1) If an employee has two or more regular rates for work performed for the same employer in a work week,

(a) the employee is entitled to be paid overtime pay for each hour of work performed in the week after the total number of hours performed for the employer reaches the overtime threshold; and

(b) the overtime pay for each hour referred to in clause (a) is one and one-half times the regular rate that applies to the work performed in that hour.

Subject to s. 22(1.1), s. 22(1) sets out the general overtime premium of one and one-half times the employee's regular rate of pay for each hour of overtime worked in each work week. Section 22(1) also establishes the general overtime threshold. The employer's obligation to pay the overtime premium is triggered when an employee works more than 44 hours in a work week. Subject to a greater right or benefit, the general premium and threshold apply for all employees except those exempted from ESA Part VIII Overtime Pay. In addition, for certain employees, listed below, different overtime thresholds have been prescribed.

Subsection 22(1.1) was added to the ESA 2000 by the *Fair Workplaces, Better Jobs Act, 2017*, SO 2017, c 22, effective January 1, 2018. It states that where an employee has two or more regular rates for work performed in a work week that the overtime rate for any hour of overtime work is one and one-half times the regular rate the employee would be entitled to for the work performed in that hour.

Special Overtime Thresholds

O Reg 285/01 varies the overtime threshold for certain employees. The regulation requires employers to pay employees the general overtime premium of one and one-half times the employee's regular rate of pay; however, it varies the overtime threshold as follows:

Road building in relation to streets, highways or parking lots

Employees engaged at the site of road building in relation to streets, highways or parking lots are entitled to the overtime premium for each hour of work in excess of 55 hours in each work week – O Reg 285/01, s. 13(1)(a). If the employee works less than 55 hours in a work week, the difference between the number of hours worked and 55 (up to a maximum of 22) is added on to the maximum number of hours that can be worked in the following work week before overtime becomes payable – O Reg 285/01, s. 13(1)(b).

Road building in relation to structures

Employees engaged at the site of road building in relation to structures such as bridges, tunnels or retaining walls in connection with streets or highways are entitled to the overtime premium for each hour of work in excess of 50 hours in each work week per O Reg 285/01, s. 13(2)(a). If the employee works less than 50 hours in a work week, the difference between the number of hours worked and 50 (up to a

maximum of 22) is added on to the maximum number of hours that can be worked in the following work week before overtime becomes payable – O Reg 285/01, s. 13(2)(b).

Hospitality industry

Employees who work for the owner or operator of a hotel, motel, tourist resort, restaurant or tavern for 24 weeks or less in a calendar year and who are provided with room and board are entitled to the overtime premium for each hour worked in excess of 50 hours in a work week – O Reg 285/01, s. 14.

Canning, processing and packing fresh fruits or vegetables

Seasonal employees whose employment is directly related to canning, processing and packing of fresh fruits or vegetables, or their distribution by the canner, processor or packer, are entitled to the overtime premium for each hour worked in excess of 50 hours in a work week – O Reg 285/01, s. 15.

Sewer or watermain construction and maintenance

Employees engaged in laying, altering, repairing or maintaining sewers and watermains and work incidental thereto, or in guarding the site during this work are entitled to the overtime premium for each hour worked in excess of 50 hours in a work week – O Reg 285/01, s. 16.

Local cartage drivers

Employees who are drivers of, or drivers' helpers on, a vehicle used in the business of carrying goods for hire within a municipality or to any point not more than five kilometres beyond the municipality's limits are entitled to the overtime premium for each hour worked in excess of 50 hours in a work week – O Reg 285/01, s. 17(1)(a).

Transport truck drivers

Employees who drive public trucks operated by holders of an operating licence issued under the *Truck Transportation Act,* RSO 1990, c T.22 are entitled to the overtime premium for each hour worked in excess of 60 hours in a work week - ss. 18(1) and 18(2). Only those hours during which such employees are directly responsible for the public truck are included when calculating the entitlement to overtime – O Reg 285/01, s. 18(4).

Invalid Employer Defences to an Employee's Claim for Overtime Pay

Subsection 22(1) places a positive obligation on employers to ensure that employees receive the statutory minimum requirement with respect to overtime pay. An employer cannot satisfy that obligation or circumvent payment for overtime by raising any of the following defences:

Employer did not authorize the employee to work overtime

In *Philip's Auto Sales and Repair Inc. v Bonneville* (October 30, 1984), ESC 1726 (Betcherman), the referee affirmed that even in the event that the employer did not authorize its employees to work overtime, they are still entitled to receive the overtime pay if they exceed the overtime threshold. This decision was based on a predecessor to O Reg 285/01, s. 1.1, which stipulated that work shall be deemed to be performed when work is permitted or suffered to be done by the employer. The employer in this case was present when the employee performed the overtime work and the referee held that the employer implicitly permitted such overtime.

In *Joseph Dobi Painting v Szekely and Szekely* (May 28, 1980), ESC 799 (Adamson), the referee stated: "[t]he law is quite clear with respect to overtime work. The responsibility rests fully upon the employer. If he does not wish employees to work overtime, he must not only order them to stop but see that they do. This employer had ample time after the first week of employment to do this. During the period in which the employer claimed to have been incapacitated, it was still his responsibility to see that another person supervised his workers."

In *Joe Kool's Restaurants Ltd. v Whitehead et al* (January 21, 1986), ESC 2023 (Brown), the work schedule prepared by the employer did not include overtime hours; however, the employees were permitted to rearrange the schedule on an individual basis to suit their own convenience, without clearing those arrangements with the employer. These informal arrangements were neither encouraged nor discouraged, and there was no advance notification to the employer. The employer argued that the overtime was not scheduled by it, nor was it worked with its knowledge or acquiescence and that the Act's overtime provisions were therefore inapplicable. The referee rejected that argument and upheld the overtime pay assessment on the basis that the employer must have known and thus was deemed to have permitted the overtime hours worked.

An employee who is working excess hours contrary to a specific term of an employment contract or without authorization may well face disciplinary action for having done so, but that does not alter the fact that they are entitled to overtime pay for overtime hours worked.

Employee agreed to a built-in overtime rate

An employer may argue that it has already compensated employees for overtime pay by providing the employee with a bonus scheme or a higher regular rate of pay. This is not a valid defence to an employee's claim for overtime pay. The employer is also liable to pay overtime notwithstanding that the employee agreed verbally or in writing to work extra hours at the regular rate of pay. In *Ferlandi Builders and Contractors Inc. v Manderscheid* (May 30, 1986), ESC 2116 (Aggarwal), *Jefferson Metal Products Inc. v Hazlehurst and Turner* (February 20, 1985), ESC 1790 (Kerr) and *Wen-Hal Limited v Hansen* (August 22, 1979), ESC 660 (MacDowell), the referees held that any agreement by an employee to work overtime without receiving overtime pay for hours worked beyond 44 per week is rendered void by s. 3 of the former *Employment Standards Act,* now ESA Part III, s. 5(1), which specifically prohibits employees, employers and their agents from contracting out of or waiving an employment standard.

The ESA 2000 does not contain the provision that appeared in the former *Employment Standards Act* that specifically prohibited employers from reducing an employee's pay to comply with the overtime provisions. However, the definition of regular rate in the ESA Part I, s. 1 makes the prohibition redundant.

Regular rate is now defined in such a way as to ensure that overtime hours shall not, in any circumstances, be used to calculate an employee's regular rate. The regular rate for hourly employees is the amount paid for an hour of work in the employee's usual work week - excluding overtime hours. The regular rate for non-hourly employees is the amount paid in a given work week divided by the number of non-overtime hours actually worked in that work week. For example, an employer cannot assign a regular rate of $24.00 for the first 44 hours of work in a work week and a regular rate of $16.00 thereafter.

Employee contracted out of their overtime pay

An employer and an employee cannot agree to contract out of the overtime provisions. This is prohibited by ESA Part III, s. 5(1). An employee cannot agree to work overtime hours at a rate lower than one and

one-half times their regular rate. Nor can an employee agree to reduce their regular rate for those hours worked in excess of the applicable overtime threshold.

Employee performed work at multiple locations

An employer cannot avoid its obligation to pay overtime by scheduling employees to work, for example, 20 hours at one of its locations and 30 hours at a second location. In *Tavares and Sgromo c.o.b. Mr. Submarine, Thunder Bay, Ontario v Coppola et al* (April 13, 1982), ESC 1197 (Aggarwal), the employer had contended that since its employee did not work more than 44 hours in one location, the employee was not entitled to overtime pay. The referee, however, ruled that it was irrelevant whether the employee worked all 54.25 hours at a single location of the employer; the essential point was that the employee worked all of those hours for one employer.

Employee performed work for different but related employers

Similarly, the obligation to pay overtime cannot be avoided by scheduling employees to work, for example, 25 hours for one corporation and 25 hours for another related corporation. This is prohibited by ESA Part III, s. 4, which provides as follows:

4(1) Subsection (2) applies if associated or related activities or businesses are or were carried on by or through an employer and one or more other persons.

(2) The employer and the other person or persons described in subsection (1) shall all be treated as one employer for the purposes of this Act.

(3) Subsection (2) applies even if the activities or businesses are not carried on at the same time.

(4) Subsection (2) does not apply with respect to a corporation and an individual who is a shareholder of the corporation unless the individual is a member of a partnership and the shares are held for the purposes of the partnership.

(4.1) Subsection (2) does not apply to the Crown, a Crown agency or an authority, board, commission or corporation all of whose members are appointed by the Crown.

(5) Persons who are treated as one employer under this section are jointly and severally liable for any contravention of this Act and the regulations under it and for any wages owing to an employee of any of them.

Where ESA Part III, s. 4 applies and two or more entities are treated as one employer, the hours worked by employees for those two or more entities are to be added together for purposes of determining the employees' overtime pay entitlement. See ESA Part III, s. 4 for a more detailed discussion of this issue.

Calculation of Overtime Pay

The method for calculating an employee's entitlement to overtime pay is set out below. This method applies to ALL employees who are not exempt from the application of Part VIII Overtime Pay.

1. Do the overtime provisions apply to the claimant?
2. Which threshold applies? Is it the standard 44-hour threshold, a higher threshold established by regulation, or a lower threshold established by contract?
3. Does s. 22(9) (the changing work provision) apply?

4. Which overtime premium(s) applies? The standard time and one-half premium or a higher premium established by contract?
5. What is the employee's work week?
6. How many non-overtime and overtime hours has the employee worked during each work week in question?
7. What is the employee's regular rate or rates in a given work week?
8. What is the employee's overtime rate or rates for each hour of overtime work in a given work week?
9. What is the employee's overtime pay for each work week in question?
10. Has the employer provided the employee with any overtime pay in respect of each work week in question?

1. Do the overtime provisions apply to the claimant?

The first determination that must be made is whether the person claiming overtime pay is covered by Part VIII Overtime Pay. To make this determination, the following issues must be considered:

- Is the claimant an employee within the meaning of the ESA 2000?
- Is the claimant excluded from the application of the ESA 2000 by virtue of ESA Part III, ss. 3(2), 3(3) or 3(5)?
- Is the employee exempt from the overtime provisions by virtue of O Reg 285/01, ss. 2(1), 2(2), 2.1, 8, 11(3) or 23?

Please note that overtime averaging agreements may also impact on a claimant's right to overtime pay. See discussion in ESA Part VIII, s. 22(2) below.

2. Which threshold applies?

Is it the standard 44-hour threshold, a higher threshold established by regulation, or a lower threshold established by contract?

The next issue for determination is whether the 44-hour threshold applies. A higher threshold may be prescribed by O Reg 285/01. A lower threshold may be established by contract. If the employee is engaged in any of the following, O Reg 285/01 should be consulted as a higher overtime threshold may apply:

- Road building – s. 13;
- Whether the employee is seasonal, employed by an owner or operator of a motel, hotel, tourist resort, restaurant or tavern, and provided with room and board – s. 14;
- Whether the employee is seasonal and engaged in canning, processing and packaging of fresh fruits or vegetables or their distribution – s. 15;
- Sewer and watermain construction, maintenance or guarding – s. 16;
- Local cartage – s. 17;
- Highway transport – s. 18.

3. Does s. 22(9) (the changing work provision) apply?

Section 22(9) provides that when an employee performs work that is exempt from this Part and work that is not, the employee is entitled to overtime pay in respect of all of the overtime work performed in a work week so long as the non-exempt work in the work week constitutes 50% or more of the time the employee spent working.

Similarly, s. 22(9) provides that employees who perform both work that attracts overtime after 44 hours and work that attracts overtime at a higher threshold will be entitled to overtime pay after 44 hours in respect of all work performed during the work week by the employee so long as the work performed by the employee that attracts overtime pay at the 44 hour threshold constitutes 50% or more of the time the employee spent working.

See the detailed discussion of s. 22(9) below.

4. Which overtime premium applies? The standard time and one-half premium or a higher premium established by contract?

The next issue for determination is whether the time and one-half overtime premium established in s. 22(1) applies. A higher premium may be established by contract. For example, the employment contract may provide for an overtime premium of double the employee's regular rate after 44 hours of work in a work week, or it may provide for time and one-half after 44 hours of work in a work week and double-time after 50 hours of work in a work week.

5. What is the employee's work week?

The definition of work week is critical to the calculation of an employee's entitlement to overtime pay. An employee's regular rate is determined with respect to a work week. Indeed, an employee's entitlement to overtime pay is determined in respect of a work week. Therefore, one of the first determinations an officer must make is what constitutes the employee's work week.

Work week is defined in ESA Part I, s. 1 as:

(a) a recurring period of seven consecutive days selected by the employer for the purpose of scheduling work, or

(b) if the employer has not selected such a period, a recurring period of seven consecutive days beginning on Sunday and ending on Saturday.

The Ontario Court of Appeal in *Re Falconbridge Nickel Mines Ltd. and Egan et al.*, 1983 CanLII 1931 (ON CA) concluded that the term week as it was used in s. 24(1) of the former *Employment Standards Act* must be interpreted as a work week. The ESA 2000 deleted the definition of week that appeared in the former Act and included an amended definition of work week to reflect the reasoning of the Court of Appeal. Part VIII Overtime Pay uses the terms week and work week interchangeably.

6. How many non-overtime and overtime hours has the employee worked during each work week in question?

When determining what overtime and non-overtime hours an employee has worked in a given work week, the first question is how many hours of work were performed by the employee in the work week. Once the officer has determined how many hours of work were performed in the work week, the officer may then determine how many of these hours constitute non-overtime hours and how many are overtime hours.

When making this determination, regard must be had for O Reg 285/01, s. 1.1, which sets out when work is and is not deemed to be performed.

i. Work Deemed to be or Not Deemed to be Performed by Employee

Section 1.1 of O Reg 285/01 provides as follows:

1.1(1) Subject to subsection (2), work shall be deemed to be performed by an employee for the employer,

(a) where work is,

- **(i) permitted or suffered to be done by the employer, or**
- **(ii) in fact performed by an employee although a term of the contract of employment expressly forbids or limits hours of work or requires the employer to authorize hours of work in advance; or**

(b) where the employee is not performing work and is required to remain at the place of employment,

- **(i) waiting or holding himself or herself ready for call to work, or**
- **(ii) on a rest or break-time other than an eating period.**

1.1(2) Work shall not be deemed to be performed for an employer during the time the employee,

(a) is entitled to,

- **(i) take time off work for an eating period,**
- **(ii) take at least six hours or such longer period as is established by contract, custom or practice for sleeping and the employer furnishes sleeping facilities, or**
- **(iii) take time off work in order to engage in the employee's own private affairs or pursuits as is established by contract, custom or practice; or**

(b) is not at the place of employment and is waiting or holding himself or herself ready for call to work.

See O Reg 285/01, s. 1.1 for a detailed discussion of this section.

ii. Calculation of Hours Worked for Employees in Highway Transport Paid by Mileage

A Program investigatory tool involving mileage approximation has been used to determine the hours of work for employees employed in highway transport and paid by mileage, where no complete and accurate records of hours of work exist. The investigatory tool consists of dividing the total distance driven by 80 kilometers per hour (or 50 miles per hour). This practice can also be used as a check to assess the accuracy of existing records. Any other (i.e., non-driving) hours, if they can be established to have been worked, must also be included in the total number of hours worked. However, the hours that the employee is not directly responsible for the truck are not included for overtime purposes.

iii. Calculation of Hours Worked where the Employer has not Kept Accurate Records

If an employer has not kept accurate records of the hours worked by an employee, or if the employer's records are challenged by the employee, the employment standards officer will determine the employee's

hours of work on the basis of the best evidence available. Note that where an employee has two or more regular rates of pay that the employer is required to maintain a record of the dates and times the employee worked in excess of the overtime threshold, at each rate of pay, in any given work week. See ESA Part VI, s. 15 (1) paragraph 3.2.

iv. Travel Time

With respect to travel time it is Program policy that:

- With the exception of commuting time, any time a person spends travelling (irrespective of the mode of transportation) for the purpose of getting to or from somewhere where work will be performed, must be counted as hours of work;
- Commuting time means the time required for an employee to travel to work from home and vice versa. However, there are a number of exceptions to this rule:
    - If the employee takes the work vehicle home in the evening for the convenience of the employer, the hours of work begin when the employee leaves home in the morning and end when they arrive home in the evening; or
    - If the employee is required to transport other staff or supplies to or from the workplace or work site, time so spent must be counted as hours of work.

7. What is the employee's regular rate or rates in a given work week?

Before an employee's overtime rate or rates in respect of the overtime hours worked in a given work week can be calculated, the employee's regular rate or rates (if the employee is paid more than one hourly rate for work performed for the employer) for the work week(s) in question must be determined. ESA Part I, s. 1 defines regular rate as follows.

Regular rate means, subject to any regulation made under paragraph 10 of subsection 141(1),

(a) for an employee who is paid by the hour, the amount paid for an hour of work in the employee's usual work week, not counting overtime hours,

(b) otherwise, the amount earned in a given work week divided by the number of non-overtime hours actually worked in that week.

Employees who are paid solely on the basis of an hourly rate (including employees who are paid two or more different hourly rates for work performed for the employer) will fall within the first portion of this definition. All other employees, including salaried employees, flat rate mechanics, commissioned salespersons, piece workers and employees receiving mixed compensation, for example, an hourly rate and mileage or an hourly rate and commission, must have their regular rate determined by reference to clause (b) of the definition of regular rate.

8. What is the employee's overtime rate or rates for each hour of overtime in a given work week?

An employee's overtime rate for the overtime hours worked in any given work week is established by multiplying their regular rate by one and one-half or by the higher rate established by contract. If the employee has more than one regular rate that applies to overtime hours worked as per s. 22(1.1), the overtime rate in respect of each hour of overtime will be one and one-half times the regular rate that applies to the work performed in each hour, or the higher rate established by contract.

9. What is the employee's overtime pay for each work week in question?

The overtime pay that an employee is entitled to for a given work week is determined by multiplying their overtime rate by the number of overtime hours worked at that rate within the week. Where the employee has two or more regular rates and has performed overtime work that attracts more than one overtime rate, the overtime pay for the work week is determined by adding together the overtime pay entitlement as calculated for each hour of overtime work. See example 1 under “Examples of How to Calculate Overtime” below.

10. Has the employer provided the employee with any overtime pay for each work week in question?

The final consideration is whether the employee has already been paid, in full or in part, for any of the overtime hours in question. This will only be appropriate in limited circumstances. For example, an employee who is paid by the hour and who works 55 hours in a work week and is paid their regular rate for those 55 hours has received a portion of their overtime pay. That employee will only be entitled to an additional .5 of their regular rate in respect of all overtime hours worked in the work week.

Please note that this will not apply to a salaried employee. See the discussion below.

Examples of How to Calculate Overtime

Overtime entitlements for employees with two or more regular rates

An employee who is paid on an hourly basis may perform, in one work week, two types of work, each of which attracts a different hourly rate. In that case, the employee has two regular rates and as a result, s. 22(1.1) applies to determine the overtime pay entitlement. That subsection provides that the overtime rate for each of hour of overtime work performed is based on the regular rate that applies to the work performed in that hour.

Note, however, that where an averaging arrangement is in place, s. 22(1.1) does not apply and it is Program policy that the employer shall apply the proportion of each overtime rate to the averaged overtime hours. For example, if the employee works 4 hours of overtime pursuant to a 2-week averaging agreement and the employee worked 25% of the overtime in the 2-week period at Job A and 75% of the overtime at Job B, this employee would be entitled to 1 hour of overtime pay at the Job A’s overtime rate and 3 hours of overtime pay at the overtime rate at Job B.

Note also that where the hourly rate for one type of work is less than minimum wage and the employee performs that type of work in overtime, an employer may be in compliance with the overtime pay requirements but in contravention of the minimum wage requirements. See Example 3 below for details.

Example 1:

An employee works as a punch press operator earning $15.00/hour and also as a shipping logistics coordinator earning $20.00/hour for the same employer. The employee’s overtime threshold is 44 hours and the overtime rate is 1.5 times the regular rate.

In one work week the employee worked 4 hours of overtime. The 45th and 46th hours were worked as punch press operator and the 47th and 48th hours were worked as a shipping logistics coordinator. This employee’s overtime pay entitlement would be calculated as follows:

- 45th hour: overtime rate is $15.00 x1.5 = $22.50 per hour
- 46th hour: overtime rate is $15.00 x1.5 = $22.50 per hour
- 47th hour: overtime rate is $20.00 x1.5 = $30.00 per hour
- 48th hour: overtime rate is $20.00 x1.5 = $30.00 per hour

The total overtime pay due to the employee is $105.00 [$22.50 + $22.50 + $30.00 + $30.00]

Example 2:

An employee usually works in job A at an hourly rate of $15.00. The employee also usually works, for the same employer in job B at an hourly rate of $20.00. The employee and the employer have entered into a valid written agreement under s. 17(3) for the employee to work excess weekly hours.. In one work week the employee works 60 hours: 36 hours in job A at $15.00 per hour and 24 hours in job B at $20.00 per hour. The employee was paid their regular rate or straight time for all hours worked including overtime hours; a total of $1020.

The regular overtime threshold and overtime rate of 1.5 times the regular rate apply to this employee. The 16 hours of work performed once the overtime threshold of 44 hours was reached were as follows:

- 12 hours in job A
- 4 hours in job B

The employee's overtime entitlement in accordance with s. 22(1.1) is:

- Job A work: 12 hours X $15.00 per hour X 1.5 = $270
- Job B work: 4 hours X $20.00 per hour X 1.5 = $120

However, the employee had already been paid straight time for the 12 hours of overtime worked in job A = 12 X $15.00 per hour = $180

Plus straight time for the 4 hours of overtime worked in job B = 4 X $20.00 = $80.00

The employee's overtime pay entitlement was $390; however the employee had already been paid $260 in straight time for the overtime hours (i.e. has received partial pay for the overtime hours). Therefore, the balance owing in respect of overtime pay for the work week in question is $390 - $260 = $130

Example 3

An employee usually works performing task A at an hourly rate of $15.00. The employee also usually works, for the same employer, performing task B at an hourly rate of $0.00. The employee's overtime threshold is 44 hours and the overtime rate is 1.5 times the regular rate.

In one work week the employee worked 2 hours of overtime. The 45th and 46th hours were worked performing task B at the hourly rate of $0.00. This employee's overtime pay entitlement would be calculated as follows:

- 45th hour: overtime rate is $0.00 x1.5 = $0.00 per hour
- 46th hour: overtime rate is $0.00 x1.5 = $0.00 per hour

The total overtime pay due to the employee is $0.00.

Note, however, that although the employer does not owe this employee any overtime pay pursuant to the Overtime Pay provisions, the employer will be in contravention of the Minimum Wage provisions if no overtime pay is paid. Section 23(4) of the Minimum Wage Part of the Act provides as follows:

> **Hourly rate**
>
> (4) Without restricting the generality of subsection (3), if the minimum wage applicable with respect to an employee is expressed as an hourly rate, the employer shall not be considered to have complied with this Part unless,
>
> (a) when the amount of regular wages paid to the employee in the pay period is divided by the number of hours he or she worked in the pay period, other than hours for which the employee was entitled to receive overtime pay or premium pay, the quotient is at least equal to the minimum wage; and
>
> **(b) when the amount of overtime pay and premium pay paid to the employee in the pay period is divided by the number of hours worked in the pay period for which the employee was entitled to receive overtime pay or premium pay, the quotient is at least equal to one and one half times the minimum wage.**

To be in compliance with paragraph (b), the employer must pay the employee an amount of overtime pay that is calculated using this formula: the minimum wage rate x 1.5 x 2 hours.

Overtime Entitlements for Employees Paid Hourly Rate and Other Forms of Compensation

From time to time employees who are paid an hourly rate will also perform work that involves different types of compensation in the same work week. For example, payment of an hourly rate and commission. If an employee who receives an hourly rate is also compensated with commissions, that employee, strictly speaking, is not paid by the hour. Accordingly, the regular rate of such employees must be determined by applying clause (b) of the definition of regular rate, by dividing their total earnings for each work week in question by the number of non-overtime hours worked. However, if an employee receives an hourly rate for each hour worked (including overtime hours), the employer will be credited for such payment when the employee's overtime entitlement is calculated.

Under the ESA 2000, overtime hours cannot be included in the calculation of an employee's regular rate.

Example:

The employee and the employer have entered into a valid written agreement under s. 17(3) for the employee to work excess weekly hours. The employee works 50 hours in a work week and is paid $20.00 per hour. The employee also receives commissions. In one work week the employee receives $1000 for 50 hours worked and $200 in respect of commissions. The general overtime premium and threshold apply.

- Employee works 44 non-overtime hours in the work week
- Employee works 6 hours of overtime in the work week
- Regular rate = (total earnings in work week divided by non-overtime hours) = $1200 divided by 44 = $27.27
- Overtime rate is $27.27 (regular rate) x 1.5 = $40.91

- Overtime pay entitlement = (overtime rate x overtime hours in a workweek) = $40.91 x 6 = $245.46

Because this employee was paid straight time for each hour worked, including overtime hours, the employee has already received $120 (6 overtime hours x $20.00) in respect of overtime. Therefore, the employee is entitled to receive an additional $125.46: $245.46 overtime entitlement minus $120 of overtime already paid, in respect of overtime for the work week in question.

Overtime Entitlements for Employees Paid on Mileage, Piecework or Commission Basis

Under the ESA 2000, the overtime entitlement for employees who are paid solely on a mileage basis, by commission or on a piece-rate must be determined by reference to the definition of regular rate in ESA Part I, s. 1. Because these employees are not paid by the hour, their regular rate must be determined by applying clause (b) of the definition of regular rate, by dividing all earned wages in the work week by the non-overtime hours worked. The overtime premium of one and one-half times the regular rate is payable for all hours worked in excess of 44 in a work week, unless a higher overtime rate applies by virtue of contract or a higher threshold applies by virtue of regulation.

Example:

An employee works making oven mitts and is paid $2.50 per pair. In a particular work week, the employee works 60 hours to make 300 pairs of mitts and is paid $750.00. The employee and the employer have entered into a valid written agreement under s. 17(3) for the employee to work excess weekly hours. The general threshold and premium apply to the employee.

- Employee works 44 non-overtime hours that work week
- Employee works 16 hours of overtime that work week
- Regular rate = total earnings in the work week divided by non-overtime hours = $750.00 divided by 44 = $17.05
- Overtime rate is $17.05 (regular rate) x 1.5 = $25.58
- Overtime pay entitlement = overtime rate x overtime hours in the work week
- = $25.58 x 16
- = $409.28 in respect of that work week.

Overtime Entitlements for Flat Rate Mechanics

Enquiries arise occasionally on the application of the legislation to motor vehicle mechanics and body repairpersons who are paid on a flat rate or incentive system. In a flat rate shop, every job is rated as taking a certain number of hours to perform and the mechanic is paid a book hourly rate for those hours. As an example, a brake reline is rated as a four-hour job, and the mechanic's book rate is $16 per hour. The mechanic will be paid $64 whether the job takes three or five hours to complete. This is acceptable so long as the minimum wage standard (compliance with which is determined on a pay period basis) is met and all overtime hours (hours worked in excess of 44) are compensated at a minimum of 1.5 times the mechanic's actual regular rate, which is not the same as the flat rate.

Generally, in a flat-rate remuneration system, it is a condition of employment that the employee rectify their own faulty work without further pay. This is not a violation of the ESA 2000, so long as the minimum wage and overtime provisions are not violated. If for some reason another mechanic makes the required

changes, the payment for the entire job may be credited to the second mechanic. Where this occurs as part of the employment contract, the transfer of credits is considered as part of the reconciliation of wages due and not a prohibited set-off or deduction. However, the minimum wage and overtime provisions still apply with respect to the hours of work the first mechanic spent on the vehicle.

It is essential in a flat rate system that the employer's records reflect both the flat rate paid and the actual hours worked: it is the actual hours worked (and any work deemed to have been performed pursuant to O Reg 285/01, s. 1.1) that must be used to calculate the employee's regular rate and overtime entitlements. Those hours of work must include any time spent rectifying the employee's faulty work.

Prior to the introduction the ESA 2000, the calculation of the regular rate for flat rate mechanics was accomplished by dividing the flat rate wages earned for the work week by the actual hours worked, including overtime hours. This had the effect of lowering the employee's regular rate when overtime was worked. Furthermore, the employee was considered to have been paid straight time for all hours worked, including overtime hours, and so received only an additional .5 times the employee's regular rate in respect of all overtime hours. Under the ESA 2000, overtime hours cannot ber included in the calculation of an employee's "regular rate". Previously, the more overtime hours a flat rate mechanic worked, the less the employee was paid for those hours. The ESA 2000's definition of "regular rate" precludes that result because overtime hours cannot be included in the calculation.

As illustrated in the examples below, payment at the book rate is payment for a task (i.e., a flat rate for the task), rather than a payment for hours actually worked. As no portion of the payment is made in respect of hours actually worked, none of it can be considered to be a payment for regular hours or overtime hours.

Example 1:

The employee is paid a flat book rate of $16.00 per hour for brake re-lining. The employee did 12 brake-relines, which resulted in a flat rate payment for 48 hours (each re-line job is rated as taking 4 hours) for a total payment of $768. The employee, however, actually spent 46 hours doing the work in that week. The general overtime rate and threshold apply to this employee.

- Employee works 44 non-overtime hours in work week
- Employee works 2 overtime hours in work week
- Employee paid $768 for work week
- Employee's regular rate is $768 divided by 44 non-overtime hours = $17.45
- Employee's overtime rate is $17.45 x 1.5 = $26.18
- Employee's overtime entitlement is 2 hours x $26.18 = $52.36

In this case, the employer owes the employee an additional $52.36 for overtime pay.

Example 2:

The employee is paid a flat book rate of $16.00 per hour to perform tune-ups that according to the book will take 1.5 hours to complete. In fact the employee is being paid $24.00 for each tune-up regardless of the time it actually took to perform the tune-up. Having completed 25 tune-ups in one week the employee

is paid $600 for that work week. However, the employee actually worked 50 hours in that work week. The general overtime rate and threshold apply to this employee.

- Employee works 44 non-overtime hours in work week
- Employee work 6 overtime hours in the work week
- Employee paid $600 for the work week
- Employee's regular rate is $600 divided by 44 non-overtime hours = $13.64
- Employee's overtime rate is $13.64 x 1.5 = $20.46
- Employee's overtime entitlement is 6 hours x $20.46 = $122.76

In this case, the employer owes the employee an additional $122.76 for overtime pay.

Overtime Entitlement for Salaried Employees

Generally, employees who are paid a fixed amount for each pay period rather than an amount determined by applying an hourly rate to each hour worked (or a piece rate or commission based on work performed) are considered to be salaried employees. It should be noted that although ESA Part VI, s. 15(4) defines a salaried employee, that definition is for the purposes of ESA Part VI, s. 15(3), which sets out the employer's obligations to record hours worked, and is not necessarily relevant to the calculation of overtime entitlements.

Salaried employees who are not exempt from the overtime provisions are entitled to overtime pay for overtime work. Once the work week has been determined, the employee's regular rate will be determined by applying clause (b) of the definition of regular rate, by dividing the salary earned in respect of the work week by the number of non-overtime hours worked in the work week. Salaried employees are entitled to receive 1.5 times their regular rate in respect of each hour worked in excess of 44 in a work week (or other applicable threshold).

Prior to the introduction the ESA 2000, the calculation of the regular rate for salaried employees was accomplished by dividing the salary earned for the work week by the actual hours worked, including overtime hours. The employee was considered to have been paid straight time for all hours worked, including overtime hours, and received an additional .5 times their regular rate in respect of all overtime hours worked in the work week in question. This method of calculating overtime had the effect of lowering the employee's regular rate as the number of hours worked increased and significantly reducing the employee's entitlement to overtime pay.

Under the ESA 2000, overtime hours cannot be included in the calculation of an employee's regular rate. Formerly, the more overtime hours a salaried employee worked, the less they were paid for those hours. The new definition of regular rate precludes that result because overtime hours cannot be included in the calculation.

Example:

An employee is paid an annual salary of $52,000 or $1000 per week. The employee works 60 hours in a work week. The employee and the employer have entered into a valid written agreement under s. 17(3) for the employee to work excess weekly hours. The general overtime rate and threshold apply.

- Employee works 44 non-overtime hours in work week

- Employee works 16 overtime hours in work week
- Employee's regular rate for the work week is $1000 divided by 44 non-overtime hours = $22.73
- Employee's overtime rate for the work week is $22.73 x 1.5 = $34.10

The employee's entitlement to overtime pay for the work week is $34.10 x 16 hours = $545.60.

Averaging – s. 22(2)

22(2) An employee's hours of work may be averaged over separate, non-overlapping, contiguous periods of two or more consecutive weeks for the purpose of determining the employee's entitlement, if any, to overtime pay if,

(a) the employee has made an agreement with the employer that his or her hours of work may be averaged over periods of a specified number of weeks; and

(b) the averaging period does not exceed four weeks or the number of weeks specified in the agreement, whichever is lower.

> Subsection 22(2) was amended effective April 3, 2019 by the *Restoring Ontario's Competitiveness Act, 2019* (ROCA). ROCA removed the previous requirement to obtain the Director of Employment Standards' approval as a condition for averaging and imposed a four-week limit on the length of averaging agreements.

Where the conditions set out in this provision are met, the employer's obligation to pay overtime pay is based on the employee's average hours per work week during the period specified in the employee's averaging agreement (which cannot exceed four weeks), rather than the hours actually worked within a work week.

Example:

An employee and employer have agreed in writing to average hours over four-week periods for the purpose of calculating the employee's entitlement to overtime pay. The employee works 48 hours in the first week, 44 hours in the second week, 40 hours in the third week and 50 hours in the fourth week. The employee and employer also have a valid written agreement for the employee to work excess weekly hours.

The employee's overtime hours will be determined on the basis of the average number of hours worked per week. In this example the employee worked an average of 45.5 hours per week (48 + 44 + 40 + 50, divided by 4). Accordingly, the employee would be entitled to overtime pay for six hours based on an average of 1.5 hours of overtime per week in the four-week period. In the absence of averaging, the employee would have been entitled to four hours of overtime pay in the first week and six hours of overtime pay in the fourth week.

Note that unless there is a time off in lieu arrangement in place pursuant to s. 22(7), the employer is required to pay the employee straight time for every hour worked within each pay period – including those hours over 44 – and that it is only the extra half that the employer can postpone paying under an averaging arrangement until the end of the averaging period. See ESA Part V, s. 11 for details.

Section 22(2) provides that where averaging is permitted, the employee's hours of work can be averaged only over separate, non-overlapping, contiguous periods of two or more consecutive weeks. That is, the

averaging periods must be contiguous (i.e., there cannot be gaps in between the end of one period and the beginning of another), and they must be separate and cannot overlap with one another. Further, the two or more weeks within each averaging period must be consecutive. The longest averaging period permitted under the ESA 2000 is four weeks.

Days on which an employee is absent during an averaging period (for example, due to illness, statutory leave or layoff) are **not** excluded when determining the average weekly hours worked during the averaging period. For example, an employee is subject to a two-week averaging period and is scheduled to work 50 hours in Week One and 30 hours in Week Two. The employee works as scheduled during Week One but is absent due to illness throughout Week Two. There is nothing in the ESA to suggest that absences are to be excluded when determining overtime pay entitlements. Accordingly, this employee has an average of 25 hours per week for the averaging period (50 hours + 0 hours, divided by two) and is not entitled to overtime pay.

Similarly, there is nothing in the ESA to suggest that the averaging period is to be truncated if the employee's employment is terminated partway through an averaging period. Accordingly, an employee who quits or is terminated partway through the averaging period continues to have their overtime pay entitlements calculated based on the average weekly hours throughout the **entire** averaging period (even though the employee is not employed for a portion of the averaging period).

Note that even if an employer has averaging agreements, if employees will be working hours in excess of the daily or weekly limits the employer must also obtain excess hours agreements from the employees.

Conditions for Averaging

The conditions that must be met before averaging can take place are discussed below.

Employee made agreement with employer that hours of work may be averaged over specified number of weeks

Before an employer is permitted to average an employee's hours, the employee must have entered into an agreement with the employer allowing their hours to be averaged over periods of a specified number of weeks.

For an agreement to valid, the following criteria must be met:

The agreement must be in writing

By virtue of ESA Part 1, s. 1(3), an agreement between an employer and an employee to average the employee's hours of work, for purposes of calculating the employee's entitlement to overtime pay must be in writing. See also ESA Part 1, s. 1(3.1), which provides that an agreement in writing may be in electronic form.

For employees represented by a trade union, the written agreement may be embodied in the collective agreement or a memorandum of agreement or other written documentation signed by union officials and, provided the other criteria are met, all bargaining unit employees will be bound by the agreement.

In the non-unionized context, a written agreement between each employee whose hours are to be averaged and the employer is required.

The agreement must specify the number of weeks over which the hours of work are going to be averaged, and cannot exceed a maximum of four weeks

Section 22(2)(a) requires that the agreement state specifically the number of weeks over which the hours of work are going to be averaged. Statements such as "up to 4 weeks" are not sufficient.

Section 22(2)(b) provides that the averaging period cannot exceed four weeks or the number of weeks specified in the agreement, whichever is lower. In other words, employees and employers can agree to average hours over periods of 2 weeks, 3 weeks, or 4 weeks. Four weeks is the maximum period over which the hours of work may be averaged for overtime pay entitlement purposes.

For example, an employee agreed to average her hours of work over a period of three weeks. The employer can average the employee's hours only over a period of three weeks, not over the four-week maximum as set out in subsection 22(2)(b).

An agreement that purports to average hours over a period of longer than four weeks is invalid.

The agreement must contain a start date and, subject to certain exceptions, an expiry date.

Section 22(3) provides that, subject to ss. (3.1) and (3.2), an averaging agreement is not valid unless it contains a start date and an expiry date.

With respect to the start date: if the agreement does not contain a start date it is invalid and as a result averaging of hours cannot take place.

With respect to the end date:

- Where employees are not represented by a union: the expiry date cannot be more than two years after the start date. See s. 22 (3.1) below. Agreements that contain an expiry date that is beyond two years after the start date are invalid and, as a result, averaging of hours cannot take place (and the employer must pay the employee overtime pay according to s. 22(1)).

- Where employees are represented by a trade union and are covered by a collective agreement: the averaging agreement cannot expire later than the day a subsequent collective agreement that applies to the employee comes into operation. See s. 22(3.2) below. The averaging agreement may contain a specific end date, or it may reference an event. For example, it may say that the agreement expires when the collective agreement expires, or it may say that it expires on the day a subsequent collective agreement comes into effect (it is not uncommon for there to be a period of time in between the date a collective agreement expires and the date the subsequent collective agreement comes into operation-Note that the rule re: the expiry date in ss. (3.2) is triggered and fixed if the conditions of the employee being represented by a trade union and covered by a collective agreement were present **at the time the averaging agreement was entered into**.

The agreement should clearly and explicitly set out what is being agreed upon

The agreement should be written with sufficient clarity for the parties to know precisely what they are agreeing to.

The agreement must contain the employee's express consent to the averaging of hours for the purpose of calculating the employee's entitlement, if any, to overtime pay. Mere agreement to a particular schedule is

not sufficient, as an employee may agree to work certain hours without necessarily having agreed to the hours being averaged for overtime pay purposes.

Employers are encouraged, but not required, to include schedules in averaging agreements.

Overtime averaging agreements must not be confused with agreements to work hours in excess of the weekly and daily maximums established in ESA Part VII, s. 17. Employers who wish employees to work hours in excess of eight hours a day (or the regular work day where that is longer than eight hours) or 48 hours a week must secure valid written agreements from their employees (which includes providing the employees the statutory information document – see s. 17(5) for details)) to work hours in excess of the daily and weekly maximums. The overtime averaging and excess hours agreements may be contained in separate documents, or in the same one.

The parties must have entered into the agreement voluntarily

An averaging agreement will not be binding if it is not entered into voluntarily by both parties. Please see ESA Part I, s. 1(3) for a more detailed discussion of the issue of voluntary consent.

The employee must have given their informed consent to the agreement

The employee must understand what is being agreed to, and the consequences of the agreement, for an averaging agreement to be binding. Informed consent will not be established unless each party knows precisely the ramifications of entering into the agreement.

The best evidence that an employee provided informed consent is where the document itself accurately sets out the consequences of the agreement. To this end, employers may wish to include the following in averaging agreements:

- A statement notifying the employee(s) that an averaging arrangement will affect the amount of overtime pay the employee will be entitled to under the arrangement, as compared to the amount of overtime pay the employee would be entitled to if the employee(s) worked the same number of hours in each week without an averaging arrangement.
- A statement informing the employee(s) that the agreement is irrevocable before it expires, unless the employee and the employer agree, in writing, to revoke it – s. 22(6).

See s. 22(6) below for a more detailed discussion of these requirements.

The Ministry has produced a list of items employers and employees may wish to consider when drafting agreements. This can be found on the Ministry of Labour's website.

In the absence of a valid agreement, the employer must pay the employee overtime pay according to s. 22(1), or ensure that the employee does not work overtime.

Employers are required to retain a copy of every averaging agreement it has made with its employees for three years after the last day on which work was performed under each agreement – see ESA Part VI, s. 15(9).

If Employee Refuses to Consent to an Averaging Agreement

If an employee does not agree to the averaging of their hours for purposes of determining overtime pay entitlements, if any, the employer must pay the employee overtime pay according to s. 22(1), or ensure that the employee does not work overtime (that is, hours in excess of 44 hours per week or other

applicable threshold). If an employer terminates the employment of an employee, or disciplines or otherwise penalizes an employee because the employee refused to consent to the averaging agreement, that employer will have committed a reprisal in violation of ESA Part XVIII, s. 74.

Averaging Arrangements for Shift Exchanges

Employers may wish to have averaging arrangements in place in order to provide employees with increased flexibility in their work schedules by allowing shift exchanges, without the requirement of paying overtime as a consequence of the shift exchanges.

Example: A three-week averaging arrangement is in place and:

- Employee A works Monday through Friday 8:00 am to 4:30 pm;
- Employee B works Wednesday through Sunday 3:30 pm to 12:00 midnight;
- Employee A asks B to work his Tuesday shift in exchange for working B's Sunday shift two weeks later;
- Even though B works more than 44 hours in the first week and A works more than 44 hours in the third week as a result of the shift change, no overtime pay will be owing because of the averaging arrangement.

An issue that may arise in the context of an averaging agreement made for the purpose of accommodating shift exchanges is how to handle circumstances in which the employment of an employee who has been involved in a shift exchange ends before the exchange is complete. The following example illustrates the Program's policy on this matter.

Example:

The employees and the employer have agreed in writing to average hours of work over a period of four weeks for purposes of calculating overtime pay. Employees are paid weekly. Employee A agrees to work a shift for Employee B in week one of the averaging period. In exchange, Employee B agrees to work a shift for Employee A in week two of the averaging period; however, Employee B's employment is terminated before she can complete the shift exchange. The employees are paid their regular wages in respect of week one and week two.

The employer owes Employee A straight time for the shift she worked in week one for Employee B and in respect of which Employee A has not been compensated.

Employee B owes the employer the regular wages that she was paid for work that she did not perform in week one. Employee B is considered to have received an advance and therefore the employer may make a reconciliation for this amount. Such a reconciliation is not considered to be a set-off or deduction as defined in ESA Part V, s. 13.

Transition: Certain Agreements – s. 22(2.2)

22(2.2) For the purposes of this section, each of the following agreements shall be treated as if it were an agreement described in clause (2)(a):

1. An agreement to average hours of work made under a predecessor to this Act.

2. An agreement to average hours of work made under this section as it read on February 28, 2005.

3. An agreement to average hours of work that complies with the conditions prescribed by the regulations made under paragraph 7 of subsection 141(1) as it read on February 28, 2005.

Section 22(2.2) is a transitional provision **relating to amendments made to the ESA 2000 in 2005**. (See s. 22(5) below for the transitional provision relating to amendments made to the ESA 2000 in April 2019.)

This provision establishes how agreements to average hours that were entered into under the provisions of the former *Employment Standards Act* or under the ESA 2000 before the amendments made by the *Employment Standards Amendment Act (Hours of Work and Other Matters), 2004*, SO 2004, c 21 came into force that have not expired are to be treated.

With respect to agreements made under the ESA 2000, paragraph 2 refers to agreements made under s. 22 as it read on February 28, 2005, i.e., agreements to average over periods of up to four weeks, while paragraph 3 refers to agreements made under O Reg 285/01, s. 30, i.e., agreements to average over period of more than four weeks. At the time, only the latter required the approval of the Director. In the case of all three types of averaging agreements, this provision states that such agreements are to be treated as if they were agreements under s. 22(2)(a).

On February 28, 2005 the relevant provisions read as follows:

Section 22(2) of the ESA 2000:

Subject to the regulations, if the employee and the employer agree to do so, the employee's hours of work may be averaged over separate, non-overlapping, contiguous periods of not more than four consecutive weeks each, for the purpose of determining the employee's entitlement, if any, to overtime pay.

Section 30 of O Reg 285/01:

An employer and an employee may agree to average hours of work over a period of more than four weeks for the purpose of determining the employee's entitlement to overtime pay under section 22 of the Act if the Director approves the agreement.

By virtue of s. 22(2.2), agreements that were entered into under s. 22(2) or O Reg 285/01, s. 30 as they read on February 28, 2005 under the former *Employment Standards Act* that are still valid are treated as if they are agreements made under the current s. 22(2)(a) (new agreements), thereby avoiding the need for employers to enter into another agreement with employees if they wished to average hours after February 28, 2005. However, employers who had old, pre-February 28, 2005agreements with employees were required to seek approval from the Director before the employer could average employees' hours of work. This was so even if the Director had approved the agreement pursuant to O Reg 285/01, s. 30 - see s. 22.1(18), which specifically provides that any approval granted by the Director under the regulation ceases to have effect on March 1, 2005. Note: As of April 3, 2019, Director approval is no longer necessary for averaging agreements to be valid.

Term of Agreement – s. 22(3); Limit on Agreement, Not represented by Trade Union – s. 22(3.1); Limit on agreement, collective agreement applies – s. 22(3.2)

The rules established in these subsections apply only to agreements entered into on or after April 3, 2019, the date that the *Restoring Ontario's Competitiveness Act, 2019* received Royal Assent. See ss. 22(5) below for the rules re: agreements that were made prior to April 3, 2019.

22(3) Subject to subsections (3.1) and (3.2), an averaging agreement is not valid unless it provides for a start date and an expiry date.

Limit on Agreement, Not Represented by Trade Union – s. 22(3.1)

22(3.1) If the employee is not represented by a trade union, the averaging agreement's expiry date shall not be more than two years after the start date.

Limit on Agreement, Collective Agreement Applies – s. 22(3.2)

22(3.2) If the employee is represented by a trade union and a collective agreement applies to the employee, an averaging agreement shall expire no later than the day a subsequent collective agreement that applies to the employee comes into operation.

Section 22(3) provides that, subject to ss. (3.1) and (3.2), an averaging agreement is not valid unless it contains a start date and an expiry date.

With respect to the start date: if the agreement does not contain a start date it is invalid and as a result averaging of hours cannot take place.

With respect to the end date:

- Where employees are not represented by a union: the expiry date cannot be more than two years after the start date. Agreements that contain an expiry date that is beyond two years after the start date are invalid and, as a result, averaging of hours cannot take place. Note that s. 22(6) provides that averaging agreements may not be revoked before they expire unless both parties agree in writing.

- Where employees are represented by a trade union *and* are covered by a collective agreement: the averaging agreement cannot expire later than the day a subsequent collective agreement that applies to the employee comes into operation.
  For employees represented by a trade union, the written averaging agreement may be embodied in the collective agreement, a memorandum of agreement or an addendum to an agreement. The terms of the averaging agreement determine which of the bargaining unit employees are bound by it. (For example, it could be all employees in the bargaining unit or only select groups of employees in the bargaining unit.)

  The averaging agreement may contain a specific end date, or it may reference an event. For example, it may say that the agreement expires when the collective agreement expires, or it may say that it expires on the day a subsequent collective agreement comes into effect (it is not uncommon for there to be a period of time in between the date a collective agreement expires and the date the subsequent collective agreement comes into operation Note that the rule re: the expiry date in ss. (3.2) is triggered and fixed if the conditions of the employee being represented by a trade union and covered by a collective agreement were present **at the time the averaging agreement was entered into**.

Agreement May Be Renewed or Replaced – s. 22(4)

22(4) For greater certainty, an averaging agreement may be renewed or replaced if the requirements set out in this section are met.

This provision clarifies that averaging agreements may, before or upon their expiry be renewed or replaced, provided the requirements set out in section 22 are met.

Existing Agreement – s. 22(5)

22(5) Any averaging agreement that was made before the day the *Restoring Ontario's Competitiveness Act, 2019* received Royal Assent in accordance with this section, as it read at the time, and that was approved by the Director under section 22.1, as it read at the time, is deemed to have met the requirements set out in subsections (2), (3), (3.1) and (3.2) and continues to be valid until the earlier of,

(a) the day the agreement is revoked under subsection (6);

(b) the day the Director's approval expires; or

(c) the day the Director's approval is revoked.

This is a transitional provision relating to amendments made to the ESA on April 3, 2019 by the *Restoring Ontario's Competitiveness Act, 2019* (ROCA).

Prior to the ROCA amendments, an employee's hours could be averaged only if the employee agreed in writing to the averaging *and* only if the Director of Employment Standards approved the agreement. ROCA removed the requirement for the approval of the Director and limited the length of averaging agreements to four weeks.

This provision states that valid averaging agreements entered into and approved by the Director of Employment Standards prior to the *Restoring Ontario's Competitiveness Act, 2019* receiving Royal Assent (April 3, 2019), are deemed to meet the requirements of this section and remain valid and in force until the earlier of the following events:

1. the agreement is revoked by written agreement of the employee and employer,
2. the approval from the Director of Employment Standards expires or
3. the approval from the Director of Employment Standards is revoked.

This provision applies *only* to agreements that were entered into and approved by the Director of Employment Standards prior to April 3, 2019. Agreements entered into on or after April 3, 2019 are governed by the rules regarding expiry dates that are set out in s. 22(3.2)

This provision applies to Director-approved averaging agreements of any length, *including those that exceed the current maximum length of four weeks*.

Agreement Irrevocable – s. 22(6)

22(6) No averaging agreement referred to in this section may be revoked before it expires unless the employer and the employee agree to revoke it.

The ESA 2000 introduced this provision to ensure that once an averaging agreement is made, it cannot be unilaterally cancelled or revoked by the employer, the employee or their agents. Averaging agreements can only be revoked by the parties if the employer and the employee agree to do so in writing, in accordance with ESA Part 1, s. 1(3). The purpose of this provision is to provide the parties with a degree of certainty.

Time Off in Lieu – s. 22(7)

22(7) The employee may be compensated for overtime hours by receiving one and one-half hours of paid time off work for each hour of overtime worked instead of overtime pay if,

(a) the employee and the employer agree to do so; and

(b) the paid time off work is taken within three months of the work week in which the overtime was earned or, with the employee's agreement, within 12 months of that work week.

This provision permits an employer and an employee to agree, in writing, that the employee be compensated for some or all overtime hours by receiving one and one-half hours of paid time off work for each hour worked in excess of 44 (or other applicable threshold) instead of receiving overtime pay if the following criteria are met:

1. The employee and the employer agree, in writing to compensate the employee with paid time off at a rate of 1.5 hours off work for every hour of overtime worked, rather than pay the employee overtime pay; and
2. The paid time off work is taken within three months of the work week in which the overtime was earned or, with the employee's written agreement within 12 months of that work week.

Please see ESA Part I, s. 1(3) and (3.1) for a more detailed discussion.

Because the subsection states that the employee is to be compensated for overtime hours with one and one-half hours of paid time off work for each hour of overtime worked instead of overtime pay, it is the Program's position that the employee is entitled to the time off at the rate the employee is earning when the employee takes the time off as opposed to the rate they were earning when the overtime was worked. Note, however, that if the employee’s employment ends before the time off can be taken, the employer will be required to pay overtime pay based on the rate the employee was earning when the overtime was worked. See the discussion at s. 22(8) below.

Where Employment Ends – s. 22(8)

22(8) If the employment of an employee ends before the paid time off is taken under s. 22(7), the employer shall pay the employee overtime pay for the overtime hours that were worked in accordance with ESA Part V, s. 11(5).

This provision stipulates that if the employee's employment ends before the lieu time earned pursuant to s. 22(7) is taken, the employee's lieu time entitlement automatically converts into an entitlement to overtime pay. Pursuant to s. 11(5), the overtime pay is payable to the employee by the later of seven days after the termination of the employee's employment or on what would have been the employee's next pay day. Note that because this provision requires that the employer pay the employee overtime pay for the overtime hours that were worked, it is the Program's position that the overtime pay the employee is

entitled to receive is based on the rate the employee was earning when the overtime was worked as opposed to the rate they were earning when the termination occurred.

Changing Work – s. 22(9)

22(9) If an employee who performs work of a particular kind or character is exempted from the application of this section by the regulations or the regulations prescribe an overtime threshold of other than 44 hours for an employee who performs such work, and the duties of an employee's position require them to perform both that work and work of another kind or character, this Part shall apply to the employee in respect of all work performed by them in a work week unless the time spent by the employee performing that other work constitutes less than half the time that the employee spent fulfilling the duties of their position in that work week.

The purpose of this provision is twofold. This provision ensures that:

1. Employees who perform work that is exempt from the overtime provisions and work that is not exempt are entitled to overtime pay for all hours worked in excess of 44 per week, provided that at least 50% of their work week is spent performing non-exempt work; and
2. Employees who perform work to which the 44-hour overtime threshold applies and work to which a higher overtime threshold attaches are entitled to overtime pay for all hours worked in excess of 44 per week provided that at least 50% of their work week is spent performing work that attracts the 44-hour threshold.

While s. 22(9) does not address the situation of employees who perform work for which the regulations prescribe differing overtime thresholds, it is Program policy to apply the principle behind that subsection by analogy to their situation. Thus, such employees are considered by the Program to be entitled to overtime pay for all hours worked in excess of the lower threshold provided that at least 50% of their work week is spent performing work that attracts the lower threshold. For example, employees who perform work that attracts overtime after 50 or 60 hours (local cartage and highway transport respectively) as per O Reg 285/01, ss. 17 and 18 would be entitled to overtime for all hours in excess of 50 in a week if at least 50% of the hours worked in the week were in local cartage.

The "overtime averaging" scheme set out in the ESA 2000 was amended effective April 3, 2019 as a result of the *Restoring Ontario's Competitiveness Act, 2019*. The provisions that are currently in force are discussed in the section above. The text below, which appears in red, is the legislative text and the associated operational policy as it applied prior to April 3, 2019. This discussion is being maintained in this publication since employees may still file a complaint relating to a situation that arose when the below provisions were in force. The text appears in red to highlight that the discussion below does not reflect the current legislative scheme.

ESA Part VIII Section 22 – Overtime Threshold

Overtime Threshold – s. 22(1); Same, Two or More Regular Rates – s. 22(1.1)

22(1) Subject to subsection (1.1), an employer shall pay an employee overtime pay of at least one and one-half times his or her regular rate for each hour of work in excess of 44 hours in each work week or, if another threshold is prescribed, that prescribed threshold.

(1.1) If an employee has two or more regular rates for work performed for the same employer in a work week,

(a) the employee is entitled to be paid overtime pay for each hour of work performed in the week after the total number of hours performed for the employer reaches the overtime threshold; and

(b) the overtime pay for each hour referred to in clause (a) is one and one-half times the regular rate that applies to the work performed in that hour.

Subject to s. 22(1.1), s. 22(1) sets out the general overtime premium of one and one-half times the employee's regular rate of pay for each hour of overtime worked in each work week. Section 22(1) also establishes the general overtime threshold. The employer's obligation to pay the overtime premium is triggered when an employee works more than 44 hours in a work week. Subject to a greater right or benefit, the general premium and threshold apply for all employees except those exempted from ESA Part VIII Overtime Pay. In addition, for certain employees, listed below, different overtime thresholds have been prescribed.

Subsection 22(1.1) is a new provision that the *Fair Workplaces, Better Jobs Act, 2017*, SO 2017, c 22, effective January 1, 2018, added to the ESA 2000. It states that where an employee has two or more regular rates for work performed in a work week that the overtime rate for any hour of overtime work is one and one-half times the regular rate the employee would be entitled to for the work performed in that hour.

Special Overtime Thresholds

O Reg 285/01 varies the overtime threshold for certain employees. The regulation requires employers to pay employees the general overtime premium of one and one-half times the employee's regular rate of pay; however, it varies the overtime threshold as follows:

Road building in relation to streets, highways or parking lots

Employees engaged at the site of road building in relation to streets, highways or parking lots are entitled to the overtime premium for each hour of work in excess of 55 hours in each work week – O Reg 285/01, s. 13(1)(a). If the employee works less than 55 hours in a work week, the difference between the number of hours worked and 55 (up to a maximum of 22) is added on to the maximum number of hours that can be worked in the following work week before overtime becomes payable – O Reg 285/01, s. 13(1)(b).

Road building in relation to structures

Employees engaged at the site of road building in relation to structures such as bridges, tunnels or retaining walls in connection with streets or highways are entitled to the overtime premium for each hour of work in excess of 50 hours in each work week per O Reg 285/01, s. 13(2)(a). If the employee works less than 50 hours in a work week, the difference between the number of hours worked and 50 (up to a maximum of 22) is added on to the maximum number of hours that can be worked in the following work week before overtime becomes payable – O Reg 285/01, s. 13(2)(b).

Hospitality industry

Employees who work for the owner or operator of a hotel, motel, tourist resort, restaurant or tavern for 24 weeks or less in a calendar year and who are provided with room and board are entitled to the overtime premium for each hour worked in excess of 50 hours in a work week – O Reg 285/01, s. 14.

Canning, processing and packing fresh fruits or vegetables

Seasonal employees whose employment is directly related to canning, processing and packing of fresh fruits or vegetables, or their distribution by the canner, processor or packer, are entitled to the overtime premium for each hour worked in excess of 50 hours in a work week – O Reg 285/01, s. 15.

Sewer or watermain construction and maintenance

Employees engaged in laying, altering, repairing or maintaining sewers and watermains and work incidental thereto, or in guarding the site during this work are entitled to the overtime premium for each hour worked in excess of 50 hours in a work week – O Reg 285/01, s. 16.

Local cartage drivers

Employees who are drivers of, or drivers' helpers on, a vehicle used in the business of carrying goods for hire within a municipality or to any point not more than five kilometres beyond the municipality's limits are entitled to the overtime premium for each hour worked in excess of 50 hours in a work week – O Reg 285/01, s. 17(1)(a).

Transport truck drivers

Employees who drive public trucks operated by holders of an operating licence issued under the *Truck Transportation Act,* RSO 1990, c T.22 are entitled to the overtime premium for each hour worked in excess of 60 hours in a work week - ss. 18(1) and 18(2). Only those hours during which such employees are directly responsible for the public truck are included when calculating the entitlement to overtime – O Reg 285/01, s. 18(4).

Invalid Employer Defences to an Employee's Claim for Overtime Pay

Subsection 22(1) places a positive obligation on employers to ensure that employees receive the statutory minimum requirement with respect to overtime. An employer cannot satisfy that obligation or circumvent payment for overtime by raising any of the following defences:

Employer did not authorize the employee to work overtime

In *Philip's Auto Sales and Repair Inc. v Bonneville* (October 30, 1984), ESC 1726 (Betcherman), the referee affirmed that even in the event that the employer did not authorize its employees to work overtime, they are still entitled to receive the overtime pay if they exceed the overtime threshold. This decision was based on a predecessor to O Reg 285/01, s. 1.1, which stipulated that work shall be deemed to be performed when work is permitted or suffered to be done by the employer. The employer in this case was present when the employee performed the overtime work and the referee held that the employer implicitly permitted such overtime.

In *Joseph Dobi Painting v Szekely and Szekely* (May 28, 1980), ESC 799 (Adamson), the referee stated: "[t]he law is quite clear with respect to overtime work. The responsibility rests fully upon the employer. If he does not wish employees to work overtime, he must not only order them to stop but see that they do. This employer had ample time after the first week of employment to do this. During the period in which the employer claimed to have been incapacitated, it was still his responsibility to see that another person supervised his workers."

In *Joe Kool's Restaurants Ltd. v Whitehead et al* (January 21, 1986), ESC 2023 (Brown), the work schedule prepared by the employer did not include overtime hours; however, the employees were permitted to rearrange the schedule on an individual basis to suit their own convenience, without clearing those arrangements with the employer. These informal arrangements were neither encouraged nor discouraged, and there was no advance notification to the employer. The employer argued that the overtime was not scheduled by it, nor was it worked with its knowledge or acquiescence and that the Act's overtime provisions were therefore inapplicable. The referee rejected that argument and upheld the overtime pay assessment on the basis that the employer must have known and thus was deemed to have permitted the overtime hours worked.

An employee who is working excess hours contrary to a specific term of an employment contract or without authorization may well face disciplinary action for having done so, but that does not alter the fact that they are entitled to overtime pay for overtime hours worked.

Employee agreed to a built-in overtime rate

An employer may argue that it has already compensated employees for overtime pay by providing the employee with a bonus scheme or a higher regular rate of pay. This is not a valid defence to an employee's claim for overtime pay. The employer is also liable to pay overtime notwithstanding that the employee agreed verbally or in writing to work extra hours at the regular rate of pay. In *Ferlandi Builders and Contractors Inc. v Manderscheid* (May 30, 1986), ESC 2116 (Aggarwal), *Jefferson Metal Products Inc. v Hazlehurst and Turner* (February 20, 1985), ESC 1790 (Kerr) and *Wen-Hal Limited v Hansen* (August 22, 1979), ESC 660 (MacDowell), the referees held that any agreement by an employee to work overtime without receiving overtime pay for hours worked beyond 44 per week is rendered void by s. 3 of the former *Employment Standards Act,* now ESA Part III, s. 5(1), which specifically prohibits employees, employers and their agents from contracting out of or waiving an employment standard.

The ESA 2000 does not contain the provision that appeared in the former *Employment Standards Act* that specifically prohibited employers from reducing an employee's pay to comply with the overtime provisions. However, the definition of regular rate in the ESA Part I, s. 1 makes the prohibition redundant.

Regular rate is now defined in such a way as to ensure that overtime hours shall not, in any circumstances, be used to calculate an employee's regular rate. The regular rate for hourly employees is the amount paid for an hour of work in the employee's usual work week - excluding overtime hours. The regular rate for non-hourly employees is the amount paid in a given work week divided by the number of non-overtime hours actually worked in that work week. For example, an employer cannot assign a regular rate of $12.00 for the first 44 hours of work in a work week and a regular rate of $8.00 thereafter.

Employee contracted out of their overtime pay

An employer and an employee cannot agree to contract out of the overtime provisions. This is prohibited by ESA Part III, s. 5(1). An employee cannot agree to work overtime hours at a rate lower than one and one-half times their regular rate. Nor can an employee agree to reduce their regular rate for those hours worked in excess of the applicable overtime threshold.

Employee performed work at multiple locations

An employer cannot avoid its obligation to pay overtime by scheduling employees to work, for example, 20 hours at one of its locations and 30 hours at a second location. In *Tavares and Sgromo c.o.b. Mr. Submarine, Thunder Bay, Ontario v Coppola et al* (April 13, 1982), ESC 1197 (Aggarwal), the employer had contended that since its employee did not work more than 44 hours in one location, the employee

was not entitled to overtime pay. The referee, however, ruled that it was irrelevant whether the employee worked all 54.25 hours at a single location of the employer; the essential point was that the employee worked all of those hours for one employer.

Employee performed work for different but related employers

Similarly, the obligation to pay overtime cannot be avoided by scheduling employees to work, for example, 25 hours for one corporation and 25 hours for another related corporation. This is prohibited by ESA Part III, s. 4, which provides as follows:

4(1) Subsection (2) applies if associated or related activities or businesses are or were carried on by or through an employer and one or more other persons.

(2) The employer and the other person or persons described in subsection (1) shall all be treated as one employer for the purposes of this Act.

(3) Subsection (2) applies even if the activities or businesses are not carried on at the same time.

(4) Subsection (2) does not apply with respect to a corporation and an individual who is a shareholder of the corporation unless the individual is a member of a partnership and the shares are held for the purposes of the partnership.

(4.1) Subsection (2) does not apply to the Crown, a Crown agency or an authority, board, commission or corporation all of whose members are appointed by the Crown.

(5) Persons who are treated as one employer under this section are jointly and severally liable for any contravention of this Act and the regulations under it and for any wages owing to an employee of any of them.

Where ESA Part III, s. 4 applies and two or more entities are treated as one employer, the hours worked by employees for those two or more entities are to be added together for purposes of determining the employees' overtime pay entitlement. See ESA Part III, s. 4 for a more detailed discussion of this issue.

Calculation of Overtime Pay

The method for calculating an employee's entitlement to overtime pay is set out below. This method applies to ALL employees who are not exempt from the application of Part VIII Overtime Pay.

11. Do the overtime provisions apply to the claimant?
12. Which threshold applies? Is it the standard 44-hour threshold, a higher threshold established by regulation, or a lower threshold established by contract?
13. Does s. 22(9) (the changing work provision) apply?
14. Which overtime premium(s) applies? The standard time and one-half premium or a higher premium established by contract?
15. What is the employee's work week?
16. How many non-overtime and overtime hours has the employee worked during each work week in question?
17. What is the employee's regular rate or rates in a given work week?

18. What is the employee's overtime rate or rates for each hour of overtime work in a given work week?
19. What is the employee's overtime pay for each work week in question?
20. Has the employer provided the employee with any overtime pay in respect of each work week in question?

Do the overtime provisions apply to the claimant?

The first determination that must be made is whether the person claiming overtime pay is covered by Part VIII Overtime Pay. To make this determination, the following issues must be considered:

- Is the claimant an employee within the meaning of the ESA 2000?
- Is the claimant excluded from the application of the ESA 2000 by virtue of ESA Part III, ss. 3(2), 3(3) or 3(5)?
- Is the employee exempt from the overtime provisions by virtue of O Reg 285/01, ss. 2(1), 2(2), 8, 11(3) or 23?

Please note that overtime averaging agreements may also impact on a claimant's right to overtime pay. See discussion in ESA Part VIII, s. 22(2) below.

Which threshold applies?

Is it the standard 44-hour threshold, a higher threshold established by regulation, or a lower threshold established by contract?

The next issue for determination is whether the 44-hour threshold applies. A higher threshold may be prescribed by O Reg 285/01. A lower threshold may be established by contract. If the employee is engaged in any of the following, O Reg 285/01 should be consulted as a higher overtime threshold may apply:

- Road building - s. 13;
- Whether the employee is seasonal and employed by an owner or operator of a motel, hotel, tourist resort, restaurant or tavern - s. 14;
- Whether the employee is seasonal and engaged in canning, processing and packaging of fresh fruits or vegetables or their distribution - s. 15;
- Sewer and watermain construction - s. 16;
- Local cartage - s. 17;
- Highway transport - s. 18.

Does s. 22(9) (the changing work provision) apply?

Section 22(9) provides that when an employee performs work that is exempt from this Part and work that is not, the employee is entitled to overtime pay in respect of all of the overtime work performed in a work week so long as the non-exempt work in the work week constitutes 50% or more of the time the employee spent working.

Similarly, s. 22(9) provides that employees who perform both work that attracts overtime after 44 hours and work that attracts overtime at a higher threshold will be entitled to overtime pay after 44 hours in respect of all work performed during the work week by the employee so long as the work performed by the employee that attracts overtime pay at the 44 hour threshold constitutes 50% or more of the time the employee spent working.

See the detailed discussion of s. 22(9) below.

Which overtime premium applies?

The standard time and one-half premium or a higher premium established by contract?

The next issue for determination is whether the time and one-half overtime premium established in s. 22(1) applies. A higher premium may be established by contract. For example, the employment contract may provide for an overtime premium of double the employee's regular rate after 44 hours of work in a work week, or it may provide for time and one-half after 44 hours of work in a work week and double-time after 50 hours of work in a work week.

What is the employee's work week?

The definition of work week is critical to the calculation of an employee's entitlement to overtime pay. An employee's regular rate is determined with respect to a work week. Indeed, an employee's entitlement to overtime pay is determined in respect of a work week. Therefore, one of the first determinations an officer must make is what constitutes the employee's work week.

Work week is defined in ESA Part I, s. 1 as:

(a) a recurring period of seven consecutive days selected by the employer for the purpose of scheduling work, or

(b) if the employer has not selected such a period, a recurring period of seven consecutive days beginning on Sunday and ending on Saturday.

The Ontario Court of Appeal in *Re Falconbridge Nickel Mines Ltd. and Egan et al.*, 1983 CanLII 1931 (ON CA) concluded that the term week as it was used in s. 24(1) of the former *Employment Standards Act*, must be interpreted as a work week. The ESA 2000 deleted the definition of week that appeared in the former Act and included an amended definition of work week to reflect the reasoning of the Court of Appeal. Part VIII Overtime Pay uses the terms week and work week interchangeably.

How many non-overtime and overtime hours has the employee worked during each work week in question?

When determining what overtime and non-overtime hours an employee has worked in a given work week, the first question is how many hours of work were actually performed by the employee in the work week. Once the officer has determined how many hours of work were performed in the work week, they may then determine how many of these hours constitute non-overtime hours and how many are overtime hours.

When making this determination, regard must be had for O Reg 285/01, s. 1.1, which sets out when work is and is not deemed to be performed.

Work Deemed to be or Not Deemed to be Performed by Employee

Section 1.1 of O Reg 285/01 provides as follows:

1.1(1) Subject to subsection (2), work shall be deemed to be performed by an employee for the employer,

(a) where work is,

(iii) permitted or suffered to be done by the employer, or

(iv) in fact performed by an employee although a term of the contract of employment expressly forbids or limits hours of work or requires the employer to authorize hours of work in advance; or

(b) where the employee is not performing work and is required to remain at the place of employment,

(iii) waiting or holding himself or herself ready for call to work, or

(iv) on a rest or break-time other than an eating period.

1.1(2) Work shall not be deemed to be performed for an employer during the time the employee,

(a) is entitled to,

(iv) take time off work for an eating period,

(v) take at least six hours or such longer period as is established by contract, custom or practice for sleeping and the employer furnishes sleeping facilities, or

(vi) take time off work in order to engage in the employee's own private affairs or pursuits as is established by contract, custom or practice; or

(b) is not at the place of employment and is waiting or holding himself or herself ready for call to work.

See O Reg 285/01, s. 1.1 for a detailed discussion of this section.

Calculation of Hours Worked for Employees in Highway Transport Paid by Mileage

A Program investigatory tool involving mileage approximation has been used to determine the hours of work for employees employed in highway transport and paid by mileage, where no complete and accurate records of hours of work exist. The investigatory tool consists of dividing the total distance driven by 80 kilometers per hour (or 50 miles per hour). This practice can also be used as a check to assess the accuracy of existing records. Any other (i.e., non-driving) hours, if they can be established to have been worked, must also be included in the total number of hours worked. However, the hours that the employee is not directly responsible for the truck are not included for overtime purposes.

Calculation of Hours Worked where the Employer has not Kept Accurate Records

If an employer has not kept accurate records of the hours worked by an employee, or if the employer's records are challenged by the employee, the employment standards officer will determine the employee's hours of work on the basis of the best evidence available. Note that where an employee has two or more regular rates of pay that the employer is required to maintain a record of the dates and times the employee worked in excess of the overtime threshold, at each rate of pay, in any given work week. See ESA Part VI, s. 15 (1) paragraph 3.2.

Travel Time

With respect to travel time it is Program policy that:

- With the exception of commuting time, any time a person spends travelling (irrespective of the mode of transportation) for the purpose of getting to or from somewhere where work will be performed, must be counted as hours of work;
- Commuting time means the time required for an employee to travel to work from home and vice versa. However, there are a number of exceptions to this rule:
    - If the employee takes the work vehicle home in the evening for the convenience of the employer, the hours of work begin when the employee leaves home in the morning and end when they arrive home in the evening; or
    - If the employee is required to transport other staff or supplies to or from the workplace or work site, time so spent must be counted as hours of work.

What is the employee's regular rate or rates in a given work week?

Before an employee's overtime rate or rates in respect of the overtime hours worked in a given work week can be calculated, the employee's regular rate or rates (if the employee is paid more than one hourly rate for work performed for the employer) for the work week(s) in question must be determined. ESA Part I, s. 1 defines regular rate as follows.

Regular rate means, subject to any regulation made under paragraph 10 of subsection 141(1),

(a) for an employee who is paid by the hour, the amount paid for an hour of work in the employee's usual work week, not counting overtime hours,

(b) otherwise, the amount earned in a given work week divided by the number of non-overtime hours actually worked in that week.

Employees who are paid solely on the basis of an hourly rate (including employees who are paid two or more different hourly rates for work performed for the employer) will fall within the first portion of this definition. All other employees, including salaried employees, flat rate mechanics, commissioned salespersons, piece workers and employees receiving mixed compensation, for example, an hourly rate and mileage or an hourly rate and commission, must have their regular rate determined by reference to clause (b) of the definition of regular rate.

What is the employee's overtime rate or rates for each hour of overtime in a given work week?

An employee's overtime rate for the overtime hours worked in any given work week is established by multiplying their regular rate by one and one-half or by the higher rate established by contract. If the employee has more than one regular rate that applies to overtime hours worked as per s. 22(1.1), the overtime rate in respect of each hour of overtime will be one and one-half times the regular rate that applies to the work performed in each hour, or the higher rate established by contract.

What is the employee's overtime pay for each work week in question?

The overtime pay that an employee is entitled to for a given work week is determined by multiplying their overtime rate by the number of overtime hours worked at that rate within the week. Where the employee has two or more regular rates and has performed overtime work that attracts more than one overtime

rate, the overtime pay for the work week is determined by adding together the overtime pay entitlement as calculated for each hour of overtime work. See example 1 under “Examples of How to Calculate Overtime” below.

Has the employer provided the employee with any overtime pay for each work week in question?

The final consideration is whether the employee has already been paid, in full or in part, for any of the overtime hours in question. This will only be appropriate in limited circumstances. For example, an employee who is paid by the hour and who works 55 hours in a work week and is paid their regular rate for those 55 hours has received a portion of their overtime pay. That employee will only be entitled to an additional .5 of their regular rate in respect of all overtime hours worked in the work week.

Please note that this will not apply to a salaried employee. See the discussion below.

Examples of How to Calculate Overtime

Overtime entitlements for employees with two or more regular rates

An employee who is paid on an hourly basis may perform, in one work week, two types of work, each of which attracts a different hourly rate. In that case, the employee has two regular rates and as a result, s. 22(1.1) applies to determine the overtime pay entitlement. That subsection provides that the overtime rate for each of hour of overtime work performed is based on the regular rate that applies to the work performed in that hour.

Example 1:

An employee works as a punch press operator earning $15.00/hour and also as a shipping logistics coordinator earning $20.00/hour for the same employer. The employee’s overtime threshold is 44 hours and the overtime rate is 1.5 times the regular rate.

In one work week the employee worked 4 hours of overtime. The 45th and 46th hours were worked as punch press operator and the 47th and 48th hours were worked as a shipping logistics coordinator. This employee’s overtime pay entitlement would be calculated as follows:

45th hour: overtime rate is $15.00 x1.5 = $22.50 per hour

46th hour overtime rate is $15.00 x1.5 = $22.50 per hour

47th hour overtime rate is $20.00 x1.5 = $30.00 per hour

48th hour overtime rate is $20.00 x1.5 = $30.00 per hour

The total overtime pay due to the employee is $105.00 [$22.50 + $22.50 + $30.00 + $30.00]

Example 2:

An employee usually works in job A at an hourly rate of $15.00. The employee also usually works, for the same employer in job B at an hourly rate of $20.00. The employer has received approval from the Director of Employment Standards under s. 17.1 to have employees work excess weekly hours. The employee has also agreed in writing to work excess hours. In one work week the employee works 60 hours: 36 hours in job A at $15.00 per hour and 24 hours in job B at $20.00 per hour. The employee was paid their regular rate or straight time for all hours worked including overtime hours; a total of $1020.

The regular overtime threshold and overtime rate of 1.5 times the regular rate apply to this employee. The 16 hours of work performed once the overtime threshold of 44 hours was reached were as follows:

- 12 hours in job A
- 4 hours in job B

The employee's overtime entitlement in accordance with s. 22(1.1) is:

- Job A work: 12 hours X $15.00 per hour X 1.5 = $270
- Job B work: 4 hours X $20.00 per hour X 1.5 = $120

However, the employee had already been paid straight time for the 12 hours of overtime worked in job A = 12 X $15.00 per hour = $180

Plus straight time for the 4 hours of overtime worked in job B = 4 X $20.00 = $80.00

The employee's overtime pay entitlement was $390; however the employee had already been paid $260 in straight time for the overtime hours (i.e. has received partial pay for the overtime hours). Therefore, the balance owing in respect of overtime pay for the work week in question is $390 - $260 = $130

Overtime Entitlements for Employees Paid Hourly Rate and Other Forms of Compensation

From time to time employees who are paid an hourly rate will also perform work that involves different types of compensation in the same work week. For example, payment of an hourly rate and commission. If an employee who receives an hourly rate is also compensated with commissions, that employee, strictly speaking, is not paid by the hour. Accordingly, the regular rate of such employees must be determined by applying clause (b) of the definition of regular rate, by dividing their total earnings for each work week in question by the number of non-overtime hours worked. However, if an employee receives an hourly rate for each hour worked (including overtime hours), the employer will be credited for such payment when the employee's overtime entitlement is calculated.

Under the ESA 2000, overtime hours cannot be included in the calculation of an employee's regular rate.

Example:

The employee works 50 hours in a work week and is paid $20.00 per hour. The employer has received approval from the Director of Employment Standards under s. 17.1 to have employees work excess weekly hours. The employee has also agreed in writing to work excess hours. The employee also receives commissions. In one work week the employee receives $1000 for 50 hours worked and $200 in respect of commissions. The general overtime premium and threshold apply.

- Employee works 44 non-overtime hours in the work week
- Employee works 6 hours of overtime in the work week
- Regular rate = total earnings in work week divided by non-overtime hours) = $1200 divided by 44 = $27.27
- Overtime rate is $27.27 (regular rate) x 1.5 = $40.91
- Overtime pay entitlement = (overtime rate x overtime hours in a workweek) = $40.91 x 6 = $245.46

Because this employee was paid straight time for each hour worked, including overtime hours, the employee has already received $120 (6 overtime hours x $20.00) in respect of overtime. Therefore, they entitled to receive an additional $125.46: $245.46 overtime entitlement minus $120 of overtime already paid, in respect of overtime for the work week in question.

Overtime Entitlements for Employees Paid on Mileage, Piecework or Commission Basis

Under the ESA 2000, the overtime entitlement for employees who are paid solely on a mileage basis, by commission or on a piece-rate must be determined by reference to the definition of regular rate in ESA Part I, s. 1. Because these employees are not paid by the hour, their regular rate must be determined by applying clause (b) of the definition of regular rate, by dividing all earned wages in the work week by the non-overtime hours worked. The overtime premium of one and one-half times the regular rate is payable for all hours worked in excess of 44 in a work week, unless a higher overtime rate applies by virtue of contract or a higher threshold applies by virtue of regulation.

Example:

An employee works making oven mitts and is paid $2.50 per pair. In a particular work week, the employee works 60 hours to make 300 pairs of mitts and is paid $750.00. The employer has received approval from the Director of Employment Standards under ESA Part VII, s. 17.1 to have employees work excess weekly hours. The employee has also agreed in writing to work excess hours. The general threshold and premium apply to the employee.

- Employee works 44 non-overtime hours that work week
- Employee works 16 hours of overtime that work week
- Regular rate = total earnings in the work week divided by non-overtime hours = $750.00 divided by 44 = $17.05
- Overtime rate is $17.05 (regular rate) x 1.5 = $25.58
- Overtime pay entitlement = overtime rate x overtime hours in the work week
- = $25.58 x 16
- = $409.28 in respect of that work week.

Overtime Entitlements for Flat Rate Mechanics

Enquiries arise occasionally on the application of the legislation to motor vehicle mechanics and body repairpersons who are paid on a flat rate or incentive system. In a flat rate shop, every job is rated as taking a certain number of hours to perform and the mechanic is paid a book hourly rate for those hours. As an example, a brake reline is rated as a four-hour job, and the mechanic's book rate is $16 per hour. The mechanic will be paid $64 whether the job takes three or five hours to complete. This is acceptable so long as minimum wage is being paid and all overtime hours (hours worked in excess of 44) are compensated at a minimum of 1.5 times the mechanic's actual regular rate, which is not the same as the flat rate.

Generally, in a flat-rate remuneration system, it is a condition of employment that the employee rectify their own faulty work without further pay. This is not a violation of the ESA 2000, so long as the minimum wage and overtime provisions are not violated. If for some reason, another mechanic makes the required changes, the payment for the entire job is credited to the second mechanic. Where this occurs as part of

the employment contract, the transfer of credits is considered as part of the reconciliation of wages due and not a prohibited set-off or deduction. However, the minimum wage and overtime provisions still apply with respect to the hours of work the first mechanic spent on the vehicle.

It is essential in a flat rate system that the employer's records reflect both the flat rate paid and the actual hours worked: it is the actual hours worked that must be used to calculate the employee's regular rate and overtime entitlements. Those actual hours of work must include any time spent rectifying the employee's faulty work.

As illustrated in the examples below, payment at the book rate is payment for a task (i.e., a flat rate for the task), rather than a payment for hours actually worked. As no portion of the payment is made in respect of hours actually worked, none of it can be considered to be a payment for regular hours or overtime hours.

Example 1:

The employee is paid a flat book rate of $16.00 per hour for brake re-lining. They did 12 brake-relines which resulted in a flat rate payment for 48 hours (each re-line job is rated as taking 4 hours) for a total payment of $768. The employee however actually spent 46 hours doing the work in that week. The general overtime rate and threshold apply to this employee.

- Employee works 44 non-overtime hours in work week
- Employee works 2 overtime hours in work week
- Employee paid $768 for work week
- Employee's regular rate is $768 divided by 44 non-overtime hours = $17.45
- Employee's overtime rate is $17.45 x 1.5 = $26.18
- Employee's overtime entitlement is 2 hours x $26.18 = $52.36

In this case, the employer owes the employee an additional $52.36 for overtime pay.

Example 2:

The employee is paid a flat book rate of $16.00 per hour to perform tune-ups that according to the book will take 1.5 hours to complete. In fact they are being paid $24.00 for each tune-up regardless of the time it actually took them to perform the tune-up. Having completed 25 tune-ups in one week the employee is paid $600 for that work week. However, the employee actually worked 50 hours in that work week. The general overtime rate and threshold apply to this employee.

- Employee works 44 non-overtime hours in work week
- Employee work 6 overtime hours in the work week
- Employee paid $600 for the work week
- Employee's regular rate is $600 divided by 44 non-overtime hours = $13.64
- Employee's overtime rate is $13.64 x 1.5 = $20.46
- Employee's overtime entitlement is 6 hours x $20.46 = $122.76

In this case, the employer owes the employee an additional $122.76 for overtime pay.

Overtime Entitlement for Salaried Employees

Generally, employees who are paid a fixed amount for each pay period rather than an amount determined by applying an hourly rate to each hour worked (or a piece rate or commission based on work performed) are considered to be salaried employees. It should be noted that although ESA Part VI, s. 15(4) defines a salaried employee, that definition is for the purposes of ESA Part VI, s. 15(3), which sets out the employer's obligations to record hours worked, and is not necessarily relevant to the calculation of overtime entitlements.

Salaried employees who are not exempt from the overtime provisions are entitled to overtime pay for overtime work. Once the work week has been determined, the employee's regular rate will be determined by applying clause (b) of the definition of regular rate, by dividing the salary earned in respect of the work week by the number of non-overtime hours worked in the work week. Salaried employees are entitled to receive 1.5 times their regular rate in respect of each hour worked in excess of 44 in a work week (or other applicable threshold).

Prior to the introduction the ESA 2000, the calculation of the regular rate for salaried employees was accomplished by dividing the salary earned for the work week by the actual hours worked, including overtime hours. The employee was considered to have been paid straight time for all hours worked, including overtime hours, and received an additional .5 times their regular rate in respect of all overtime hours worked in the work week in question. This method of calculating overtime had the effect of lowering the employee's regular rate as the number of hours worked increased and significantly reducing the employee's entitlement to overtime pay.

Under the ESA 2000, overtime hours cannot be included in the calculation of an employee's regular rate. Formerly, the more overtime hours a salaried employee worked, the less they were paid for those hours. The new definition of regular rate precludes that result because overtime hours cannot be included in the calculation.

Example:

An employee is paid an annual salary of $52,000 or $1000 per week. The employee works 60 hours in a work week. The employer has received approval from the Director of Employment Standards under s. 17.1 to have employees work excess weekly hours. The employee has also agreed in writing to work excess hours. The general overtime rate and threshold apply.

- Employee works 44 non-overtime hours in work week
- Employee works 16 overtime hours in work week
- Employee's regular rate for the work week is $1000 divided by 44 non-overtime hours = $22.73
- Employee's overtime rate for the work week is $22.73 x 1.5 = $34.10

The employee's entitlement to overtime pay for the work week is $34.10 x 16 hours = $545.60.

Averaging – s. 22(2)

22(2) An employee's hours of work may be averaged over separate, non-overlapping, contiguous periods of two or more consecutive weeks for the purpose of determining the employee's entitlement, if any, to overtime pay if,

(a) the employee has made an agreement with the employer that their hours of work may be averaged over periods of a specified number of weeks;

(b) the employer has received an approval under section 22.1 that applies to the employee or a class of employees that includes the employee; and

(c) the averaging period does not exceed the lesser of,

(i) the number of weeks specified in the agreement, and

(ii) the number of weeks specified in the approval.

Where the conditions set out in this provision are met, the employer's obligation to pay overtime pay is based on the employee's average hours per work week (during the period specified in the employee's averaging agreement or the period specified in the approval, whichever period is shorter), rather than the hours actually worked within a work week.

Example:

An employee and employer have agreed in writing and have the Director's approval to average hours over four-week periods for the purpose of calculating the employee's entitlement to overtime pay. The employee works 48 hours in the first week, 44 hours in the second week, 40 hours in the third week and 50 hours in the fourth week. The employee and employer have also agreed in writing and have the Director's approval to work excess weekly hours.

The employee's overtime hours will be determined on the basis of the average number of hours worked per week. In this example the employee worked an average of 45.5 hours per week (48 + 44 + 40 + 50, divided by 4). Accordingly, the employee would be entitled to overtime pay for six hours based on an average of 1.5 hours of overtime per week in the four-week period. In the absence of averaging, the employee would have been entitled to four hours of overtime pay in the first week and six hours of overtime pay in the fourth week.

Calculating overtime pay when employee works different jobs for different rates of pay:

It is program policy that the employer shall apply the proportion of each overtime rate to the averaged overtime hours.

For example, if the employee gets 4 hours of overtime pursuant to the 2-week averaging agreement and the employee worked 25% of the overtime in the 2-week period at Job A and 75% of the overtime at Job B, this employee would get 1 hour of overtime at the Job A’s overtime rate and 3 hours of the overtime rate at Job B.

Note that, unless there is a time off in lieu arrangement in place pursuant to s. 22(7), the employer is required to pay the employee straight time for every hour worked within each pay period – including those hours over 44 – and that it is only the extra half that the employer can postpone paying under an averaging arrangement until the end of the averaging period. See ESA Part V, s. 11 for details.

Section 22(2) provides that where averaging is permitted, the employee's hours of work can be averaged only over separate, non-overlapping, contiguous periods of two or more consecutive weeks. That is, the averaging periods must be contiguous (i.e., there cannot be gaps in between the end of one period and

the beginning of another), and they must be separate and cannot overlap with one another. Further, the two or more weeks within each averaging period must be consecutive.

Note that even if an employer has averaging agreements and an averaging approval, if employees will be working hours in excess of the daily or weekly limits the employer must also obtain excess hours agreements from the employees and, in the case where they work in excess of the weekly limit, an excess hours approval from the Director, subject to the pending approval rule.

Three Conditions for Averaging

The three conditions that must be met before averaging can take place are discussed below.

Condition 1: Employee made agreement with employer that hours of work may be averaged over specified number of weeks

The first condition that must be met before an employer is permitted to average an employee's hours is the employee must have entered into an agreement with the employer that their hours may be averaged over periods of a specified number of weeks.

For an agreement to valid, the following criteria must be met:

Agreement must be in writing

By virtue of ESA Part 1, s. 1(3), an agreement between an employer and an employee to average the employee's hours of work, for purposes of calculating the employee's entitlement to overtime pay must be in writing. See also ESA Part 1, s. 1(3.1), which provides that an agreement in writing may be in electronic form.

For employees represented by a trade union, the written agreement may be embodied in the collective agreement or a memorandum of agreement or other written documentation signed by union officials and, provided the other criteria are met, all bargaining unit employees will be bound by the agreement.

In the non-unionized context, a written agreement between each employee and the employer is required.

Agreement must specify the number of weeks over which the hours of work are going to be averaged

Section 22(2)(a) requires that the agreement state precisely the number of weeks over which the hours of work are going to be averaged. Statements such as "up to 4 weeks" are not sufficient.

Agreement must contain an expiry date

The averaging agreement must also contain an expiry date. There are restrictions placed on when the expiry date can be. See s. 22(3) below for a more detailed discussion.

Agreement must clearly and explicitly set out what is being agreed upon

The agreement should be written with sufficient clarity for the parties to know precisely what they are agreeing to. Ambiguous or equivocal agreements will be ineffective.

The agreement should contain the employee's express consent to the averaging of hours for the purpose of calculating the employee's entitlement, if any, to overtime pay. Mere agreement to a particular

schedule is not sufficient, as an employee may agree to work certain hours without necessarily having agreed to the hours being averaged for overtime pay purposes.

Employers are encouraged, but not required, to include schedules in averaging agreements.

Overtime averaging agreements must not be confused with agreements to work hours in excess of the weekly and daily maximums established in ESA Part VII, s. 17. Employers who wish employees to work hours in excess of eight hours a day (or the regular work day where that is longer than eight hours) or 48 hours a week must secure valid written agreements from their employees (and, in the case of excess weekly hours, obtain the Director's approval) to work hours in excess of the daily and weekly maximums.

Parties must have entered into the agreement voluntarily

An averaging agreement will not be binding if it is not entered into voluntarily by both parties. Please see ESA Part I, s. 1(3) for a more detailed discussion of the issue of voluntary consent.

Employee must have given their informed consent to the agreement

The employee must understand what they are agreeing to, and the consequences of the agreement, for an averaging agreement to be binding. Informed consent will not be established unless each party knows precisely the ramifications of entering into the agreement.

The best evidence that an employee provided their informed consent is where the document itself accurately sets out the consequences of the agreement. To this end, employers may wish to include the following in averaging agreements:

- A statement notifying the employee(s) that an averaging arrangement, if approved by the Director, will affect the amount of overtime pay the employee will be entitled to under the arrangement, as compared to the amount of overtime pay the employee would be entitled to if the employee(s) worked the same number of hours in each week without an averaging arrangement.
- A statement informing the employee(s) that the agreement is irrevocable before it expires, unless the employee and the employer agree, in writing, to revoke it – s. 22(6).

See s. 22(6) below for a more detailed discussion of these requirements.

Employers may also wish to consider including a specific schedule in an averaging agreement.

The Ministry has produced a list of items employers and employees may wish to consider when drafting agreements. This can be found on the Ministry of Labour's website.

In the absence of a valid agreement, the employer must pay the employee overtime according to s. 22(1), or ensure that the employee does not work overtime, even if the Director of Employment Standards has issued an approval that applies to the employee.

Employers are required to retain a copy of every averaging agreement it has made with its employees for three years after the last day on which work was performed under each agreement – see ESA Part VI, s. 15(9).

If Employee Refuses to Consent to an Averaging Agreement

If an employee does not agree to the averaging of their overtime hours, the employer must pay the employee overtime according to s. 22(1), or ensure that the employee does not work overtime (that is,

hours in excess of 44 hours per week or other applicable threshold). If an employer terminates the employment of an employee or otherwise disciplines an employee because the employee refused to consent to the averaging agreement, that employer will have committed a reprisal in violation of ESA Part XVIII, s. 74.

Averaging Arrangements for Shift Exchanges

Employers may wish to have averaging arrangements in place in order to provide employees with increased flexibility in their work schedules by allowing shift exchanges, without the requirement of paying overtime as a consequence of the shift exchanges.

Example:

- Employee A works Monday through Friday 8:00 am to 4:30 pm;
- Employee B works Wednesday through Sunday 3:30 pm to 12:00 midnight;
- Employee A asks B to work his Tuesday shift in exchange for working B's Sunday shift two weeks later;
- Even though B works an additional eight hours in the first week (and A works eight hours less) neither will see an increase or reduction in their weekly pay for the weeks in which the shift exchanges took place and, specifically, no overtime will be paid for the week in which each employee worked 48 hours.

An issue that may arise in the context of an averaging agreement made for the purpose of accommodating shift exchanges is how to handle circumstances in which the employment of an employee who has been involved in a shift exchange ends before the exchange is complete. The following example illustrates the Program's policy on this matter.

Example:

The employees and the employer have agreed in writing and have received the Director's approval to average hours of work over a period of four weeks for purposes of calculating overtime pay. Employee A agrees to work a shift for Employee B in week one of the averaging period. In exchange, Employee B agrees to work a shift for Employee A in week two of the averaging period; however, Employee B's employment is terminated before she can complete the shift exchange. The employees are paid their regular wages in respect of week one and week two.

The employer owes Employee A straight time for the shift she worked in week one for Employee B and in respect of which Employee A has not been compensated.

Employee B owes the employer the regular wages that she was paid for work that she did not perform in week one. Employee B is considered to have received an advance and therefore, the employer may make a reconciliation for this amount. Such a reconciliation is not considered to be a set-off or deduction as defined in ESA Part V, s. 13.

Condition 2: Employer received an approval that applies to employee or a class of employees

The second condition that must be met before an employer can average an employee's hours for overtime pay purposes is the employer must be in receipt of an approval by the Director of Employment Standards under s. 22.1 that applies to the employee or to a class of employees that includes the employee.

ESA Part VIII, s. 22.1 describes how employers apply for an averaging approval.

This section must be read in conjunction with s. 22.1(8), which states:

22.1(8) An approval applies to the employee or class of employees specified in the approval, and applies to every employee in a specified class whether or not the employee was employed by the employer at the time the approval was issued.

Accordingly, where an employer already has an approval from the Director of Employment Standards, the employer may begin averaging an employee's hours of work for overtime pay purposes immediately after the employee provides their written agreement to do so if that employee falls within the class of employees set out in the approval immediately (assuming that all of the requirements for a valid agreement are met) the employer will not be required to apply for another approval. For example, an employer will be allowed to average an employee's hours without having to obtain another approval where the employee who provides the valid written agreement:

- Was not an employee of the employer at the time the approval was issued;
- Was an employee of the employer at the time the approval was issued but was working in a position the approval does not apply to; or
- Was an employee in the class of employees the approval applies to at the time the approval was issued, but at that time had not yet agreed to average hours for overtime pay purposes?

See ESA Part VIII, s. 22.1 for further discussion.

This section must also be read in conjunction with s. 22(2.1), which allows employers to average an employee's hours for the purposes of overtime pay entitlements (but for periods of not more than two weeks) if the employer does not receive either an approval or a refusal from the Director within 30 days of the application being served and certain other conditions are met.

Condition 3: Averaging period does not exceed the lesser of number of weeks specified in the agreement and number of weeks specified in approval

This is the third condition that must be met before an employer is allowed to average an employee's hours of work for overtime pay entitlement purposes. It provides that averaging will be lawful only if the averaging period does not exceed the number of weeks specified in the employee's agreement or the number of weeks specified in the Director's approval, whichever is less.

For example, an employee agreed to average their hours of work over a period of eight weeks, but the Director issued an approval to average only over a period of four weeks. The employer can average the employee's hours only over a period of four weeks.

Conversely, an approval was issued for an averaging period of four weeks that applies to a particular class of employees. Some employees in that class agreed to an averaging period of four weeks. The employer is permitted to average those employees' hours over a period of four weeks. One employee in that class agreed to an averaging period of only two weeks. Pursuant to s. 22(2)(c), the employer is permitted to average that employee's hours only over a period of two weeks.

Same, Pending Approval – s. 22(2.1)

22(2.1) Despite subsection (2), an employee's hours of work may be averaged for the purpose of determining the employee's entitlement, if any, to overtime pay even though the employer has not received the approval described in clause (2)(b), if,

(a) the employee has made an agreement described in clause (2)(a) with the employer;

(b) the employer has served on the Director an application for an approval under section 22.1;

(c) the application is for an approval that applies to the employee or to a class of employees that includes the employee;

(d) 30 days have passed since the application was served on the Director;

(e) the employer has not received a notice that the application has been refused;

(f) the employer's most recent previous application, if any, for an approval under section 22.1 was not refused;

(g) the most recent approval, if any, received by the employer under section 22.1 was not revoked; and

(h) the employee's hours of work, pending the approval, are averaged over separate, non-overlapping, contiguous periods of not more than two consecutive weeks.

This section provides an exception to the requirement in s. 22(2) that the employer have received an averaging approval from the Director before the employer is permitted to average the employee's hours for the purposes of determining overtime pay entitlements. It permits an employer to begin averaging an employee's hours - but only over periods of two weeks - if the Director has not issued either an approval or a notice of refusal of the application within 30 days of the date the application was served and certain other conditions are met.

This section permits averaging of hours pending the Director issuing an approval or a notice of refusal if certain conditions are met. It does not deem an approval to have been granted. If the application is ultimately rejected, the averaging must cease when the notice is received.

If the application is ultimately approved, s. 22(2) will dictate the conditions under which averaging may occur from that point forward.

The employer will be permitted to average an employee's hours of work for overtime pay entitlement purposes pending the disposal of the application - but only over periods of two weeks - only if all eight conditions set out in s. 22(2.1) are met. If any of the eight conditions are not met, the employer will not be permitted to average the employee's hours pending the disposal of the application.

Each of the eight conditions is discussed below.

Employee made an agreement described in s. 22(2)(a) with employer

The first condition is the employee must have made an agreement described in s. 22(2)(a) with the employer to average hours of work over periods of a specified number of weeks. See the discussion of s. 22(2)(a) below.

Employer served on the Director an application for an approval under s. 22.1

The second condition is that the employer must have served the application for an averaging approval on the Director of Employment Standards under s ESA Part VIII, s. 22.1. See in particular the discussion of the issue of when an application is considered to be served if the approval application is not properly completed.

Application is for an approval that applies to the employee or to a class of employees

The third condition is the application for an averaging approval that has been served on the Director must apply to the individual employee at issue, or to a class of employees that includes the employee.

30 days have passed since application was served on the Director

The fourth condition is at least 30 days must have passed since the employer served the Director with the averaging approval application. Day means a calendar day.

Note that ss. 22.1(4) and (5) contain rules regarding when service is deemed to be effective, and, accordingly, when the 30-day period begins. See the discussion at ESA Part VIII, s. 22.1.

Note also that s. 22(5.1) contains a special rule regarding when the 30-day period expires if the application is filed before March 1, 2005.

Employer has not received a notice that the application has been refused

The fifth condition is the employer not have received a notice from the Director that the application has been refused. The notice could be in writing (by e-mail, facsimile transmission, courier, or mail).

Employer's most recent previous application, if any, for an approval under s. 22.1 was not refused

The sixth condition is the employer's most recent previous averaging application cannot have been refused. If the employer submitted an earlier application that was refused for any reason, and that application was the most recent application, the employer will not be permitted to rely on s. 22(2.1), and the employer will not be allowed to begin averaging the hours of the employees who are the subject of the current application until the current application is approved. This is so whether or not the most recent previous application that was refused applied to the same employees who are the subject of the current application.

Most recent approval received by employer under s. 22.1 was not revoked

The seventh condition is the most recent approval (if any) that was granted by the Director must not have been revoked. Pursuant to s. 22.1(14), the Director can revoke an approval.

Employee's hours of work in a work week are averaged over periods of not more than two weeks

The eighth condition sets an upper limit on the number of weeks in the periods over which an employee's hours can be averaged pending the disposal of the application. It provides that the maximum period over which an employee's hour of work can be averaged pending the disposal of the application is two weeks. This limit applies even if the employee agreed to average hours over periods longer than two weeks and/or the application asks for an approval to average hours over periods longer than two weeks.

Transition: Certain Agreements – s. 22(2.2)

22(2.2) For the purposes of this section, each of the following agreements shall be treated as if it were an agreement described in clause (2)(a):

1. An agreement to average hours of work made under a predecessor to this Act.

2. An agreement to average hours of work made under this section as it read on February 28, 2005.

3. An agreement to average hours of work that complies with the conditions prescribed by the regulations made under paragraph 7 of subsection 141(1) as it read on February 28, 2005.

Section 22(2.2) is a transitional provision. It establishes how agreements to average hours that were entered into under the provisions of the former *Employment Standards Act* or under the ESA 2000 before the amendments made by the *Employment Standards Amendment Act (Hours of Work and Other Matters), 2004*, SO 2004, c 21 came into force that have not expired are to be treated.

With respect to agreements made under the ESA 2000, paragraph 2 refers to agreements made under s. 22 as it read on February 28, 2005, i.e., agreements to average over periods of up to four weeks, while paragraph 3 refers to agreements made under O Reg 285/01, s. 30, i.e., agreements to average over period of more than four weeks. The latter required the approval of the Director. In the case of all three types of averaging agreements, this provision states that such agreements are to be treated as if they were agreements under s. 22(2)(a).

On February 28, 2005 the relevant provisions read as follows:

Section 22(2) of the ESA 2000:

Subject to the regulations, if the employee and the employer agree to do so, the employee's hours of work may be averaged over separate, non-overlapping, contiguous periods of not more than four consecutive weeks each, for the purpose of determining the employee's entitlement, if any, to overtime pay.

Section 30 of O Reg 285/01:

An employer and an employee may agree to average hours of work over a period of more than four weeks for the purpose of determining the employee's entitlement to overtime pay under section 22 of the Act if the Director approves the agreement.

By virtue of s. 22(2.2), agreements that were entered into under s. 22(2) or O Reg 285/01, s. 30 as they read on February 28, 2005 under the former *Employment Standards Act* that are still valid are treated as if they are agreements made under the current s. 22(2)(a) (new agreements), thereby avoiding the need for employers to enter into another agreement with employees if they wish to average hours after February 28, 2005. However, employers who have old agreements with employees must seek approval

from the Director before the employer can average employees' hours of work. This is so even if the Director had approved the agreement pursuant to O Reg 285/01, s. 30 - see s. 22.1(18), which specifically provides that any approval granted by the Director under the regulation ceases to have effect on March 1, 2005.

Term of Agreement – s. 22(3)

22(3) An averaging agreement is not valid unless it provides for an expiry date and, if it involves an employee who is not represented by a trade union, the expiry date shall not be more than two years after the day the agreement takes effect.

This provision requires averaging agreements to include an expiry date. In the non-unionized context the expiry date cannot be later than two years from the date the averaging agreement takes effect. In the unionized context the parties must negotiate the expiry date. The purpose of this provision is to preclude perpetual averaging agreements. This is particularly important given that s. 22(6) provides that averaging agreements may not be revoked before they expire, unless the parties agree otherwise in writing.

Agreement May Be Renewed – s. 22(4)

22(4) Nothing in subsection (3) prevents an employer and employee from agreeing to renew or replace an averaging agreement.

This provision states that employers and employees may, before or upon the expiry of an averaging agreement, agree, in writing, to extend, to renew or replace the agreement.

Existing Agreements – s. 22(5)

22(5) An averaging agreement made before this Act comes into force that was approved by the Director under the *Employment Standards Act* is valid for the purposes of subsection (2) until,

(a) one year after the day this section comes into force; or

(b) if the employee is represented by a trade union and a collective agreement applies to the employee,

- **(i) the day a subsequent collective agreement that applies to the employee comes into operation, or**
- **(ii) if no subsequent collective agreement comes into operation within one year after the existing agreement expires, at the end of that year.**

This provision stipulates that averaging agreements made under the former *Employment Standards Act* and approved by the Director of Employment Standards, before the ESA 2000 came into force, will remain in force, for specified periods of time.

The purpose of this provision was to provide workplace parties operating under existing averaging agreements that predated the ESA 2000 with a period of stability before having to negotiate new averaging agreements.

This section was not repealed when amendments made by the *Employment Standards Amendment Act (Hours of Work and Other Matters), 2004*, came into effect on March 1, 2005, because it is possible that some agreements that predate the ESA 2000 are still in effect.

In the non-unionized workplace, an averaging agreement approved by the Director under the former Act remained in force until September 4, 2002, which was one year after the day s. 22 of the ESA 2000 came into force.

Where a collective agreement applies, valid pre-existing averaging agreements will remain valid until a subsequent collective agreement comes into operation. If a subsequent collective agreement has not come into operation one year after the existing collective agreement expires, the agreement will expire at the end of that year. For example, if a collective agreement that was in force on September 4, 2001, expired January 31, 2002, and no subsequent collective agreement came into force on or before January 31, 2003, the averaging agreement would have ceased to be valid on January 31, 2003.

Transition: Application for Approval Before Commencement – s. 22(5.1)

22(5.1) If the employer applies for an approval under section 22.1 before March 1, 2005, the 30-day period referred to in clause (2.1) (d) shall be deemed to end on the later of,

(a) the last day of the 30-day period; and

(b) March 1, 2005

This is a transitional provision. Pursuant to s. 22.1(19), employers can apply for approval of averaging agreements on or after December 9, 2004, the day the *Employment Standards Amendment Act (Hours of Work and Other Matters), 2004* received Royal Assent, even though the amendments that require approvals for averaging agreements do not come into force until March 1, 2005. Applications are permitted prior to March 1, 2005 in order to facilitate a seamless transition between the old rules and the new rules.

Section 22(2.1) permits, in certain circumstances, an employer to average an employee's hours of work for the purposes of determining any overtime pay entitlements (but only over a maximum period of two weeks) if the employer has not received either an approval or a notice of refusal of an averaging application within 30 days of the date the application was served. By virtue of s. 22(5.1), where an employer applies for an averaging approval prior to March 1, 2005, the 30-day wait period will expire on March 1, 2005 at the earliest.

For example, an employee agreed in writing to average hours of work over two-week periods for a period of two years back in July 2003. The employer served an application for an averaging approval on the Director on January 15, 2005. As of March 1, 2005, the Director had not issued either an approval or a notice of refusal of the application. This employer:

- Was permitted to average the employee's hours of work over two-week periods until February 28, 2005 pursuant to the provisions that were in force until that date; and
- Is permitted to average the employee's hours of work over two-week periods as of March 1, 2005 pursuant to the pending approval rules of s. 22(2.1), assuming all of the conditions in s. 22(2.1) are met by the employer.

Agreement Irrevocable – s. 22(6)

22(6) No averaging agreement referred to in this section may be revoked before it expires unless the employer and the employee agree to revoke it.

The ESA 2000 introduced this provision to ensure that once an averaging agreement is made, it cannot be unilaterally cancelled or revoked by the employer, the employee or their agents. Averaging agreements can only be revoked by the parties if the employer and the employee agree to do so in writing, in accordance with ESA Part 1, s. 1(3). The purpose of this provision is to provide the parties with a degree of certainty.

Note, however, that the Director has the authority to revoke an approval - see ESA Part VIII, s. 22.1.

Time Off in Lieu – s. 22(7)

22(7) The employee may be compensated for overtime hours by receiving one and one-half hours of paid time off work for each hour of overtime worked instead of overtime pay if,

(a) the employee and the employer agree to do so; and

(b) the paid time off work is taken within three months of the work week in which the overtime was earned or, with the employee's agreement, within 12 months of that work week.

The provision permits an employer and an employee to agree, in writing, that the employee be compensated for some or all overtime hours by receiving one and one-half hours of paid time off work for each hour worked in excess of 44 (or other applicable threshold) instead of receiving overtime pay if the following criteria are met:

3. The employee and the employer agree, in writing to compensate the employee with paid time off at a rate of 1.5 hours off work for every hour of overtime worked, rather than pay the employee overtime pay; and
4. The paid time off work is taken within three months of the work week in which the overtime was earned or, with the employee's written agreement within 12 months of that work week.

Please see ESA Part I, s. 1(3) and (3.1) for a more detailed discussion.

Because the subsection states that the employee is to be compensated for overtime hours with one and one-half hours of paid time off work for each hour of overtime worked instead of overtime pay, it is the Program's position that the employee is entitled to the time off at the rate they are currently earning as opposed to the rate they were earning when the overtime was worked. Note however, that if employment ends before the time off can be taken, the employer will be required to pay overtime pay based on the rate they were earning when the overtime was worked. See the discussion in s. 22(8) below.

Where Employment Ends – s. 22(8)

22(8) If the employment of an employee ends before the paid time off is taken under s. 22(7), the employer shall pay the employee overtime pay for the overtime hours that were worked in accordance with ESA Part V, s. 11(5).

This provision stipulates that if the employee's employment ends before the lieu time earned pursuant to s. 22(7) is taken, the employee's lieu time entitlement automatically converts into an entitlement to overtime pay. Pursuant to s. 11(5), the overtime pay is payable to the employee by the later of seven days after the termination of the employee's employment or on what would have been the employee's next pay day. Note that because this provision requires that the employer pay the employee overtime pay for the overtime hours that were worked, it is the Program's position that the overtime pay the employee is

entitled to receive is based on the rate the employee was earning when the overtime was worked as opposed to the rate they were earning when the termination occurred.

Changing Work – s. 22(9)

22(9) If an employee who performs work of a particular kind or character is exempted from the application of this section by the regulations or the regulations prescribe an overtime threshold of other than 44 hours for an employee who performs such work, and the duties of an employee's position require them to perform both that work and work of another kind or character, this Part shall apply to the employee in respect of all work performed by them in a work week unless the time spent by the employee performing that other work constitutes less than half the time that the employee spent fulfilling the duties of their position in that work week.

The purpose of this provision is twofold. This provision ensures that:

3. Employees who perform work that is exempt from the overtime provisions and work that is not exempt are entitled to overtime pay for all hours worked in excess of 44 per week, provided that at least 50% of their work week is spent performing non-exempt work; and
4. Employees who perform work to which the 44-hour overtime threshold applies and work to which a higher overtime threshold attaches are entitled to overtime pay for all hours worked in excess of 44 per week provided that at least 50% of their work week is spent performing work that attracts the 44-hour threshold.

While s. 22(9) does not address the situation of employees who perform work for which the regulations prescribe differing overtime thresholds, it is Program policy to apply the principle behind that subsection by analogy to their situation. Thus, such employees are considered by the Program to be entitled to overtime pay for all hours worked in excess of the lower threshold provided that at least 50% of their work week is spent performing work that attracts the lower threshold. For example, employees who perform work that attracts overtime after 50 or 60 hours (local cartage and highway transport respectively) as per O Reg 285/01, ss. 17 and 18 would be entitled to overtime for all hours in excess of 50 in a week if at least 50% of the hours worked in the week were in local cartage.

ESA Part VIII Section 22.1 - Averaging: Application for Approval

Averaging: Application for Approval – s. 22.1(1)

22.1(1) An employer may apply to the Director for an approval permitting the employer to average an employee's hours of work for the purpose of determining the employee's entitlement, if any, to overtime pay.

Under s. 22(2) of the *Employment Standards Act, 2000*, an employer may average an employee's hours of work for the purpose of determining the employee's overtime pay entitlement if certain conditions are met. One of those conditions is that the employer be in receipt of an approval under s. 22.1 that applies to the employee or to a class of employees that includes the employee.

Sections 22.1(1) to (19) describe the process for applying for an averaging approval.

Form – s. 22.1(2)

22.1(2) The application shall be in a form provided by the Director.

This section provides that an application for an averaging approval must be made in a form provided by the Director of Employment Standards.

The form, Hours of Work and Averaging Hours", is available on the Ministry of Labour's website.

Service of Application – s. 22.1(3)

22.1(3) The application shall be served on the Director,

(a) by being delivered to the Director's office on a day and at a time when it is open;

(b) by being mailed to the Director's office using a method of mail delivery that allows delivery to be verified; or

(c) by being sent to the Director's office by electronic transmission or by telephonic transmission of a facsimile.

This section sets out three different methods an employer may use to serve an averaging application form on the Director of Employment Standards. The three ways are:

1. By delivery to the Director's office when it is open.

For example, personal delivery by the employer or its representative or agent, or by private courier The Director's office will provide a receipt or other acknowledgement to verify that the application has been received.

2. By mail to the Director's office using a method of mail delivery that allows for the delivery to be verified.

Three Canada Post services falls within the meaning of verifiable mail - Registered Mail, Xpresspost and Priority Courier. Xpresspost and Priority Courier comply with the requirement of s. 22.1(3)(b) only if the signature upon delivery option is selected.

3. By electronic transmission or facsimile transmission.

To serve the application by electronic transmission, employers must complete the application on the Ministry of Labour's website and submit it electronically.

The application form provides the Director's address and facsimile number.

This section must be read in conjunction with s. 22.1(4), which sets out when service is deemed to be effective.

When Service Effective - ss. 22.1(4), (5)

22.1(4) Service under subsection (3) shall be deemed to be effected,

(a) in the case of service under clause (3)(a), on the day shown on a receipt or acknowledgment provided to the employer by the Director or his or her representative;

(b) in the case of service under clause (3)(b), on the day shown in the verification;

(c) in the case of service under clause (3)(c), on the day on which the electronic or telephonic transmission is made, subject to subsection (5).

(5) Service shall be deemed to be effected on the next day on which the Director's office is not closed, if the electronic or telephonic transmission is made,

(a) on a day on which the Director's office is closed; or

(b) after 5 p.m. on any day.

These sections set out when the service of the application is considered to have been effected. This is important for the purposes of the pending approval provisions in s. 22(2.1) which permit employers to begin averaging an employee's hours for overtime pay purposes (if certain conditions are met and even then only over a period of two weeks) if the application has been neither approved nor rejected within 30 days of the effective service date.

Under ss. 22.1(4) and (5), service is considered to be effected:

Delivery to the Director's Office

If the employer served the application by delivering it to the Director's office on a day and at a time when it is open as per s. 22.1(3)(a), service is deemed to be effective on the day indicated on the receipt or acknowledgement provided by the Director or their representative.

Mailing to the Director's Office

If the employer served the application by mailing it to the Director's officer using a method of mail delivery that allows the delivery to be verified as per s. 22.1(3)(b), service is deemed to be effective on the day shown in the verification.

Electronic Transmission

If the employer served the application by sending it to the Director's office by electronic transmission via the online filing system or by fax as per s. 22.1(3)(c), service is deemed to be effective on the day on which the electronic transmission or fax transmission is made. However, if the electronic transmission or fax transmission is made on a day that the Director's office is closed or after 5 p.m. on any day, the service is deemed to be effected on the next day that the office is open. Generally, the Director's office is closed on Saturdays, Sundays, the nine public holidays under the ESA 2000, as well as Easter Monday, the August Civic Holiday, and Remembrance Day. See the definition of public holidays in ESA Part I, s. 1.

Criteria – ss. 22.1(6), (7)

22.1(6) The Director may issue an approval to the employer if the Director is of the view that it would be appropriate to do so.

(7) In deciding whether it is appropriate to issue an approval to the employer, the Director may take into consideration any factors that he or she considers relevant, and, without restricting the generality of the foregoing, he or she may consider,

(a) any current or past contraventions of this Act or the regulations on the part of the employer;

(b) the health and safety of employees; and

(c) any prescribed factors.

Section 22.1(6) provides that the Director may issue an approval for an averaging application if they iare of the view that it would be appropriate to do so. Section 22.1(7) sets out some criteria that the Director may consider when deciding whether to issue an approval.

Section 22.1(7) allows to Director to consider any factor they consider relevant, and specifically lists three factors that may be taken into consideration:

1. Current or past contraventions of the ESA 2000 or its regulations on the part of the employer, including related employers under ESA Part III, s. 4.
    - This includes situations where the Director, in the course of considering an application, discovers that the employer was found to be in contravention of the ESA 2000.
    - The number of contraventions, the extent of the contraventions (e.g. the number of employees affected by the contraventions), the monetary amounts involved, and the Part of the ESA 2000 to which the contraventions relate are all be factors that may be taken into consideration.
2. The health and safety of employees.
    - This factor could include whether the health and safety of employees covered by the application may be put at risk, as well the past health and safety record of the employer.
3. Any prescribed factors.
    - At the time of writing, there were no other prescribed factors.

In addition to the factors listed above, the Director may consider any factor they consider relevant. Some factors that may be considered when the Director is asked to approve an averaging application under s. 22.1 include:

1. Whether information provided by the employer during the application process was false, inaccurate or misleading.
    - Any significant problem of this nature, unless quickly remedied, would most likely lead to a refusal.
2. Whether the employer co-operated with the Ministry's request for further information during the approval process, e.g. if the employer fails to respond to a request to provide work schedules.
    - A lack of co-operation, unless quickly remedied, would most likely lead to a refusal.
3. Whether the employer has also filed an application for approval for excess weekly hours.
    - If so, and the employer provided proposed schedules, does it appear that an employee will work a large number of excess hours without ever receiving overtime pay? If so, this will militate against the granting of an approval.
4. Whether there are any benefits to employees that accompany the proposed work schedule and hours of work scheme. For example:
    - Is there a lower threshold for overtime pay than what is required in the ESA 2000?
    - Do employees get paid for a set number of hours per week regardless of the number of hours that they work? For example, employees work 36 hours, but get paid for 40 hours of work?

- Does the proposed scheme provide for a more flexible work arrangement for employees? For example: provides employees with increased flexibility in their work schedules to allow for shift exchanges; employees have a four week work schedule that provides for longer hours in the first two weeks of the work cycle (e.g., 96 hours) and fewer hours in the second two weeks of the cycle (e.g., 72 hours)?
- Do employees receive extra compensation for working on the weekends or for working unscheduled hours?
    - Positive answers to any of the above questions may operate in favour of granting an approval.

5. The employer's reason for requesting overtime averaging is limited to a brief time frame.
    - This may operate in favour of granting an approval.

Please refer to Delegation of Powers for general principles of how the Director exercises their discretion under the ESA 2000.

Employees to Whom Approval Applies – ss. 22.1(8), (9)

22.1(8) An approval applies to the employee or class of employees specified in the approval, and applies to every employee in a specified class whether or not the employee was employed by the employer at the time the approval was issued.

(9) For greater certainty, all the employees of the employer may constitute a specified class.

These sections specify to which employees an approval applies. The approval applies to:

- If approval was given with respect to a particular employee (or employees), it applies to the employee(s) specified in the approval.
- If approval was given with respect to a specified class of employees, it applies to every employee in that class.

Section 22.1(9) provides that all of the employer's employees can be a specified class. Where approval is given to a specified class, the approval will apply to an employee in that class even if the employee was not an employee in that class when the approval was given. This means that where an employer already has an approval for a specified class of employees, it is not required to seek another approval if a new employee subsequently begins working in that class, assuming that all of the requirements for a valid averaging agreement are met.

Section 22.1(8) means that an employer will be allowed to average an employee's hours for the purposes of determining overtime pay entitlements without having to obtain another approval where, for example, the employee who provides the written agreement:

- Was not an employee of the employer at the time the approval was issued;
- Was an employee of the employer at the time the approval was issued but was working in a position the approval does not apply to; or
- Was an employee in the class of employees the approval applies to at the time the approval was issued, but at that time had not yet agreed to have their hours of work averaged.

Approval to Be Posted – ss. 22.1(10), (11)

22.1(10) An employer to whom an approval is issued shall post the approval or a copy of the approval in at least one conspicuous place in every workplace of the employer where the employee or the class of employees in respect of whom the approval applies works, so that it is likely to come to the attention of the employee or class of employees.

(11) The employer shall keep each approval or copy posted as set out in subsection (10) until the approval expires or is revoked, and shall then remove it.

This section requires employers who receive an approval to post the approval or a copy of the approval in the workplace. It must be posted in a place or places such that it is likely to come to the attention of the employee(s) named in the application. If the application is with respect to a class of employees, a copy of it must be posted in a place or places that that all of the employees in the class are likely to see it.

An issue arises as to how this requirement applies where the approval is issued to an employer whose employees are assigned to work in a client's workplace, for example, where the employer is a temporary help agency, security company, food service provider, or cleaning company. In this type of situation, the employer is required by s. 22.1(10) only to ensure that the approval is posted in its own workplace. If the employer has several branches where the employees to whom the approval applies attend, then the approval issued to the employer must be copied and posted in each branch. The employer is not required to post a copy of the approval at its clients' work sites.

Section 22.1(11) requires the employer to keep the approval posted until the day it expires or is revoked. This section further requires the employer to remove the approval upon the expiry or revocation of the approval.

Expiry – s. 22.1(12)

22.1(12) An approval under this section expires on the date on which the averaging agreement between the employer and the employee expires, or on the earlier date that the Director specifies in the approval.

This section establishes an expiry date for an averaging approval.

Generally, an approval will expire on the date specified in the agreement itself. Section 22(3) requires that agreements contain an expiry date, and sets limits on the duration of the agreement - see ESA part VIII, s. 22. Where the Director has specified an expiry date in the approval that is earlier than the expiry date in the agreement, the approval will expire on the earlier date. In this latter case, an employer who wishes to apply for another approval when the expiry date of the approval is approaching may not be required to obtain another agreement from the employee(s), since the agreement is still in effect.

Conditions – s. 22.1(13)

22.1(13) The Director may impose conditions on an approval.

This section authorizes the Director to impose conditions on an approval. See the discussion of s. 22.1(15) below, for the criteria the Director may consider when deciding whether to impose conditions.

Revocation - s. 22.1 (14)

22.1(14) The Director may revoke an approval on giving the employer such notice as the Director considers reasonable in the circumstances.

This section authorizes the Director to revoke an approval that was granted to an employer, upon giving the employer an amount of notice the Director considers to be reasonable in the circumstances. See the discussion of s. 22.1(15) below, for the criteria the Director may consider when deciding whether to revoke an approval.

Criteria – s. 22.1(15)

22.1(15) In deciding whether to impose conditions on or to revoke an approval, the Director may take into consideration any factors that he or she considers relevant, including but not limited to any factor that the Director could consider under subsection (7).

Section 22.1(15) provides that the Director may consider any factor they consider relevant when deciding whether to impose conditions on an approval or whether to revoke an approval. The three factors that are specifically listed in s. 22.1(7) as factors the Director can consider when determining whether to grant an approval are among those that may be taken into account when deciding whether to impose conditions on an approval or revoke an approval. See the discussion of s. 22.1(7) above.

Another factor that the Director may, depending on the circumstances, consider relevant when deciding whether to revoke an approval is if, after the approval is issued, an employment standards officer finds that some of the employees to whom the approval applies did not have valid agreements to average hours, either because, for example, they were coerced into signing the agreement, the agreements were ambiguous, or they did not sign agreements at all.

Where there is no valid averaging agreement between the employer and a particular employee, it would not be lawful for the employer to average that employee's hours of work, even if the employer has an approval that applies to a class that includes that employee. However, the fact that some of the employees who fall into the class do not have valid averaging agreements may cause the Director to decide to revoke the approval, thereby also making it unlawful for the employer to average the hours of employees who were in the class who do have valid averaging agreements.

Further Applications - s. 22.1(16)

22.1(16) For greater certainty, nothing in this section prevents an employer from applying for an approval after an earlier approval expires or is revoked or after an application is refused.

This provision clarifies that nothing in s. 22.1 prevents an employer from re-applying for an approval after:

- An earlier approval expires;
- An earlier approval was revoked; or
- An earlier application was refused.

Refusal to Approve - s. 22.1(17)

22.1(17) If the Director decides that it is inappropriate to issue an approval to the employer, the Director shall give notice to the employer that the application for approval has been refused.

This section requires the Director to provide notice to the employer if an application for approval has been refused. If notice of a refusal is given, employers will no longer - as of the date the notice is received - be allowed to rely on the pending approval provision in s. 22(2.1) to average an employee's hours, since one of the conditions that must be satisfied in order to use s. 22(2.1)(e) - "the employer has not received a notice that the application has been refused" - will no longer be met.

Termination of Old Approvals - s. 22.1(18)

22.1(18) Any approval of an averaging agreement granted by the Director under a regulation made under paragraph 7 of subsection 141(1) of this Act, as that paragraph read on February 28, 2005, ceases to have effect on March 1, 2005.

This section provides that certain approvals granted before March 1, 2005 expire on March 1, 2005, which is the date the amendments made by the *Employment Standards Amendment Act (Hours of Work and Other Matters), 2004* that require employers to obtain approval from the Director to engage in any averaging came into force.

The approvals that expire are those that were granted pursuant to O Reg 285/01, s. 30, which was subsequently revoked. Prior to its revocation, O Reg 285/01, s. 30 allowed an employer and employee to agree to average hours of work over a period of more than four weeks for the purpose of determining the employee's entitlement to overtime pay if the Director approved the agreement.

These approvals ceased to have effect on March 1, 2005 even though the approval may have contained an expiry date later than March 1, 2005.

An employer that had an approval under the revoked O Reg 285/01, s. 30 is required to apply for an approval under s. 22.1 in order to average its employees' hours on and after March 1, 2005. Applications may be made on or after December 9, 2004, the day that the *Employment Standards Amendment Act (Hours of Work and Other Matters), 2004* received Royal Assent – see s. 22.1(19).

Time for Applications – s. 22.1(19)

22.1(19) An application under subsection (1) may be made on or after on or after the day the *Employment Standards Amendment Act (Hours of Work and Other Matters), 2004* receives Royal Assent.

This section provides that applications for approval to average hours under s. 22.1 can be made on or after December 9, 2004, the day that the *Employment Standards Amendment Act (Hours of Work and Other Matters), 2004* received Royal Assent. Although any approval that is issued before March 1, 2005 can take effect no earlier than March 1, 2005, as that is the date the amendments to the ESA 2000 by the *Employment Standards Amendment Act (Hours of Work and Other Matters), 2004* came into force, this provision was intended to facilitate a seamless transition between the old rules and the new rules.

ESA Part VIII Section 22.2 - Delegation by Director

Delegation by Director - s. 22.2(1)

22.2(1) The Director may authorize an individual employed in the Ministry to exercise a power or to perform a duty conferred on the Director under section 22.1, either orally or in writing.

Section 22.2(1) sets out the authority of the Director of Employment Standards to delegate his or her powers under s. 22.1. The delegation may be made orally or in writing to anyone employed in the Ministry of Labour. In contrast, the Director's general delegation power in s. 88(3) of the *Employment Standards Act, 2000* extends only to employment standards officers.

Residual Powers - s. 22.2(2)

22.2(2) The Director may exercise a power conferred on the Director under section 22.1 even if he or she has delegated it to a person under subsection (1).

Section 22.2(2) preserves the Director's ability to exercise powers under s. 22.1 even if they have been delegated under subsection (1).

Duty re Policies - s. 22.2(3)

22.2(3) An individual authorized by the Director under subsection (1) shall follow any policies established by the Director under subsection 88(2).

Section 22.2(3) provides that an individual to whom the Director has delegated his or her s. 22.1 powers must follow any policies established by the Director under s. 88(2) respecting the interpretation, administration and enforcement of the Act.

ESA Part IX – Minimum Wage

The minimum wage establishes a wage floor to prevent employers from taking unfair advantage of employees with little or no bargaining power.

Historically, the minimum wage was adjusted periodically on an ad hoc basis to reflect declining purchasing power of low wage earners, loss of their position relative to wage gains of workers generally, and changing minimum wage rates in other jurisdictions. In considering adjustments to the minimum wage, a number of other factors were considered to be relevant, including the relationship between minimum wage income and income from social assistance, and an industry's ability to compete internationally and to create employment.

The *Stronger Workplaces for a Stronger Economy Act, 2014,* SO 2014, c10 amended the ESA 2000 to directly tie changes in the minimum wage rates to increases in inflation through a formula based on changes in the Consumer Price Index. The *Fair Workplaces Better Jobs Act, 2017*, SO 2017, c 22, subsequently amended the minimum wage provisions and increased minimum wage rates to set amounts on January 1, 2018 and again on January 1, 2019. Effective October 1, 2019, the minimum wage rates in effect immediately before October 1 resumed being adjusted annually by the formula based on changes in the Consumer Price Index. The *Build Ontario Act (Budget Measures), 2021,* SO 2021, c. 40 (BOABM) further amended the minimum wage provisions by increasing the minimum wage rates for classes of employees described in paragraph 1 of ss. 23.1(1) to set amounts on January 1, 2022. Effective October 1, 2022, the minimum wage rates in effect immediately before October 1 are to resume being adjusted annually by the formula based on changes in the Consumer Price Index.

O. Reg. 285/01 was also amended effective January 1, 2022 to increase the minimum wage rate applying to the “wilderness guides” class of employees. Effective October 1, 2022, the rate in effect immediately before October 1 will resume being adjusted annually by the formula based on changes in the Consumer Price Index.

The BOABM also eliminated a class of employees to whom a special minimum wage rate previously applied: employees who, as a regular part of their employment, serve liquor directly to customers, guests, members or patrons in premises for which a licence or permit has been issued under the *Liquor Licence Act* and who regularly receive tips or other gratuities as a part of their work. As of January 1, 2022, employees who previously fell into this "liquor server" category are entitled to receive the "general" minimum wage instead of a rate specific to the "liquor server" class of employees.

ESA Part IX Section 23 – Minimum Wage

Minimum Wage – s. 23(1)

23(1) An employer shall pay employees at least the minimum wage.

This provision requires that an employer pay employees at least the minimum wage. See the discussion under s. 23.1 "Determination of minimum wage" for information about the minimum wage rates.

Room or Board – s. 23(2)

23(2) If an employer provides room or board to an employee, the prescribed amount with respect to room or board shall be deemed to have been paid by the employer to the employee as wages.

This provision deems prescribed amounts with respect to room or board to be wages paid to the employee. The prescribed amounts are set out in the following regulations:

- General – O Reg 285/01, s 5(1);
- Domestic workers – O Reg 285/01, s. 19(2);
- Fruit, vegetable and tobacco harvesters – O Reg 285/01, s. 25(5).

Note that the prescribed amounts cannot be deemed to be wages unless the room/accommodation satisfies criteria set out in the regulation and the employee has received the meals or occupied the room. For a detailed discussion of these requirements, see O Reg 285/01.

Determining Compliance – s. 23(3)

23(3) Compliance with this Part shall be determined on a pay period basis.

This provision simply states that the assessment as to whether the minimum wage requirements have been met shall be conducted on a pay period basis. (Contrast this to the overtime provisions, where the threshold to determine whether overtime pay is owing is determined with reference to the work week – see ESA Part VIII, s. 22(1)). Section 23(4) elaborates on this by providing a formula to be used in the case of employees whose minimum wage rate is expressed as an hourly rate.)

Hourly Rate – s. 23(4)

23(4) Without restricting the generality of subsection (3), if the minimum wage applicable with respect to an employee is expressed as an hourly rate, the employer shall not be considered to have complied with this Part unless,

(a) when the amount of regular wages paid to the employee in the pay period is divided by the number of hours he or she worked in the pay period, other than hours for which the employee was entitled to receive overtime pay or premium pay, the quotient is at least equal to the minimum wage; and

(b) when the amount of overtime pay and premium pay paid to the employee in the pay period is divided by the number of hours worked in the pay period for which the employee was entitled to receive overtime pay or premium pay, the quotient is at least equal to one and one half times the minimum wage.

This section sets out two calculations to be used for determining whether the minimum wage requirements have been met for employees whose minimum wage is expressed as an hourly rate. The provision is not, therefore, relevant for hunting and fishing guides.

First calculation – s. 23(4)(a)

Divide the “regular wages” paid for the pay period by the number of hours worked in the pay period (other than those hours that attract overtime or premium pay). The resulting number ("the quotient") must meet or exceed the minimum wage.

Note:

- “Regular wages” excludes overtime pay, public holiday pay, premium pay, vacation pay, domestic or sexual violence leave pay, termination pay, severance pay and termination of assignment pay – see the definition of “regular wages” in ESA Part I, s. 1;
- “Overtime hours” and “premium pay” – see definitions in ESA Part I, s. 1.

Second calculation – s. 23(4)(b)

Divide the amount of overtime pay plus premium pay paid to the employee in the pay period by the number of hours worked during the pay period for which the employee is entitled to receive overtime pay or premium pay. The resulting number must meet or exceed one and one-half times the minimum wage.

Note that this second calculation is necessary only if there are overtime hours or hours that attract premium pay in the pay period.

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An employer may pay an employee on a basis other than time (e.g., piece rate); however, the amount paid must at least be equal to the minimum wage.

Note that ESA 2000 Part IX, s. 23.0.1 states that where the employee's pay period crosses over the effective date for a minimum wage rate increase, the calculations required by s. 23(4) are to be performed as if the pay period were in fact two separate pay periods.

ESA Part IX Section 23.0.1 – Change to Minimum Wage During Pay Period

23.0.1 If the minimum wage rate applicable to an employee changes during a pay period, the calculations required by subsection 23 (4) shall be performed as if the pay period were two

separate pay periods, the first consisting of the part falling before the day on which the change takes effect and the second consisting of the part falling on and after the day on which the change takes effect.

The *Fair Workplaces, Better Jobs Act, 2017*, SO 2017, c 22 added s. 23.0.1 to the ESA, effective January 1, 2018. The same provision previously existed in O Reg 285/01, s. 5.1.

This provision states that where the employee's pay period crosses over the effective date for a minimum wage rate increase, the calculations required by ESA Part IX, s. 23(4) are to be performed as if the pay period were in fact two separate pay periods.

The following example, based on the increase in the minimum wage on January 1, 2018 demonstrates how compliance with the minimum wage entitlement is determined when an employee's pay period straddled the date of a rate change:

The employee's pay period runs from Wednesday, December 27, 2017 to Tuesday, January 9, 2018 inclusive.

The employee's work week runs from Wednesday - Tuesday and the employee works eight hours per day Wednesday, Thursday and Monday of each work week except for the public holiday on Monday January 1, 2018.

Because the minimum wage rate applicable to the employee changed as of January 1, the pay period of December 27, 2017 to January 9, 2018 must be treated as consisting of two separate pay periods for purposes of the calculations required by ESA Part IX, s. 23(4).

The first period would be the period from December 27 to December 31 and the second period would be the period from January 1 to January 9. As there are no overtime pay or premium pay in this example, the calculations would be made as per s. 23(4)(a).

As a result, in order for the employer to show compliance with the minimum wage entitlements:

- The pay for the hours worked in the first period when divided by the hours worked in that period would have to equal at least $11.60; and
- The pay for the hours worked in the second period, when divided by the hours worked in that period would have to equal at least $14.00.
    - Hours worked –December 27 – December 31 = 16 hours @ $11.60/hour
    - Hours worked January 1 – January 9 = 24 hours @ $14.00/hour

Refer to ESA Part IX, s. 23(4) for further explanation.

ESA Part IX Section 23.1 – Determination of Minimum Wage

Determination of Minimum Wage – s. 23.1(1)

23.1(1) The minimum wage is the following:

1. On or after January 1, 2022 but before October 1, 2022, the amount set out below for the following classes of employees:

i. For employees who are students under 18 years of age, if the student's weekly hours do not exceed 28 hours or if the student is employed during a school holiday, $14.10 per hour.

ii. For the services of hunting and fishing guides, $75.00 for less than five consecutive hours in a day and $150.05 for five or more hours in a day, whether or not the hours are consecutive.

iii. For employees who are homeworkers, $16.50 per hour.

iv. For any other employees not listed in subparagraphs i to iii, $15.00 per hour.

2. From October 1, 2022 onwards, the amount determined under subsection (4).

Subsection 23.1(1) was amended by the *Build Ontario Act (Budget Measures), 2021* effective January 1, 2022. The rates for employees in classes (i) to (iv) were increased. The special minimum wage class that applied to employees who serve liquor directly to customers, guests, members or patrons in premises for which a licence or permit had been issued under the *Liquor Licence* Act and who regularly received tips or other gratuities from their work was eliminated. As such, employees who previously fell within that class of employees are entitled to the "general" minimum wage rate as set out in subparagraph (iv) effective January 1, 2022. The rates described in section 23.1 are in effect between January 1, 2022 and September 30, 2022. Beginning on October 1, 2022, the rates will be determined in accordance with the formula based on the Consumer Price Index set out in subsection (4).

Student Minimum Wage

The special student minimum wage in s. 23.1(1)(i) applies to a student under the age of 18 years who does not work more than 28 hours per week while attending school, or who is employed while on a school holiday. A school holiday includes summer holidays and breaks during the academic year, e.g., Christmas holidays, March break, etc.

This special rate was introduced to facilitate the employment of younger persons, recognizing their competitive disadvantage in the job market relative to older students who generally have more work experience and may be perceived by employers as more productive.

The term student is not defined in the ESA 2000. The Program considers a student to be a person who is in attendance at an elementary, secondary or post-secondary institution. In order to be paid the student minimum wage, the student must be under the age of 18 years.

Under s. 21 of the *Education Act,* RSO 1990, c E.2, generally speaking, every child is required to attend an elementary or secondary school from the age of six until attaining the age of 18 years. There are some exceptions.

If an employee is neither attending an educational institution nor on a school holiday, the employer will be liable for the general minimum wage even if the employee is under the age of eighteen.

The onus is on the employer seeking to pay the student minimum wage rate to confirm that the youth is either in attendance at an educational institution or on a school holiday.

Note that students who are employed as homeworkers are entitled to the higher homeworkers' minimum wage in accordance with s. 23.1(1.1).

Hunting or Fishing Guide Minimum Wage

The hunting or fishing guide minimum wage rate in s. 23.1(1)(ii) must be paid by employers who employ guides for their guests (such as camp or lodge proprietors) or who carry on a guide service. This rate is not expressed as an hourly rate.

Homeworkers' Minimum Wage

The minimum wage for employees who are homeworkers in s. 23.1(1)(iii) has historically been set at 110 per cent of the general minimum wage. The rationale for a higher rate is that the homeworker has certain overhead costs (e.g., heat, electricity, taxes) in connection with their employment that other employees do not have. Effective October 1, 2015 and annually thereafter, it is expressed as a dollar amount rather than a percentage of the general minimum wage rate, although at the time of writing, the dollar amount was in fact 110% of the general minimum wage rate.

General Minimum Wage

The general minimum wage rate in s. 23.1(1)(iv) applies to any other employee not falling within one of the classes described in subparagraphs i-iii of paragraph 1 of s. 23.1(1) or section 6 of O. Reg. 285/01 (the minimum wage for wilderness guides) and who is not otherwise exempted from coverage of ESA Part IX, Minimum Wage.

Minimum Wage for Commission Salespersons and Flat Rate Mechanics

Commission Salespersons

Commission salespersons who normally make their sales away from the employer's premises (other than route salespersons) are exempt from the minimum wage provisions pursuant to O Reg 285/01, s. 2(1)(h). However, commission salespersons who normally make their sales at the employer's premises ("inside salespersons") or who are route salespersons are covered by the minimum wage provisions. Car, furniture and appliance salespersons would typically be inside salespersons. Although note that there are special rules regarding commission earnings for car salespersons – see O Reg 285/01, s. 28 for a further discussion.

Some inside salespersons may receive a draw against commissions. In such a case, if the draw equals or exceeds the minimum wage for the pay period in question, the minimum wage requirement in the ESA 2000 is met.

In some cases, salespersons may be employed under arrangements, whereby, if the draws exceed the commissions actually earned, the employer may carry forward the negative balance and make an adjustment when calculating future commissions owing. In other words, the draw (or some portion thereof) is a negative balance carried forward for the purposes of calculating the employee's earnings in subsequent pay periods. A negative balance may continue to be carried forward over any number of pay periods but the employee must be paid the equivalent of at least minimum wage in respect of all hours worked in each and every pay period, whether through draw or a combination of draw and commission earnings. Applying a negative balance with the result that the employee's gross wages amount to something less than minimum wage for all hours actually worked in any pay period would contravene the minimum wage provisions. Note however that statutory or other authorized deductions (for example) that then reduce the *net pay* to something less than minimum wage does not result in a contravention of the minimum wage provisions. See the discussion in ESA Part V, ss. 13(1) and (3). If the employer pays straight commission with no advance or draw, then the commission must equal at least the minimum wage for the pay period over which the commissions are calculated; if it does not, the employer must top up the employee's earnings so that they receive at least the minimum wage.

Flat Rate Mechanics

Enquiries arise occasionally on the application of the minimum wage provisions to motor vehicle mechanics and body repair persons who are paid on a flat rate or incentive system. In a flat rate shop, every job is rated as taking a certain number of hours to perform and the mechanic is paid a “book” rate, i.e., the employee's hourly rate is multiplied by the hours rated for the job rather than their actual hours. As an example, a brake reline is rated as a four-hour job, and the mechanic's book rate is $16 per hour. The mechanic will be paid $64, even if the job takes the employee less than four or more than four hours to complete. This is acceptable so long as minimum wage is paid on the basis of actual time worked and all overtime hours (hours worked in excess of 44) are compensated at a minimum of 1.5 times the mechanic's actual regular rate, which is not the same as the flat rate. For a discussion on how to calculate overtime entitlements, see ESA Part VIII, s. 22.

Generally, in a flat-rate remuneration system, it is a condition of employment that the employee rectify their own faulty work without further pay. This is not a violation of the ESA 2000, so long as the minimum wage and overtime provisions are not violated based on actual time worked. If for some reason, another mechanic makes the required changes, the payment for the entire job is credited to the second mechanic. Where this occurs as part of the employment contract, the transfer of credits is considered as part of the reconciliation of wages due and not a prohibited set-off or deduction. However, the minimum wage and overtime provisions still apply with respect to the actual hours of work the first mechanic spent on the vehicle.

It is essential in a flat rate system that the employer's records reflect both the flat rate paid and the actual hours worked: it is the actual hours worked that must be used to calculate the employee's regular rate and overtime entitlements including any time the employee spends rectifying their own faulty work.

Liquor Servers' Minimum Wage - REPEALED

Effective January 1, 2022, the *Build Ontario Act (Budget Measures), 2021* eliminated a class of employees to whom a special minimum wage rate previously applied: employees who, as a regular part of their employment, serve liquor directly to customers, guests, members or patrons in premises for which a licence or permit has been issued under the *Liquor Licence Act* and who regularly receive tips or other gratuities from their work. As such, there is no longer a special minimum wage rate that applies to “liquor servers”. However, employees may still have a minimum wage complaint that arose when the “liquor servers’” minimum wage rate was in effect. For this reason, the Program has retained the following discussion as part of this publication.

Until January 1, 2022, a special liquor servers' minimum wage rate applied to employees who directly serve liquor to a customer, guest, member or patron in premises where a licence or permit had been issued under the *Liquor Licence Act*, RSO 1990, c L-19, and who regularly receive tips or other gratuities from their work. The minimum wage rate for this class of employees over the last few years is as follows:

- From January 1, 2018 to September 30, 2020: $12.20 per hour
- From October 1, 2020 to September 30, 2021: $12.45 per hour
- From October 1, 2021 to December 31, 2021: $12.55 per hour
- Beginning on January 1, 2022, this special minimum wage rate no longer applies

The *Fair Workplaces, Better Jobs Act, 2017* amended the subparagraph describing this class of employees to add the condition that liquor servers regularly receive tips or other gratuities in order for this rate to apply effective January 1, 2018.

Liquor service must also be a regular part of the employee's duties; an employee who only occasionally serves liquor is entitled to the general minimum wage. An earlier regulation did not include the regular service requirement, which led the Ontario Divisional Court in *Re Fisherman's Wharf Ltd. and*

Wehrenberg to hold that an employer did not violate the Act by paying the liquor server minimum wage to a busperson who was not employed to serve liquor but who occasionally took liquor to tables to assist a waiter. However, under the wording of the current provision, a busperson in those circumstances would be entitled to be paid the general minimum wage.

Employees who serve liquor as a regular part of their employment are entitled only to the liquor servers' minimum wage for all hours worked within that employment relationship. The ESA 2000 does not require that employees be paid the general minimum wage rate when liquor is not being served and the liquor server rate when liquor is being served. Rather, the question to ask is whether an employee serves liquor directly to customers as a regular part of their employment and regularly receives tips or gratuities from their work. If so, that employee is entitled only to the liquor servers' minimum wage for all hours worked.

Note that tips or other gratuities, as defined in ESA Part I, s. 1, are not wages, as they are specifically excluded from that definition in ESA Part I, s. 1. As a consequence, they are not considered in determining whether or not an employee has been paid minimum wage. However, as noted above, whether the employee regularly receives tips or other gratuities from their work must be taken into consideration in determining whether the liquor server minimum wage rate applies to the employee. If the employee does not regularly receive tips or other gratuities from their work, the employee would be entitled to the general minimum wage rate for all hours worked.

Student Homeworker – s. 23.1(1.1)

23.1(1.1) If an employee falls within both subparagraphs 1 i and iii of subsection (1), the employer shall pay the employee not less than the minimum wage for a homeworker.

Subsection 23.1(1.1) was amended by the *Build Ontario Act (Budget Measures), 2021* effective January 1, 2022 to reflect the renumbering of the subparagraphs in subsection (1) due to the elimination of the liquor servers' minimum wage rate.

Section 23.1(1.1) provides that where an employee is both a homeworker and a student under 18 years of age of age whose weekly hours do not exceed 28 hours or if the student is employed during a school holiday, the homeworkers' minimum wage rate applies to that employee.

Exception – s. 23.1(2)

23.1(2) If a class of employees that would otherwise be in the class described in subparagraph 1 iv of subsection (1) is prescribed and a minimum wage for the class is also prescribed,

(a) subsection (1) does not apply; and

(b) the minimum wage for the class is the minimum wage prescribed for it.

Subsection 23.1(2) was amended by the *Build Ontario Act (Budget Measures), 2021* effective January 1, 2022 to reflect the renumbering of the subparagraphs in subsection (1) due to the elimination of the liquor servers' minimum wage rate.

This provision is an exception to s. 23.1(1). It permits a minimum wage to be prescribed by regulation for any new class of prescribed employees who would otherwise fall within the class described in subparagraph 1 v. In other words, a new class of employees may be prescribed out of the class otherwise entitled to receive the general minimum wage and a minimum wage may be prescribed for that new class.

O Reg 285/01 s. 6(1) has prescribed wilderness guides as a class of employees for the purposes of s. 23.1(2). See the discussion of that provision for additional information.

Same – s. 23.1(3)

23.1(3) If a class of employees and a minimum wage for the class are prescribed under subsection (2), subsections (4) to (6) apply as if the class and the minimum wage were a class and a minimum wage under subsection (1).

Section 23.1(3) provides that if a new class of employees is prescribed under s. 23.1(2) and a minimum wage is prescribed for that class, the minimum wage for that class will be adjusted annually in accordance with ss. 23.1(4) to (6). In other words, once a minimum wage is prescribed for any new class of employees, it will thereafter be subject to adjustments using the same formula that applies to the classes of employees set out in s. 23.1(1).

Since wilderness guides have been prescribed as a class under s. 23.1(2), this provision establishes that the wilderness guide minimum wage will be adjusted annually in accordance with ss. 23.1(4) to (6).

Annual Adjustment – s. 23.1(4)

23.1(4) On October 1 of every year starting in 2022, the minimum wage that applied to a class of employees immediately before October 1 shall be adjusted as follows:

Previous wage x (Index A/Index B) = Adjusted wage

in which,

"Previous wage" is the minimum wage that applied immediately before October 1 of the year,

"Index A" is the Consumer Price Index for the previous calendar year,

"Index B" is the Consumer Price Index for the calendar year immediately preceding the calendar year mentioned in the description of "Index A", and

"adjusted wage" is the new minimum wage.

Subsection 23.1(4) was amended by the *Build Ontario Act (Budget Measures), 2021* effective January 1, 2022 to establish that the minimum wage rates in effect immediately before October 1 in each year are to be adjusted on October 1 of that year starting in 2022.

The provision sets out a formula based on changes in the Consumer Price Index, which reflects inflation. Consumer Price Index is defined in s. 23.1(12) – see below.

The way in which the minimum wage rates are adjusted under s. 23.1(4) can be illustrated with the following example using the general minimum wage rate of $15 per hour that came into effect on January 1, 2022. **Note that the changes in the CPI shown in the example are not the actual figures and are used merely for purposes of illustration.**

- The formula is: Previous Wage x (Index A / Index B) = Adjusted Wage.
- Previous Wage: the general minimum wage that applied immediately before October 1, 2022, was $15 an hour
- Index A: the CPI for the previous calendar year, which will be the CPI for 2021.

    - In this example, assume the CPI for 2021 is 105
- Index B: the CPI for the calendar year preceding the year referred to in Index A, will be the CPI for 2020.
    - In this example, assume the CPI is 100
- Therefore, the formula that would be applied in this example would be:
    - $15 x (105 divided by 100), which is
    - $15 x 1.05, which equals
    - $15.75

Thus, using the fictional CPI numbers the general minimum wage rate that would come into effect on October 1, 2022 would be $ 15.75 an hour.

Subsection 23.1(4) is subject to s. 23.1(5) and (6). If the adjusted wage is an amount that is not a multiple of five cents, the amount will be rounded up or down to the nearest amount that is a multiple of five cents. In addition, if the applying the formula in s. 23.1(4) would result in a decrease, no adjustment will be made. See ss. 23.1(5) and (6) below.

Rounding – s. 23.1(5)

23.1(5) If the adjustment required by subsection (4) would result in an amount that is not a multiple of 5 cents, the amount shall be rounded up or down to the nearest amount that is a multiple of 5 cents.

If applying the formula in s. 23.1(4) results in an amount that is not a multiple of five cents, the amount will be rounded up or down to the nearest amount that is a multiple of five cents.

For example, if the calculation resulted in an amount of $16.04, the new minimum wage rate will be $16.05.

Exception Where Decrease – s. 23.1(6)

23.1(6) If the adjustment otherwise required by subsection (4) would result in a decrease in the minimum wage, no adjustment shall be made.

This subsection provides that if applying the formula in s. 23.1(4) would result in a decrease in the minimum wage, no adjustment is to be made. Thus, if the provincial economy went through a deflationary period, such that the change in the Consumer Price Index was negative, the minimum wage would remain unchanged.

Publication of Minimum Wage – s. 23.1(7)

23.1(7) The Minister shall, not later than April 1 of every year after 2021, publish on a website of the Government of Ontario the minimum wages that are to apply starting on October 1 of that year.

This provision requires the Minister to publish on a government website the minimum wage rates that will be in effect on October 1 of each year by April 1 of that year, beginning in 2021.

Subsection 23.1(7) was amended by the *Build Ontario Act (Budget Measures), 2021* effective January 1, 2022 to establish that the Minister shall publish the rates that are to apply starting on October 1 no later than April 1 of every year after 2021.

Same – s. 23.1(8) – REPEALED

Same – s. 23.1(9)

23.1(9) If, after the Minister publishes the minimum wages that are to apply starting on October 1 of a year, a minimum wage is prescribed under subsection (2) for a prescribed class of employees, the Minister shall promptly publish the new wage that will apply to that class starting on October 1 of the applicable year as a result of the wage having been prescribed.

Paragraph 2.0.1 of ESA Part XXVII, s. 141(1) provides that a regulation may be made that in effect carves out a class of employees who would otherwise fall within the general class in subparagraph 1v of s. 23.1(1), and to prescribe a minimum wage for that class that is different from the minimum wage that applies to the general class. This leaves open the possibility that such a regulation might be made in the interval between the date that the Minister publishes the minimum wage rates that are to come into effect on October 1 (which must be no later than April 1) and October 1. In that event, the rate that was published for the general class will not apply to the new class that was carved out of the general class. To address this possibility, s. 23.1(9) requires the Minister to promptly publish the rate that will apply to the new class as of October 1.

Review – s. 23.1(10) – REPEALED

Same – s. 23.1(11) – REPEALED

Definition – s. 23.1(12)

23.1(12) In this section,

"Consumer Price Index" means the Consumer Price Index for Ontario (all items) published by Statistics Canada under the *Statistics Act* (Canada).

This provision defines Consumer Price Index, a term that appears in the formula for making annual adjustments in the minimum wage rates in s. 23.1(4). Note that Statistics Canada publishes a number of indices for measuring inflation; the one used for purposes of s. 23.1(4) is the index for Ontario (not the national index) that considers all items (i.e., without excluding any goods or services in the basket of goods and services that Statistics Canada uses for measurement purposes).

ESA Part X - Public Holidays

Part X provides for an employee's right (subject to specified qualifying conditions) to:

1. A day off with public holiday pay on a public holiday (or on a day that has been substituted for the public holiday); **or**

2. If the employee agrees to or is required to work on the holiday, either public holiday pay plus a premium rate of pay, or another day off with public holiday pay.

The labour arbitration case of *U.A.W., Local 569 v. Sealed Power Corp. of Canada* (1971), 22 LAC 371 (Ont Arb Bd) spoke of three rationales for the public holiday entitlement:

1. The facilitation of religious or social activity:
2. Relief from the everyday pressures of a job; and
3. The payment of an entitlement earned through daily work.

ESA Part X Section 24 – Public Holiday Pay

Public Holiday Pay – s. 24(1)

24(1) An employee's public holiday pay for a given public holiday shall be equal to,

(a) the total amount of regular wages earned and vacation pay payable to the employee in the four work weeks before the work week in which the public holiday occurred, divided by 20; or

(b) if some other manner of calculation is prescribed, the amount determined using that manner of calculation.

Section 24(1) establishes how public holiday pay is to be calculated for the purposes of Part X of the ESA 2000.

Paragraph (a) provides for what is commonly referred to as a "pro-rating" formula for public holiday pay, based on a five-day work week (20 divided by four work weeks). At the time of writing, no other manner of calculation is prescribed pursuant to paragraph (b).

There were several significant changes to the public holiday pay provisions in 2018. See the text that is in red at the end of this section for details of the changes, information on which provisions applied at which points in time, and for the interpretation of the former provisions.

24(1) An employee's public holiday pay for a given public holiday shall be equal to,

(a) the total amount of regular wages earned and vacation pay payable to the employee in the four work weeks before the work week in which the public holiday occurred, divided by 20;

The amount of public holiday pay owing is calculated as follows:

1. The amount of regular wages as defined in ESA Part I, s. 1 earned by the employee in the four work weeks before the work week in which the public holiday occurs;

   R**egular wages** is defined in ESA Part I, s. 1 as follows:

   "regular wages" means wages other than overtime pay, public holiday pay, premium pay, vacation pay, domestic or sexual violence leave pay, termination pay, severance pay and termination of assignment pay and entitlements under a provision of an employee's contract of employment that under subsection 5(2) prevail over Part VIII, Part X, Part XI, section 49.7, Part XV or section 74.10.1.

   Work week is defined in ESA Part I, s. 1 as follows:

"Work week" means,

(a) a recurring period of seven consecutive days selected by the employer for the purpose of scheduling work, or

(b) if the employer has not selected such a period, a recurring period of seven consecutive days beginning on Sunday and ending on Saturday.

This means that the phrase in s. 24(1) that sets out the period over which the calculation of public holiday pay is to be performed - the four work weeks before the work week in which the public holiday occurred - does not necessarily refer to the four calendar weeks immediately preceding the public holiday.

For example, an employer has selected a work week of Monday to Sunday and the public holiday falls on a Thursday. The four work weeks with respect to which the public holiday pay calculation is performed will go backwards four weeks starting on the first Sunday (the last day of the employer's work week) before the public holiday:

- Employer's work week runs from Monday to Sunday.
- Public holiday falls on Thursday, December 25.
- Week 1: Monday, December 15 – Sunday, December 21
- Week 2: Monday, December 8 – Sunday, December 14
- Week 3: Monday, December 1 – Sunday, December 7
- Week 4: Monday, November 24 – Sunday, November 30

In this example, the regular wages earned and vacation pay payable to the employee in the four work weeks identified will be used in the calculation.

plus

2. The amount of vacation pay payable to the employee with respect to the four work weeks before the work week in which the public holiday occurs.

   Vacation pay can become payable in the following circumstances:

   - Vacation pay that is payable to an employee before they take their vacation, pursuant to ESA Part XI, s. 36(1);
   - Vacation pay that is payable to an employee on or before the pay day for the period in which the vacation falls, where the employee is paid by direct deposit or where the employee does not take vacation in complete weeks, pursuant to ESA Part XI, s. 36(2);
   - Vacation pay that is payable to an employee as it accrues pursuant to ESA Part XI, s. 36(3); and
   - Vacation pay that is payable at a time agreed to in writing by the employee pursuant to ESA Part XI, s. 36(4).

3. Take the total of the amounts obtained in 1. and 2., and divide that sum by 20.

In Munro Ltd. v Director of Employment Standards, 2015 CanLII 37329 (ON LRB), the Board determined that the employer must take into account the vacation pay **earned** by an employee in reference to their regular wages in the four-week period before the public holiday when calculating public holiday pay. This decision is contrary to Program policy, which is that "vacation pay payable" means vacation pay that is **payable with respect to** the relevant four work week period, as described elsewhere in this section. See the examples below in particular

Which Period to Use for Substitute Holiday Calculation

Note that in certain circumstances, employees are entitled to a substitute holiday and to be paid public holiday pay as if the substitute day were a public holiday – see for example ESA Part X, s. 27(2)(a). This means that when calculating the amount of public holiday pay owing for a substitute day, the period over which the calculation is performed is the four work weeks before the work week in which the substitute day falls, not the four work weeks before the work week in which the actual public holiday fell.

Sale of Business in calculation period

An issue may arise as to the wages that are to be included where there has been a sale of a business shortly before a public holiday and an employee of the seller is hired by the purchaser. Specifically, the question is whether the calculation includes wages that were earned by the employee from the seller. For example, the four work weeks prior to Canada Day over which the calculation of public holiday pay is performed is, for the sake of this example, June 1 to June 28. Employee ZZ had been working for Employer A. On June 25, Employer A's business was sold to Employer B. Employer B hired Employee ZZ, effective June 25. When determining Employer B's public holiday pay obligations towards Employee ZZ for Canada Day, does one include the wages that were earned by Employee ZZ under Employer A from June 1 to June 24? It is Program policy that the answer is yes. To say otherwise would undermine the general intent behind the continuity of employment provisions found in ESA Part IV, s. 9. Similarly, because s. 9 states that there is deemed to not be a termination or severance in circumstances such as the one in this example, the situation can be viewed as being the same employment relationship. Since s. 24(1)(a) refers to regular wages that are "earned" by the employee and vacation pay "payable" to the employee, all wages earned and vacation pay payable within that employment relationship are included, i.e., including those from the seller.

Examples of Calculating Public Holiday Pay

Example 1:

Employee:

- Works eight hours a day, five days a week, earning $200/day;
- Receives vacation pay when the vacation is taken (as opposed to on each pay cheque as it accrues, or at some other time);
- Was not on vacation during the four work weeks preceding the work week in which the public holiday occurred;
- Was not otherwise absent from work during those four work weeks.

To calculate public holiday pay:

1. Regular wages earned by the employee in the four work weeks before the work week in which the public holiday occurred: $4000 ($200/day times 20 days worked)

plus

2. Vacation pay payable to the employee with respect to the four work weeks before the work week in which the public holiday occurred: $0

   = $4,000

3. $4000 divided by 20 = $200 public holiday pay

Example 2 – Employee takes a paid vacation during the four work weeks prior to public holiday

Employee:

- Works eight hours a day, five days a week, earning $200/day;
- Receives vacation pay when the vacation is taken (as opposed to on each pay cheque as it accrues, or at some other time);
- Was on a vacation for two of the four work weeks preceding the work week in which the public holiday occurred, for which the employee was entitled to receive $2000;
- Was not absent from work on any other day during those four work weeks.

To calculate public holiday pay:

1. Regular wages earned by the employee in the four work weeks before the work week in which the public holiday occurred: $2000 ($200/day times 10 days worked)

plus

2. Vacation pay payable to the employee with respect to the four work weeks before the work week in which the public holiday occurred: $2000

   = $4000

3. $4000 divided by 20 = $200 public holiday pay

Example 3 – Employee absent because of illness

Employee:

- Works eight hours a day, five days a week, earning $200/day;
- Receives vacation pay when the vacation is taken;
- Was not on vacation during the four work weeks prior to the public holiday;
- Was absent from work due to illness for two days during the four work weeks prior to the public holiday.

To calculate public holiday pay:

1. Regular wages earned by the employee in the four work weeks before the work week in which the public holiday occurred: $3600 ($200/day times 18 days worked).

- Note: the figure of $3600 would not increase if the employee received sick benefits while off work due to illness - the definition of wages in s. 1 specifically excludes benefit plan payments.

plus

2. Vacation pay payable to the employee with respect to the four work weeks before the work week in which the public holiday occurred: $0

   = $3600

3. $3600 divided by 20 = $180 public holiday pay

Example 4 – Employee gets vacation pay as it accrues

4A – Employee not on vacation during four work weeks prior to public holiday

Employee:

- Works eight hours a day, five days a week, earning $200/day;
- Receives vacation pay on each pay cheque as it accrues, pursuant to ESA Part XI, s. 36(3);
- Was not on a vacation during four work weeks prior to the work week in which the public holiday occurred;
- Was not otherwise absent from work for any other reason during those four work weeks.

To calculate public holiday pay:

1. Regular wages earned by the employee in the four work weeks before the work week in which the public holiday occurred: $4000 ($200/day times 20 days worked)

plus

2. Vacation pay payable to the employee with respect to the four work weeks before the work week in which the public holiday occurred: assuming the employee has fewer than five years of employment – $160 (4% times $4000)

   = $4160

3. $4160 divided by 20 = $208 public holiday pay

4B – Employee is on unpaid vacation during four work weeks prior to public holiday

Employee:

- Works eight hours a day, five days a week, earning $200/day;
- Receives vacation pay on each pay cheque as it accrues, pursuant to ESA Part XI, s. 36(3);
- Was on a vacation for two of the four work weeks prior to the work week in which the public holiday occurred;
- Was not otherwise absent from work for any other reason during those four work weeks.

To calculate public holiday pay:

1. Regular wages earned by the employee in the four work weeks before the work week in which the public holiday occurred: $2000 ($200/day times 10 days worked)

plus

2. Vacation pay payable to the employee with respect to the four work weeks before the work week in which the public holiday occurred: assuming the employee has fewer than five years of employment – $80 (4% of the wages earned during the 10 days the employee was at work)

   = $2080

3. $2080 divided by 20 = $104 public holiday pay

Example 5 – Employee works less than five days a week

5A – Part-time employee

Employee:

- Works three days a week, five hours a day, earning $80/day;
- Receives vacation pay when vacation is taken;
- Was not on a vacation during four work weeks prior to the work week in which the public holiday occurred;
- Was not otherwise absent from work for any other reason during those four work weeks.

To calculate public holiday pay:

1. Regular wages earned by the employee in the four work weeks before the work week in which the public holiday occurred: $960 ($80/day times 12 days worked)

plus

2. Vacation pay payable to the employee with respect to the four work weeks before the work week in which the public holiday occurred: $0

   = $960

3. $960 divided by 20 = $48 public holiday pay

5B – Employee on compressed work week

Employee:

- Works 11 hours a day, 4 days a week, earning $220/ day;
- Receives vacation pay when vacation is taken;
- Was not on vacation during the four work weeks prior to the work week in which the public holiday occurred;
- Was not otherwise absent from work during those four work weeks.

To calculate public holiday pay:

1. Regular wages earned by the employee in the four work weeks before the work week in which the public holiday occurred: $3520 ($220 times 16 days worked)

plus

2. Vacation pay payable to the employee with respect to the four work weeks before the work week in which the public holiday occurred: $0

   = $3520

3. $3520 divided by 20 = $176 public holiday pay

Note that even though this employee is full-time, in the sense that they work full-time hours, the amount of public holiday pay owing will be a pro-rated amount of their regular daily wage because they work less than five days a week.

Example 6 – Employee works overtime

Only regular wages and vacation pay are included in the calculation of public holiday pay. Regular wages is defined in ESA Part I, s. 1 to exclude overtime pay. Overtime pay as per Part VIII, s. 22(1) is not just the extra premium of .5 times the regular rate for each hour over the prescribed overtime threshold, but is the entire 1.5 times the regular rate for each hour worked over the prescribed overtime threshold. This means that all payment for hours worked over the prescribed threshold is excluded from the calculation.

Employee:

- Earns $20 an hour;
- Has agreed in writing to work 50 hours per week (10 hours/day, 5 days/week), and works 50 hours per week in each of the four work weeks prior to the work week in which the public holiday falls;
- Receives vacation pay on each pay cheque as it accrues;
- Was not on vacation or otherwise absent from work during the four work weeks prior to the work week in which the public holiday fell.

To calculate public holiday pay:

1. Regular wages earned by the employee in the four work weeks before the work week in which the public holiday fell: $3520 ($20/hour x 44 hours/week x 4 weeks) – note that all pay for hours worked in excess of 44 are excluded;

plus

2. Vacation pay payable to the employee with respect to the four work weeks before the work week in which the public holiday fell: assuming the employee has fewer than five years of employment - $169.60 [($3520 of regular wages + $720 of overtime pay) x 4%]

   - Note: vacation pay is payable on ALL wages (except for vacation pay), including overtime pay, pursuant to ESA Part XI, s. 35.2.

   = $3869.60

3. $3869.60 divided by 20 = $184.48 public holiday pay

Note that although this employee's average daily wage (not including vacation pay) is $212 [(44 hours x $20) + (6 hours x $30) divided by 5], the employee is entitled only to $184.48 public holiday pay because overtime pay is excluded from the public holiday pay calculation.

Example 7 – Employee works overtime with overtime averaging agreement

7A – Only hours that attract overtime pay are excluded from the public holiday pay calculation

If an employee is subject to an averaging agreement or arrangement, the employee may exceed the weekly overtime threshold in a particular week, but might not receive overtime pay for those hours because of the averaging arrangement. In this case, wages for all of the hours worked will be included in the calculation.

Employee:

- Earns $20 an hour;
- Has agreed in writing to average the hours worked over four weeks for the purpose of determining the employee's overtime pay entitlement pursuant to ESA Part VIII, s. 22(2);
- In the four work weeks prior to the work week in which the public holiday occurred, the employee worked:
    - Week 1: 35 hours
    - Week 2: 48 hours
    - Week 3: 35 hours
    - Week 4: 48 hours
    - Total hours worked: 166
    - Average hours worked: 41.5 per work week
    - Average overtime hours worked: 0
    - Overtime pay: $0
- Receives vacation pay when vacation is taken;
- Was not on vacation or otherwise absent from work during the four work weeks prior to the week in which the public holiday fell.

To calculate public holiday pay:

1. Regular wages earned by the employee in the four work weeks before the work week in which the public holiday occurred: $3320 ($20/hour x 166 hours)
    - Note: pay for hours worked in excess of 44 per week in weeks 2 and 4 are included because they were not compensated as overtime hours due to the averaging agreement.

plus

2. Vacation pay payable to the employee in the four work weeks before the work week in which the public holiday occurred: $0

    = $3320

3. $3320 divided by 20 = $166 public holiday pay

7B – Despite an averaging agreement, an employee may still earn overtime pay.

As in example 7A, those overtime wages will be excluded from the calculation of public holiday pay.

Employee:

- Earns $20 an hour;
- Has agreed in writing to average the hours worked over four weeks for the purpose of determining the employee's overtime pay entitlement;
- In the four work weeks prior to the work week in which the public holiday occurred, the employee worked:
    - Week 1: 60 hours
    - Week 2: 30 hours
    - Week 3: 60 hours
    - Week 4: 30 hours
    - Total hours worked: 180
    - Average hours worked: 45 per work week
    - Average non-overtime hours: 44 per work week
    - Average overtime hours worked: one per work week
    - Overtime pay: ($20/hour x 1.5) x (one overtime hour/week x 4 weeks) = $120
- Receives vacation pay when vacation is taken;
- Was not on vacation or otherwise absent from work during the four work weeks prior to the work week in which the public holiday fell.

To calculate public holiday pay:

1. Regular wages earned by the employee in the four work weeks before the work week in which the public holiday occurred: $3520 ($20/hour x 44 hours per week x 4 work weeks)

plus

2. Vacation pay payable to the employee in the four work weeks before the work week in which the public holiday occurred: $0

   = $3520

3. $3520 divided by 20 = $176 public holiday pay

Example 8 – Public holiday pay calculation during Christmas holiday season

Public holiday pay is excluded from the definition of regular wages. This becomes relevant for the New Year's Day and, depending on the work week of a workplace, possibly Boxing Day, calculation of public holiday pay. It can have the effect of lowering the amount of public holiday pay owing to an employee on New Year's Day and possibly Boxing Day.

Employee:

- Works eight hours a day, Monday to Friday, earning $200/day;
- Receives vacation pay when the vacation is taken;
- Was not on vacation during the four work weeks prior to the public holiday;
- During those four work weeks, the only workdays the employee was not at work was on Christmas Day and December 26. For these two days, the employee was paid public holiday pay;
- The work week is Monday to Sunday;
- Christmas falls on a Thursday.

To calculate public holiday pay for Christmas:

The four work weeks over which the calculation is performed is from Monday November 24 to Sunday December 21.

1. Regular wages earned by the employee in the four work weeks before the work week in which the public holiday occurred: $4000 ($200 times 20 days worked).

plus

2. Vacation pay payable to the employee with respect to the four work weeks before the work week in which the public holiday occurred: $0

   = $4000

3. $4000 divided by 20 = $200 public holiday pay

To calculate public holiday pay for December 26 (Boxing Day):

The four work weeks over which the calculation is performed is from Monday November 24 to Sunday December 21.

1. Regular wages earned by the employee in the four work weeks before the work week in which the public holiday occurred: $4000 ($200 times 20 days worked).

plus

2. Vacation pay payable to the employee with respect to the four work weeks before the work week in which the public holiday occurred: $0

   = $4000

3. $4000 divided by 20 = $200 public holiday pay

To calculate public holiday pay for New Year's Day:

The four work weeks over which the calculation is performed is from Monday December 1 to Sunday December 28.

1. Regular wages earned by the employee in the four work weeks before the work week in which the public holiday occurred: $3600 ($200 times 18 days worked).

- Note: The $200 of public holiday pay the employee earned on each of Christmas Day and December 26 is excluded from the calculation, because public holiday pay is excluded from the definition of regular wages.

plus

2. Vacation pay payable to the employee with respect to the four work weeks before the work week in which the public holiday occurred: $0

   = $3600

3. $3600 divided by 20 = $180 public holiday pay

Example 9 – Verifying if correct PHP paid to salaried employee with varying daily hours

Employee:

- Works Monday, Wednesday, Friday, Saturday and Sunday for 5.5 hours each day and Tuesday for 4 hours, earns a salary of $800/week;
- Receives vacation pay when vacation is taken;
- Received a substitute day off for a public holiday, which was taken on a Tuesday;
- Was not on vacation during the four weeks prior to the work week in which the substitute holiday is taken;
- Was not otherwise absent from work during those four work weeks.

To determine whether the proper amount of public holiday pay has been paid:

1. Determine the employee's hourly rate: $800.00 divided by 31.5 (hours worked in a week) = $25.40 an hour
2. Using the hourly rate and the number of hours that would have been worked on the day the employee took off, determine how much of the salary paid is attributable to the day off ;
   - By virtue of the fact that the employee did not work on the Tuesday because it was taken as a substitute holiday and yet received his full salary of $800 for that week, he in effect received $25.40 x 4 hours = $101.60 for the substitute holiday.
3. Determine the public holiday entitlement by applying the method set out in s. 24(1)(a): total of the regular wages earned during plus the vacation pay payable with respect to the four work weeks before the holiday (i.e., substitute day in this example) divided by 20];
   - ($800/week times 4 weeks) divided by 20 = $160.00
4. Compare the amounts obtained in step 2 and step 3

As the amount owing to the employee under the public holiday calculation is $160.00 and the employee only received $101.60 for the substitute holiday, the employer owes the employee $58.40.

Note that if the employee had taken a different workday off other than a Tuesday, the result would differ because of the different number of hours the employee works on their other workdays.

If a contract of employment provides that an employee is to be given public holiday pay in addition to their salary, then the employee gets the public holiday pay plus the regular salary. But, absent such a

provision, it is Program policy that the salary is understood to include public holiday pay amounts when the employee gets the day off. In that situation, the four steps outlined above would apply.

For employees who work five days a week and work the same number of hours each day, the result of the above-described four-step calculation will be that the employer will be in compliance so long as the employee is paid their usual salary and given the day off.

Calculating Public Holiday Pay for Assignment Employees of Temporary Help Agencies

Public holiday pay is calculated as the total amount of regular wages earned plus the vacation pay payable in the four work weeks preceding the work week in which the public holiday falls, divided by 20. All regular wages earned and vacation pay payable to an assignment employee in the four-week period is included for the purposes of this calculation, regardless of the number of assignments the employee was on within that four-week period.

CHANGES TO THE PUBLIC HOLIDAY PAY FORMULA IN 2018

There were several significant changes to the public holiday pay provisions in 2018. The changes are detailed in the table below. The interpretation of the provisions that were previously in force are set out under the table. Since employees may still have claims relating to provisions that are no longer in force, the discussion of the former provisions remains as part of this publication. The text appears in red to highlight that these provisions are no longer in force.

DATE	PUBLIC HOLIDAY PAY FORMULA
Prior to January 1, 2018	"Pro-rating" formula This was pursuant to s. 24(1)(a) of the ESA 2000
January 1, 2018 – June 30, 2018	"Averaging" formula • This was pursuant to s. 24(1)(a) of the ESA 2000, which was amended by the *Fair Workplaces, Better Jobs Act, 2017* effective January 1, 2018
July 1, 2018 – December 31, 2018	"Pro-rating" formula • This was pursuant to O Reg 375/18, which was prescribed pursuant to s. 24(1)(b). This pro-rating formula in the Regulation effectively replaced the "averaging" formula that was set out in s. 24(1)(a) of the ESA 2000.
January 1, 2019 – current	"Pro-rating" formula • This was pursuant to s. 24(1)(a) of the ESA 2000, which was amended by the *Making Ontario Open for Business Act, 2018* (MOOBA) effective January 1, 2019. The MOOBA also revoked O Reg 375/18 effective January 1, 2019.
"Pro-rating" formula: total amount of regular wages earned and vacation pay payable in the four work weeks before the work week in which the public holiday occurred, divided by 20.	

- The text that precedes this chart – in black front – provides an interpretation of the "pro-rating" formula.

"Averaging" formula: the total amount of regular wages earned in the pay period immediately preceding the public holiday, divided by the number of days the employee worked in that period. Additional provisions that were in effect January 1, 2018 to June 30, 2018 (ss. 24(1.1) and 24(1.2)) established rules for applying the averaging formula when an employee was on a personal emergency leave or vacation during the relevant pay period or was not employed during the relevant pay period.

- The text that appears below this chart – in red font – provides an interpretation of the now repealed "averaging" formula.

AVERAGING FORMULA: PUBLIC HOLIDAY PAY CALCULATIONS FOR PUBLIC HOLIDAYS THAT OCCURRED, AND SUBSTITUTE HOLIDAYS THAT WERE TAKEN, BETWEEN JANUARY 1, 2018 AND JUNE 30, 2018

The amount of public holiday pay owing for public holidays from January 1, 2018 to June 30, 2018, and for substitute holidays that were taken during that time period (regardless of when the public holiday for which the substitute holiday was earned occurred) was determined by now-repealed sections 24(1)(a), 24(1.1) and 24(1.2), as follows:

24(1) An employee's public holiday pay for a given public holiday shall be equal to,

(a) the total amount of regular wages earned in the pay period immediately preceding the public holiday, divided by the number of days the employee worked in that period; or

The calculation, which provides for an average day`s pay in respect of the public holiday, is made by taking the regular wages earned in the pay period immediately preceding the public holiday and dividing that amount by the number of days actually worked within that pay period. However, see ss. 24(1.1) and (1.2) below which set out those situations in which a pay period other than the pay period immediately preceding the public holiday is used to calculate public holiday pay.

Shift Spans Two Calendar Days

For the purposes of counting the number of days the employee worked in the pay period, an employee is considered to have worked only one day in situations where their shift spans two calendar days. For example, one day is counted as having been worked where an employee works from 11:00 p.m. on one day to 7:00 a.m. on the next day.

Same, Leave or Vacation – s. 24(1.1)

24(1.1) If an employee is on a leave under section 50, on vacation or both for the entire pay period immediately preceding the public holiday, the calculation in clause 24 (1) (a) shall be applied to the pay period before the start of that leave or vacation.

Section 24(1.1) provides that if an employee is on a leave under ESA Part XIV, s. 50 (which was personal emergency leave at the time s. 24(1.1) was in force), or on vacation, or on a combination of ESA Part XIV, s. 50 personal emergency leave and vacation for the entire pay period immediately preceding the public holiday, the pay period to be used in the calculation in s. 24(1)(a) is the pay period preceding the start of that leave or vacation. Note that the employee must be on ESA Part XIV, s. 50 personal

emergency leave or on vacation (or both) for the entire pay period for s. 24(1.1) to apply. If the employee is on personal emergency leave or on vacation for only part of the pay period immediately preceding the public holiday, that is the pay period that will be used in the calculation of public holiday pay.

Note that s. 24(1.1) applies only if the leave the employee takes is a leave of absence under the personal emergency leave provisions in ESA Part XIV, s. 50 for the entire pay period immediately preceding the public holiday. If the leave of absence that the employee is on in the pay period immediately preceding the public holiday is any other type of leave of absence, s. 24(1.1) does not apply. For example, if an employee was on a pregnancy or parental leave for all (or part) of the pay period immediately preceding a public holiday, her public holiday pay would be calculated on the basis of days worked and pay earned in the pay period immediately preceding the holiday. This could result in the employee receiving $0 as public holiday pay.

Start of that leave or vacation

The question may arise as to what is considered the start of a ESA Part XIV, s. 50 personal emergency leave or vacation taken within the pay period preceding a public holiday if an employee has also taken leave or vacation days in the pay period prior to the pay period immediately preceding the public holiday.

It is the Program's policy that if an employee takes days of personal emergency leave or vacation (or both) in that prior pay period that are consecutive with the personal emergency leave or vacation days taken in the pay period immediately preceding the public holiday, all of those days are together considered a single period of leave or vacation. For the purposes of s. 24(1.1) then, the leave or vacation starts on the first day of that single continuous period of personal emergency leave and/or vacation.

Example 1: January 1, 2018 to June 30, 2018

- Employee regularly works Monday through Friday and has a weekly pay period
- Public holiday falls May 21
- Weekly pay period immediately preceding the public holiday is May 13 to May 19: 5 days of s. 50 leave taken Monday, May 14 to Friday, May 18
- Weekly pay period May 6 to May 12: 2 days of s. 50 leave taken Thursday, May 10 and Friday, May 11

Because the employee works Monday through Friday in this example, the two ESA Part XIV, s. 50 personal emergency leave days taken May 10 and May 11 were taken consecutively with the five s. 50 leave days taken May 14 to May 18 and the personal emergency leave then started on May 10.

In accordance with s. 24(1.1), the public holiday pay for May 21 is calculated using the pay period preceding the start of the s. 50 personal emergency leave, that is April 29 to May 5.

It is also Program policy that in determining whether days are consecutive, you only look to the days the employee is regularly scheduled to work. For example, if an employee only regularly works one day a week and takes two vacation days (i.e., the one day in each week that they would have regularly worked), the two vacation days are considered consecutive.

Example 2: January 1, 2018 to June 30, 2018

- Employee regularly works Monday through Friday and has a weekly pay period

- Public holiday falls May 21
- Weekly pay period immediately preceding the public holiday is May 13 to May 19: 3 days of s. 50 leave taken Monday, May 14 to Wednesday, May 16 and 2 days of vacation taken Thursday, May 17 and Friday, May 18
- Weekly pay period May 6 to May 12: 2 days of s. 50 leave taken Thursday, May 10 and Friday, May 11

Because the employee works Monday through Friday in this example, the two s. 50 personal emergency leave days taken May 10 and May 11 were taken consecutively with the personal emergency leave days and vacation days taken May 14 to May 18 and the leave then started on May 10.

In accordance with s. 24(1.1), the public holiday pay for May 21 is calculated using the pay period preceding the start of the leave, that is April 29 to May 5.

Example 3: January 1, 2018 to June 30, 2018

However, if an employee is on s. 50 personal emergency leave or vacation (or both) in that prior pay period that is not consecutive with the s. 50 personal emergency leave or vacation days taken in the pay period immediately preceding the public holiday, the leave or vacation starts in the pay period immediately preceding the public holiday. Therefore, pursuant to s. 24(1.1), public holiday pay would be calculated using the pay period prior to the pay period immediately preceding the public holiday as shown in the following example:

- Employee regularly works Monday through Friday and has a biweekly pay period
- Public holiday falls May 21
- Biweekly pay period May 6 to May 19: 10 days of vacation taken Monday, May 7 to Friday, May 18
- Biweekly pay period April 22 to May 5: 2 days of vacation taken Thursday, April 26 and Friday, April 27.

Because the vacation days taken April 26 and April 27 were not taken consecutively with the vacation days taken May 7 to May 19, the vacation started on May 7.

In accordance with s. 24(1.1), the public holiday pay for May 21 is calculated using the pay period preceding the start of the vacation, that is April 22 to May 5.

Same, No Pay Period Before Public Holiday – s. 24(1.2)

24(1.2) If the employee was not employed during the pay period immediately preceding a public holiday, the employee's public holiday pay for the public holiday shall be equal to the amount of regular wages earned in the pay period that includes the public holiday divided by the number of days the employee worked in that period.

Under s. 24(1.2), employees who commence employment in the pay period that includes a public holiday are entitled to public holiday pay for that holiday based on the regular wages earned in the pay period that includes the public holiday divided by the number of days the employee worked in that period.

A question may arise regarding the calculation of the public holiday pay entitlement under s. 24(1.2) with respect to an employee who commences employment during the pay period in which the public holiday falls and who does not have a substitute day scheduled. In other words, the employee works on the

holiday and is entitled to public holiday pay for the holiday and premium pay for the hours worked on the holiday.

For example, if an employee was hired during the pay period in which Family Day falls and agreed in accordance with ESA Part X, s. 27(2)(b) to work on Family Day, what is the public holiday pay entitlement for that day? The employee's wages earned in the pay period would not include the premium pay for any hours worked or any public holiday pay paid in respect of Family Day as such wages do not fall within the definition of regular wages. As noted in the discussion of s. 24(1)(a), all days worked (including Family Day in this example) in the pay period would be included in the count for the number of days worked when calculating the public holiday pay for Family Day.

Examples of Calculating Public Holiday Pay for public holidays that occurred January 1, 2018 to June 30, 2018 and for substitute holidays that were taken January 1, 2018 to June 30, 2018 regardless of when the public holiday for which the substitute holiday was earned occurred

Example 1 – Employee has irregular hours

Employee:

- Has a bi-weekly pay period;
- Is paid $20.00/hour;

In the pay period before the public holiday, the employee worked:

- Week 1:
    - 7 hours on Monday
    - 6 hours on Wednesday
    - 5 hours on Thursday
    - 10 hours on Friday
- Week 2:
    - 5 hours on Tuesday
    - 4 hours on Wednesday
    - 6 hours on Thursday
    - 7 hours on Friday
    - 8 hours on Saturday
- Total hours worked: 58
- Total days worked: 9

The employee was not absent on s. 50 personal emergency leave or vacation for the entire pay period immediately preceding the public holiday. Therefore, public holiday pay to be calculated using the pay period immediately preceding the public holiday.

To calculate public holiday pay:

1. Regular wages earned by the employee in the pay period before the public holiday:

   $1160 ($20.00/hour times 58 hours worked)

2. Divided by 9 (the number of days the employee worked in the pay period before the public holiday)
3. $1160 divided by 9 = $128.89 public holiday pay.

Example 2 – Employee is absent from work in pay period preceding public holiday

Employee:

- Works eight hours a day, five days a week, earning $200/day;
- Has a bi-weekly pay period;
- Employee worked 7 days

Per the employee's contract, took three days off as floater days in the pay period immediately preceding the public holiday. Therefore, public holiday pay to be calculated using the pay period immediately preceding the public holiday.

To calculate public holiday pay:

1. Regular wages earned by the employee in the pay period preceding the public holiday= $1400 ($200 per day x 7 days worked).
2. Divided by 7 (the number of days the employee worked in the pay period preceding the public holiday)
3. $1400 divided by 7 = $200 public holiday pay

Example 3 – Employee works overtime

Only regular wages are included in the calculation of public holiday pay. Regular wages is defined in ESA Part I, s. 1 to exclude overtime pay. Overtime pay as per Part VIII, s. 22(1) is not just the extra premium of .5 times the regular rate for each hour over the prescribed overtime threshold, but is the entire 1.5 times the regular rate for each hour worked over the prescribed overtime threshold. This means that all payment for hours worked over the prescribed threshold is excluded from the calculation.

Employee:

- Earns $20 an hour;
- Has a bi-weekly pay period;
- Agreed in writing to work 50 hours per week (10 hours/day, 5 days/week), and works 50 hours per week in each of the weeks in the pay period immediately preceding the public holiday;
- Was not on vacation, s. 50 personal emergency leave or otherwise absent from work during the pay period before the public holiday.

To calculate public holiday pay:

1. Regular wages earned by the employee in the pay period before the public holiday: $1760 ($20/hour x 44 hours/week x 2 weeks)

- Note that all pay for hours worked in excess of 44 are excluded;

2. Divided by 10 (the number of days worked in the pay period before the public holiday);
    - Note that all days on which the employee worked are included, even if only overtime was worked on a particular day;
3. $1760 divided by 10 = $176.00 public holiday pay

Note that although this employee's average daily wage when you include overtime is $212 [(44 hours x $20) + (6 hours x $30) divided by 5], they are entitled only to $176.00 public holiday pay because overtime pay is excluded from the public holiday pay calculation.

Example 4 – Employee is on personal emergency leave for part of pay period

Employee:

- Works eight hours a day, five days a week, earning $200/day;
- Has a bi-weekly pay period;
- Worked seven days and took three days of s. 50 personal emergency leave in the pay period immediately preceding the public holiday.

Although the employee was on s. 50 personal emergency leave during the pay period immediately preceding the public holiday the employee was not on personal emergency leave for the entire pay period. Therefore, public holiday pay is to be calculated using the pay period immediately preceding the public holiday.

To calculate public holiday pay:

1. Regular wages earned by the employee in the pay period immediately preceding the public holiday = $1400 ($200 per day x 7 days worked).
2. Divided by 7 (the number of days the employee worked in the pay period immediately preceding the public holiday)
3. $1400 divided by 7 = $200 public holiday pay

Note that even if the employee had been paid for one or more of the personal emergency leave days pursuant to subsection 50(5), the amount paid would not be included in the public holiday pay calculation, since personal emergency leave pay is excluded from the definition of regular wages.

Example 5 – Employee is on vacation for entire pay period

Employee:

- Works eight hours a day, five days a week, earning $200/day;
- Has a bi-weekly pay period;
- Was on a vacation for all 10 working days in the pay period immediately preceding the public holiday;
    - Note s. 24(1.1) applies because the employee was on vacation for the entire pay period immediately preceding the public holiday. Public holiday pay to be calculated using the pay period preceding the start of the vacation.

- Worked all 10 days in pay period preceding the start of the vacation.

To calculate public holiday pay:

4. Regular wages earned by the employee in the pay period preceding the start of the vacation = $2000 ($200 per day x 10 days worked).
5. Divided by 10 (the number of days the employee worked in the pay period preceding the start of the vacation)
6. $2000 divided by 10 = $200 public holiday pay

Example 6 – Employee not employed during pay period

Employee:

- Commenced employment on Sunday, December 30
- Has a weekly pay period, from Sunday to Saturday;
- Is paid $20.00/hour;
- In the pay period that includes the public holiday (New Year's Day), the employee worked:
    - 6 hours on Sunday
    - 6 hours on Thursday
    - 8 hours on Friday
    - 8 hours on Saturday
    - Total hours worked: 28
    - Total days worked: 4

To calculate public holiday pay:

Because the employee was not employed in the pay period immediately preceding the public holiday, public holiday pay is calculated in accordance with s. 24(1.2):

1. Regular wages earned by the employee in the pay period that includes the public holiday: $560 ($20/hour times 28 hours worked)
2. Divided by 4 (the number of days the employee worked in the pay period that includes the public holiday)
3. $560 divided by 4 = $140 public holiday pay

Note that if the employee had commenced employment on or after January 2, they would not be entitled to public holiday pay for January 1 because they were not yet in an employment relationship with the employer on the holiday.

Example 7 – Employee works overtime with an overtime averaging agreement

7A – Employee does not earn any overtime pay

The employee is subject to an averaging agreement and exceeds the weekly overtime threshold in a particular week, but does not receive overtime pay for those hours because of the averaging agreement. In this case, wages for all of the hours worked will be included in the calculation of public holiday pay.

Employee:

- Earns $20 an hour and works 5 days per week;
- Has a bi-weekly pay period;
- Has agreed in writing to average his/her hours over two weeks for the purpose of determining the employee's overtime pay entitlement pursuant to ESA Part VIII, s. 22(2);
- In the pay period prior to the public holiday, the employee worked:
    - Week 1: 35 hours
    - Week 2: 48 hours
    - Total hours worked: 83
    - Average hours worked: 41.5 per work week
    - Average overtime hours worked: 0
    - Overtime pay: $0
- Was not on vacation, s. 50 personal emergency leave or otherwise absent from work during the pay period before the public holiday.

To calculate public holiday pay:

1. Regular wages earned by the employee in the pay period before the public holiday: $1660 ($20/hour x 83 hours)
        - Note: pay for hours worked in excess of 44 per week in week 2 is included because the hours were not compensated as overtime hours due to the averaging agreement.
2. Divided by 10 (the number of days worked in the pay period before the public holiday);
3. $1660 divided by 10 = $166 public holiday pay

7B – Employee earns overtime pay

The employee is subject to an averaging agreement and exceeds the weekly overtime threshold in a particular week, and receives overtime pay for some of those hours because of the averaging agreement. In this case, those overtime wages will be excluded from the calculation of public holiday pay.

Employee:

- Earns $20 an hour and works 10 days per week;
- Has a bi-weekly pay period;
- Has agreed in writing to average their hours over two weeks for the purpose of determining the employee's overtime pay entitlement;
- In the pay period immediately preceding the public holiday, the employee worked:

- Week 1: 60 hours
- Week 2: 30 hours
- Total hours worked: 90
- Average hours worked: 45 per work week
- Average non-overtime hours: 44 per work week
- Average overtime hours worked: one per work week
- Overtime pay: ($20/hour x 1.5) x (one overtime hour/week x 2 weeks) = $60

- Was not on vacation, s. 50 personal emergency leave or otherwise absent from work during the pay period before the public holiday.

To calculate public holiday pay:

1. Regular wages earned by the employee in the pay period immediately preceding the public holiday: $1760 ($20/hour x 44 hours per week x 2 work weeks)
2. Divided by 10 (the number of days worked in the pay period immediately preceding the public holiday);
3. $1760 divided by 10 = $176 public holiday pay

Example 8 – Public holiday pay calculation during Christmas holiday season

Public holiday pay and premium pay are excluded from the definition of regular wages. This becomes relevant when a public holiday falls within the pay period immediately preceding a public holiday. For example, where Christmas Day and Boxing Day fall within one pay period and New Year's Day falls in the next pay period.

Employee:

- Works eight hours a day, Monday to Friday, earning $200/day;
- Has a weekly pay period.
- Is entitled to both Christmas Day and Boxing Day as days off with public holiday pay in the pay period immediately preceding New Year's Day, so only works 3 days.

To calculate public holiday pay for New Year's Day:

1. Regular wages earned by the employee in the pay period immediately preceding New Year's Day: $600 ($200 X 3 days worked)
2. Divided by 3 (the number of days worked in the pay period before the public holiday);
3. $600 divided by 3 = $200 public holiday pay for New Year's Day

Example 9 – Verifying public holiday pay for salaried employee whose daily hours of work vary

Employee:

- Works Monday Tuesday, Wednesday, Friday, Saturday and Sunday. Employee works 5.5 hours each day except for Mondays when the employee works for 4 hours.

- Employee’s salary is $600/week
- Has a weekly pay period
- Public holiday taken as a day off on Monday.
- Assume employee worked the entire pay period immediately preceding the week in which the public holiday fell

To determine whether the proper amount of public holiday pay has been paid:

1. Determine the employee's hourly rate $600.00 divided by 31.5 (hours worked in a week) = $19.05 an hour;
2. Using the hourly rate and the number of hours that would have been worked on the public holiday off, determine how much of the $600 salary paid is attributable to the public holiday off;
    - Because the employee did not work on the Monday (the public holiday) but received the full $600 salary for that week, the employee in effect received $19.05 x 4 hours = $76.20 for the public holiday.
3. Determine the public holiday entitlement by applying the method set out in s. 24(1)(a): total of the regular wages earned in the pay period before the holiday ($600) divided by 6 (i.e. the number of days worked in that pay period);
    - $600 divided by 6 = $100
4. Compare the amounts obtained in step 2 and step 3

As the public holiday calculation netted the employee $100 and the employee only received $76.20 for the public holiday, a balance of $23.80 in public holiday pay is owed to the employee.

Note that if the public holiday fell on a workday other than Monday, the result would differ because of the different number of hours the employee works on their other workdays.

If a contract of employment provides that an employee is to be given public holiday pay in addition to their salary, then the employee gets the public holiday pay plus the regular salary. But, absent such a provision, it is Program policy that the salary is understood to include public holiday pay amounts when the employee gets the day off. In that situation, the four steps outlined above would apply.

For employees who work five days a week and work the same number of hours each day, the result of the above-described four-step calculation will be that the employer will be in compliance so long as the employee is paid their usual salary and given the day off.

Premium Pay – s. 24(2)

24(2) An employer who is required under this Part to pay premium pay to an employee shall pay the employee at least one and one half times his or her regular rate.

This section sets out the rate that is to be used to calculate any premium pay an employee may be entitled to pursuant to other sections in Part X. It provides that the amount of premium pay shall be at least one and one half times an employee's regular rate.

ESA Part I, s. 1 defines regular rate as follows:

"Regular rate" means, subject to any regulation made under paragraph 10 of subsection 141 (1),

a) for an employee who is paid by the hour, the amount earned for an hour of work in the employee's usual work week, not counting overtime hours,

b) otherwise, the amount earned in a given work week divided by the number of non-overtime hours actually worked in that week;

As of the time of writing, there is no regulation made under paragraph 10 of ESA Part XXVII, s. 141(1) that provides a different definition of regular rate.

See ESA Part I, s. 1 for a discussion of the term regular rate, particularly as it applies to employees whose compensation consists of an hourly rate plus some other form of compensation.

ESA Part X Section 25 - Two Kinds of Work

Two Kinds of Work - ss. 25(1), (2)

25(1) Subsection (2) applies with respect to an employee if,

(a) an employee performs work of a particular kind or character in a work week in which a public holiday occurs;

(b) the regulations exempt employees who perform work of that kind or character from the application of this Part; and

(c) the duties of the employee's position also require him or her to perform work of another kind or character.

(2) This Part applies to the employee with respect to that public holiday unless the time spent by the employee performing the work referred to in clause (1) (b) constitutes more than half the time that the employee spent fulfilling the duties of his or her position in that work week.

These provisions were introduced in the *Employment Standards Act, 2000*. They codify policy that applied under the former *Employment Standards Act*.

These provisions state what happens when, during a work week in which a public holiday falls, an employee performs some work for an employer that is covered by Part X, and some work that is exempted from coverage of Part X by O Reg 285/01, s. 2 or s. 9.

In this situation, Part X will apply to that employee for that particular public holiday if 50 per cent or more of the employee's hours during that work week were spent performing work that is not exempt.

It is only the work performed during the work week in which the public holiday falls that is reviewed when applying s. 25. For example, assume Work A is exempt from Part X, while Work B is covered by Part X. During each of the three work weeks prior to the public holiday, an employee spends 60 per cent of her time performing Work A (exempt work) and 40 per cent performing Work B (non-exempt work). However, during the work week the public holiday occurs, she spends 45 per cent of her time performing Work A (exempt work) and 55 per cent of her time performing Work B (non-exempt work). Because she spent 50 per cent or more of her time performing non-exempt work during the work week in which the public holiday fell, she will be entitled to the Public Holiday standard with respect to that particular public holiday. (The same review must be performed for each public holiday.)

ESA Part X Section 26 – Public Holiday Ordinarily a Working Day

Public Holiday Ordinarily a Working Day – s. 26(1)

26(1) If a public holiday falls on a day that would ordinarily be a working day for an employee and the employee is not on vacation that day, the employer shall give the employee the day off work and pay him or her public holiday pay for that day.

This provision sets out an employee's entitlement when a public holiday falls on a day that is ordinarily the employee's working day and that is not during the employee's vacation. See ESA Part X, s. 29 for the entitlement if a public holiday falls on a day that is not ordinarily an employee's working day, or is during an employee's vacation.

It is not always readily apparent which days are ordinarily working days for a given employee. Whether or not a holiday falls on a day that is ordinarily a working day for an employee will determine what the employee is entitled to for the holiday, and, in certain industries, whether or not the employer can require the employee to work on the holiday. For example, the question has arisen in the restaurant industry as to how to determine which days are ordinarily working days for part-time employees who have irregular shifts. It is Program policy that to make this determination, one looks at the days that the employee tells the employer that they are available to work and the past scheduling practice. For example, an employee is hired on the basis that they are available to work Mondays through Fridays, and is actually scheduled to work on each of those days (although not on any regular basis – e.g., Monday and Tuesday one week, Tuesday and Friday the next week, Wednesday and Thursday the next week, etc.). In this case, the Program would consider Mondays through Fridays to be days that would ordinarily be working days for that employee. However, if that same employee is only ever scheduled to work Tuesdays and Thursdays, the Program would consider only Tuesdays and Thursdays to be days that would ordinarily be working days for that employee, even though they said they were available all weekdays.

For employees who are on lay-off, a leave under ESA Part XIV, or any other leave of absence when a public holiday occurs, their pre-leave or pre-lay-off schedule determines whether the public holiday falls on a day that would or would not ordinarily be a working day for an employee, and thus whether s. 26 or s. 29 will apply to that particular public holiday.

For example, if an employee on parental leave worked Mondays to Fridays before the leave, Mondays to Fridays are days that are ordinarily working days for that employee, and Saturdays and Sundays are days that would not ordinarily be working days for that employee. Consequently, s. 26 will apply to any public holiday that falls on a weekday during that employee's leave, and s. 29 will apply to any public holiday that falls on a weekend during that employee's leave. In either case, the employee is entitled to public holiday pay for the holiday – see ESA Part X, s. 29(2.1). But because public holiday pay is based on regular wages earned and vacation pay payable in the four work weeks prior to the public holiday, an employee who was on a leave or lay-off for some or all of the four weeks prior to the public holiday, the quantum of public holiday pay to which they will be entitled will be less than the equivalent of a regular day's pay [and in the case of an employee who was on a leave or lay-off for the entire four weeks, will be zero].

Some employees may have had a varying, irregular schedule before their leave or lay-off, such that it cannot be determined whether or not the employee would have been scheduled to work on the day the public holiday falls. In this case, because there are no days that "would ordinarily be a working day for" that employee, s. 29 will apply to any public holiday that occurs during the leave or lay-off.

See ESA Part XVIII.1, s. 74.10 for a discussion of the application of Part X to assignment employees of temporary help agencies, particularly the Program's policy that a public holiday falls on a day that is ordinarily a working day for an assignment employee only if the employee is on assignment and the holiday falls on a day that they would be working pursuant to the assignment (assuming there had been no holiday). In that case only, ESA Part X, ss. 26, 27 or 28 would apply to determine the employee's public holiday entitlements.

Section 26(1) states that when a public holiday falls on a day that is ordinarily an employee's working day and the employee is not on vacation, the employee is to be given the public holiday off and paid public holiday pay. See ESA Part X, s. 24 for a discussion of public holiday pay.

The entitlement in s. 26(1) is subject to:

- Section 26(2) which provides that employees lose their s. 26(1) entitlement if they fail without reasonable cause to work their entire regularly scheduled day of work before or after the public holiday;
- ESA Part X, s. 27 which allows employees to agree in writing to work on the public holiday; and
- ESA Part X, s. 28 which permits employers to require employees in certain operations to work on a public holiday that falls on a day that is ordinarily an employee's working day and the employee is not on vacation.

Exception – s. 26(2)

26(2) The employee has no entitlement under subsection (1) if he or she fails, without reasonable cause, to work all of his or her last regularly scheduled day of work before the public holiday or all of his or her first regularly scheduled day of work after the public holiday.

This section provides that employees are not entitled to the s. 26(1) entitlement of a public holiday off with public holiday pay if they fail, without reasonable cause, to work their entire regularly scheduled day of work before or after the holiday.

This section is intended to discourage employees from unilaterally taking an extra day off around the public holiday by failing to show up on the day they are expected to work before or after the holiday, or by showing up to work later or leaving earlier than expected before or after the holiday.

Regularly Scheduled

Reference to "regularly scheduled" relates to the schedule of the particular employee, not to the business hours of the employer. For example, an employee works Monday to Friday in a business that is open seven days a week. A holiday falls on a Monday. The employee would not be disqualified under this section because they did not work on Sunday. So long as they worked their entire scheduled shift on the Friday before the public holiday and the Tuesday after the public holiday, they will be considered to have worked the last regularly scheduled day before and the first regularly scheduled day after the public holiday.

If the employee in the above example had originally been scheduled to work on the Friday before the public holiday, but exchanged this shift with the employer's approval, the effect of this change would be to alter their regularly scheduled day of work. So long as the employee worked the entire scheduled days on the Thursday before the holiday and the Tuesday after the holiday, they will be considered to have

worked the last regularly scheduled day before and the first regularly scheduled day after the public holiday – see 472323 Ontario Limited c.o.b.a. the Weed Man v Clark (October 28, 1985) ESC 1971 (Kerry) a decision under the former *Employment Standards Act.*

In 398827 Ontario Limited c.o.b. Palangio Vending & Food Services v Guimond et al (May 31, 1982), ESC 1232 (Black), a decision under the former *Employment Standards Act*, the employer terminated the employees at a school cafeteria before Christmas, fully intending to rehire them after the New Year, so that they could claim Employment Insurance benefits. The referee held that the employees had worked their scheduled days before and after the holiday.

If the employer's argument that the claimants were not employees on the holidays in question because they had been terminated was upheld, then surely nothing would prevent an unscrupulous employer from terminating an employee the day before each public holiday only to rehire the day after such holiday in order to avoid compliance with the legislation.

An employee will not be considered to have worked all of their last regularly scheduled day of work before the public holiday and all of their first regularly scheduled day of work after the public holiday if they did not work the entire scheduled shift on both of those days. However, if the employer allows the employee to leave early (or begin late), the employee would not be disqualified, since what constituted the full regularly scheduled day of work was adjusted by mutual consent. Note that agreements to adjust the schedule are not required to be in writing, as they are not agreements provided for in the ESA 2000.

What follows are some examples of situations in which an employee will not be considered to have failed to work their last regularly scheduled day of work before or first regularly scheduled day of work after the public holiday.

Scheduled leaves of absence

Where the last regularly scheduled work day before a public holiday or the first regularly scheduled day of work after a public holiday falls on a day that, although it would ordinarily have been a working day for the employee, is a day on which the employee is on a scheduled leave of absence, they will not be considered to have failed to work the "last before" or "first after"; since the employee was on a scheduled leave, work could not have been scheduled for them on that day. Leaves that are arranged in advance would fall into this category; examples would include sabbatical leaves and, if notice is given in advance of the start date, leaves under ESA Part XIV.

Where advance notice is not given, as is often the case with some ESA Part XIV leaves, the leave would obviously not be considered to have been arranged in advance; however, an employee who misses the last before or first after because of taking such leave would not lose the public holiday entitlement because of the reasonable cause exception to the "last before and first after" requirement. See the discussion in under Reasonable Cause below.

Vacations

Where the last regularly scheduled work day before a public holiday or the first regularly scheduled day of work after a public holiday falls on a day that, while it would ordinarily have been a working day for the employee, is a day on which the employee is on vacation, they will not be considered to have failed to work the last before or first after; since the employee was on vacation, work could not have been scheduled for them on that day.

Lay-offs

Where the last regularly scheduled work day before a public holiday or the first regularly scheduled day of work after a public holiday falls on a day that, while it would ordinarily have been a working day for the employee, is a day on which the employee is on lay-off, they will not be considered to have failed to work the last before or first after; since the employee was on lay-off, work would not have been scheduled for them on that day.

Termination or resignation of employment

A person who resigns or whose employment is terminated immediately after the public holiday (i.e., before the commencement of what would have been their first regularly scheduled day of work after the holiday) is not considered to have failed to work the first regularly scheduled day of work after the public holiday. Since the individual was no longer employed on that day, work could not have been scheduled for them on that day. However, an employment relationship must have still existed between the parties on the public holiday itself. For example, if the employment of an employee who regularly works Monday through Friday each week is terminated at the end of their shift on the Friday preceding the public holiday (which falls on the following Monday), they would have no public holiday entitlement for the Monday. If however, the employment was terminated when the employee arrived at work on the Tuesday morning following the holiday, the entitlement would be maintained because there was an employment relationship on the day of the public holiday.

Disciplinary Suspension

An employee who has been suspended by the employer on a day that would otherwise have been the last regularly scheduled day before a public holiday or the first regularly scheduled day after a public holiday is not considered to have failed to work the last before or first after. Since the employee was on suspension, work could not have been scheduled for them on that day.

Note that s. 26(2) provides that an employee will not lose their public holiday entitlement, despite not having worked all of their last regularly scheduled day of work before the holiday or the first regularly scheduled day of work after the holiday, if they had reasonable cause for having failed to do so. What constitutes reasonable cause is discussed in the next section.

Reasonable Cause

Employees who do not work their entire regularly scheduled shifts before or after the public holiday will not lose their right to a paid day off if they had reasonable cause for failing to perform the work.

The onus is on the employee to show that there was reasonable cause. Usually, reasonable cause will be something beyond the control of the employee, although this is not always the case. What follows are some examples of situations where reasonable cause may or may not exist:

Transportation Breakdown

An employee may claim that their failure to report may be due to the breakdown of their car, but if alternate transportation was readily available, this would not be considered to be reasonable cause. However, if the employee did take public transit and arrived late for their shift, this may be considered reasonable cause.

“Too tired”

Reasons such as "slept in" or "too tired" will generally not amount to reasonable cause. However, if the reason the employee slept in is because there was a power failure and the employee's alarm clock did not go off as a result, that may amount to reasonable cause.

Part XIV leave

As was discussed above, an employee who gives advance notice that they are taking a Part XIV leave and for whom what would otherwise have been the last regularly scheduled day of work before the holiday or first regularly scheduled day of work after the holiday falls during the leave will not be considered to have failed to work the last before or first after; this is because work cannot be scheduled where the employer knows beforehand that the employee will be on leave. However, where the employee had to commence the leave without advance notice, they will not lose the public holiday entitlement despite not working the last before or first after; although work was scheduled, the employee had reasonable cause for not working.

Sick leave, family responsibility leave and bereavement leave

Sick leave, family responsibility leave and bereavement leave under ESA Part XIV are, because of the nature of the events for which they can be taken, often not possible to be arranged in advance; therefore, an employee who had to take sick leave, family responsibility leave or bereavement leave on a day that is the last regularly scheduled day of work before or the first regularly scheduled day of work after the public holiday would arguably - if no advance notice was given – be regarded as having failed to work on the last regularly scheduled day before or the last regularly scheduled day after, as the case may be. However, it is Program policy that an employee who is away for any reason listed in s. 50(1), or in s.50.0.1(1) or s.50.0.2(1) with respect to any person in a category listed in s. 50.0.1(3) or s.50.0.2.(3), will be considered to have reasonable cause. See the discussion of the sick leave, family responsibility leave and bereavement leave provisions in ESA Part XIV.

This policy applies even if the employee was not exercising a right to sick leave, family responsibility leave or bereavement leave because they already "used up" the leave days provided for under the ESA 2000. If an employee fails to work their last regularly scheduled day of work before or first regularly scheduled shift after the public holiday because of a reason listed in s. 50(1), or for a reason listed in s. 50.0.1(1) or s. 50.0.2(1) with respect to a person listed in s. 50.0.1(3) or s. 50.0.2(3), the Program will consider that employee to have reasonable cause.

On the other hand, just because an employee is away for a reason that is not listed in s. 50(1), or in the case of family responsibility leave or bereavement leave that does not relate to a person listed in s. 50.0.1(3) or s. 50.0.2(3), does not necessarily mean that the employee does not have reasonable cause. While any event that entitles an employee to take sick leave, family responsibility leave or bereavement leave will constitute reasonable cause, the opposite is not necessarily true. That is, s. 50, s. 50.0.1 and s. 50.0.2 do not provide an exhaustive list of what constitutes reasonable cause for the purposes of the public holiday provisions. Whether or not an event that does not fall within s. 50, s. 50.0.1 or s. 50.0.2 amounts to reasonable cause for the purpose of s. 26(2) will depend on the circumstances. For example, an employee may fail to work their regularly scheduled day of work before a public holiday because their neighbour had a medical emergency and needed the employee's assistance. Although this employee is not entitled to a family responsibility leave of absence because "neighbours" are not listed in s. 50.0.1(3),

the employee may have reasonable cause for the purpose of s. 26(2), depending on all of the circumstances.

The same approach applies to personal emergency leave taken under the previous provisions, in force prior to January 1, 2019. Also note that s. 50(13) of the previous personal emergency leave provisions prohibited an employer from requiring that the employee provide a certificate from a qualified health practitioner: therefore, an employee could not be required to produce such a certificate to support an entitlement to public holiday pay when the employee took personal emergency leave during all or part of the time the employee was scheduled to work on a public holiday. However, an employee could be required to provide evidence reasonable in the circumstances per the previous version of s. 50 (12) and to support reasonable cause per ESA Part X, ss. 26(2), 27, 28 or 29.

Lawful strike

It is Program policy that an employee represented by a trade union who is on a lawful strike on the last regularly scheduled shift before or first regularly scheduled shift after a public holiday will be considered to have reasonable cause. Employees on an unlawful strike will be considered to not have reasonable cause.

Note that an employee who is entitled to a substitute holiday pursuant to s. 27(2)(a) does not lose that entitlement if they fail without reasonable cause to work all of their last regularly scheduled day of work before or first regularly scheduled day of work after the substitute holiday. An employee does not have to "requalify" for the substitute holiday once they have already earned it.

Application of "Last and First" Rule for Assignment Employees of Temporary Help Agencies

As discussed above, employees may lose the entitlement to public holiday pay or a substitute day off with public holiday pay if the employee fails, without reasonable cause, to work all of their last regularly scheduled working day before the holiday or all of their first regularly scheduled working day after the holiday.

The Program's position is that an assignment employee will not be considered to have failed to work the last regularly scheduled working day before the holiday or first regularly scheduled working day after the holiday if they work on the last day they were supposed to work before the holiday and the first day they were supposed to work after the holiday in accordance with their assignment or assignments (if any). Note that if the employee does fail to work either of those days, they may still be entitled to the public holiday entitlements so long as they had reasonable cause for not working the day(s).

The following examples are intended to provide guidance in determining the public holiday entitlements of assignment employees pursuant to ESA Part X, ss. 24 through 32, ESA Part XVIII.1, ss. 74.10(1) and (2) (as applicable) as well as ESA Part XVIII.1, s. 74.11 and in accordance with Program policy with respect to those provisions, including the Program's policy as described above:

Example 1: Employee on assignment, public holiday ordinarily a working day

An employee was on a two-week assignment working Monday through Thursday each week. Their previous assignment ended two months earlier. The current assignment began one week prior to the

week Thanksgiving Day (Monday) occurs and ended the Thursday following the holiday. What are her entitlements with respect to the public holiday?

The employee was on assignment when the holiday occurred and would ordinarily have worked on the day the holiday fell (pursuant to their assignment) and so is entitled to Thanksgiving Day as a day off with public holiday pay for the day – see s. 26(1).

The employee will pass the last and first day test if they worked the Thursday prior to the holiday as well as the Tuesday following the holiday, or had reasonable cause if they failed to work either of those days as per s. 26(2).

The public holiday pay would be calculated as the regular wages earned and vacation pay payable in the four work weeks before the work week in which the public holiday occurred, divided by 20 – see ESA Part X, s. 24(1). Assume that the public holiday occurs after July 1, 2018, so that s. 24(1)(a) does not apply in this example.

Note that if the employee had taken more than one assignment from the agency in the four work weeks before the holiday, the calculation of public holiday pay would have been based on the total regular wages earned and vacation pay payable in respect of both of those assignments.

Example 2: Employee not on assignment and "not available for work" when the holiday falls

An assignment employee was hired by a temporary help agency on October 1, 2017. Their most recent assignment ended on July 15, 2018 and at the end of August 2018, they advised the agency that because of other commitments they would not be prepared to accept any new assignments until the beginning of October 2018. What are this employee's entitlements with respect to Labour Day, (the first Monday in September)?

The assignment employee was an employee of the agency on Labour Day. Because they were not assigned to perform work for a client at that time, the holiday fell on a day that was not ordinarily a working day – see ESA Part X, s. 29(1).

Because they were not on an assignment on the day on which Labour Day fell they are on a lay-off pursuant to ESA Part XVIII.1, s. 74.10(1). ESA Part X, s. 29(2.1) applies to determine their entitlements. They are therefore entitled to public holiday pay for the day. However, as they had not earned any wages in the four work weeks before Labour Day, their public holiday pay is $0.

Example 3: Employee on assignment but holiday on a day not ordinarily a working day

An employee was on an assignment from January 15 to May 1 and was scheduled to work only Tuesdays and Thursdays of each week. What are their entitlements with respect to the public holidays that fell during this assignment?

There were two public holidays during this assignment: Family Day (Monday) and Good Friday (Friday).

Because Mondays and Fridays were not days that the employee was ordinarily scheduled to work pursuant to their assignment, their public holiday entitlements would be determined under ESA Part X, s. 29.

As they were on an assignment from January 15 to May 1 when the holidays fell they are not considered to be on a lay-off pursuant to ESA Part XVIII.1, s. 74.10(1) for the purposes of s. 29(2.1).

As a result, s. 29(1) applies and they are entitled to a substitute day off for both Family Day and Good Friday with public holiday pay calculated as if the substitute days were the public holidays. This means that the substitute holiday takes the place of the public holiday. Therefore, the formula to be used for calculating public holiday pay for the substitute holiday would be the formula that is in effect on the date of the substitute holiday.

As per s. 29(2) the substitute days must be scheduled within three months following the public holidays or within 12 months if the employee and employer agree. As per s. 29(2.1), the employer must provide the employee with a written statement that sets out the date of the day that is substituted for the public holiday.

ESA Part X Section 27 – Agreement to Work, Ordinarily a Working Day

Agreement to Work, Ordinarily a Working Day – s. 27(1)

27(1) An employee and employer may agree that the employee will work on a public holiday that would ordinarily be a working day for that employee, and if they do, section 26 does not apply to the employee.

This section provides an exception to the entitlement in ESA Part X, s. 26, which provides employees with the right to the public holiday off with public holiday pay if the holiday falls on a day that is ordinarily an employee's working day and the employee is not on vacation. Section 27(1) allows such employees and their employers to agree that the employee will work on the public holiday. If an agreement is reached, the entitlements set out in s. 27(2) will apply instead of those set out in s. 26.

Any agreement that the employee will work on the public holiday must be in writing. See ESA Part 1, s. 1(3) and (3.1) for a discussion of agreements and voluntary consent. The agreement must be reached prior to the date of the public holiday.

If an employee works on a public holiday but there is no proper written agreement in place, the "alternate" standard of s. 27 will not apply and, accordingly, the employee's entitlement will be determined under the "default" standard of s. 26. This is so even if there was an oral agreement that the employee would work on the public holiday - see the discussion of the written agreement requirements at ESA Part I, s. 1(3) and s. 1(3.1). The ESA 2000 permits employees and employers to opt into the alternate standard of s. 27 only where there is a written agreement. Where there is no written agreement, the default standard of s. 26 will apply to the employee. In this case, an officer would apply the requirements of s. 26 when determining what violations have occurred. The requirements of s. 26 are:

1. The employee receives the public holiday off; and
2. The employee be paid public holiday pay.

For example, where an employee worked on a public holiday without providing their written agreement and was paid their regular rate, the officer could find that there has been a non-monetary violation of the requirement that the employee receive the public holiday off, and a monetary violation of the requirement that the employee be paid public holiday pay.

In determining how much money the employer owes the employee, the amount of public holiday pay owing would NOT be offset by the amount of wages earned by the employee for working on the holiday. The employee earned those wages for working and must be paid in addition to the amount of public holiday pay owing. This would be so even if the employer paid the employee a higher rate for working on the public holiday, such as 1.5 times the employee's regular rate. Again, the higher rate of wages was earned by the employee for working on the public holiday and must be paid in addition to the amount of public holiday pay owing.

Note that this section applies to employees in all operations, including hospitals, continuous operations, and hotels, motels, tourist resorts, restaurants and taverns, who agree to work on a public holiday that falls on a day that is ordinarily a working day for them. Employees who are employed in a hospital, continuous operation, or hotel, motel, tourist resort, restaurant or tavern who are required to work on a public holiday that is ordinarily a working day for the employee and that is a day the employee is not on vacation are governed by ESA Part X, s. 28.

Employee's Entitlement – s. 27(2)

27(2) Subject to subsections (3) and (4), if an employer and an employee make an agreement under subsection (1),

(a) the employer shall pay to the employee wages at his or her regular rate for the hours worked on the public holiday and substitute another day that would ordinarily be a working day for the employee to take off work and for which he or she shall be paid public holiday pay as if the substitute day were a public holiday; or

(b) if the employee and the employer agree, the employer shall pay to the employee public holiday pay for the day plus premium pay for each hour worked on that day.

This section sets out to what an employee who agreed to work on a public holiday pursuant to s. 27(1) is entitled.

The default entitlement for such an employee is:

- Wages paid at the employee's regular rate for each hour worked on the public holiday – see the definition in ESA Part I, s. 1

  plus

- A substitute holiday:
  - For which the employee must be paid public holiday pay. This means that the substitute holiday takes the place of the public holiday. Therefore, the formula to be used for calculating public holiday pay for the substitute holiday would be the formula that is in effect on the date of the substitute holiday. See ESA Part X, s. 24 for the calculation of public holiday pay;
  - Which must be scheduled for a day that would ordinarily be a working day for the employee; and
  - Which must be scheduled for a day before the deadlines set out in s. 27(3) – see ESA Part X, s. 26.

  plus

- A written statement setting out specifics about the substitute holiday, as outlined in section 27(2.1).

However, if an employer and employee agree in writing, the employee is entitled to public holiday pay plus premium pay for each hour worked on the public holiday, rather than to the default entitlement.

See ESA Part I, s. 1(3) for a discussion of agreements in writing.

See ESA Part X, s. 24 for the calculation of public holiday pay and premium pay.

If the employee does not agree in writing to receive public holiday pay plus premium pay, then the entitlement in s. 27(2)(a) will apply. The alternate entitlement of s. 27(2)(b) applies only if there is such a written agreement. If there is no such written agreement, the default entitlement of s. 27(2)(a) will apply. This assumes that there was a written agreement in place for the employee to work on the holiday, as required by s. 27(1). If there was no written agreement to work on the holiday, then the default standard of s. 26 will apply, rather than s. 27. See ESA Part X, s. 26 for more details.

The entitlements described above are subject to s. 27(4), discussed below.

Substitute Day of Holiday – s. 27(2.1)

(2.1) If a day is substituted for a public holiday under clause (2) (a), the employer shall provide the employee with a written statement, before the public holiday, that sets out,

(a) the public holiday on which the employee will work;

(b) the date of the day that is substituted for a public holiday under clause (2) (a); and

(c) the date on which the statement is provided to the employee.

The *Fair Workplaces, Better Jobs Act, 2017*, SO 2017, c 22, added s. 27(2.1) to the ESA 2000, effective January 1, 2018. Where the employee has agreed to work on a public holiday and the employer is substituting the public holiday in accordance with s. 27(2) (a), this section requires the employer to provide the employee with a written statement:

- Naming the public holiday on which the employee has agreed to work,
- Specifying the date that has been selected to be the substitute holiday, and
- Noting the date on which the employee was given the statement.

The written statement must be provided to the employee before the actual public holiday. The legislation does not specify the manner in which the written statement must be provided. Consistent with the Program's position regarding the provision of the poster under ESA Part III, s. 2(5), an employer may provide the statement as a printed copy or as an attachment in an email to the employee.

There is no requirement for the parties to sign the written statement, nor is there a requirement for the employee to agree to the date of the substitute holiday, so long as it is a day that would ordinarily be a working day for the employee and that it is scheduled for a day before the deadlines set out in s. 27(3), discussed below.

Restriction – s. 27(3)

27(3) A day that is substituted for a public holiday under clause (2)(a) shall be,

(a) a day that is no more than three months after the public holiday; or

(b) if the employee and the employer agree, a day that is no more than 12 months after the public holiday.

This section establishes a deadline for scheduling a substitute holiday an employee earns pursuant to s. 27(2)(a).

The section states that the employer must schedule the substitute holiday (which, pursuant to s. 27(2)(a), must be set for a day that is ordinarily a working day for the employee) for a day that is no later than three months after the date of the public holiday.

The substitute day can be taken before the actual public holiday itself. For example, Canada Day is on a Tuesday. It is not a violation of the ESA 2000 for an employee who has agreed in writing to work on Canada Day to be given Monday, June 30, as the substitute holiday. If the employer and employee agree in writing, the substitute holiday can be scheduled for a day that is up to 12 months after the date of the public holiday. An employee may wish to extend the three-month deadline if, for example, they want to tack the substitute holiday on to their next vacation but the vacation is more than three months away. See ESA Part 1, s. 1(3) and (3.1) for a discussion of written agreements and voluntary consent.

The written agreement contemplated in s. 27(3)(b) must be made prior to the public holiday as the employer is required under s. 27(2.1) to give the employee a written statement setting out the date of the substitute day.

Where Certain Work Not Performed – s. 27(4)

27(4) The employee's entitlement under subsection (2) is subject to the following rules:

1. If the employee, without reasonable cause, performs none of the work that he or she agreed to perform on the public holiday, the employee has no entitlement under subsection (2).

2. If the employee, with reasonable cause, performs none of the work that he or she agreed to perform on the public holiday, the employer shall give the employee a substitute day off work in accordance with clause (2) (a) or, if an agreement was made under clause (2) (b), public holiday pay for the public holiday. However, if the employee also fails, without reasonable cause, to work all of his or her last regularly scheduled day of work before the public holiday or all of his or her first regularly scheduled day of work after the public holiday, the employee has no entitlement under subsection (2).

3. If the employee performs some of the work that he or she agreed to perform on the public holiday but fails, without reasonable cause, to perform all of it, the employer shall give the employee premium pay for each hour worked on the public holiday but the employee has no other entitlement under subsection (2).

4. If the employee performs some of the work that he or she agreed to perform on the public holiday but fails, with reasonable cause, to perform all of it, the employer shall give the employee wages at his or her regular rate for the hours worked on the public holiday and a substitute day off work in accordance with clause (2) (a) or, if an agreement was made under clause (2)(b), public holiday pay for the public holiday plus premium pay for each hour worked on the public holiday.

However, if the employee also fails, without reasonable cause, to work all of his or her last regularly scheduled day of work before the public holiday or all of his or her first regularly scheduled day of work after the public holiday, the employer shall give the employee premium pay for each hour worked on the public holiday but the employee has no other entitlement under subsection (2).

5. If the employee performs all of the work that he or she agreed to perform on the public holiday but fails, without reasonable cause, to work all of his or her last regularly scheduled day of work before or all of his or her first regularly scheduled day of work after the public holiday, the employer shall give the employee premium pay for each hour worked on the public holiday but the employee has no other entitlement under subsection (2).

This section simply sets out the entitlements for an employee who agreed in writing to work on the public holiday pursuant to s. 27(1), but who fails to perform certain work.

Every situation that impacts on an employee's entitlement is covered. That is, this provision sets out the consequences in the event of any of the following circumstances, whether they occur on their own or in combination with one another:

- Performs only some of the work on a public holiday that the employee had agreed to perform:
    - With reasonable cause; or
    - Without reasonable cause.

ii. Performs none of the work on a public holiday that the employee had agreed to perform:

- With reasonable cause;
- Without reasonable cause.

iii. Does not work the entire regularly scheduled days of work before or after the public holiday without reasonable cause.

In the discussion below:

- "Substitute holiday" is a day off that would ordinarily be a working day for the employee, for which the employee is entitled to receive public holiday pay – see ss. 27(2) and (3)
- "Public holiday pay" is as calculated pursuant to ESA Part X, s. 24(1)
- "Premium pay" is as calculated pursuant to ESA Part X, s. 24(2)
- See ESA Part X, s. 26(2) for a discussion of the phrase "fail to work all of [the employee's] regularly scheduled day of work [before/after] the public holiday".
- See ESA Part X, s. 26(2) for a discussion of the term "reasonable cause". That discussion takes places in the context of the criterion of failure to work the regularly scheduled day before or after a public holiday, but applies equally to the criterion of failure to work on the public holiday.

The statutory phrases, "performs none of the work that he or she agreed to perform on the public holiday" and "performs some of the work that he or she agreed to perform on the public holiday but fails . . . to perform all of it" do not refer to the quantity or quality of the employee's work. Rather, it refers to whether the employee worked the whole shift, part of the shift, or none of the shift they agreed to work on the public holiday.

For example, an employee who agreed to work an eight-hour shift on Canada Day and who usually assembles 100 widgets during an eight-hour shift will not be considered to have performed only some of the work merely because they assembled only 80 widgets on Canada Day. So long as the employee worked through the entire eight-hour shift, they will have performed all of the work they agreed to perform on the holiday.

The situations and consequences addressed in each of the five paragraphs in s. 27(4) are as follows:

Performs none of the work on public holiday without reasonable

Employee performs none of the work on the public holiday, (i.e., did not show up at all for the shift, without reasonable cause: **Employee has no entitlement.**

Pursuant to s. 27(4) paragraph 1, the employee has no entitlement of any sort under s. 27(2): not to a substitute holiday, to public holiday pay or to premium pay. When the employee entered into the s. 27(1) agreement, the general entitlement under ESA Part X, s. 26 ceased to apply to that employee.

Performs none of the work on public holiday with reasonable cause

Works last regularly scheduled day of work

Employee performs none of the work on the public holiday, (i.e., did not show up at all for the shift), with reasonable cause, **employee entitled to:**

- Substitute holiday;

  OR

- Public holiday pay **if** employee earlier agreed to be paid public holiday pay and premium pay for each hour they were going to work on the public holiday instead of receiving a substitute holiday

Pursuant to s. 27(4) paragraph 2, the employee is entitled to a substitute holiday or public holiday pay if the employee agreed to be paid public holiday pay and premium pay instead of receiving a substitute holiday.

Fails to work last or first regularly scheduled day of work

Employee:

- Performs none of the work on the public holiday, (i.e., did not show up at all for the shift), with reasonable cause;

  and

- Fails to work all of the last regularly scheduled day of work before or first regularly scheduled day of work after the public holiday, without reasonable cause:

Employee has no entitlement.

Pursuant to s. 27(4) paragraph 2, the employee has no entitlement of any sort: not to a substitute holiday, to public holiday pay or to premium pay. When the employee entered into the s. 27(1) agreement, the general entitlement under ESA Part X, s. 26 ceased to apply to that employee.

Performs only some of the work on public holiday without reasonable cause

Employee performs some but not all of the work they agreed to perform on the public holiday, (i.e., showed up for only part of the shift), without reasonable cause: **Employee entitled only to premium pay for each hour worked on the public holiday.**

Pursuant to s. 27(4) paragraph 3, the employee is entitled only to premium pay for each hour worked on the public holiday. They have no other entitlements to public holiday pay or a substitute holiday.

Performs only some of the work on public holiday with reasonable cause

Works last regularly scheduled day of work

Employee performs some but not all of the work they agreed to perform on the public holiday, (i.e., showed up for only part of the shift), with reasonable cause, **employee entitled to:**

- Wages at employee's regular rate for each hour worked on the public holiday PLUS a substitute holiday;

  OR

- Public holiday pay PLUS premium pay for each hour worked on the holiday if the employee earlier agreed to be paid public holiday pay plus premium pay for each hour they were going to work on the public holiday instead of receiving a substitute holiday.

Pursuant to s. 27(4) paragraph 4, the employee is entitled to wages at their regular rate plus a substitute holiday, or public holiday pay plus premium pay if the employee agreed to they were going to work on the public holiday instead of receiving a substitute holiday.

Fails to work last or first regularly scheduled day of work

Employee:

- Performs some but not all of the work they agreed to perform on the public holiday, (i.e., showed up for only part of the shift), with reasonable cause;

  and

- Fails to work all of their last regularly scheduled day of work before or first regularly scheduled day of work after the public holiday, without reasonable cause:

Employee entitled only to premium pay for each hour worked on the public holiday.

Pursuant to s. 27(4) paragraph 4, the employee is only entitled to premium pay for each hour worked on the public holiday. They have no other entitlements.

Performs all work on public holiday but fails to work last or first regularly scheduled day of work

Employee:

- Performs all of the work they agreed to perform on the public holiday (i.e. showed up for the entire shift);

  BUT

- Fails to work all of their last regularly scheduled day of work before or first regularly scheduled day of work after the public holiday, without reasonable cause:

Employee entitled only to premium pay for each hour worked on the public holiday.

Pursuant to s. 27(4) paragraph 5, the employee is entitled only to premium pay. They have no other entitlements

NOTE: An employee who is entitled to a substitute holiday pursuant to s. 27(2)(a) does not lose that entitlement if they fail without reasonable cause to work all of their regularly last regularly scheduled day of work before or first regularly scheduled day of work after the substitute holiday. An employee does not have to "requalify" for the substitute holiday once they have already earned it.

ESA Part X Section 28 – Requirement to Work on a Public Holiday: Certain Operations

Requirement to Work on a Public Holiday: Certain Operations – s. 28(1)

28(1) If an employee is employed in a hospital, a continuous operation, or a hotel, motel, tourist resort, restaurant or tavern, the employer may require the employee to work on a public holiday that is ordinarily a working day for the employee and that is not a day on which the employee is on vacation, and if the employer does so, sections 26 and 27 do not apply to the employee.

This section provides a second exception to the entitlement in ESA Part X, s. 26(1) to a public holiday off with public holiday pay. The first exception is found in ESA Part X, s. 27. Section 28(1) allows some flexibility in certain operations that cannot reasonably be expected to shut down on public holidays, and permits employers to require employees in these operations to work on a public holiday. The entitlement for an employee in these operations who is required to work on a public holiday is set out in s. 28(2).

The terms "hospital" and "continuous operation" are defined in ESA Part I, s. 1.

In order for s. 28 to apply, the employee must be employed "in" a hospital, continuous operation, hotel, motel, tourist resort, restaurant or tavern. A question has arisen as to whether s. 28 will apply to employees who work for a call centre that deals exclusively with making hotel reservations. It is Program policy that s. 28 will not apply in that case (assuming that the call centre is not actually located in the hotel, and assuming that the call centre is not a continuous operation), since such employees are employed in a call centre, not in a hotel.

Note that the employer's ability to require employees in these operations to work on the public holiday applies only if the holiday falls on a day that is ordinarily a working day for that employee and is a day the employee is not on vacation. If the holiday falls on a day that is not ordinarily a working day for the employee in these operations, or on a day the employee is on vacation, ESA Part X, s. 29 applies and the employee has a choice of whether or not to work on the holiday, if requested – see ESA Part X, s. 26(1) for a discussion on how to determine whether or not a public holiday falls on a day that is ordinarily a working day for an employee who has an irregular schedule.

Note also that Part XVII Retail Business Establishments has the effect of granting some of the above employees the right to refuse to work on a public holiday, if they work in a retail business establishment, despite s. 28(1). Specifically, "retail" employees who work in a continuous operation (e.g., a 24-hour convenience store) have the right to refuse to work on public holidays, even if the holiday falls on a day that is ordinarily their working day. For further discussion, please refer to ESA Part XVII Retail Business Establishments.

Further note that the employer's ability to require employees to work on a public holiday is also subject to the employee's right to take a day off for purposes of religious observance under the Ontario *Human Rights Code*, RSO 1990, c H.19, and to the terms of the employee's employment contract, which may state, for example, that an employee cannot be required to work on public holidays (and, as well, the requirements in the ESA 2000 regarding hours of work and daily and weekly/bi-weekly rest provisions).

Employee's Entitlement – s. 28(2)

28(2) Subject to subsections (3) and (4), if an employer requires an employee to work on a public holiday under subsection (1), the employer shall,

(a) pay to the employee wages at his or her regular rate for the hours worked on the public holiday and substitute another day that would ordinarily be a working day for the employee to take off work and for which he or she shall be paid public holiday pay as if the substitute day were a public holiday; or

(b) pay to the employee public holiday pay for the day plus premium pay for each hour worked on that day.

This section sets out what an employee who is required to work on a public holiday pursuant to s. 28(1) is entitled to.

The entitlement for such an employee is either:

- Wages paid at the employee's regular rate (see ESA Part I, s.1 – Definitions) for each hour worked on the public holiday, plus a substitute holiday:
    - For which the employee must be paid public holiday pay. This means that the substitute holiday takes the place of the public holiday. Therefore, the formula to be used for calculating public holiday pay for the substitute holiday would be the formula that is in effect on the date of the substitute holiday. See ESA Part X, s. 24(1) for the calculation of public holiday pay;
    - Which must be scheduled for a day that would ordinarily be a working day for the employee; and
    - Which must be scheduled for a day before the deadlines set out in s. 28(3);

    plus

- A written statement setting out specifics about the substitute holiday, as outlined in section 28(2.1)

    OR

- Public holiday pay for the day plus premium pay for each hour worked on the holiday – see ESA Part X, s. 24

The employer chooses which of the options above to provide the employee. This feature of s. 28 distinguishes it from the entitlements under s. 27 and s. 30, where the first option is the default entitlement and the second option applies only if the employee agrees in writing.

The entitlement in s. 28(2) is subject to s. 28(4).

An issue has arisen as to the appropriate remedy where an employer requires an employee to work on the public holiday but neither provides a substitute holiday, nor pays the employee premium pay or public holiday pay. The question is which clause - (a) or (b) - should the officer assess under. In these cases, the officer looks for evidence as to whether the employer provided the employee with a written statement setting out the day that was to be substituted for the public holiday as required by s. 28(2.1). If there was no statement provided to the employee, it is Program policy that the officer will assess under clause (b).

If the officer assesses under clause (a), they will not be able to order a substitute holiday for the employee if the three-month deadline for taking the substitute holiday has already passed, because to do so would not be in accordance with s. 28(3)(a) - although the parties could, of course, agree to such a result on their own.

Substitute Day of Holiday – s. 28(2.1)

(2.1) If a day is substituted for a public holiday under clause (2) (a), the employer shall provide the employee with a written statement, before the public holiday, that sets out,

(a) the public holiday on which the employee will work;

(b) the date of the day that is substituted for a public holiday under clause (2) (a); and

(c) the date on which the statement is provided to the employee.

Subsection 28(2.1) is a new provision added by the *Fair Workplaces, Better Jobs Act, 2017*, SO 2017, c 22, effective January 1, 2018. Where the employee has agreed to work on a public holiday and the employer is substituting the public holiday in accordance with s. 28(2)(a), this section requires the employer to provide the employee with a written statement:

a) Naming the public holiday on which the employee is required to work,

b) Specifying the date that has been selected to be the substitute holiday, and

c) Noting the date on which the employee was given the statement.

The written statement must be provided to the employee before the actual public holiday. The legislation does not specify the manner in which the written statement must be provided. Consistent with the Program's position regarding the provision of the poster under ESA Part II, s. 2(5), an employer may provide the statement as a printed copy or as an attachment in an email to the employee.

There is no requirement for the parties to sign the written statement, nor is there a requirement for the employee to agree to the date of the substitute holiday, so long as it is a day that would ordinarily be a working day for the employee and that it is scheduled for a day before the deadlines set out in s. 28(3).

Restriction – s. 28(3)

28(3) A day that is substituted for a public holiday under clause (2) (a) shall be,

(a) a day that is no more than three months after the public holiday; or

(b) if the employee and the employer agree, a day that is no more than 12 months after the public holiday.

This section establishes a deadline for scheduling a substitute holiday an employee earns pursuant to s. 28(2)(a).

The section states that the employer must schedule the substitute holiday (which, pursuant to s. 28(2)(a), must be set for a day that is ordinarily a working day for the employee) for a day that is no later than three months after the date of the public holiday.

The substitute day can be taken before the actual public holiday itself. For example, Canada Day is on a Tuesday. It is not a violation of the ESA 2000 for an employee who was required to work on Canada Day to be given June 30, for example, as the substitute holiday.

If the employer and employee agree in writing, the substitute holiday can be scheduled for a day that is up to 12 months after the date of the public holiday. See ESA Part I, s. 1(3) and (3.1) regarding agreements in writing. An employee may wish to extend the three-month deadline if, for example, they want to tack the substitute holiday on to their next vacation but the vacation is more than three months away.

The written agreement contemplated in s. 28(3)(b) must be made prior to the public holiday as the employer is required under s. 28(2.1) to give the employee a written statement setting out the date of the substitute day. See ESA Part 1, s. 1(3) for a discussion of issues surrounding agreements, e.g., retroactivity, specificity, and requirements regarding informed and voluntary consent.

Where Certain Work Not Performed – s. 28(4)

28(4) The employee's entitlement under subsection (2) is subject to the following rules:

1. If the employee, without reasonable cause, performs none of the work that he or she was required to perform on the public holiday, the employee has no entitlement under subsection (2).

2. If the employee, with reasonable cause, performs none of the work that he or she was required to perform on the public holiday, the employer shall give the employee a substitute day off work in accordance with clause (2) (a) or public holiday pay for the public holiday under clause (2)(b), as the employer chooses. However, if the employee also fails, without reasonable cause, to work all of his or her last regularly scheduled day of work before the public holiday or all of his or her first regularly scheduled day of work after the public holiday, the employee has no entitlement under subsection (2).

3. If the employee performs some of the work that he or she was required to perform on the public holiday but fails, without reasonable cause, to perform all of it, he or she is entitled to premium pay for each hour worked on the public holiday but has no other entitlement under subsection (2).

4. If the employee performs some of the work that he or she was required to perform on the public holiday but fails, with reasonable cause, to perform all of it, the employer shall give the employee wages at his or her regular rate for the hours worked on the public holiday and a substitute day

off work in accordance with clause (2) (a) or public holiday pay for the public holiday plus premium pay for each hour worked on the public holiday under clause (2)(b), as the employer chooses. However, if the employee also fails, without reasonable cause, to work all of his or her last regularly scheduled day of work before the public holiday or all of his or her first regularly scheduled day of work after the public holiday, the employer shall give the employee premium pay for each hour worked on the public holiday but the employee has no other entitlement under subsection (2).

5. If the employee performs all of the work that he or she was required to perform on the public holiday but fails, without reasonable cause, to work all of his or her last regularly scheduled day of work before or all of his or her first regularly scheduled day of work after the public holiday, the employer shall give the employee premium pay for each hour worked on the public holiday but the employee has no other entitlement under subsection (2).

This section sets out the entitlements for an employee who was required to work on the public holiday pursuant to s. 28(1), but who fails to perform certain work.

Every situation that impacts on an employee's entitlement is covered. That is, this provision sets out the consequences in the event of any of the following circumstances, whether they occur on their own or in combination with one another:

- Performs only some of the work on a public holiday that the employee was required to perform:
    - With reasonable cause; or
    - Without reasonable cause.
- Performs none of the work on a public holiday that the employee was required to perform:
    - With reasonable cause; or
    - Without reasonable cause.
- Does not work the entire regularly scheduled days before or after the public holiday without reasonable cause.

In the discussion below:

- "Substitute holiday" is a day off that would ordinarily be a working day for the employee, for which the employee is entitled to receive public holiday pay – see ESA Part X, ss. 28(2) and (3).
- "Public holiday pay" is as calculated pursuant to ESA Part X, s. 24(1).
- "Premium pay" is as calculated pursuant to ESA Part X, s. 24(2).
- See ESA Part X, s. 26(2) for a discussion of the phrase "fail to work all of [the employee's] regularly scheduled day of work [before/after] the public holiday".
- See ESA Part X, s. 26(2) for a discussion of the term "reasonable cause". That discussion takes places in the context of the criterion of failure to work the regularly scheduled day before and after a public holiday, but applies equally to the criterion of failure to work on the public holiday.

The statutory phrases, "performs none of the work that he or she required to perform on the public holiday" and "performs some of the work that he or she required to perform on the public holiday but fails . . . to perform all of it," does not refer to the quantity or quality of the employee's work. Rather, it refers to

whether the employee worked the whole shift, part of the shift, or none of the shift they were required to work on the public holiday.

For example, an employee who was required to work an eight-hour shift on Canada Day and who usually assembles 100 widgets during an eight-hour shift will not be considered to have performed only some of the work merely because they assembled only 80 widgets on Canada Day. So long as the employee worked the entire eight-hour shift, they will have performed all of the work they were required to perform on the holiday.

The situations and consequences addressed in each of the five paragraphs in s. 28(4) are:

Performs none of the work on public holiday without reasonable cause

Employee performs none of the work on the public holiday, (i.e., did not show up at all for the shift), without reasonable cause**, employee has no entitlement.**

Pursuant to s. 28(4), paragraph 1, the employee has no entitlement of any sort: not to a substitute holiday, to public holiday pay or to premium pay. When the employee was required to work on the public holiday, ESA Part X, s. 26 and s. 27 and the entitlements available under those provisions no longer applied to that employee.

Performs none of the work on public holiday with reasonable cause

Works last regularly scheduled day of work

Employee performs none of the work on the public holiday, (i.e., did not show up at all for the shift), with reasonable cause**, employee entitled to:**

i. Substitute holiday;

OR

ii. Public holiday pay

Pursuant to s. 28(4) paragraph 2, the employer chooses which to give the employee: a substitute holiday or public holiday pay.

Fails to work last or first regularly scheduled day of work

Employee:

- Performs none of the work on the public holiday, (i.e., did not show up at all for the shift), with reasonable cause;

  AND

- Fails to work all of the last regularly scheduled day of work before or first regularly scheduled day of work after the public holiday, without reasonable cause:

Employee has no entitlement.

Pursuant to s. 28(4) paragraph 2, the employee has no entitlement of any sort: not to a substitute holiday, to public holiday pay or to premium pay. When the employee was required to work pursuant to s. 28(1), s. 26 and s. 27 and the entitlements available under those provisions no longer applied.

Performs only some of the work on public holiday without reasonable cause

Employee performs some but not all of the work they were required to perform on the public holiday (i.e., showed up for only part of the shift) without reasonable cause:

Employee entitled only to premium pay for each hour worked on the public holiday.

Pursuant to s. 28(4) paragraph 3, the employee is entitled only to premium pay for each hour worked on the public holiday. They have no other entitlements - not to public holiday pay or to a substitute holiday.

Performs only some of the work on public holiday with reasonable cause

Works last regularly scheduled day of work

Employee performs some but not all of the work they agreed to perform on the public holiday, (i.e., showed up for only part of the shift), with reasonable cause, **employee entitled to:**

i. Wages at employee's regular rate for each hour worked on the public holiday PLUS a substitute holiday;

OR

ii. Public holiday pay PLUS premium pay for each hour worked on the holiday.

Pursuant to s. 28(4) paragraph 4, the employer chooses which to give the employee: wages at the regular rate plus a substitute holiday, or public holiday pay plus premium pay.

Fails to work last or first regularly scheduled day of work

Employee:

- Performs some but not all of the work they agreed to perform on the public holiday, (i.e., showed up for only part of the shift), with reasonable cause;

  AND

- Fails to work all of their last regularly scheduled day of work before or first regularly scheduled day of work after the public holiday, without reasonable cause:

Employee entitled only to premium pay for each hour worked on the public holiday.

Pursuant to s. 28(4) paragraph 4, the employee is only entitled to premium pay for each hour worked on the public holiday.

Performs all work on public holiday but fails to work last or first regularly scheduled day of work

Employee:

- Performs all of the work they agreed to perform on the public holiday (i.e., showed up for the entire shift);

BUT

- Fails to work all of their last regularly scheduled day of work before or first regularly scheduled day of work after the public holiday, without reasonable cause:

Employee entitled only to premium pay for each hour worked on the public holiday.

Pursuant to s. 28(4) paragraph 5, the employee is only entitled to premium pay for each hours worked on the public holiday.

NOTE: An employee who is entitled to a substitute holiday pursuant to s. 28(2)(a) does not lose that entitlement if they fail without reasonable cause to work all of their last regularly scheduled day of work before or first regularly scheduled day of work after the substitute holiday. An employee does not have to "requalify" for the substitute holiday once they have already earned it.

ESA Part X Section 29 – Public Holiday Not Ordinarily a Working Day

Public Holiday Not Ordinarily a Working Day – s. 29(1)

29(1) If a public holiday falls on a day that would not ordinarily be a working day for an employee or a day on which the employee is on vacation, the employer shall substitute another day that would ordinarily be a working day for the employee to take off work and for which he or she shall be paid public holiday pay as if the substitute day were a public holiday.

This provision sets out an employee's entitlement when a public holiday falls on a day that is not ordinarily the employee's working day, or is during the employee's vacation.

This provision applies to employees in all operations, including hospitals, continuous operations, and hotels, motels, tourist resorts, restaurants and taverns. See Part X, ss. 26-28 for the entitlements if a public holiday falls on a day that is ordinarily an employee's working day and that is not during an employee's vacation.

It is not always readily apparent which days are ordinarily working days for a given employee. Whether or not a holiday falls on a day that is ordinarily a working day for an employee will determine what the employee is entitled to for the holiday, and, in certain industries, whether or not the employer can require the employee to work on the holiday. For example, the question has arisen in the restaurant industry as to how to determine which days are ordinarily working days for part-time employees who have irregular shifts. It is Program policy that to make this determination, one looks at the days that the employee tells the employer that they are available to work and the past scheduling practice. For example, an employee is hired on the basis that they are available to work Mondays through Fridays, and is actually scheduled to work on each of those days (although not on any regular basis, e.g., Monday and Tuesday one week, Tuesday and Friday the next week, Wednesday and Thursday the next week, etc.). In this case, the Program would consider Mondays through Fridays to be days that would ordinarily be working days for that employee. However, if that same employee is only ever scheduled to work Tuesdays and Thursdays, the Program would consider only Tuesdays and Thursdays to be days that would ordinarily be working days for that employee, even though they said they were available all weekdays.

For employees who are on lay-off, a leave under ESA Part XIV, or any other leave of absence when a public holiday occurs, their pre-leave or pre-lay-off schedule determines whether the public holiday falls

on a day that would or would not ordinarily be a working day for an employee, and thus whether s. 26 or s. 29 will apply to that particular public holiday. For example, if an employee on parental leave worked Mondays to Fridays before the leave, Mondays to Fridays are days that are ordinarily working days for that employee, and Saturdays and Sundays are days that would not ordinarily be working days for that employee. Consequently, s. 26 will apply to any public holiday that falls on a weekday during that employee's leave, and s. 29 will apply to any public holiday that falls on a weekend during that employee's leave.

Some employees may have had a varying, irregular schedule before their leave or lay-off, such that it cannot be determined whether or not the employee would have been scheduled to work on the day the public holiday falls. In this case, because there are no days that, in the words of s. 26, "would ordinarily be a working day for" that employee, s. 29 will apply to any public holiday that occurs during the leave or lay-off.

See ESA Part XVIII.1, s. 74.10 for a discussion of the application of Part X to assignment employees of temporary help agencies, particularly the Program's policy that a public holiday will be considered to fall on a day that is ordinarily a working day for an assignment employee only if the employee is on assignment and the holiday falls on a day that they would be working pursuant to the assignment (assuming there had been no holiday). In that case only, s. 26, 27 or 28 would apply to determine an assignment employee's public holiday entitlements. In all other cases, s. 29 would apply. Note that s. 29(2.1) and s. 29(2.2) must be read together with s. 74.10.

When a public holiday falls on a day that is not ordinarily an employee's working day or is during an employee's vacation, the employee is to be given a substitute day off, which must be:

- Scheduled for a day that would ordinarily be a working day for the employee;
- Paid as public holiday pay. This means that the substitute holiday takes the place of the public holiday. Therefore, the formula to be used for calculating public holiday pay for the substitute holiday would be the formula that is in effect on the date of the substitute holiday. See ESA Part X, s. 24(1) for the calculation of public holiday pay; and
- Scheduled for a day before the deadlines set out in s. 29(2).

In addition, the employer must provide the employee a written statement setting out specifics about the substitute holiday, as outlined in s. 29(1.1) below.

The entitlement to a substitute day under s. 29 is subject to:

- Section 29(2.1), which states that an employee who is on pregnancy or parental leave or lay-off when a public holiday falls will get public holiday pay for the public holiday, rather than a substitute day;
- Section 29(3), which allows employers and employees to agree in writing that the employee will be paid public holiday pay for the holiday instead of receiving a substitute day;
- Section 29(4), which disentitles an employee from a substitute day and public holiday pay if they fail without reasonable cause to work all of their regularly scheduled shifts before or after the public holiday; and
- Section 30(1), which allows employers and employees to agree in writing that an employee will work on a public holiday that falls on a day that is not ordinarily a working day for the employee or is a day that is during their vacation.

Substitute Day of Holiday – s. 29(1.1)

29(1.1) If a day is substituted for a public holiday under subsection (1), the employer shall provide the employee with a written statement, before the public holiday, that sets out,

(a) the public holiday that is being substituted

(b) the date of the day that is substituted for a public holiday under subsection (1); and

(c) the date on which the statement is provided to the employee.

Subsection 29(1.1) is a new provision added by the *Fair Workplaces, Better Jobs Act, 2017*, SO 2017, c 22, effective January 1, 2018. Where the employer is substituting the public holiday in accordance with s. 29(1), this section requires the employer to provide the employee with a written statement:

d) Naming the public holiday that is being substituted,
e) Specifying the date that has been selected to be the substitute holiday, and
f) Noting the date on which the employee was given the statement.

The written statement must be provided to the employee before the actual public holiday. The legislation does not specify the manner in which the written statement must be provided. Consistent with the Program's position regarding the provision of the poster under ESA Part II, s. 2(5), an employer may provide the statement as a printed copy or as an attachment in an email to the employee.

There is no requirement for the parties to sign the written statement, nor is there a requirement for the employee to agree to the date of the substitute holiday, so long as it is a day that would ordinarily be a working day for the employee and that it is scheduled for a day before the deadlines set out in ESA Part X, s. 29(2).

Restriction – s. 29(2)

29(2) A day that is substituted for a public holiday under subsection (1) shall be,

(a) a day that is no more than three months after the public holiday; or

(b) if the employee and the employer agree, a day that is no more than 12 months after the public holiday.

This section establishes a deadline for scheduling a substitute holiday an employee earns pursuant to s. 29(1).

The section states that the employer must schedule the substitute holiday (which, pursuant to s. 29(1), must be set for a day that is ordinarily a working day for the employee) for a day that is no later than three months from the date of the public holiday.

The substitute day can be taken before the actual public holiday itself. For example, Canada Day is on a Saturday. It is not a violation of the Act for an employee whose ordinary working days are Mondays to Fridays to be given Friday, June 30, as the substitute holiday.

If the employer and employee agree in writing, the substitute holiday can be scheduled for a day that is up to 12 months after the date of the public holiday. See ESA Part I, ss. 1(3) and (3.1) for a discussion of

written agreements. An employee may wish to extend the three-month deadline if, for example, they want to tack the substitute holiday on to their next vacation but the vacation is more than three months away.

The written agreement contemplated in s. 29(2)(b) must be signed prior to the public holiday as the employer is required under s. 29(1.1) to give the employee a written statement setting out the date of the substitute day.

Employee on Leave or Lay-off – s. 29(2.1)

29(2.1) If a public holiday falls on a day that would not ordinarily be a working day for an employee and the employee is on a leave of absence under section 46 or 48 or on a layoff on that day, the employee is entitled to public holiday pay for the day but has no other entitlement under this Part with respect to the public holiday.

This section provides that where an employee is on a pregnancy leave, parental leave, or lay-off when a public holiday falls, and it falls on a day that is not ordinarily a working day for that employee, the employee is entitled only to public holiday pay for the holiday, rather than to the substitute day with public holiday pay provided for in s. 29(1).

Note that s. 29(2.1) does not apply to an employee on a Part XIV leave other than pregnancy or parental leave. Thus, if an employee is on sick leave, family responsibility leave, bereavement leave, family medical leave, family caregiver leave, critical illness leave, domestic or sexual violence leave, crime-related child disappearance leave, child death leave, reservist leave, organ donor leave, or emergency leave when a public holiday falls and it falls on a day that would not ordinarily be a working day for the employee, the employee will be entitled to the substitute day with public holiday pay provided by s. 29(1).

Note also that because the amount of public holiday pay owing is based on the wages earned by an employee in the four work weeks prior to the public holiday, the amount of public holiday pay to which an employee who was on pregnancy or parental leave or lay-off for any time during those four weeks will be less than what the employee's entitlement would have been had the employee not been on leave or lay-off for any part of those four weeks.

In the case of an employee who is on lay-off (as opposed to pregnancy or parental leave), s. 29(2.1) must be read in conjunction with s. 29(2.2).

For information about the application of s. 29(2.1) to assignment employees of temporary help agencies, see ESA Part XVIII.1, s. 74.10.

Lay-off Resulting in Termination – s. 29(2.2)

29(2.2) Subsection (2.1) does not apply to an employee if his or her employment has been terminated under clause 56(1)(c) and the public holiday falls on or after the day on which the lay-off first exceeded the period of a temporary lay-off.

This section states that s. 29(2.1) will not apply to employees who are on lay-off if their employment has been terminated pursuant to ESA Part XV, s. 56(1)(c). For example, an employee is on lay-off for more than 13 weeks in any period of 20 consecutive weeks. None of the conditions in s. 56(2)(b) or (c) that would allow a lay-off to continue longer than 13 weeks are present. Pursuant to s. 56(1)(c), the employee is considered to be terminated. However, they may not be considered to be severed for the purposes of the severance pay provisions; they may still be on lay-off. In this circumstance, s. 29(2.2) states that s.

29(2.1) does not apply. As a result, s. 29(1) will apply and the employee will be entitled to a substitute day with public holiday pay. If the employment ends before the substitute day, ESA Part X, s. 32 would apply and the employee will just be entitled to public holiday pay.

The application of this section was clarified in respect of certain assignment employees of temporary help agencies by s. 74.10(2) on November 6, 2009 with the coming into force of the *Employment Standards Amendment Act (Temporary Help Agencies) 2009*, SO 2009, c 9. Pursuant to s. 74.2, Part XVIII.1 of the Act, which includes s. 74.10(2), does not apply to those assignment employees who provide professional services, personal support services or homemaking services as defined in the *Home Care and Community Services Act, 1994* if the assignment is made under a contract between the employee or their employer and a community care access corporation within the meaning of the *Community Care Access Corporations Act, 2001*, SO 2001, c 33. As a result, the application of s. 29(2.2) is not clarified in respect of such employees by s. 74.10(2).

Section 74.10(2) provides that a period of temporary lay-off referred to in s. 29(2.2) is to be determined in accordance with s. 56 as that section is modified by s. 74.11 for the purposes of Part XV. For further discussion see ESA Part XVIII.1, s.74.10.

Agreement Re: Public Holiday Pay – s. 29(3)

29(3) An employer and an employee may agree that, instead of complying with subsection (1), the employer shall pay the employee public holiday pay for the public holiday, and if they do subsection (1) does not apply to the employee.

This section allows an employer and employee to agree in writing that an employee will be paid public holiday pay for a holiday instead of receiving a substitute day the employee would otherwise be entitled to pursuant to s. 29(1).

See ESA Part X, s. 24 for the calculation of public holiday pay.

Exception – s. 29(4)

29(4) The employee has no entitlement under subsection (1), (2.1) or (3) if he or she fails, without reasonable cause, to work all of his or her last regularly scheduled day of work before the public holiday or all of his or her first regularly scheduled day of work after the public holiday.

This section provides that employees are not entitled to the entitlements under s. 29(1), (2.1) or s. 29(3) if they fail, without reasonable cause, to work their entire regularly scheduled day of work before or after the holiday.

This section is intended to discourage employees from unilaterally taking an extra day off around the public holiday by failing to show up on the day they are expected to work before or after the holiday, or by showing up to work later or leaving earlier than expected before or after the holiday.

This exception to the entitlement is identical in substance to s. 26(2). Please refer to ESA Part X, s. 26 for a discussion of this provision.

NOTE: An employee who is entitled to a substitute holiday pursuant to s. 29(1) does not lose that entitlement if they fail without reasonable cause to work all of their last regularly scheduled day of work before or first regularly scheduled day of work after the substitute holiday. An employee does not have to "requalify" for the substitute holiday once they have already earned it.

ESA Part X Section 30 - Agreement to Work Where Not Ordinarily a Working Day

Agreement to Work Where Not Ordinarily a Working Day - s. 30(1)

30(1) An employee and employer may agree that the employee will work on a public holiday that falls on a day that would not ordinarily be a working day for that employee or on a day on which the employee is on vacation, and if they do, section 29 does not apply to the employee.

This section provides an exception to the entitlement in ESA Part X, s. 29.

Section 29 provides employees (who are not on pregnancy or parental leave, or on lay-off) with the right to a substitute holiday or, if the employer and employee agree in writing, to public holiday pay for a holiday, when the public holiday falls on a day that is not ordinarily a working day for an employee or is on a day that the employee is on vacation. Section 30(1) allows employers and employees in these circumstances to agree that the employee will work on the public holiday. If an agreement is made, the entitlement in s. 30(2) will apply instead of those set out in s. 29.

The agreement to work on the public holiday must be in writing. See ESA Part I, s. 1(3) and (3.1) for information on this written requirement, and other issues regarding agreements, e.g., retroactivity, specificity, and requirements on informed and voluntary consent. The written agreement must be reached prior to the date of the public holiday.

Employee's Entitlement - s. 30(2)

30(2) Subject to subsections (3) and (4), if an employer and an employee make an agreement under subsection (1),

(a) the employer shall pay to the employee wages at his or her regular rate for the hours worked on the public holiday and substitute another day that would ordinarily be a working day for the employee to take off work and for which he or she shall be paid public holiday pay as if the substitute day were a public holiday; or

(b) if the employer and employee agree, the employer shall pay the employee public holiday pay for the day plus premium pay for each hour worked.

This section sets out the entitlement of an employee who agreed to work on a public holiday that fell on a day that is not ordinarily a working day, pursuant to s. 30(1).

The default entitlement for such an employee is wages paid at the employee's "regular rate" (see ESA Part I, s. 1) for each hour worked on the public holiday, plus a substitute holiday:

- For which the employee must be paid public holiday pay. This means that the substitute holiday takes the place of the public holiday. Therefore, the formula to be used for calculating public holiday pay for the substitute holiday would be the formula that is in effect on the date of the substitute holiday. - see s. 24(1) for the calculation of public holiday pay;
- Which must be scheduled for a day that would ordinarily be a working day for the employee; and
    - Which must be scheduled for a day before the deadlines set out in s. 30(3).

plus

- A written statement setting out specifics about the substitute holiday, as outlined in section 30(2.1). See s. 30(2.1) below for more details.

However, if an employer and employee agree in writing, the employer must, instead of the default entitlement, give to the employee public holiday pay plus premium pay for each hour worked on the public holiday. See ESA Part 1, s. 1(3) and (3.1) for a discussion on agreements in writing. See ESA Part X, s. 24 for the calculation of public holiday pay and premium pay.

The entitlements described above are subject to s. 30(4) - see the discussion below.

Substitute Day of Holiday – s. 30(2.1)

32(2.1) If a day is substituted for a public holiday under clause (2) (a), the employer shall provide the employee with a written statement, before the public holiday, that sets out,

(a) the public holiday on which the employee will work;

(b) the date of the day that is substituted for a public holiday under clause (2) (a); and

(c) the date on which the statement is provided to the employee.

Subsection 30(2.1) is a new provision added by the *Fair Workplaces, Better Jobs Act, 2017*, SO 2017, c 22, effective January 1, 2018. Where the employee has agreed to work on a public holiday and the employer is substituting the public holiday in accordance with s. 30(2) (a), this section requires the employer to provide the employee with a written statement:

a) Naming the public holiday on which the employee has agreed to work,

b) Specifying the date that has been selected to be the substitute holiday, and

c) Noting the date on which the employee was given the statement.

The written statement must be provided to the employee before the actual public holiday. The legislation does not specify the manner in which the written statement must be provided. Consistent with the Program's position regarding the provision of the poster under ESA Part II, s. 2(5), an employer may provide the statement as a printed copy or as an attachment in an email to the employee.

There is no requirement for the parties to sign the written statement, nor is there a requirement for the employee to agree to the date of the substitute holiday, so long as it is a day that would ordinarily be a working day for the employee and that it is scheduled for a day before the deadlines set out in s. 30(3).

Restriction - s. 30(3)

30(3) A day that is substituted for a public holiday under clause (2) (a) shall be,

(a) a day that is no more than three months after the public holiday; or

(b) if the employee and the employer agree, a day that is no more than 12 months after the public holiday.

This section establishes a deadline for scheduling a substitute holiday an employee earns pursuant to s. 30(2)(a).

The section states that the employer must schedule the substitute holiday (which, pursuant to s. 30(2), must be set for a day that is ordinarily a working day for the employee) for a day that is no later than three months from the date of the public holiday.

The substitute day can be taken before the actual public holiday itself. For example, Canada Day is on a Saturday. An employee usually works weekdays, but agrees in writing to work on Canada Day. It is not a violation of the Act for the employee to be given Friday, June 30, as the substitute holiday.

If the employer and employee agree in writing the substitute holiday can be scheduled for a day that is up to 12 months after the date of the public holiday. See ESA Part 1, s. 1(3) and (3.1) for a discussion on written agreements. An employee may wish to extend the three-month deadline if, for example, they want to tack the substitute holiday on to their next vacation but the vacation is more than three months away.

The written agreement contemplated in s. 30(3)(b) must be reached prior to the public holiday as the employer is required under s. 30(2.1) to give the employee a written statement setting out the date of the substitute day. See ESA Part I, s. 1 for a discussion of issues around agreements, e.g., retroactivity, specificity, and requirements regarding informed and voluntary consent.

Where Certain Work Not Performed - s. 30(4)

30(4) The employee's entitlement under subsection (2) is subject to the following rules:

1. If the employee, without reasonable cause, performs none of the work that he or she agreed to perform on the public holiday, the employee has no entitlement under subsection (2).

2. If the employee, with reasonable cause, performs none of the work that he or she agreed to perform on the public holiday, the employer shall give the employee a substitute day off work in accordance with clause (2) (a) or, if an agreement was made under clause (2) (b), public holiday pay for the public holiday. However, if the employee also fails, without reasonable cause, to work all of his or her last regularly scheduled day of work before the public holiday or all of his or her first regularly scheduled day of work after the public holiday, the employee has no entitlement under subsection (2).

3. If the employee performs some of the work that he or she agreed to perform on the public holiday but fails, without reasonable cause, to perform all of it, the employer shall give the employee premium pay for each hour worked on the public holiday but the employee has no other entitlement under subsection (2).

4. If the employee performs some of the work that he or she agreed to perform on the public holiday but fails, with reasonable cause, to perform all of the work that he or she agreed to perform on the public holiday, the employer shall give the employee wages at his or her regular rate for the hours worked on the public holiday and a substitute day off work in accordance with clause (2) (a) or, if an agreement was made under clause (2) (b), public holiday pay for the public holiday plus premium pay for each hour worked on the public holiday. However, if the employee also fails, without reasonable cause, to work all of his or her last regularly scheduled day of work before the public holiday or all of his or her first regularly scheduled day of work after the public holiday, the employer shall give the employee premium pay for each hour worked on the public holiday but the employee has no other entitlement under subsection (2).

5. If the employee performs all of the work that he or she agreed to perform on the public holiday but fails, without reasonable cause, to work all of his or her last regularly scheduled day of work before or all of his or her first regularly scheduled day of work after the public holiday, the employer shall give the employee premium pay for each hour worked on the public holiday but the employee has no other entitlement under subsection (2).

This section sets out the entitlements for an employee who agreed to work on the public holiday pursuant to s. 30(1), but who fails to perform certain work.

Every situation that impacts on an employee's entitlement is covered. That is, this provision sets out the consequences in the event of any of the following circumstances, whether they occur on their own or in combination with one another:

- Employee performs only some of the work on a public holiday that the employee had agreed to perform:
    - With reasonable cause; or
    - Without reasonable cause.
- Employee performs none of the work on a public holiday that the employee had agreed to perform:
    - With reasonable cause; or
    - Without reasonable cause.
- Employee does not work the entire regularly scheduled days of work before or after the public holiday without reasonable cause.

In the discussion below:

- "Substitute holiday" is a day off that would ordinarily be a working day for the employee, for which the employee is entitled to receive public holiday pay - see ESA Part X, s. 30.
- "Public holiday pay" is as calculated in s. 24(1) - see ESA Part X, s. 24.
- "Premium pay" is as calculated in s. 24(2) - see ESA Part X, s. 24.
- See ESA Part X, s. 26(2) for a discussion of the phrase "fail to work all of [the employee's] regularly scheduled day of work [before/after] the public holiday".
- See ESA Part X, s. 26(2) for a discussion of the term "reasonable cause". That discussion takes places in the context of the criterion of failure to work the regularly scheduled day before and after a public holiday, but applies equally to the criterion of failure to work on the public holiday.

The statutory phrases, "performs none of the work that he or she agreed to perform on the public holiday" and "performs some of the work that he or she agreed to perform on the public holiday but fails . . . to perform all of it," does not refer to the quantity or quality of the employee's work. Rather, it refers to whether the employee worked the whole shift, part of the shift, or none of the shift they agreed to work on the public holiday.

For example, an employee who agreed to work an eight-hour shift on Canada Day and who usually assembles 100 widgets during an eight-hour shift will not be considered to have performed only some of the work merely because they assembled only 80 widgets on Canada Day. So long as the employee

worked the entire eight-hour shift, they will have "performed all of the work" they agreed to perform on the holiday.

The situations and consequences addressed in each of the five paragraphs in s. 30(4) are:

Performs none of the work on public holiday without reasonable cause

Employee performs none of the work on the public holiday, (i.e., did not show up at all on the holiday), without reasonable cause: **employee has no entitlement.**

Pursuant to s. 30(4) paragraph 1, the employee has no entitlement of any sort: not to a substitute holiday, to public holiday pay or to premium pay. When the employee entered into the s. 30(1) agreement, the entitlement under s. 29 ceased to apply to that employee.

Performs none of the work on public holiday with reasonable cause

Works last regularly scheduled day of work

Employee performs none of the work on the public holiday, (i.e., did not show up at all on the holiday), with reasonable cause, **employee entitled to:**

i. Substitute holiday,

   OR

ii. Public holiday pay if the employee had earlier agreed to be paid public holiday pay and premium pay for each hour they were going to work on the public holiday instead of receiving a substitute holiday.

Pursuant to s. 30(4) paragraph 2, the employee is entitled to either a substitute holiday or public holiday pay if the employee had earlier agreed to be paid public holiday pay and premium pay for each hour they were going to work on the public holiday instead of receiving a substitute holiday.

Fails to work last or first regularly scheduled day of work

Employee performs none of the work on the public holiday, (i.e., did not show up at all), with reasonable cause AND fails to work all of the last regularly scheduled day of work before or first regularly scheduled day of work after the public holiday, without reasonable cause:

Employee has no entitlement.

Pursuant to s. 30(4) paragraph 2, the employee has no entitlement of any sort: not to a substitute holiday, to public holiday pay or to premium pay. When the employee entered into the s. 30(1) agreement, the general entitlement under ESA Part X, s. 29 ceased to apply to that employee.

Performs only some of the work on public holiday without reasonable cause

Employee performs some but not all of the work they agreed to perform on the public holiday, (i.e., showed up for only part of the shift) without reasonable cause:

Employee entitled only to premium pay for each hour worked on the public holiday.

Pursuant to s. 30(4), paragraph 3, the employee is entitled only to premium pay for each hour worked on the public holiday. They have no other entitlements - not to public holiday pay or to a substitute holiday.

Performs only some of the work on public holiday with reasonable cause

Works last regularly scheduled day of work

Employee performs some but not all of the work they agreed to perform on the public holiday, (i.e., showed up for only part of the shift) with reasonable cause:

Employee entitled to:

i. Wages at employee's regular rate for each hour worked on the public holiday PLUS a substitute holiday,

OR

ii. Public holiday pay plus premium pay for each hour worked on the public holiday if the employee had earlier agreed to be paid public holiday pay plus premium pay for each hour they were going to work on the public holiday instead of receiving a substitute holiday.

Pursuant to s. 30(4) paragraph 4, the employee is entitled to either wages at their regular rate plus a substitute holiday, or public holiday pay plus premium pay if they agreed to be paid public holiday pay plus premium pay instead of receiving a substitute holiday.

Fails to work last or first regularly scheduled day of work

Employee performs some but not all of the work they agreed to perform on the public holiday, (i.e., showed up for only part of the shift), with reasonable cause AND fails to work all of their last regularly scheduled day of work before or first regularly scheduled day of work after the public holiday, without reasonable cause:

Employee entitled only to premium pay for each hour worked on the public holiday.

Pursuant to s. 30(4) paragraph 4, the employee is only entitled to premium pay for each hour worked on the public holiday.

Performs all work on public holiday but fails to work last or first regularly scheduled day of work

Employee performs all of the work they agreed to perform on the public holiday (i.e., showed up for the entire shift), BUT fails to work all of their last regularly scheduled day of work before or first regularly scheduled day of work after the public holiday, without reasonable cause:

Employee entitled only to premium pay for each hour worked on the public holiday.

Pursuant to s. 30(4) paragraph 5, the employee is only entitled to premium pay for each hour worked on the public holiday.

NOTE: An employee who is entitled to a substitute holiday pursuant to s. 30(2)(a) does not lose that entitlement if they fail without reasonable cause to work all of their last regularly scheduled day of work

before or first regularly scheduled day of work after the substitute holiday. An employee does not have to "requalify" for the substitute holiday once they have already earned it.

ESA Part X Section 31 - Premium Pay Hours Not Overtime Hours

31 If an employee receives premium pay for working on a public holiday, the hours worked shall not be taken into consideration in calculating overtime pay to which the employee may be entitled.

This section means that any hours worked on a public holiday that are compensated with premium pay are to be excluded when determining whether an employee's hours of work exceed the applicable overtime threshold.

Note that only those hours that are worked on a public holiday AND that are compensated with premium pay are excluded when determining whether or not the employee has crossed the overtime threshold. For example, if an employee works on Canada Day for regular pay and is given a substitute day off with public holiday pay, the hours worked on Canada Day are counted.

Note also that those hours that are worked on a public holiday and compensated with premium pay are excluded only for the purposes of determining overtime entitlements. They are not excluded for any other purposes, such as the hours of works limits or the weekly/biweekly rest periods.

The following examples illustrate the application of s. 31:

Example 1:

Employee works on a public holiday (Monday) and is paid public holiday pay plus premium pay for every hour worked on the holiday.

Employee’s schedule:

- Sunday: No hours worked
- Monday (public holiday): 8 hours
- Tuesday: 12 hours
- Wednesday: 9 hours
- Thursday: 8 hours
- Friday: 8 hours
- Saturday: 8 hours

Actual hours worked = 53 hours

Number of hours to be included in overtime threshold calculation = 53 actual hours worked minus 8 hours worked on the public holiday for which the employee was paid premium pay = 45 hours

Number of overtime hours = 45 hours minus 44 hours = 1 hour

Assume that the employee's rate of pay is $15.00 per hour.

For the 53 hours worked in that work week, the employee is entitled to:

- Regular pay = 44 hours x $15/hour = $660
- Premium pay for work on public holiday = ($15 x 1.5) x 8 hours = $180
- Overtime Pay = 1 hour x ($15 x 1.5) = $22.50
- Public holiday pay = Regular wages earned and vacation pay payable in the four work weeks before the work week in which the public holiday occurred, divided by 20. Assume $132.

Total wages owing = $994.50

Example 2:

Employee works on a public holiday (Monday) and is paid his or her regular rate for hours worked on the public holiday plus receives a substitute day off with public holiday pay, scheduled to be taken in two months.

Employee's schedule:

- Sunday: No hours worked
- Monday (public holiday): 8 hours
- Tuesday: 12 hours
- Wednesday: 9 hours
- Thursday: 8 hours
- Friday: 8 hours
- Saturday: 8 hours

Actual hours worked = 53 hours

Number of hours to be included in overtime threshold calculation = 53 hours (the 8 hours worked on the public holiday are included in the total because they were not compensated with premium pay)

Number of overtime hours = 53 hours minus 44 hours = 9 hours

Assume that the employee's rate of pay is $15.00 per hour.

For the 53 hours worked in that work week, the employee is entitled to:

- Regular pay = 44 hours x $15/hour = $660
- Premium pay for work on public holiday = $0
- Overtime Pay = 9 hours x ($15 x 1.5) = $202.50
- Public holiday pay = $0 in this week (For the work week in which the substitute day falls, the public holiday pay will be: regular wages earned and vacation pay payable in the four work weeks before the work week in which the substitute holiday fell, divided by 20.)

Total wages owing = $862.50

ESA Part X Section 32 – If Employment Ends

32 If the employment of an employee ends before a day that has been substituted for a public holiday under this part, the employer shall pay the employee public holiday pay for that day in accordance with subsection 11(5).

This section provides that an employee whose employment is terminated before they received their substitute day off with public holiday pay is owed the public holiday pay. The employer must pay the public holiday pay no later than the later of seven days after the termination or the day that would ordinarily have been the employee's next pay day.

Section 32 will apply regardless of the reason for the employment coming to an end, whether it be because the employee resigned, or was terminated, whatever the reason behind the termination. For example, s. 32 will apply even if an employee is terminated because they were guilty of wilful misconduct that has not been condoned by the employer and is therefore not entitled to termination pay or notice.

Section 24(1) sets out the calculation that is used to determine the amount of public holiday pay owing. Because public holiday pay for a substitute holiday is calculated on the basis that the substitute day is a public holiday in accordance with s. 27(2)(a), s. 28(2)(a), s. 29(1) and s. 30(2)(a), the formula in s. 24(1) applies when calculating public holiday pay for substitute days.

As a result, the four work week time frame over which the calculation for a substitute holiday is performed is normally the four work weeks prior to the work week in which the substitute holiday falls.

However, **where the employee's employment has been terminated prior to the substitute day being taken**, s. 32 provides that the amount of public holiday pay owing is to be determined using the actual public holiday as the reference point.

That is, in accordance with ESA Part X, s. 24(1), the four work weeks prior to the actual holiday is the relevant time frame for the calculation.

ESA Part XI - Vacation with Pay

The general intent of Part XI Vacation with Pay is to provide employees with vacation time and vacation pay. An employee whose period of employment is less than five years is entitled to two weeks of vacation time after the completion of each 12-month vacation entitlement year. An employee whose period of employment is five years or more is entitled to three weeks of vacation time after the completion of each 12-month vacation entitlement year.

Where the employer has established an alternative vacation entitlement year (i.e., one that does not start on the date of hire or the anniversary of the date of hire), the employee is entitled to a pro-rated amount of vacation time for the period ("stub period") preceding the first alternative vacation entitlement year and two or three weeks of vacation time after each alternative vacation entitlement year thereafter depending upon their period of employment upon competition of each vacation entitlement year.

Vacation pay accrues so as to provide a sum upon which the employee can draw during their vacation. The amount of vacation the employee accrues will depend upon the employee’s period of employment when the vacation entitlement period ends. Employees whose period of employment is less than five years upon completion of a vacation entitlement period, are entitled to accrue vacation pay at four per cent of the gross wages (excluding vacation pay) earned in that vacation entitlement period. Employees whose period of employment upon completion of a vacation entitlement period is five years or more are entitled to accrue vacation pay at six per cent of the gross wages (excluding vacation pay) earned in that vacation entitlement period.

ESA Part XI Section 33 – Right to Vacation

Right to Vacation – s. 33(1)

33(1) An employer shall give an employee a vacation of,

a) at least two weeks after each vacation entitlement year that the employee completes, if the employee's period of employment is less than five years; or

b) at least three weeks after each vacation entitlement year that the employee completes, if the employee's period of employment is five years or more.

The *Government Efficiency Act, 2002*, SO 2002, c 18 ("GEA 2002") amended this provision, effective November 26, 2002, to reflect the employer's ability to establish an alternative vacation entitlement year. ESA Part I, s. 1 defines an alternative vacation entitlement year as a recurring 12-month period chosen by the employer and beginning on a date other than the first day of the employee's employment. A standard vacation entitlement year is defined as a recurring 12-month period beginning on the date of hire.

The *Fair Workplaces, Better Jobs Act, 2017*, SO 2017, c 22 ("FWBJA"), effective January 1, 2018, amended the requirement to provide employees with two weeks' of vacation time after each completed vacation entitlement year with a requirement to provide employees whose period of employment is less than five years upon the completion of a vacation entitlement year with two weeks of vacation time and to provide employees whose period of employment is five years or more upon the completion of a vacation entitlement year with three weeks of vacation time in respect of that vacation entitlement year.

When Vacation Must Be Taken

It is the responsibility of the employer to ensure that each employee receives their minimum statutory requirement. Note that where the employer has established an alternative vacation entitlement year, ESA Part XI, s. 34 establishes the employee's entitlement to a pro-rated amount of vacation time for the period of employment (the "stub period") that precedes the first alternative vacation entitlement year.

The right to vacation time accrues only after the completion of each 12-month vacation entitlement year. Nevertheless, vacation time may be taken prior to the expiry of the 12-month vacation entitlement year if the employer is agreeable to this or if the contract of employment clearly provides for that entitlement. The only restriction on when the vacation must be taken is set out in ESA Part XI, ss. 35 and 35.1, which provide that it must be completed no more than 10 months following the end of the period over which it was earned.

Period of Employment

The entitlement to either two or three weeks of vacation time is determined solely by the employee's period of employment upon completion of each vacation entitlement year. If the employee's period of employment is less than five years upon completion of the vacation entitlement year, the employee is entitled to two weeks of vacation time in respect of that vacation entitlement year. Likewise, if the employee's period of employment is five years or more upon the completion of the vacation entitlement year, the employee's entitlement is to three weeks of vacation time in respect of that vacation entitlement year. For example, an employee who reaches the five year period of employment threshold a full 10 months prior to the completion of the vacation entitlement year and an employee who reaches that

threshold just one day prior to the completion of the vacation entitlement year will both be entitled to three weeks of vacation in respect of that vacation entitlement year.

The period of employment is a reference to the period that the employee has been employed by the employer since the date of hire. Under the ESA 2000, the period of employment also determines entitlements to things such a pregnancy and parental leave, organ donor leave, reservist leave and termination pay. The period of employment is not affected by inactive periods of employment such as leaves or lay-off. However, if there is a break in the employment relationship, the period of employment will be determined by the most recent period beginning after that break. Note that O Reg 288/01, s. 8(2), which ties together any two periods of employment separated by less than 13 weeks for the purposes of notice entitlements under the ESA 2000, does not apply to ESA Part XI.

Greater Right or Benefit

In accordance with ESA Part III, s. 5(2), where the vacation time entitlement is a period of more than the statutory entitlement of two or three weeks, as per an agreement between the employer and the employee, this greater right will prevail. However, it should be noted that because vacation time and vacation pay are separate entitlements under ESA Part XI, s. 35.2, the fact that an employer provides a greater right or benefit with respect to vacation time does not necessarily mean that the employer is also providing a correspondingly greater right or benefit with respect to vacation pay and vice versa.

Example:

Employee hired on June 1, 2014 and has a standard vacation entitlement year that runs from June 1 of each year to May 31 of the following year:

Employee earns two weeks of vacation time upon completion of each of the following four vacation entitlement years:

- June1, 2014 to May 31, 2015
- June 1, 2015 to May 31, 2016
- June 1, 2016 to May 31, 2017
- June 1, 2017 to May 31, 2018

On May 31, 2019, the employee completed five years of employment and so will be entitled to three weeks of vacation for the vacation entitlement year June 1, 2018 to May 31, 2019. In each subsequent vacation entitlement year, the employee's vacation time entitlement will be three weeks.

Active and Inactive Employment – s. 33(2)

33(2) Both active employment and inactive employment shall be included for the purposes of subsection (1).

Section 33(2) provides that inactive as well as active periods of employment be included in the 12-month vacation entitlement period for the purpose of determining an employee's entitlement to vacation time. The corresponding provision with respect to the accrual of vacation time over a stub period is ESA Part XI, s. 34(4).

An employee's entitlement to vacation time accrues so long as the employment relationship continues. Therefore, the employee need not be actively employed (i.e., actually performing work) to earn the right to vacation time. Provided that the employee completes the vacation entitlement year (i.e., there is no break in the employment relationship during the vacation entitlement year), time spent on a Part XIV leave, or an approved leave of absence, temporary lay-off etc. (all periods of inactive employment) must be credited to an employee in respect of their entitlement to vacation time. However, vacation pay will only be calculated on the actual wages earned during the period in respect of which the vacation is earned as per ESA Part XI, s. 35.2.

Where Vacation Not Taken in Complete Weeks – s. 33(3)

33(3) If an employee does not take vacation in complete weeks, the employer shall base the number of days of vacation that the employee is entitled to,

(a) on the number of days in the employee's regular work week; or

(b) if the employee does not have a regular work week, on the average number of days the employee worked per week during the most recently completed vacation entitlement year.

Subsection 33(3) sets out a calculation for vacation entitlements for employees who will be taking vacation in blocks of less than one week.

An employee must request permission, in writing, from their employer to take vacation time in days rather than weeks. If the employer agrees to this request, in writing, the employee may take vacation time in shorter periods, i.e., days rather than weeks – see ESA Part XI, s. 35.

Calculating the Number of Vacation Days to Which an Employee is Entitled

Section 33(3)(a)

For those employees who have a regular work week, the number of single vacation days is based on the number of days in the employee's regular work week. For example, if an employee regularly worked four days per week, the employee would be entitled to four single vacation days for each of the two or three weeks' vacation earned, as applicable, in the vacation entitlement year in accordance with s. 33(1).

Section 33(3)(b)

If the employee does not have a regular work week, the entitlement to single vacation days is calculated under s. 33(3)(b) as the average number of days worked per week during the most recently completed vacation entitlement year. For example, if an employee works an average of three days per week, the employee would be entitled to three single vacation days for each of the two or three weeks' vacation earned, as applicable, in the vacation entitlement year in accordance with s. 33(1).

Calculation of single vacation days under s. 33(3)(b):

1. Count the total number of days the employee worked in the 12-month vacation entitlement year
2. Divide this number by the number of weeks in a year (365.25 days per year divided by 7 days per weeks) = 52.18 weeks per year

Example 1: Employee does not have a regular work week

If an employee had worked 160 days in the 12-month period, the number of single vacation days would be calculated as 160 days divided by 52.18 = 3.07 days for each week of vacation (either two or three weeks) the employee is entitled to under s. 33(1).

Example 2: Employee does not have a regular work week and does not have a regular work day

If an employee does not have a regular work day as defined in ESA Part I, s. 1(1) in that the employee does not usually work the same number of hours each day, it is Program policy that a day will be based on an average number of hours worked on the days worked in the 12-month vacation entitlement year preceding the first vacation day. This calculation requires totaling the number of hours worked in the 12-month period and dividing that by the number of days actually worked.

On the facts described in example 1, if the employee had worked a total of 500 hours in the 160 days worked in the 12-month vacation entitlement year, an average day would be: 500 hours divided by 160 days worked = 3.13 hours

As a result, the employee would be entitled to 3.07 vacation days of 3.13 hours each for each week of vacation time (either two or three weeks) that the employee was entitled to in accordance with s. 33(1).

Vacation Days/Hours vs Vacation Pay Entitlements

The number of single vacation days/hours to which an employee is entitled under this section may not correspond directly to the amount of vacation pay that the employee is entitled to under the ESA 2000. An employee is entitled to a minimum of four or six per cent of the total wages earned in each vacation year as vacation pay (depending upon the employee's period of employment upon the completion of the vacation entitlement year) or the amount to which the employee is entitled as a greater right or benefit under a contract of employment.

Transition – s. 33(4)

33(4) Clause 1(b) requires employers to provide employees with a period of employment of at least five years or more with a least three weeks of vacation after each vacation entitlement year that ends on or after December 31, 2017 but does not require them to provide additional vacation days in respect of vacation entitlement years that ended before that time.

The FWBJA added this provision to the ESA 2000. It provides that although s. 33(1)(b) provides that employees whose period of employment is five years or more upon completion of a vacation entitlement year are entitled to three weeks of vacation in respect of that vacation entitlement year, employers are not required to provide any increased vacation entitlement in respect of a vacation entitlement year that ends before December 31, 2017.

Under s. 33(4), if the vacation entitlement year ended before December 31, 2017, an employee is entitled to two weeks of vacation time in respect of that vacation entitlement year, regardless of the employee's period of employment upon the completion of that vacation entitlement year. If the vacation entitlement year ended either on or after December 31, 2017, an employee whose period of employment was five years or more when that vacation entitlement year ended is entitled to three weeks of vacation time in respect of that vacation entitlement year.

There is a similar transition provision that applies with respect to stub periods ending before December 31, 2017 in ESA Part XI, s. 34(5).

ESA Part XI Section 34 – Alternative Vacation Entitlement Year

Alternative Vacation Entitlement Year Application – s. 34(1)

34(1) This section applies if the employer establishes an alternative vacation entitlement year for an employee.

The *Government Efficiency Act, 2002,* SO 2002, c 18 ("GEA 2002") added this provision to the ESA 2000. It states that s. 34, which provides for the accrual of vacation time over a stub period, applies where the employer has established an alternative vacation entitlement year. Subsequently, the *Fair Workplaces, Better Jobs Act, 2017*, SO 2017, c 22 (“FWBJA”) repealed and replaced this provision to reflect the increased vacation entitlement (a pro-rated three-week entitlement) brought in by that FWBJA for employees whose period of employment is five or more years upon completion of a stub period.

ESA Part I, s. 1 defines an alternative vacation entitlement year as a recurring 12-month period that begins on a date chosen by the employer, other than the first day of the employee's employment.

ESA Part I, s. 1 defines a stub period as follows:

"stub period" means, with respect to an employee for whom the employer establishes an alternative vacation entitlement year,

(a) if the employee's first alternative vacation entitlement year begins before the completion of his or her first 12 months of employment, the period that begins on the first day of employment and ends on the day before the start of the alternative vacation entitlement year,

(b) if the employee's first alternative vacation entitlement year begins after the completion of his or her first 12 months of employment, the period that begins on the day after the day on which his or her most recent standard vacation entitlement year ended and ends on the day before the start of the alternative vacation entitlement year.

Vacation for Stub Period, Less than Five Years of Employment – s. 34(2)

34(2) If the employee’s period of employment is less than five years, the employer shall do the following with respect to the stub period:

> **1. The employer shall calculate the ratio between the stub period and 12 months.**
>
> **2. If the employee has a regular work week, the employer shall give the employee a vacation for the stub period that is equal to two weeks multiplied by the ratio calculated under paragraph 1.**
>
> **3. If the employee does not have a regular work week, the employer shall give the employee a vacation for the stub period that is equal to,**
>
> **2 x A x the ratio calculated under paragraph 1,**

where,

> **A = the average number of days the employee worked per work week in the stub period.**

Section 34(2) sets out the method for calculating the vacation entitlement earned in a stub period where the employee's period of employment is less than five years upon completion of that stub period.

The stub period entitlement is essentially a pro-rated amount of the two week entitlement that an employee whose period of employment was less than five years would earn upon completion of a 12-month vacation entitlement year.

Employees who have a regular work week will earn vacation time of two weeks multiplied by the ratio of the stub period to 12 months.

Example 1:

If the stub period was three months' long the calculation would be as follows:

1. Ratio of stub period to 12 months = 3/12
2. Two weeks x 3/12 = .5 weeks

Employees who do not have a regular work week will earn vacation time of two times the average number of days worked per work week in the stub period multiplied by the ratio of the stub period to 12 months.

Example 2:

If the stub period was three months' long and the employee worked an average of 2.6 days per week in the stub period the calculation would be as follows:

1. Ratio of stub period to 12 months = 3/12
2. Two weeks x 2.6 days per week x 3/12 = 1.3 days

Vacation for Stub Period, Five Years or More of Employment – s. 34(3)

34(3) If the employee's period of employment is five years or more, the employer shall do the following with respect to the stub period:

> **1. The employer shall calculate the ratio between the stub period and 12 months.**
>
> **2. If the employee has a regular work week, the employer shall give the employee a vacation for the stub period that is equal to three weeks multiplied by the ratio calculated under paragraph 1.**
>
> **3. If the employee does not have a regular work week, the employer shall give the employee a vacation for the stub period that is equal to,**
>
> **3 x A x the ratio calculated under paragraph 1,**

where,

> **A = the average number of days the employee worked per work week in the stub period.**

Section 34(3) sets out the method for calculating the vacation entitlement earned in a stub period where the employee's period of employment is five years or more upon completion of that stub period.

The stub period entitlement is essentially a pro-rated amount of the three week entitlement that an employee whose period of employment was five years or more would earn upon completion of a 12-month vacation entitlement year.

Employees who have a regular work week will earn vacation time of three weeks multiplied by the ratio of the stub period to 12 months.

Example 1:

If the stub period was three months' long the calculation would be as follows:

1. Ratio of stub period to 12 months = 3/12
2. Three weeks x 3/12 = .75 weeks

Employees who do not have a regular work week will earn vacation time of three times the average number of days worked per work week in the stub period multiplied by the ratio of the stub period to 12 months.

Example 2:

If the stub period was three months' long and the employee worked an average of 2.6 days per week in the stub period the calculation would be as follows:

1. Ratio of stub period to 12 months = 3/12
2. Three weeks x 2.6 days per week x 3/12 = 1.95 days

Active and Inactive Employment – s. 34(4)

34(4) Both active and inactive employment shall be included for the purposes of subsections (2) and (3).

Section 34(4) provides that inactive as well as active periods of employment are included in the stub period for the purpose of determining an employee's entitlement to vacation time. Note that ESA Part XI, s. 33(2) is the corresponding provision in regards to the accrual of vacation time over a vacation entitlement year.

An employee's entitlement to vacation time accrues while the employment relationship continues. Therefore, the employee need not be actively employed (actually performing work) to earn the right to vacation time. Provided that the employee completes the stub period (i.e., there is no break in the employment relationship during the stub period), time spent on any Part XIV leave, an approved leave of absence, temporary lay-off, etc. (all periods of inactive employment) must be credited to an employee in respect of their entitlement to vacation time. However, vacation pay will only be calculated on the actual wages earned during the period in respect of which the vacation is earned as per ESA Part XI, s. 35.2.

Transition – s. 34(5)

34(5) Subsection (3) requires employers to provide employees with a period of employment of at least five years or more with vacation calculated in accordance with that subsection for any stub period that ends on or after December 31, 2017 but does not require them to provide additional vacation days in respect of a stub period that ended before that time.

While the transition provision for vacation entitlement years is found in ESA Part XI, s. 33(4), the transition provision that applies to stub periods is found in s. 34(5).

Subsection 34(3) provides that employees whose period of employment is five years or more upon completion of a stub period are entitled to a pro-rated amount of three weeks of vacation in respect of that stub period. However, this transition provision specifies that employers are not required to provide this increased vacation entitlement in respect of a stub period that ends before December 31, 2017. Therefore, if a stub period ended before December 31, 2017, an employee is entitled to a pro-rated amount of two weeks of vacation time in respect of that stub period, regardless of the employee's period of employment upon completion of that stub period.

Timing of Vacation – s. 35

35. The employer shall determine when an employee shall take vacation for a vacation entitlement year, subject to the following rules:

1. The vacation must be completed no later than 10 months after the end of the vacation entitlement year for which it is given.

2. If the employee's period of employment is less than five years, the vacation must be a two-week period or two periods of one week each, unless the employee requests in writing that the vacation be taken in shorter periods and the employer agrees to that request.

3. If the employee's period of employment is five years or more, the vacation must be a three-week period or a two-week period and a one-week period or three periods of one week each, unless the employee requests in writing that the vacation be taken in shorter periods and the employer agrees to that request.

This provision was previously amended by the *Government Efficiency Act, 2002,* SO 2002, c 18, to reflect the changes to the ESA, 2000, allowing employers to establish alternative vacation years. It was subsequently repealed and replaced by the *Fair Workplaces, Better Jobs Act, 2017*, SO 2017, c 22 to reflect the increased vacation entitlement (three weeks) brought in by that Act for employees whose period of employment is five or more years upon completion of a vacation entitlement year.

Section 35 gives employers the right and the obligation to determine when an employee may take the vacation earned upon completion of a vacation entitlement year. However, the employer must ensure that the vacation is completed no later than 10 months following the completion of the vacation entitlement year during which the vacation was earned.

Under paragraphs 1 and 2, the employer is required to provide the vacation in periods of at least one week, unless the employee requests in writing and the employer agrees to allow the employee to take vacation in increments of less than one week.

The Employer's Right to Assign the Vacation Time

Since the employer has the right to assign the employee's vacation time and, accordingly, the right to approve or reject a vacation period requested by the employee, it follows that the employee has no right to take a vacation on their own initiative. For example, in *Fox, Glicksman & Co. v Reynolds* (December 16, 1981), ESC 1118 (Black), a decision under the former *Employment Standards Act*, an employee took a two-week vacation but had obtained employer approval for only one week. Additionally, the employee was warned not to take the two-week vacation. The referee held that in taking the two weeks of vacation

without the employer's permission, the employee's actions amounted to wilful misconduct and therefore the employee was not entitled to pay in lieu of notice of termination. It must be noted, however, that where an employee expresses an intention to take vacation, in order for the employee's actions to amount to wilful misconduct the employer must expressly forbid the proposed vacation period - see *Peter Tsorovas c.o.b. Mr. Submarine v Zwicker* (January 12, 1982), ESC 1131 (Betcherman), also decided under the former *Employment Standards Act*. For further discussion of the meaning of wilful misconduct, disobedience or neglect of duty, see O Reg 288/01, s. 2.

Limitations on the Employer's Right to Schedule an Employee's Vacation

The vacation must be completed no later than 10 months after the end of the employee's 12-month vacation entitlement year. The employer will therefore not be in violation of this requirement until 22 months after the commencement of the 12-month period during which the vacation time was earned.

It should also be noted that an employer is not permitted to schedule an employee’s vacation during the statutory notice period, unless the employee, after having received the notice, agrees to take their vacation during the statutory notice period. See O Reg 288/01, s. 7.

Length of Vacation Period

Section 35 permits employees to take vacation time earned over a vacation entitlement year in increments of less than one week provided the following criteria are met:

1. The employee must request, in writing, vacation time in a period shorter than one week; and,
2. The employer must agree to the employee's written request in writing.

It should be noted that where an employee is provided with vacation time in excess of the employee’s two- or three- week entitlement under the Act, an employer is free to schedule those excess weeks as it sees fit (e.g., as single days).

ESA Part XI Section 35.1 - Timing of Vacation, Alternative Vacation Entitlement Year

Timing of Vacation, Alternative Vacation Entitlement Year – s. 35.1(1)

35.1(1) This section applies if an employer establishes an alternative vacation entitlement year for an employee.

Section 35.1 was added by the *Government Efficiency Act, 2002,* SO 2002, c 18, to reflect the changes to the *Employment Standards Act, 2000* allowing employers to establish alternative vacation years.

Section 35.1 gives employers the right and the obligation to determine when an employee may take the vacation time earned over the stub period. However, under s. 35.1(2) the vacation days must be taken in minimum blocks (unless agreed otherwise) and the vacation must be taken no later than 10 months following the stub period during which the vacation was earned.

Same - s. 35.1(2)

35.1(2) The employer shall determine when the employee shall take his or her vacation for the stub period subject to the following rules:

1. The vacation shall be completed no later than 10 months after the start of the first alternative vacation entitlement year.

2. Subject to paragraphs 3 and 4, if the vacation entitlement is equal to two or more days, the vacation shall be taken in a period of consecutive days.

3. Subject to paragraph 4, if the vacation entitlement is equal to or more than five days, at least five vacation days shall be taken in a period of consecutive days and the remaining vacation days may be taken in a separate period of consecutive days.

4. Paragraphs 2 and 3 do not apply if the employee requests in writing that the vacation be taken in shorter periods and the employer agrees to that request.

Section 35.1(2) requires the employer to ensure the employee takes the vacation earned in a stub period within 10 months of the completion of the stub period.

Except where the parties have agreed otherwise, it also provides that if the employee has earned less than five vacation days, those days are to be taken consecutively. If the employee has earned more than five days, the first five days must be taken consecutively, and the balance may be taken together with the first five days or as a separate period of consecutive days.

An employee may request in writing and where the employer agrees, the vacation may be taken in shorter periods than otherwise required under this section.

ESA Part XI Section 35.2 – Vacation Pay

Vacation Pay – s. 35.2

35.2 An employer shall pay vacation pay to an employee who is entitled to vacation under section 33 or 34, equal to at least,

(a) 4 per cent of the wages, excluding vacation pay, the employee earned during the period for which the vacation is given, if the employee's period of employment is less than five years; or

(b) 6 per cent of the wages, excluding vacation pay, that the employee earned during the period for which the vacation is given, if the employee's period of employment is five years or more.

Section 35.2 provides employees who are entitled to vacation under ESA Part XI, s. 33 or s. 34 with an entitlement to vacation pay. This provision was amended to reflect the changes to the ESA 2000 that allow vacation to accrue over alternative vacation entitlement years in addition to standard vacation entitlement years, as well as the accrual of vacation over a stub period where an alternative vacation entitlement year is established. It was subsequently repealed and replaced by the *Fair Workplaces, Better Jobs Act, 2017*, SO 2017, c 22 to increase the minimum vacation pay entitlement of four per cent of the wages earned in any vacation entitlement period (i.e., a stub period or vacation entitlement year) to six per cent for employees whose period of employment is five years or more. This change is consistent with the changes made to s. 33 and s. 34 which increased the vacation time entitlement to three weeks and a pro-rated amount of three weeks for such employees upon the completion of a vacation entitlement year or stub period respectively.

The effect of s. 35.2 is to require employers to pay vacation pay of at least four per cent (for employees whose period of employment is less than five years upon completion of a vacation entitlement period) and six per cent (for employees whose period of employment is five years or more upon completion of a vacation entitlement period) of all of the wages earned during the vacation entitlement period (whether a standard vacation entitlement year, alternative vacation entitlement year or stub period) for which the vacation is given, as payment for the vacation. Any vacation pay previously paid is to be excluded from the calculation of wages under this section. ESA Part XI, ss. 36, 37 and 38 stipulate when vacation pay is to be paid.

Note that the vacation pay entitlement is either four per cent or six per cent of the wages earned in a vacation entitlement period. In other words, an employee whose period of employment is less than five years upon completion of a vacation entitlement period is entitled to vacation pay calculated as four percent of the wages earned in the vacation entitlement period. An employee whose period of employment is five years or more upon completion of a vacation entitlement period is entitled to vacation pay calculated as six percent of the wages earned during the entitlement period regardless of whether the employee's period of employment was five years or more when the vacation entitlement period commenced or the employee reached the five year period of employment part way through the vacation entitlement period.

The question arises however as to how employees who are paid vacation pay on a pay period by pay period basis will be paid vacation pay in a vacation entitlement period in which the employee reaches the five year period of employment threshold.

Although s. 35.2 ties the right to vacation pay to the completion of vacation entitlement periods, employees accrue vacation pay on an ongoing basis as a result of the application of the *Apportionment Act*, RSO 1990, c A.23. See also the discussion regarding payment of vacation pay on cessation of employment in ESA Part XI, s. 38.

As a consequence, an employee who is paid their accrued vacation pay on each pay day will be paid four per cent of the wages earned in each pay period as vacation pay until the employee reaches the five year period of employment threshold. At that time, the employee's entitlement increases to six per cent vacation pay on all wages earned **in the vacation entitlement period** and so an additional two percent of vacation pay will be due and payable on the wages earned to the date the five year threshold is reached. From that date forward, the employee would be paid six percent of the wages earned in each pay period as vacation pay.

Example – Payment of Vacation pay on a pay period by pay period basis:

- Employee's vacation entitlement year is January 1 to December 31
- Employee is entitled to be paid vacation pay on a pay period by pay period basis
- Employee reaches five year period of employment threshold on July 1

The employee is entitled to be paid four per cent on the wages earned between January 1 and June 30 as vacation pay because the employee's period of employment is less than five years.

However, on July 1 the employee reaches the five year period of employment threshold and as a consequence the vacation pay entitlement for that vacation year increases from four per cent to six per cent of all the wages earned in the vacation entitlement year.

The employer will therefore be required to "top-up" the four per cent vacation pay earned up to and including June 30 with an additional two per cent. This payment will be due on the pay day for the pay period in which July 1 falls.

The employee will then be paid six per cent vacation pay on the wages earned from July 1 to December 31.

Employee's Right to Vacation Pay

An employee has the right to be provided with vacation pay of at least four per cent or six per cent as the case may be of the total wages (excluding any vacation pay) earned during the period of employment for which the vacation is given.

As an employment standard, vacation pay is mandatory and cannot be waived pursuant to ESA Part III, s. 5(1). Accordingly, an employer cannot reduce or eliminate vacation pay to compensate for the incompetence of the employee – see MacNamarra v Hanrath (February 23, 1980), ESC 717 (Adamson). Nor is an employer excused from the obligation under s. 38 where the employee has committed a criminal offence – see Burlington Carpet Mills Canada Ltd. v Smitten (May 16, 1974), ESC 227 (Magerman). Both of the aforementioned decisions were decided under the former *Employment Standards Act*.

In Tim Wilkins Pontiac Buick Ltd. d.b.a. Lorne Brett Motos Ltd. v Ojamae et al (October 2, 1980), ESC 878 (Davis), a decision under the former *Employment Standards Act*, Referee Davis ruled that where a monthly-salaried employee receives a full month's salary for a month in which the employee took a one-week vacation, the amount of vacation pay to be considered to have been paid is not one-quarter of the monthly salary but rather an amount equal to the monthly salary divided by 4.33. This is because a month is a slightly longer period than four weeks.

In Laurentian University of Sudbury v Kretzchmar (September 30, 1983), ESC 1492 (Betcherman), the employer and employee agreed that if the employee did not take any vacation, no payment in lieu of vacation would be paid. In confirming the order for pay in lieu of vacation pay under the former *Employment Standards Act*, the referee held that any agreement between an employee and employer that represents a waiver of the rights to vacation pay under s. 28 of the former *Employment Standards Act* (corresponding to s. 35.2 of the ESA 2000) was void pursuant to s. 3 of the former *Employment Standards Act* (corresponding to ESA Part III, s. 5 of the ESA 2000). In this regard, see also John Bear Pontiac Buick Limited v Wade (December 17, 1985), ESC 2001 (Egan). Furthermore, although ESA Part XI, s. 41(1) of the ESA 2000 now expressly allows an employee to agree to forego their vacation time (with the Director's approval), ESA Part XI, s. 41(2) precludes any agreement to forego vacation pay.

Calculating Vacation Pay

Vacation pay accumulates as wages are earned. Vacation pay is the equivalent of four or six per cent of wages for the period of employment for which the vacation is given, except that in calculating wages, any vacation pay previously paid must be excluded.

Vacation pay is payable on wages as defined in ESA Part I, s. 1(1):

"wages" means,

(a) monetary remuneration payable by an employer to an employee under the terms of an employment contract, oral or written, express or implied,

(b) any payment required to be made by an employer to an employee under this Act, and

(c) any allowances for room or board under an employment contract or prescribed allowances,

but does not include,

(d) tips or other gratuities,

(e) any sums paid as gifts or bonuses that are dependent on the discretion of the employer and that are not related to hours, production or efficiency,

(f) expenses and travelling allowances, or

(g) subject to subsections 60(3) or 62(2), employer contributions to a benefit plan and payments to which an employee is entitled from a benefit plan.

For a more detailed discussion refer to ESA Part I, s. 1. Note that wages includes payments made under the ESA 2000 relating to Part XIV domestic violence leave pay.

The decisions cited below (all decided under the former *Employment Standards Act*) hold that the following items are included in wages for the purposes of calculating vacation pay:

- Termination pay – see *Inco. Ltd. v. U.S.W.A*
- Any bonus that qualifies as wages – see Studio Sound Limited v Hobbs and Taylor (October 25, 1985), ESC 1968 (Sherwood) and Tim Wilkins Pontiac Buick Ltd. d.b.a. Lorne Brett Motos Ltd. v Ojamae et al (October 2, 1980), ESC 878 (Davis)
- Commissions – see Studio Sound Limited v Hobbs and Taylor and Lorne Brett Motos Ltd. v Ojamae et al
- Overtime – see Bruce's Appliance Service v Doyle (June 20, 1974), ESC 223 (McNish)
- The pro-rata allocation of profit-sharing bonuses (that is, that which is paid to the employee and attributable to the period in which the employee took their vacation, regardless of when it is paid) – see Lorne Brett Motos Ltd. v Ojamae et al.

Early referee decisions were not settled on whether termination pay should be considered wages for the purpose of calculating vacation pay. Program policy however, is that termination pay is taken into account when calculating the wages upon which vacation pay will be assessed. The Program's policy that vacation pay is payable on termination pay has been confirmed by the Ontario Divisional Court in *Inco Ltd. v. U.S.W.A*.

Where notice of termination is provided under ESA Part XV, s. 60, vacation pay is calculated on wages earned during the notice period. If the employer does not provide notice but gives the employee pay in lieu under ESA Part XV, s. 61, the employer is required to pay the employee the amount the employee would have received "had notice been given". Consequently, the pay in lieu would include vacation pay on the wages the employee would have earned during the notice period. If it were otherwise, an employer would realize a monetary advantage in choosing to provide pay in lieu instead of giving the employee notice. However, vacation pay is not payable on severance pay as severance pay is not compensation for lack of notice of termination. Rather, severance pay is an entitlement that crystallizes after the employment relationship has ended and is provided as compensation for loss of seniority and job-related benefits and also for the investment of long service with the employer.

ESA Part XI Section 36 - When to Pay Vacation Pay

When to Pay Vacation Pay - s. 36(1)

36(1) Subject to subsections (2) to (4), the employer shall pay vacation pay to the employee in a lump sum before the employee commences his or her vacation.

Section 36(1) requires employers to pay vacation pay in a lump sum before the vacation time is taken, subject to ss. 36(2), 36(3) and 36(4).

It should be noted that s. 36(1) does not specify when the vacation pay is to be paid beyond the requirement that it be paid before the vacation is taken. The Act does not require the employer to pay it for example, the day before the vacation commences, the week before the vacation commences or on any other particular date prior to the commencement of the vacation.

In *Grand & Toy Limited v Ontario (Director of Employment Standards)*, 2006 CanLII 39100 (ON LRB), the vacation pay accruing during the vacation entitlement year was paid on a date shortly after the vacation entitlement year ended and sometime before the employee took vacation. On that basis, the Ontario Labour Relations Board found that the payment was in conformity with s. 36(1). Further, because the payment was made in conformity with s. 36(1), there was no need for an agreement in writing to fix a date for the payment as per s. 36(4).

Same - s. 36(2)

36(2) If the employer pays the employee his or her wages in accordance with subsection 11(4) or the employee does not take his or her vacation in complete weeks, the employer may pay the employee his or her vacation pay on or before the pay day for the period in which the vacation falls.

Section 36(2) sets out an exception to the general rule of advance payment of vacation pay set out in s. 36(1) and permits employers to pay vacation pay on or before the employee's pay day for the period in which the vacation falls.

For example, if an employee takes vacation during week of September 9 to 13, and the pay day for the pay period September 1 to 15 is September 21, then the employee's vacation pay is due on or before September 21.

Section 36(2) applies in the following two situations only:

1. If the employer pays the employee in accordance with s. 11(4), that is, by direct deposit, or
2. If the employee does not take their vacation in complete weeks.

ESA Part V, s. 11(4) provides as follows:

11(4) An employer may pay an employee's wages by direct deposit into an account of a financial institution if,

(a) the account is in the employee's name;

(b) no person other than the employee or a person authorized by the employee has access to the account; and

(c) unless the employee agrees otherwise, an office or facility of the financial institution is located within a reasonable distance from the location where the employee usually works.

Same - s. 36(3)

36(3) The employer may pay the employee vacation pay that accrues during a pay period on the pay day for that period if the employee agrees that it may be paid in that manner and,

(a) the statement of wages provided for that period under subsection 12(1) sets out, in addition to the information required by that subsection, the amount of vacation pay that is being paid separately from the amount of other wages that are being paid; or

(b) a separate statement setting out the amount of vacation pay that is being paid is provided to the employee at the same time that the statement of wages is provided under subsection 12(1).

Section 36(3) has the effect of permitting an employee and an employer to agree in writing that the employer may pay the vacation pay that accrues during each pay period on the pay day for that period. See ESA Part I, s. 1(3) and s. 1(3.1) for information on agreements in writing. This method of paying vacation pay may only be used if the following criteria are met:

1. The employer and the employee agree to this method of payment, in writing.
2. The employee must be informed, with each pay period that the monies received include an amount in respect of vacation pay. The employer may fulfil this requirement by:
    - Setting out the amount of vacation pay being paid separately from the amount of other wages being paid in the statement of wages required under s. 12(1), or
    - Issuing the employee a separate statement of the vacation pay paid with respect to that pay period at the same time the statement of wages required under s. 12(1) is provided.

It should be noted that although ESA Part XI, s. 35 and s. 35.1 require vacation time to be taken (completed) within the 10 months following the period in which the vacation is earned, these provisions do not impose a time limit with respect to the payment of vacation pay where the employer and employee have made an agreement under s. 36(3) or s. 36(4). Where the employer and employee have made such an agreement, the obligations with respect to the payment of vacation pay are independent from the requirements to schedule vacation time.

Same - s. 36(4)

36(4) The employer may pay the employee vacation pay at a time agreed to by the employee.

This provision permits the employer and the employee to agree in writing to pay the employee vacation pay at a time they mutually choose. See ESA Part I, s. 1(3) and s. 1(3.1) for information on agreements in writing. Agreements made pursuant to s. 36(4) do not require approval from the Director of Employment Standards.

It should be noted that although ESA Part XI, s. 35 and s. 35.1 require vacation time to be taken (completed) within the 10 months following the period in which the vacation is earned, these provisions do not impose a time limit with respect to the payment of vacation pay where the employer and employee have made an agreement under s. 36(4) or s. 36(3). Where the employer and employee have made such

an agreement, the obligations with respect to the payment of vacation pay are independent from the requirements to schedule vacation time.

ESA Part XI Section 37 - Payment During Labour Dispute

Payment During Labour Dispute - s. 37(1)

37(1) If the employer has scheduled vacation for an employee and subsequently the employee goes on strike or is locked out during a time for which the vacation had been scheduled, the employer shall pay to the employee the vacation pay that would have been paid to him or her with respect to that vacation.

This provision introduced by the *Employment Standards Act, 2000*. It codifies Program policy that applied with respect to the application of s. 29(3) of the former *Employment Standards Act*.

Section 37(1) requires employers to pay employees their vacation pay at the time of their scheduled vacation, despite any strike or lock-out during the scheduled vacation period. Sections 29(2) and 29(3) under the former *Employment Standards Act* permitted this result but did not require it. Section 29(2) gave the Director the power to require an employer to pay vacation pay to an employee (who was entitled to vacation pay) at any time. Section 29(3) provided that the Director's power under s. 29(2) applied even in the context of a strike or lock-out.

Cancellation - s. 37(2)

37(2) Subsection (1) applies despite any purported cancellation of the vacation.

This provision was introduced by the ESA 2000. The effect of this provision is to require an employer to pay vacation pay to an employee in respect of a pre-approved and scheduled vacation that falls during a strike or lock-out, despite a purported cancellation of that previously scheduled vacation.

ESA Part XI Section 38 – If Employment Ends

38 If an employee's employment ends at a time when vacation pay has accrued with respect to the employee, the employer shall pay the vacation pay that has accrued to the employee in accordance with subsection 11(5).

This section provides that when an employee's employment ends, for any reason, the employee is entitled to any accrued vacation pay that is outstanding at the time the employment ended and the employer is required to pay any such vacation pay within the later of seven days of the date the employment ended or on the day that would have been the employee's next pay day as per ESA Part V, s. 11(5). Note also that ESA Part V, s. 12.1 sets out a requirement to provide a statement of the wages paid (including vacation pay) when employment ends.

Vacation Pay Entitlements on Cessation of Employment

An employee whose employment has ended and has not been given a vacation with pay in respect of a completed stub period or 12-month vacation entitlement year is entitled to vacation pay on wages (excluding any vacation pay previously paid) for the stub period or vacation entitlement year.

If the employee has not completed a vacation entitlement period, the employee is not entitled to vacation time and, under ESA Part XI, s. 35.2, the right to accrue vacation pay appears to be explicitly tied to the completion of a vacation entitlement period.

However, by application of another piece of legislation called the *Apportionment Act*, RSO 1990, c A.23, employees have the right to accrue vacation pay on an ongoing day by day basis and therefore, the right to accrue vacation pay does not depend upon the completion of a vacation entitlement period. Even if an employee is hired and is terminated after working just one hour, the employee has accrued vacation pay on those wages.

The employee whose employment has ended will, therefore, receive at least four per cent or six per cent of the wages earned in any period of employment (whether a completed vacation entitlement year or stub period or not) for which vacation pay has not been given.

Because the entitlement to six per cent vacation pay is determined by whether an employee has reached the five year period of employment threshold, an employee whose employment is terminated during a vacation entitlement period *before* the employee has reached the five year threshold will be entitled on termination to vacation pay calculated as four per cent of the wages earned during the last (partially completed) vacation entitlement period (plus any outstanding vacation pay earned in previously completed vacation entitlement periods).

An employee who reached the five year period of employment threshold in that last (partially completed) vacation entitlement period is entitled to six per cent of all of the wages earned in that period (plus any outstanding vacation pay earned in previously completed vacation entitlement periods).

Example 1 – employee's period of employment less than five years on termination of employment

- Employee's vacation entitlement year is January 1 to December 31
- Employee would reach five year period of employment threshold on July 1
- Employment is terminated March 31

Employee's vacation pay for the period January 1 to March 31 is calculated as four per cent of all wages earned January 1 to March 31 because the employee had not reached the five year period of employment threshold prior to the termination.

Example 2 – employee's period of employment five years or more on termination of employment

- Employee's vacation entitlement year is January 1 to December 31
- Employee would reach five year period of employment threshold on July 1
- Employment is terminated November 1

The employee's vacation pay for the period January 1 to November 1 is calculated as six per cent of all wages earned January 1 to November 1 because the employee had reached the five year period of employment threshold prior to the termination.

Pursuant to s. 38, the employee is entitled to payment of that vacation pay on cessation of employment in accordance with ESA Part V, s. 11(5).

Deductions from Section 38 Payments (Section 13)

The standard rules with respect to permissible and non-permissible deductions from wages apply to s. 38 payments. For a detailed discussion, refer to ESA Part V, s. 13.

Where no records have been kept of vacations taken or payments of vacation pay, and there has been no separate item for vacation pay on wage statements, referees (in decisions made under the former *Employment Standards Act*) have consistently rejected employers' claims that the rate of pay included vacation pay and that it should therefore be deducted from vacation pay owing under s. 30 of the former *Employment Standards Act* (which correspond to s. 38 of the ESA 2000) or that vacation had already been taken. See the following decisions decided under the former *Employment Standards Act*: *Natalizio c.o.b. The Lords Men's Hairstyling and Nataligio Enterprises Inc. c.o.b. L'Image Harstudio v Kraft et al* (June 16, 1986), ESC 2132 (Egan); *Roundhill Apartments v Turcaj* (January 2, 1979), ESC 564 (Franks); *Legal Personnel Consultants Ltd. v Strauss* (December 8, 1979), ESC 673 (Green); *Baker v Newland* (July 22, 1980) ESC 821 (Bigelow); and *Snow-Sport Limited v Bondy* (May 26, 1986), ESC 2119 (Houston).

In *Ener-Temp Mechanical v Bristow* (February 1, 1985) ESC 1777 (Eaton), vacation pay was incorporated into the hourly rate, but the employee did not understand the method of payment. An order for vacation pay was affirmed.

In addition, no paid time-off will be deducted from a vacation payment under s. 38 unless both the employee and the employer agreed that such time-off constituted vacation with pay.

Finally, an employer is prohibited from deducting or setting off vacation pay from any vacation pay or a vacation with pay previously paid to an employee in excess of the employer's obligations under ESA Part XI Vacation with Pay. In *Re Harold J. O'Brien* (a decision under the former *Employment Standards Act*), where the employee had received three weeks' paid vacation – 1 week in excess of the applicable minimum standard, the employer was not allowed to set off the excess one-week paid vacation from the amount subsequently owed to the employee under s. 30 (now s. 38). However, the payment of vacation in excess of the Part XI Vacation with Pay requirements must be carefully reviewed in order to determine its characterization and the intent of the payment at the time it was made. If it was intended and characterized as an advance on a vacation pay payment, as opposed to an intentional payment of a greater contractual benefit than the Part XI Vacation with Pay standard, then it will be considered as a wage advance as opposed to wages earned. In that case, any adjustment on a subsequent vacation pay payment will be accepted as a proper reconciliation of wages due, i.e., a determination of wages earned, wages paid and those remaining outstanding, as opposed to a deduction or set-off prohibited by ESA Part V, s. 13. The employment standards officer would, in addition to ascertaining the employer's and employee's understanding of the payments, review the relevant employer's payroll records, as well as wage statements to determine if any evidence of intent or characterization of the payments exists.

ESA Part XI Section 39 - Multi-Employer Plans

39 Sections 36, 37 and 38 do not apply with respect to an employee and his or her employer if,

(a) the employee is represented by a trade union; and

(b) the employer makes contributions for vacation pay to the trustees of a multi-employer vacation benefit plan.

This provision was introduced by the *Employment Standards Act, 2000* and codifies Program policy that applied with respect to s. 31 of the former *Employment Standards Act*. The provision has the effect of permitting unionized employers to participate in multi-employer vacation plans, where the types of obligations described in ss. 36, 37 and 38 of the ESA 2000 are performed by the administrator of the multi-employer plan as opposed to the employee's specific employer. These types of arrangements are common in the construction industry.

Where such a plan is in place, ss. 36, 37 and 38 of the Act which deal with:

1. When vacation pay is to be paid;
2. Vacation pay payments during labour disputes; and
3. Payment of vacation pay when employment ends,

do not apply.

ESA Part XI Section 40 - Vacation Pay in Trust

Vacation Pay in Trust - s. 40(1)

40(1) Every employer shall be deemed to hold vacation pay accruing due to an employee in trust for the employee whether or not the employer has kept the amount for it separate and apart.

This provision, together with s. 40(2), is substantially the same as s. 15 of the former *Employment Standards Act*. Section 40(1) creates a statutory "deemed trust" for vacation pay. In doing this, the provision gives employee vacation pay a status equivalent to property that has been held in trust by an employer for another party. In other words, trust property is not the employer's property and does not form part of the employer's estate.

Trust claims receive priority over the claims of most other creditors of the employer, including many secured creditors. However, the courts have ruled that a statutory deemed trust, such as the s. 40 provision, does not meet the requirements of an actual trust under the federal *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("BIA"). Therefore, vacation pay entitlements receive preferred but unsecured status in a distribution by a trustee in bankruptcy, in accordance with the scheme of distribution set out in s. 136 of the BIA.

Bankruptcy

In *British Columbia v Henfrey Samson Belair Ltd.*, [1989] 2 SCR 24, 1989 CanLII 43 (SCC) the Supreme Court of Canada considered the effect of a deemed trust provision in the British Columbia *Social Services Tax Act,* RSBC 1996, c 431 [repealed]. The Court ruled that a deemed trust created by statute was not a trust as contemplated by the former Bankruptcy Act ("BIA"). *British Columbia v Henfrey Samson Belair Ltd.* has been applied consistently. For example, in *I.B.L. Industries Ltd. (Re) (Bkcy.)*, 1991 CanLII 7223 (ON SC), the Ontario Divisional Court held that an attempt to impose a deemed trust on the property of a bankrupt could not succeed. (If, however, an employer creates an actual trust by keeping the vacation pay separate and apart from other monies, the vacation pay would not form part of the property of the

bankrupt and therefore will have priority over the interests of most other creditors, including secured creditors, as a trust under the BIA. Vacation pay is seldom placed in an actual trust by employers.)

In *Abraham v Coopers & Lybrand Ltd. Trustee in bankruptcy for Canadian Admiral Corp*., 1993 CanLII 8538 (ON SC) the Ontario Divisional Court quashed the referee's decision in *Coopers & Lybrand Limited v Abraham et al* (January 26, 1993), ES 08/93 (Wacyk) and indicated that vacation pay falls within the BIA definition of wages and therefore constitutes a preferred claim under s. 136(1)(d). Therefore, in a bankruptcy, vacation pay is subordinate to the claims of secured creditors, although it does have priority over other unsecured creditors with regards to what has accrued during the six months prior to the bankruptcy, to a maximum of $2,000 per employee (the maximum of $2,000 as set out in the BIA). If the bankruptcy occurred prior to August 1, 1992, the vacation pay would only have a priority to the extent of what has accrued during the three months prior to the bankruptcy, to a maximum of $500 per employee. The Divisional Court's decision in *Abraham v Coopers & Lybrand Ltd.* is consistent with the Divisional Court's decision in *Armstrong et al. v Coopers & Lybrand Ltd. et al.*, 1986 CanLII 2621 (ON SC).

Section 136(1)(d) of the BIA now reads:

136(1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

(d) wages, salaries, commissions or compensation of any clerk, servant, travelling salesman, labourer or workman for services rendered during the six months immediately preceding the bankruptcy to the extent of two thousand dollars in each case, together with, in the case of a travelling salesman, disbursements properly incurred by that salesman in and about the bankrupt's business, to the extent of an additional one thousand dollars in each case, during the same period, and for the purposes of this paragraph commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for within the six month period, shall be deemed to have been earned therein[.]

It should be emphasized that in many bankruptcies, this section will not greatly improve the prospects for recovery of wage entitlements, since it does not give wages priority over the secured creditors of the employer.

Receiverships

The "deemed trust" for vacation pay continues to apply in receivership and other formal insolvency proceedings that are not bankruptcies, to ensure the trust status and priority for the vacation pay claims of employees over the claims of other creditors, including secured creditors. In this regard, see the Divisional Court's decision in in *Abraham v. Coopers & Lybrand Ltd.*

In that case, the court upheld the decision of the referee, who had determined that vacation pay took priority over a bank's secured claims in the form of a registered debenture and general security agreement under the *Personal Property Security Act*, RSO 1990, c P.10 ("PPSA"). The receiver argued that the bank's security took priority over the trust claim, as a prior "fixed" charge duly registered under the PPSA. The Court disagreed. In dismissing the receiver's application, the Court noted that according to s. 3(1)(a) of the PPSA (now s. 4(1)(a)), the PPSA does not apply to a lien given by statute.

Same - s. 40(2)

40(2) An amount equal to vacation pay becomes a lien and charge upon the assets of the employer that in the ordinary course of business would be entered in books of account, even if it is not entered in the books of account.

This provision together with s. 40(1) is substantially the same as s. 15 of the former *Employment Standards Act*. It has the effect of deeming a lien or charge on the assets of the employer. A lien or charge is a means of enforcing a debt or what may or will become a debt. In this case it is an unsecured debt. This is so, irrespective of whether the charge or lien is ever recorded in the employer's books of account.

ESA Part XI Section 41 - Approval to Forego Vacation

41(1) If the Director approves and an employee's employer agrees, an employee may be allowed to forego taking vacation to which he or she is entitled under this part.

(2) Nothing in subsection (1) allows the employer to forego paying vacation pay.

Section 41(1) has the effect of permitting employees and employers to agree in writing that the employee will forego their entitlement to time off for vacation. It should be noted that because the right to forego vacation is limited to vacation to which the employee is entitled, an employee cannot forego future vacation entitlements. See ESA Part I, s. 1(3) and s. 1(3.1) for information on agreements in writing.

Under the Act, an employee's right to vacation time is earned through completion of a stub period or vacation entitlement year. An employee cannot therefore agree to forego the vacation entitlement in any stub period or vacation entitlement year until the completion of that stub period or vacation entitlement year.

The agreement must be approved by the Director to be valid. However, as per s. 41(2), the employer is not permitted to forego paying the employee their vacation pay even though they have chosen to forego taking vacation time under s. 41(1).

ESA Part XI Section 41.1 – Vacation Statements

Vacation Statements – s. 41.1(1)

41.1(1) An employee is entitled to receive the following statements on making a written request:

1. After the end of a vacation entitlement year, a statement in writing that sets out the information contained in the record the employer is required to keep under subsection 15.1(2).

2. After the end of a stub period, a statement in writing that sets out the information contained in the record the employer is required to keep under subsection 15.1(3).

Section 41.1 was introduced by the *Government Efficiency Act, 2002*, SO 2002, c 18 ("GEA 2002"), effective November 26, 2002. It sets out employees' rights to statements regarding vacation time and pay statements, except where vacation pay is paid on each pay day as it accrues over each pay period as per ESA Part XI, s. 36(3).

Section 41.1(1) requires the employer to provide a statement containing the same information the employer is required to record under the new ESA Part VI, ss.15.1(2) and (3), on the written request of the employee, no more than once with respect to each vacation entitlement year or stub period.

When Statement to Be Provided – s. 41.1(2)

41.1(2) Subject to subsection (3), the statement shall be provided to the employee not later than the later of,

(a) seven days after the employee makes his or her request; and

(b) the first pay day after the employee makes his or her request.

Section 41.1(2) requires that, subject to s. 41.1(3), the vacation statement under s. 41.1(1) must be provided either seven days after the written request was made or the first pay day after the request was made, whichever is later.

Same – s. 41.1(3)

41.1 (3) If the request is made during the vacation entitlement year or stub period to which it relates, the statement shall be provided to the employee not later than the later of,

(a) seven days after the start of the next vacation entitlement year or the first vacation entitlement year, as the case be; and

(b) the first pay day of the next vacation entitlement year or of the first vacation entitlement year, as the case may be.

Section 41.1(3) provides that where the employee has made a written request for vacation information during the course of a current vacation entitlement year or stub period, the employer is required to provide the information either:

- Seven days after the end of that vacation entitlement year or stub period, or
- On the first regular pay of the next vacation entitlement year or first vacation entitlement year, whichever is later.

Restriction Re Frequency – s. 41.1(4)

41.1(4) The employer is not required to provide a statement to an employee more than once with respect to a vacation entitlement year or stub period.

Section 41.1(4) provides that an employer is required to provide a vacation information statement not more than once with respect to any vacation entitlement year or stub period.

Exception – s. 41.1(5)

41.1(5) This section does not apply with respect to an employee whose employer pays vacation pay in accordance with subsection 36(3).

Section 41.1(5) provides that the vacation statement obligations in s. 41.1 do not apply where the employer pays vacation pay in accordance with ESA Part XI, s. 36(3) (i.e., the employer and employee have agreed that the vacation pay that accrues in each pay period is to be paid on the pay day for that pay period). Under s. 36(3), the employer must provide information regarding the vacation pay paid each

pay day as a separate item on the statement of wages required under ESA Part V, s. 12(1) or on a separate statement at the same time the employee is given the wage statement.

ESA Part XII - Equal Pay for Equal Work

Although the equal pay legislation was initially written to redress the problem of lower wages paid to females, Part XII of the *Employment Standards Act, 2000* ensures that employees (both male and female) in Ontario are not paid a lower wage than their co-workers simply because of their sex.

Equal Pay for Equal Work vs. Pay Equity

The *Pay Equity Act,* RSO 1990, c P.7, was enacted in 1987 and came into force on January 1, 1988. It imposes a requirement commonly referred to in this country as "equal pay for work of equal value", which is also known as "comparable worth" in the United States and "equal pay for equal value" in Europe.

The purpose of the *Pay Equity Act* is to remove systemic gender discrimination from employers' compensation practices.

Pay equity is different from the s. 42 equal pay provision under the ESA 2000 in that the pay equity legislation compares wage rates of female job classes to male job classes to ensure that women performing jobs that are different from but of equal value to jobs performed by men will receive equal pay. (Note: subsequent amendments to the *Pay Equity Act* also imposed a "proportional value" requirement where the jobs are not equal.) Section 42 of the ESA 2000, on the other hand, requires that women performing substantially the same job as men, and vice versa, receive equal pay.

The *Pay Equity Act* is intended to eliminate the wage gap that exists due to the undervaluation of what is typically thought of as "women's work". Therefore, the equal pay provision in the ESA 2000 continues to be a remedy where a wage gap exists between men and women performing substantially the same jobs.

The *Pay Equity Act* is administered by the Pay Equity Commission, under the direction of a Pay Equity Commissioner who reports to the Minister of Labour. Inquiries concerning pay equity should be directed to the Pay Equity Commission.

ESA Part XII Section 41.2 – Interpretation

41.2 In this Part,

“substantially the same” means substantially the same but not necessarily identical.

Section 41.2 clarifies that for the purposes of the equal pay for equal work provisions in ESA Part XII, “substantially the same” means substantially the same but not necessarily identical. This provision informs the interpretation of the ESA Part XII, s. 42(1), s. 42.1(1) and s. 42.2(1).

ESA Part XII Section 42 – Equal Pay for Equal Work

Equal Pay for Equal Work – s. 42(1)

42(1) No employer shall pay an employee of one sex at a rate of pay less than the rate paid to an employee of the other sex when,

(a) they perform substantially the same kind of work in the same establishment;

(b) their performance requires substantially the same skill, effort and responsibility; and

(c) their work is performed under similar working conditions.

This section prohibits an employer from paying an employee a lower rate of pay than another employee on the basis of sex, where the employees perform “equal work”, as established in clauses (a) through (c). This requirement is subject to certain exceptions that are set out in s. 42(2) of the ESA 2000.

Employees of Different Sexes

Section 42 addresses a difference in the rate of pay between a male and a female, and vice versa. Two males, or alternately, two females, could be paid different rates of pay for performing “equal work” with no violation of this section occurring. Accordingly, the comparison must be between a male and female. Either a male or a female may be the lower paid employee, requiring the situation to be redressed.

Rate of Pay

For this provision to apply, there must be a difference in the rate of pay between a female and a male employee who perform “equal work”.

“Rate of pay” is not defined in the legislation.

It is Program policy that, for the purposes of Part XII, rate of pay generally includes:

- Hourly rates
- Salaries
- Piece work rates
- Commission rates
- Overtime pay rates

It is Program policy that, for the purposes of Part XII, rate of pay generally does not include:

- Vacation pay rates
- Tips or other gratuities, including tip pool percentages
- Expenses and travel allowances
- Benefit plans (or a payment in lieu of benefits)

There may be other forms of remuneration that could be captured under “rate of pay” that are not addressed in the list above. For example, there may be situations where certain bonus structures would properly fall under “rate of pay”, whereas other bonus structures would not. In assessing whether particular remuneration contributes to an employee’s “rate of pay”, an employment standards officer will consider all relevant factors, including the specifics of the compensation system, its purpose, and the legislative intent behind Part XII.

When determining whether there is a difference in the rate of pay between employees earning commissions, or employees who are subject to piece work rates, an employment standards officer will compare the *rates* applicable to both employees. For example, if a female and male employee both earn minimum wage plus 15% commission on all sales, the employees will be considered to be paid the same rate of pay even if one of the employees takes home a greater dollar amount because he or she made more sales. A similar approach will be taken with respect to overtime. As long as two employees are subject to the same overtime rate and overtime threshold, there would not be a difference in the rate of overtime pay between the two employees. One employee may earn more overtime pay than another

because they work more hours, but this would not mean that there is a difference in the overtime rate between the employees.

One question that might arise is how to conduct a comparison in rate of pay between two employees who do “equal work” but who are paid pursuant to different compensation schemes. Comparing a set hourly rate or yearly salary to earnings that may fluctuate based on employee performance, such as commission or piece work, is not a viable assessment. It is Program policy that, generally, comparisons can only be made between two employees with the same remuneration scheme – in other words, only by comparing “apples to apples”. For example, if a female employee earns $24 an hour, an employment standards officer will not compare her rate of pay with a male employee who earns $18 an hour plus a commission rate. One exception, however, is the comparison between employees earning an hourly, weekly, or monthly rate, or a yearly salary; the comparison becomes “apples to apples” once it is established what each employee earns as an hourly rate and thus a direct comparison is possible. Similarly, an “apples to apples” comparison is possible where two employees, for example, both earn $25 per hour but one of the two also earns a 10% commission on sales. In this case, though there are different remuneration schemes, a direct comparison is possible because the employees earn exactly the same rate in one element of the remuneration scheme. In this example, the obvious outcome is that the rates of pay are not the same.

“Equal Work”

For this provision to apply, the female and male employees who are being compared must perform “equal work”. The elements that make up “equal work” are established in clauses 42(1)(a) through (c). In order for work to be considered equal, all of the following must be present:

1. The employees perform substantially the same kind of work;
2. The work is performed in the same establishment;
3. The work being performed requires substantially the same skill, effort and responsibility; and
4. The work is performed under similar working conditions.

Each of these elements is examined individually in the analysis below.

1. Substantially the Same Kind of Work

Until January 1, 1975, the equal pay section of the Act set out that the male and female employees were to be paid the same wage "... for the same kind of work... the performance of which requires equal skill, effort and responsibility. . ."

In *Regina v Howard et al., Ex parte Municipality of Metropolitan Toronto,* 1970 CanLII 395 (ON CA), the Ontario Court of Appeal overturned a lower court decision and stated that "to construe ‘the same work’ as meaning ‘the identical work’ is to render completely redundant the words following ‘the performance of which requires equal skill, effort and responsibility.’" This decision led to legislative amendment of this section of the Act to its current wording in s. 42(1)(a) i.e. to reflect the court’s ruling, which was consistent with the policy intent of the provision.

Further to that, the *Fair Workplaces Better Jobs Act, 2017* introduced a definition to Part XII of the ESA 2000 that took effect on April 1, 2018. Section 41.2 defines “substantially the same” to mean substantially the same but not necessarily identical.

"Substantially the same kind of work" refers to the main characteristics or the core duties of the work. Jobs do not have to be identical for this standard to apply. Minor differences in job content do not, in and of themselves, make the section inapplicable.

When considering whether the kind of work is “substantially the same”, the work to be compared is work that the employees are performing contemporaneously. The comparison is to be made on the basis of the actual work the employees perform, not the terms of hiring, or the job descriptions.

An officer must look at the jobs as a whole and consider all information that is relevant in the particular circumstances. There are a number of different possible scenarios where a finding of substantially the same kind of work may be made.

For example, where two employees perform identical tasks 90% of the time and different tasks only 10% of the time, an officer may conclude that the employees perform substantially the same kind of work – i.e. the time spent on different tasks is not so extensive as to support a finding that the overall kind of work being performed is not substantially the same.

Similarly, a finding that substantially the same kind of work is being performed may be made where 90% of the employees' time is spent performing tasks that, although not identical, are so alike as to warrant that finding even though 10% of their time is spent on tasks that are different. Note that in the context of these provisions, it is the work itself that is being compared, not the value of the work (as is the case in the pay equity context).

The examples above are provided as illustrations of possible scenarios where a finding of substantially the same kind of work may be made. They are not intended to be an exhaustive list of such scenarios or to suggest that, as a threshold, 90% of the employees’ time must be spent on work that is identical or so alike before a finding that substantially the same kind of work is being performed can be made. Rather, the examples are provided as a point of reference only and are meant to assist in achieving general consistency in the interpretation of this provision. The examples do not establish a “rule” or a “test” and they should not be applied in a formulaic way without consideration of all relevant information. There may be situations where a higher or lower percentage of time may be spent on tasks that are identical or so alike, such that a finding that substantially the same kind of work is being performed is appropriate.

2. In the Same Establishment

The term "establishment" is defined in s. 1 of the ESA 2000 as follows:

"establishment", with respect to an employer, means a location at which the employer carries on business but, if the employer carries on business at more than one location, separate locations constitute one establishment if,

(a) the separate locations are located within the same municipality, or

(b) 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 another employee of the same employer.

"Establishment" means a location where the employer carries on business. However, two or more locations of the employer will be considered a single establishment if:

1. They are in the same municipality; or

2. There are common bumping rights for at least one employee across municipal boundaries.

See ESA Part I, s. 1 of the Manual for further information regarding the definition of establishment.

3. Performance Requires Substantially the Same Skill, Effort and Responsibility

Per s. 42(1)(b), the performance of the work must require substantially the same skill, effort and responsibility. These are three separate requirements, each of which must be met in order for s. 42 to apply.

The *Fair Workplaces Better Jobs Act, 2017* introduced a definition in Part XII of the ESA 2000 that took effect on April 1, 2018. Section 41.2 defines "substantially the same" to mean substantially the same but not necessarily identical.

This further clarified that the skill, effort and responsibilities do not need to be exactly the same or identical to be considered substantially the same. Minor or inconsequential differences do not render the standard inapplicable.

The requirement for skill, effort and responsibility are applied to the actual work that the employees perform, and not their terms of hiring, job description or job title. The work that is to be compared is work that the employees are performing contemporaneously. The jobs must be evaluated as a whole. The fact that there are some differences in tasks between two jobs would not be a sufficient reason, in and of itself, to establish that the jobs do not require the same skill, effort or responsibility.

(i) Performance Requires Substantially the Same Skill

Skill refers to the degree or amount of knowledge or physical or motor capability needed by the employee performing the job. It includes factors such as education, manual dexterity, experience and training, and is measured in terms of performance requirements.

(ii) Performance Requires Substantially the Same Effort

Effort is the physical or mental exertion needed to perform a job. An example of physical effort is the amount of strength a labourer needs to lift packed boxes. An example of mental effort is the amount of thinking and concentration required by a bookkeeper to balance the books.

When determining whether the performance of the work requires substantially the same effort, the evaluation is based on the effort required for the work itself, and not on the effort expended by a particular individual. For example, where two employees lift 50 pound boxes, it is irrelevant that one employee finds the task to be very physically demanding while the other employee finds the same task to be quite effortless. However, it would take substantially more effort for an employee to lift 80 pound boxes as compared to an employee who lifts boxes that weigh only 10 pounds. As a result, where two jobs have different weight lifting requirements (e.g. 80 pounds versus 10 pounds), they may not satisfy the requirement that the work require substantially the same amount of effort.

The sporadic performance of an activity that may require extra physical or mental effort does not suffice to establish that the jobs require substantially different levels of effort.

(iii) Performance Requires Substantially the Same Responsibility

Responsibility is measured by the number and nature of an employee's job obligations, the degree of accountability and the degree of authority exercised by an employee in the performance of the job. Some factors to consider include:

- Responsibility for the safety of others;
- Supervision of others;
- Handling of cash;
- Safeguarding of confidential or restricted information; and
- Supervision received by the employee.

For example, an employee who always performs assigned tasks and duties in accordance with specific, detailed instructions would not have substantially the same degree of responsibility as an employee who works only from general policy objectives and refers to superiors on an infrequent basis only, when interpretations of organizational policy are in question.

As another example, where one employee is responsible for collecting and providing the money from individual cash registers to the accounting department, that employee would likely have more responsibility than an employee who does not handle any cash, or who handles cash only rarely in the performance of their job.

4. Similar Working Conditions

The working conditions between the two jobs being compared must be “similar”. (Note this is a lower threshold than “substantially the same,” as defined in s. 41.2 and applied in the “substantially the same kind of work” and “substantially the same skill, effort and responsibility” parts of the test).

"Working conditions" generally refer to factors such as:

- the working environment, such as an office or warehouse
- exposure to the elements, such as work that must be performed in severe weather conditions
- health and safety hazards, such as working at heights or exposure to chemicals

For example, appliance repairers who spend all their time on the employer’s premises do not have similar working conditions to appliance repairers who do their work attending at customers’ homes.

The performance of work in different departments generally does not, in and of itself, make the working conditions dissimilar.

Whether working at different times of the day makes the working conditions dissimilar depends on the particular circumstances. For example, it could be that an employee who works at night is regularly exposed to safety risks that an employee who works during the day is not, such that the working conditions may be dissimilar.

Note that where two employees work at different times of the day, but the working conditions remain similar, the difference in the timing of the shifts might still provide a basis for a differential in pay pursuant to the exception in s. 42(2)(d). This might arise, for example, if an employer pays a premium to an employee for working a particular shift (e.g. the night shift). See s. 42(2)(d) for more discussion on this point.

Exception – s. 42(2)

42(2) Subsection (1) does not apply when the difference in the rate of pay is made on the basis of,

(a) a seniority system;

(b) a merit system;

(c) a system that measures earnings by quantity or quality of production; or

(d) any other factor other than sex.

The prohibition against paying different rates of pay to employees of different sexes who perform "equal work", per s. 42(1) does not apply if the difference in the rate of pay is made on the basis of one of the exceptions set out in subsection (2).

(a) A Seniority System – s. 42(2)(a)

In order to fall within this exception, the difference in rate of pay must result from a system established by the employer in which employees' compensation is at least partially based on their length of service or accumulated number of hours worked. The same system must apply to both employees being compared.

For example, where a seniority system provides employees with a wage increase after every 500 hours worked, male and female employees might have different earnings based on where they fall in the seniority system; this would be in accordance with the exception in s. 42(2)(a) because it is the accumulated number of hours worked that determines the wage rate.

Note that where the employer does not have an established seniority system, a difference in rate of pay may be still be based on a "seniority-like" factor per subsection (d) below. For example, a longer-term employee may earn a higher rate of pay than a newly hired employee based informally on years of service.

(b) A Merit System – s. 42(2)(b)

In order to fall within this exception, the difference in rate of pay must result from a system established by the employer in which employees' compensation is at least partially based on their achievements and/or how well they perform their jobs. The system must apply to both employees being compared.

For example, an employer may increase employees' hourly wages by a set percentage if they meet a pre-established sales target. If an employee of one sex reaches the sales target before an employee of the opposite sex, and therefore earns a greater hourly wage, the difference in rate of pay is permissible under this provision.

Note that where the employer does not have an established merit system, a difference in rate of pay may be still be based on a "merit-like" factor (such as high productivity, above-average sales, exceptional customer service etc.) per subsection (d) below. Please see the discussion below for more information.

(c) A System that Measures Earnings by Quantity or Quality of Production – s. 42(2)(c)

This exception provides that a difference in rate of pay is not prohibited where the workplace has a system in place that measures earnings by quantity or quality of production. In order for this exception to apply, the system must apply to both employees being compared.

For example, an employer operates a widget factory and employs manufacturing employees who perform equal work. All employees receive $1.00 per completed widget, and receive a pay increase of 15 cents per widget after they complete 1,000 widgets. A difference in rate of pay will be justified where an employee of one sex earns $1.00 per completed widget because the employee has not yet reached the 1,000 threshold, while a comparator employee of the opposite sex who has already completed 1,000 widgets earns $1.15 per widget.

(d) Any Other Factor Other than Sex – s. 42(2)(d)

Note that between April 1, 2018 and December 31, 2018, this provision read as “Any other factor other than sex or employment status”. “Employment status” was added to s. 42(2)(d) on April 1, 2018 as a result of the *Fair Workplaces Better Jobs Act, 2017*; the amendment was consistent with the prohibition set out in s. 42.1 that also came into force on April 1, 2018. The “or employment status” wording was repealed on January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*, which also repealed s. 42.1 in its entirety.

This clause provides that the prohibition against paying different rates of pay to two employees of different sexes performing “equal work” per s. 42(1) does not apply if the difference is based on any factor other than sex. The broad scope of this exception acknowledges the myriad of factors other than sex that come into play when pay rates are determined. In practice, this exception allows for a differentiation in rate of pay based on a wide variety of factors, including those that are subjective. Note, however, that the factor (or factors) that the employer provides as the reason(s) for the pay differential must be the actual reason(s). Employment standards officers will review and assess the credibility of any available evidence (which may in some cases be limited to the employer’s assertions) in order to satisfy themselves that the reason(s) provided are in fact the actual reason(s) for the pay differential. Note that it is possible for a “factor” used to support a difference in the rate of pay to fit within the s. 42(2)(d) exception, but to be prohibited by legislation that is not administered by the Ministry of Labour, such as the Ontario Human Rights Code.

The key determination to be made in applying this provision is whether the “factor” used to support the difference in the rate of pay is sex. The question to be answered is whether the employee is earning a particular rate of pay ***because*** he is male or she is female. If the answer is yes, this exception does not apply and equal pay is required. If the factor is anything other than sex, then this exception generally does apply.

Some examples of factors that the Program generally considers to fall under “any other factor other than sex” include:

Differences in experience or educational achievement

Even where the work is “equal”, a difference in relevant experience with another employer or educational achievement may be a “factor other than sex”, such that the requirement for equal pay would not apply.

Length of Service with the Employer

Where the employer does not have an established seniority system, a “seniority-like” factor may be a “factor other than sex”, such that the requirement for equal pay would not apply. For example, a new hire may receive a lesser rate of pay than an employee who has been employed for a longer period of time on the basis that they have less service.

Coverage under a Collective Agreement

Where one of the two employees being compared is covered by a collective agreement: the Program considers a difference in rate of pay that arises out of the collective bargaining process to be a “factor other than sex” such that the requirement for equal pay would not apply.

This policy does not apply where the two employees being compared are covered by the same collective agreement. Note, however, that in this situation, differences in rate of pay might be substantiated under other exceptions.

Red Circling

Some employers engage in the practice of “red circling”. This means they maintain an employee's rate of pay, even after transferring the employee to a job that normally pays a lower rate. An example of this is an employee transferred to a lower paying job due to a company reorganization. Under a pure "red-circling" system, the higher-paid employee would remain at the present rate of pay until the lower paid employees catch up. "Red circling" is generally considered to be a “factor other than sex”, meaning that the requirement for equal pay would not apply.

Job Market Conditions

The nature of the job market at a particular point in time may require an employer to offer a higher rate of pay to attract an employee to fill a particular role in its organization if the supply of qualified candidates is low. This is generally considered to be a “factor other than sex”, meaning that the requirement for equal pay would not apply.

Nepotism

Paying an employee more (or less) than another employee because they are part of the employer’s family is a “factor other than sex”, meaning that the requirement for equal pay would not apply.

Wage Premiums

In some cases, a difference in the shifts that are being worked by employees may mean that “equal work” is not being performed (e.g. a security guard on the day shift and a security guard on the night shift who have very different duties, level of responsibility and working conditions).

In certain situations, despite work between two employees on different shifts being “equal” per s. 42(1), the employer may pay a wage premium. This may be, for example, to compensate employees who work the evening shift for the inconvenience of working at that time. This rationale for providing a wage premium is considered to be a “factor other than sex”, meaning that the requirement for equal pay would not apply.

Temporarily Working in Another Role

The question may arise as to whether an employee temporarily working in another role is an exception to the requirement in s. 42. An employee, for example, may temporarily occupy another position that has a different rate of pay, yet maintain the rate of pay associated with their “home” position (which may be higher or lower than the pay rate of the other employees in the temporary position.)

Whether or not this raises equal pay concerns will depend on the circumstances. For example, there may be an issue as to whether the employee who is temporarily performing the duties of another position is performing “equal work” to the other employees in that position. For example, the employee who is temporarily performing the duties may have substantially fewer or more responsibilities than the other

employee(s) (e.g. a non-managerial employee may be in an acting assignment as manager but not be required to perform the tasks associated with disciplining employees).

If “equal work” is being performed by the employee who is temporarily in the position and an employee of the opposite sex whose “regular” job is to work in that position, the employer may nonetheless be permitted to maintain the differential in their rates of pay on the basis of any other factor other than sex. For example, assume that an employee who is temporarily in a position is permitted to maintain their usual, higher rate of pay for the duration of the temporary assignment. The employer may maintain that the difference in pay rate was based on the sudden or urgent need to fill the position and that the only practical way to do so was to transfer the higher-paid employee at their current rate of pay. The employer might also have a policy establishing as its regular practice that employees who temporarily “fill in” doing work in another role maintain their higher rate of pay. These reasons both constitute “any other factor other than sex” under s. 42(2)(d).

Conversely, if the employee who is temporarily in the position has a lower rate of pay than an employee doing “equal work”, the employer may pay that employee less because – although the work is “equal” (as per s. 42(1)) – the employee temporarily in the position is less experienced, not expected to perform all of the duties normally associated with that position, or on the basis of any other factor as discussed elsewhere in this section. All of these reasons constitute “any other factor other than sex”. However, if the difference in rate of pay is not based on a factor other than sex, the employer will be required to equalize the pay rates.

Other

An employer may pay an employee a higher rate of pay based on a factor such as the employee being well liked by key clients, being particularly friendly or because that employee is seen as always “going the extra mile”. Examples such as these, even though they may be based on the subjective opinion of the employer, may still constitute a “factor other than sex” meaning the requirement for equal pay would not apply.

Reduction Prohibited – s. 42(3)

42(3) No employer shall reduce the rate of pay of an employee in order to comply with subsection (1).

Section 42(3) prohibits an employer from reducing an employee’s rate of pay to comply with s. 42(1). This means that where there is a difference in the rate of pay between employees in contravention of section 42, the employer cannot lower the higher-paid employee’s rate of pay to correct the violation.

For example, a male and a female both work as lifeguards performing equal work and none of the exceptions in s. 42(2) apply. The male employee earns a salary of $45,000 per year. The female employee earns $3,500 per month, which is equivalent to $42,000 per year. The employees work the same number of hours. The employer is prohibited from reducing the male employee’s rate of pay to $42,000 per year to comply with s. 42(1).

Organizations – s. 42(4)

42(4) No trade union or other organization shall cause or attempt to cause an employer to contravene subsection (1).

This section reinforces s. 5(1) of the ESA 2000, which states:

5(1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.

A trade union or other organization is prohibited from causing or attempting to cause the employer to pay different rates of pay to employees who do "equal work" per s. 42(1) on the basis that they are different sexes.

Deemed Wages – s. 42(5)

42(5) If an employment standards officer finds that an employer has contravened subsection (1), the officer may determine the amount owing to an employee as a result of the contravention and that amount shall be deemed to be unpaid wages for that employee.

This section permits an employment standards officer to determine the amount owed to an employee as a result of the contravention of s. 42(1), and deems that amount owing to be unpaid wages. An employment standards officer may consequently issue an order to pay wages under ESA Part XXII, s. 103 against an employer. This order may include the amount necessary to correct the inequality in the rate of pay between employees and may also include amounts owing under other standards that were calculated in the relevant period using the rate of pay that was found to violate s. 42. This may include, for example, vacation pay, public holiday pay, overtime pay, termination pay, etc.

Note that a director order to pay cannot be issued in relation to these deemed wages per s. 81(3).

Written Response – s. 42(6)

Subsection 42(6) was repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. This provision is therefore no longer in force. However, the Program's interpretation of this provision remains in this publication as complaints may still arise relating to the period of time when the provision was in force: from April 1, 2018 to December 31, 2018.

42(6) An employee who believes that their rate of pay does not comply with subsection (1) may request a review of their rate of pay from the employee's employer, and the employer shall,

(a) adjust the employee's pay accordingly; or

(b) if the employer disagrees with the employee's belief, provide a written response to the employee setting out the reasons for the disagreement.

Subsection 42(6) came into force on April 1, 2018. It was added to section 42 as a result of the *Fair Workplaces, Better Jobs Act, 2017*. It was repealed pursuant to the *Making Ontario Open for Business Act, 2018* effective January 1, 2019.

This subsection provides that employees who believe that their employer is not complying with s. 42(1) may ask the employer to review their rate of pay. In response, the employer must review the employee's rate of pay and either adjust it upwards to address the contravention, or provide a written response that sets out the reasons why the employer disagrees with the employee's belief that there is a contravention.

The requirement that the employer's response be in writing is satisfied if the response is provided to the employee on paper (for example, in a printed letter) or electronically.

Section 42(6)(b) does not specify a timeline within which the employer must provide the written response. It is Program policy that the employer's response must be provided within a reasonable timeframe; what is reasonable will depend on the particular circumstances.

Note that this section does not require an employee to request a review of their rate of pay as a prerequisite to filing a claim under ESA Part XXII, s. 96(1). In other words, an employee who believes their rate of pay does not comply with s. 42(1) may file a claim without ever requesting a rate of pay review from the employer.

The requirement in this subsection to adjust the employee's pay rate applies prospectively only; it does not require the employer to retroactively pay the employee what they would have earned had they received equal pay prior to the adjustment. However, an employee may file a claim to recover any amounts owing prior to the adjustment (subject to the limitations on recovery set out in section 111).

ESA Part XII Section 42.1 – Difference in Employment Status - REPEALED

Section 42.1 of the ESA 2000 was repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. This section is therefore no longer in force. However, employees may still have a complaint relating to section 42.1 that arose during the period of time when the section was in force: from April 1, 2018 to December 31, 2018. For that reason, the Program's interpretation of this section remains as part of this publication, though the text appears in red to highlight that the relevant provisions have been repealed.

Difference in Employment Status – s. 42.1(1) (REPEALED)

Subsection 42.1(1) was repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. This provision is no longer in force. The discussion of this provision is being maintained for use in situations that arose when it was in force.

42.1(1) No employer shall pay an employee at a rate of pay less than the rate paid to another employee of the employer because of a difference in employment status when,

(a) they perform substantially the same kind of work in the same establishment;

(b) their performance requires substantially the same skill, effort and responsibility; and

(c) their work is performed under similar working conditions.

Section 42.1 was added to the ESA 2000 as a result of the *Fair Workplaces, Better Jobs Act, 2017*; it came into effect on April 1, 2018. It was repealed effective January 1, 2019 by the *Making Ontario Open for Business Act, 2018.*

This section prohibits an employer from paying an employee a lower rate of pay than another employee on the basis of a difference in employment status, where the employees perform "equal work", as established in clauses (a) through (c). This requirement is subject to certain exceptions that are set out in s. 42.1(2) of the ESA 2000.

Note that certain employees are exempted from s. 42.1 – see O Reg 285/01, s. 9.1 for further information.

Employees of Different Employment Status

Section 42.1 addresses a difference in the rate of pay between two employees of the same employer with different employment status.

Section 1 of the ESA defines difference in employment status as follows:

"difference in employment status", in respect of one or more employees, means,

(a) a difference in the number of hours regularly worked by the employees; or

(b) a difference in the term of their employment, including a difference in permanent, temporary, seasonal or casual status; ("situation d'emploi différente")

See ESA Part I, s. 1 for a discussion of this definition.

Under this provision, the comparison of work performed must be between employees with a difference in employment status. Two employees of the same "employment status" could be paid different rates of pay for performing "equal work" with no violation of this section occurring. The work being compared is work that is being performed by the two employees contemporaneously.

Note that subject to certain exceptions, s. 42(1) prohibits employers from paying employees different rates of pay for "equal work" if one employee is being paid less due to a difference in sex. As such, although it would not be a violation of s. 42.1 for two employees of the same "employment status" to be paid differently, a potential violation could exist under sections 42 if there is a difference in sex between these employees. Also, where an employee is an assignment employee, the employer is prohibited from paying the assignment employee at a rate of pay less than the rate paid to an employee of the client when performing equal work, see section 42.2.

Rate of Pay

For this provision to apply, there must be a difference in the rate of pay between two employees of different employment status who perform "equal work".

"Rate of pay" is not defined in the legislation.

It is Program policy that, for the purposes of Part XII, rate of pay generally includes:

- Hourly rates
- Salaries
- Piece work rates
- Commission rates
- Overtime pay rates

It is Program policy that, for the purposes of Part XII, rate of pay generally does not include:

- Vacation pay rates
- Tips or other gratuities, including tip pool percentages
- Expenses and travel allowances
- Benefit plans (or a payment in lieu of benefits)

There may be other forms of remuneration that could be captured under “rate of pay” that are not addressed in the list above. For example, there may be situations where certain bonus structures would properly fall under “rate of pay”, whereas other bonus structures would not. In assessing whether particular remuneration contributes to an employee’s “rate of pay”, an employment standards officer will consider all relevant factors, including the specifics of the compensation system, its purpose, and the legislative intent behind Part XII.

When determining whether there is a difference in the rate of pay between employees earning commissions, or employees who are subject to piece work rates, an employment standards officer will compare the *rates* applicable to both employees. For example, if a full-time and a part-time employee both earn minimum wage plus 15% commission on all sales, the employees will be considered to be paid the same rate of pay even if one of the employees takes home a greater dollar amount because that employee made more sales. A similar approach will be taken with respect to overtime. As long as two employees are subject to the same overtime rate and overtime threshold, there would not be a difference in the rate of overtime pay between the two employees. One employee may earn more overtime pay than another because they work more hours, but this would not mean that there is a difference in the overtime rate between the employees.

One question that might arise is how to conduct a comparison in rate of pay between two employees who do “equal work” but who are paid pursuant to different compensation schemes. Comparing a set hourly rate or yearly salary to earnings that may fluctuate based on employee performance, such as commission or piece work, is not a viable assessment. It is Program policy that, generally, comparisons can only be made between two employees with the same remuneration scheme – in other words, only by comparing “apples to apples”. For example, if a female employee earns $24 an hour, an employment standards officer will not compare her rate of pay with a male employee who earns $18 an hour plus a commission rate. One exception, however, is the comparison between employees earning an hourly, weekly, or monthly rate, or a yearly salary; the comparison becomes “apples to apples” once it is established what each employee earns as an hourly rate and thus a direct comparison is possible. Similarly, an “apples to apples” comparison is possible where two employees, for example, both earn $25 per hour but one of the two also earns a 10% commission on sales. In this case, though there are different remuneration schemes, a direct comparison is possible because the employees earn exactly the same rate in one element of the remuneration scheme. In this example, the obvious outcome is that the rates of pay are not the same.

“Equal Work”

For this provision to apply, employees of different employment status who are being compared must perform “equal work”. The elements that make up “equal work” are established in clauses 42.1(a) through (c). In order for work to be considered equal, all of the following must be present:

1. The employees perform substantially the same kind of work;
2. The work is performed in the same establishment;
3. The work being performed requires substantially the same skill, effort and responsibility; and
4. The work is performed under similar working conditions.

Each of these elements is examined individually in the analysis below.

1. Substantially the Same Kind of Work

The employees being compared must perform substantially the same kind of work. The *Fair Workplaces Better Jobs Act, 2017* introduced a definition to Part XII of the ESA 2000 that took effect on April 1, 2018. Section 41.2 defines “substantially the same” to mean substantially the same but not necessarily identical.

In other words, jobs do not have to be identical for this standard to apply. "Substantially the same kind of work" refers to the main characteristics or the core duties of the work. Minor differences in job content do not, in and of themselves, make the section inapplicable.

When considering whether the kind of work is “substantially the same”, the work to be compared is generally work that the employees are performing contemporaneously. The comparison is to be made on the basis of the actual work the employees perform, not the terms of hiring, or the job descriptions.

An officer must look at the jobs as a whole and consider all information that is relevant in the particular circumstances. There are a number of different possible scenarios where a finding of substantially the same kind of work may be made.

For example, where two employees perform identical tasks 90% of the time and different tasks only 10% of the time, an officer may conclude that the employees perform substantially the same kind of work – i.e. the time spent on different tasks is not so extensive as to support a finding that the overall kind of work being performed is not substantially the same.

Similarly, a finding that substantially the same kind of work is being performed may be made where 90% of the employees' time is spent performing tasks that, although not identical, are so alike as to warrant that finding even though 10% of their time is spent on tasks that are different. Note that in the context of these provisions, it is the work itself that is being compared, not the value of the work (as is the case in the pay equity context).

The examples above are provided as illustrations of possible scenarios where a finding of substantially the same kind of work may be made. They are not intended to be an exhaustive list of such scenarios or to suggest that, as a threshold, 90% of the employees’ time must be spent on work that is identical or so alike before a finding that substantially the same kind of work is being performed can be made. Rather, the examples are provided as a point of reference only and are meant to assist in achieving general consistency in the interpretation of this provision. The examples do not establish a “rule” or a “test” and they should not be applied in a formulaic way without consideration of all relevant information. There may be situations where a higher or lower percentage of time may be spent on tasks that are identical or so alike, such that a finding that substantially the same kind of work is being performed is appropriate.

2. In the Same Establishment

The term "establishment" is defined in s. 1 of the ESA 2000 as follows:

"establishment", with respect to an employer, means a location at which the employer carries on business but, if the employer carries on business at more than one location, separate locations constitute one establishment if,

(a) the separate locations are located within the same municipality, or

(b) 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 another employee of the same employer.

"Establishment" means a location where the employer carries on business. However, two or more locations of the employer will be considered a single establishment if:

1. They are in the same municipality; or
2. There are common bumping rights for at least one employee across municipal boundaries.

See ESA Part I, s. 1 of the Manual for further information regarding the definition of establishment.

3. Performance Requires Substantially the Same Skill, Effort and Responsibility

Per s. 42.1(1)(b), the performance of the work must require substantially the same skill, effort and responsibility. These are three separate requirements, each of which must be met in order for s. 42.1 to apply.

The *Fair Workplaces Better Jobs Act, 2017* introduced a definition in Part XII of the ESA 2000 that took effect on April 1, 2018. Section 41.2 defines “substantially the same” to mean substantially the same but not necessarily identical.

This clarifies that the skill, effort and responsibilities do not need to be exactly the same or identical in every respect to be considered substantially the same. Minor or inconsequential differences do not render the standard inapplicable.

The requirement for skill, effort and responsibility are applied to the actual work that the employees perform, and not their terms of hiring, job description or job title. The work that is to be compared is work that the employees are performing contemporaneously. The jobs must be evaluated as a whole. The fact that there are some differences in tasks between two jobs would not be a sufficient reason, in and of itself, to establish that the jobs do not require the same skill, effort or responsibility.

(i) Performance Requires Substantially the Same Skill

Skill refers to the degree or amount of knowledge or physical or motor capability needed by the employee performing the job. It includes factors such as education, manual dexterity, experience and training, and is measured in terms of performance requirements.

(ii) Performance Requires Substantially the Same Effort

Effort is the physical or mental exertion needed to perform a job. An example of physical effort is the amount of strength a labourer needs to lift packed boxes. An example of mental effort is the amount of thinking and concentration required by a bookkeeper to balance the books.

When determining whether the performance of the work requires substantially the same effort, the evaluation is based on the effort required for the work itself, and not on the effort expended by a particular individual. For example, where two employees lift 50 pound boxes, it is irrelevant that one employee finds the task to be very physically demanding while the other employee finds the same task to be quite effortless. However, it would take substantially more effort for an employee to lift 80 pound boxes as compared to an employee who lifts boxes that weigh only 10 pounds. As a result, where two jobs have different weight lifting requirements (e.g. 80 pounds versus 10 pounds), they may not satisfy the requirement that the work require substantially the same amount of effort.

The sporadic performance of an activity that may require extra physical or mental effort does not suffice to establish that the jobs require substantially different levels of effort.

(iii) Performance Requires Substantially the Same Responsibility

Responsibility is measured by the number and nature of an employee's job obligations, the degree of accountability and the degree of authority exercised by an employee in the performance of the job. Some factors to consider include:

- Responsibility for the safety of others;
- Supervision of others;
- Handling of cash;
- Safeguarding of confidential or restricted information; and
- Supervision received by the employee.

For example, an employee who always performs assigned tasks and duties in accordance with specific, detailed instructions would not have substantially the same degree of responsibility as an employee who works only from general policy objectives and refers to superiors on an infrequent basis only, when interpretations of organizational policy are in question.

As another example, where one employee is responsible for collecting and providing the money from individual cash registers to the accounting department, that employee would likely have more responsibility than an employee who does not handle any cash, or who handles cash only rarely in the performance of their job.

4. Similar Working Conditions

The working conditions between the two jobs being compared must be “similar”. (Note this is a lower threshold than “substantially the same” as defined in s. 41.2 and applied in in the “substantially the same kind of work” and “substantially the same skill, effort and responsibility” parts of the test.)

"Working conditions" generally refer to factors such as:

- the working environment, such as an office or warehouse
- exposure to the elements, such as work that must be performed in severe weather conditions
- health and safety hazards, such as working at heights or exposure to chemicals

For example, appliance repairers who spend all their time on the employer’s premises do not have similar working conditions to appliance repairers who do their work attending at customers’ homes.

The performance of work in different departments generally does not, in and of itself, make the working conditions dissimilar.

Whether working at different times of the day makes the working conditions dissimilar depends on the particular circumstances. For example, it could be that an employee who works at night is regularly exposed to safety risks that an employee who works during the day is not, such that the working conditions may be dissimilar.

Note that where two employees work at different times of the day, but the working conditions remain similar, the difference in the timing of the shifts might still provide a basis for a differential in pay pursuant to the exception in s. 42.1(2)(d). This might arise, for example, if an employer pays a premium to an employee for working a particular shift (e.g. the night shift). See s. 42.1(2)(d) for more discussion on this point.

Exception – s. 42.1(2) (REPEALED)

Subsection 42.1(2) was repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. This provision is no longer in force. The discussion of this provision is being maintained for use in situations that arose when it was in force.

42.1(2) Subsection (1) does not apply when the difference in the rate of pay is made on the basis of,

(a) a seniority system;

(b) a merit system;

(c) a system that measures earnings by quantity or quality of production; or

(d) any other factor other than sex or employment status.

The prohibition against paying different rates of pay to employees of different employment status who perform "equal work", per s. 42.1(1) does not apply if the difference in the rate of pay is made on the basis of one of the exceptions set out in subsection (2).

(a) A Seniority System – s. 42.1(2)(a)

In order to fall within this exception, the difference in rate of pay must result from a system established by the employer in which employees' compensation is at least partially based on their length of service or accumulated number of hours worked. The same system must apply to both employees being compared.

For example, where a seniority system provides employees with a wage increase after every 500 hours worked, permanent and temporary employees might have different earnings based on where they fall in the seniority system; this would be in accordance with the exception in s. 42.1(2)(a) because it is the accumulated number of hours worked that determines the wage rate.

Note that where the employer does not have an established seniority system, a difference in rate of pay may be still be based on a "seniority-like" factor per subsection (d) below. For example, a longer-term employee may earn a higher rate of pay than a newly hired employee based informally on years of service. Please see the discussion under clause (d) for more information.

(b) A Merit System – s. 42.1(2)(b)

In order to fall within this exception, the difference in rate of pay must result from a system established by the employer in which employees' compensation is at least partially based on their achievements and/or how well they perform their jobs. The system must apply to both employees being compared.

For example, an employer may increase employees' hourly wages by a set percentage if they meet a pre-established sales target. If an employee of one employment status reaches the sales target before an employee with a different employment status, and therefore earns a greater hourly wage, the difference in rate of pay is permissible under this provision.

Note that where the employer does not have an established merit system, a difference in rate of pay may be still be based on a "merit-like" factor (such as high productivity, above-average sales, exceptional

customer service etc.) per subsection (d) below. Please see the discussion under clause (d) for more information.

(c) A System that Measures Earnings by Quantity or Quality of Production – s. 42.1(2)(c)

This exception provides that a difference in rate of pay is not prohibited where the workplace has a system in place that measures earnings by quantity or quality of production. In order for this exception to apply, the system must apply to both employees being compared.

For example, an employer operates a widget factory and employs manufacturing employees who perform equal work. All employees receive $1.00 per completed widget, and receive a pay increase of 15 cents per widget after they complete 1,000 widgets. A difference in rate of pay will be justified where a temporary employee earns $1.00 per completed widget because they had not yet reached the 1,000 threshold, while a permanent employee who has already completed 1,000 widgets earns $1.15 per widget.

(d) Any Other Factor Other than Sex or Employment Status – s. 42.1(2)(d)

This clause provides that the prohibition against giving different rates of pay to two employees of different employment status performing “equal work” per s. 42.1(1) does not apply if the difference is based on any factor other than sex or employment status. The broad scope of this exception acknowledges the myriad of factors other than sex or employment status that come into play when pay rates are determined. In practice, this exception allows for a differentiation in rate of pay based on a wide variety of factors, including those that are subjective. Note, however, that the factor (or factors) that the employer provides as the reason(s) for the pay differential must be the actual reason(s). Employment standards officers will review and assess the credibility of any available evidence (which may in some cases be limited to the employer’s assertions) in order to satisfy themself that the reason(s) provided are in fact the actual reason(s) for the pay differential. Note that it is possible for a “factor” used to support a difference in the rate of pay to fit within the s. 42.1(2)(d) exception, but to be prohibited by legislation that is not administered by the Ministry of Labour, such as the *Ontario Human Rights Code*.

The key determination to be made in applying this provision is whether the “factor” used to support the difference in rate of pay is sex or employment status. If it is, this exception does not apply. If the factor is anything other than sex or employment status, then generally this exception does apply.

When determining whether the difference in rate of pay is based on “employment status”, the question to be answered is whether the employee is earning a particular rate of pay ***because*** of the number of hours they regularly work or ***because*** of the term of their employment (such as permanent, temporary, seasonal, or casual).

When determining whether the difference in rate of pay is based on “sex”, the question to be answered is whether the employee is earning a particular rate of pay ***because*** he is male or she is female.

If the answer to any of these three questions is yes, then the exception does not apply and equal pay is required per subsection 42.1(1).

Some examples of factors that the Program generally considers to fall under “any other factor other than sex or employment status” include:

Differences in experience or educational achievement

Even where the work is “equal”, a difference in relevant experience with another employer or educational achievement may be a “factor other than sex or employment status”, such that the requirement for equal pay would not apply.

Length of Service with the Employer

Where the employer does not have an established seniority system, a “seniority-like” factor may be a “factor other than sex or employment status”, such that the requirement for equal pay would not apply. For example, a new hire may receive a lesser rate of pay than an employee who has been employed for a longer period of time on the basis that they have less service.

Coverage under a Collective Agreement

Where one of the two employees being compared is covered by a collective agreement: the Program considers a difference in rate of pay that arises out of the collective bargaining process to be a “factor other than sex or employment status” such that the requirement for equal pay would not apply. For practical purposes, this means that a non-unionized employee and a unionized employee of different employment status can receive different rates of pay for performing “equal work”.

This policy does not apply where the two employees being compared are covered by the same collective agreement. Note, however, that in this situation, differences in rate of pay might be substantiated under other exceptions.

Red Circling

Some employers engage in the practice of “red circling”. This means they maintain an employee's rate of pay, even after transferring the employee to a job that normally pays a lower rate. An example of this is an employee transferred to a lower paying job due to a company reorganization. Under a pure "red-circling" system, the higher-paid employee would remain at the present rate of pay until the lower paid employees catch up. "Red circling" is generally considered to be a “factor other than sex or employment status”, meaning that the requirement for equal pay would not apply.

Job Market Conditions

The nature of the job market at a particular point in time may require an employer to offer a higher rate of pay to attract an employee to fill a particular role in its organization if the supply of qualified candidates is low. This is generally considered to be a “factor other than sex or employment status”, meaning that the requirement for equal pay would not apply.

Nepotism

Paying an employee more (or less) than another employee because they are part of the employer’s family is a “factor other than sex or employment status”, meaning that the requirement for equal pay would not apply.

Wage Premiums

In some cases, a difference in the shifts that are being worked by employees may mean that “equal work” is not being performed (e.g. a security guard on the day shift and a security guard on the night shift who have very different duties, level of responsibility and working conditions).

In certain situations, despite work between two employees on different shifts being “equal” per s. 42.1(1), the employer may pay a wage premium. This may be, for example, to compensate employees who work the evening shift for the inconvenience of working at that time. This rationale for providing a wage premium is considered to be a “factor other than sex or employment status”, meaning that the requirement for equal pay would not apply.

Temporarily Working in Another Role

The question may arise as to whether an employee temporarily working in another role is an exception to the requirement in s. 42.1. An employee, for example, may temporarily occupy another position that has a different rate of pay, yet maintain the rate of pay associated with their “home” position (which may be higher or lower than the pay rate of the other employees in the temporary position).

Whether or not this raises equal pay concerns will depend on the circumstances. For example, there may be an issue as to whether the employee who is temporarily performing the duties of another position is performing “equal work” to the other employees in that position. For example, the employee who is temporarily performing the duties may have substantially fewer or more responsibilities than the other employee(s) (e.g. a non-managerial employee may be in an acting assignment as manager but not be required to perform the tasks associated with disciplining employees).

If “equal work” is being performed by the employee who is temporarily in the position and an employee of a different employment status whose “regular” job is to work in that position, the employer may nonetheless be permitted to maintain the differential in their rates of pay on the basis of any other factor other than sex or employment status. For example, assume that an employee who is temporarily in a position is permitted to maintain their usual, higher rate of pay for the duration of the temporary assignment. The employer may maintain that the difference in pay rate was based on the sudden or urgent need to fill the position and that the only practical way to do so was to transfer the higher-paid employee at their current rate of pay. The employer might also have a policy establishing as its regular practice that employees who temporarily “fill in” doing work in another role maintain their higher rate of pay. These reasons both constitute “any other factor other than sex or employment status” under s. 42.1(2)(d).

Conversely, if the employee who is temporarily in the position has a lower pay rate than an employee doing “equal work”, the employer may pay that employee less because – although the work is “equal” (as per s. 42.1(1)) – the employee temporarily in the position is less experienced, not expected to perform all of the duties normally associated with that position, or on the basis of any other factor as discussed elsewhere in this section. All of these reasons constitute “any other factor other than sex or employment status”. However, if the difference in rate of pay is not based on a factor other than sex or employment status, the employer will be required to equalize the pay rates.

(Note that temporarily working in another position does not necessarily involve a change in employment status. For example, a permanent full-time employee may remain a permanent full-time employee when taking on a temporary work assignment.)

Other

An employer may pay an employee a higher rate of pay based on a factor such as the employee being well liked by key clients, being particularly friendly or because that employee is seen as always “going the extra mile”. Examples such as these, even though they may be based on the subjective opinion of the

employer, constitute a “factor other than sex or employment status” meaning the requirement for equal pay would not apply.

Reduction Prohibited – s. 42.1(3) (REPEALED)

Subsection 42.1(3) was repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. This provision is no longer in force. The discussion of this provision is being maintained for use in situations that arose when it was in force.

42.1(3) No employer shall reduce the rate of pay of an employee in order to comply with subsection (1).

Section 42.1(3) prohibits an employer from reducing an employee’s rate of pay to comply with s. 42.1(1). This means that where there is a difference in the rate of pay between employees in contravention of section 42.1, the employer cannot lower the higher-paid employee’s rate of pay to correct the violation.

For example, two employees of different employment status both work as cooks performing equal work and none of the exceptions in s. 42.1(2) apply. The permanent employee earns a salary of $45,000 per year. The temporary employee earns $3,500 per month, which is equivalent to $42,000 per year. The employees work the same number of hours.The employer is prohibited from reducing the first employee’s rate of pay to $42,000 per year to comply with s. 42.1(1).

Organizations – s. 42.1(4) (REPEALED)

Subsection 42.1(4) was repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. This provision is no longer in force. The discussion of this provision is being maintained for use in situations that arose when it was in force.

42.1(4) No trade union or other organization shall cause or attempt to cause an employer to contravene subsection (1).

This section reinforces s. 5(1) of the Act, which states:

5(1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.

A trade union or other organization is prohibited from causing or attempting to cause the employer to pay different rates of pay to employees who do “equal work” per s. 42.1(1) on the basis that the employees have different employment status.

Deemed Wages – s. 42.1(5) (REPEALED)

Subsection 42.1(5) was repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. This provision is no longer in force. The discussion of this provision is being maintained for use in situations that arose when it was in force.

42.1(5) If an employment standards officer finds that an employer has contravened subsection (1), the officer may determine the amount owing to an employee as a result of the contravention and that amount shall be deemed to be unpaid wages for that employee.

This section permits the employment standards officer to determine the amount owed to an employee as a result of the contravention of s. 42.1(1), and deems that amount owing to be unpaid wages. An employment standards officer may consequently issue an order to pay wages under ESA Part XXII, s. 103 against an employer. This order may include the amount necessary to correct the inequality in the rate of pay between employees and may also include amounts owing under other standards that were calculated in the relevant period using the rate of pay that was found to violate s. 42.1. This may include, for example, vacation pay, public holiday pay, overtime pay, termination pay, etc.

Note that a director order to pay cannot be issued in relation to these deemed wages per s. 81(3).

Written Response – s. 42.1(6) (REPEALED)

Subsection 42.1(6) was repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. This provision is no longer in force. The discussion of this provision is being maintained for use in situations that arose when it was in force.

42.1(6) An employee who believes that their rate of pay does not comply with subsection (1) may request a review of their rate of pay from the employee's employer, and the employer shall,

(a) adjust the employee's pay accordingly; or

(b) if the employer disagrees with the employee's belief, provide a written response to the employee setting out the reasons for the disagreement.

This subsection provides that employees who believe that their employer is not complying with s. 42.1(1) may ask the employer to review their rate of pay. In response, the employer must review the employee's rate of pay and either adjust it upwards to address the contravention, or provide a written response that sets out the reasons why the employer disagrees with the employee's belief that there is a contravention.

The requirement that the employer's response be in writing is satisfied if the response is provided to the employee on paper (for example, in a printed letter) or electronically.

Section 42.1(6)(b) does not specify a timeline within which the employer must provide the written response. It is Program policy that the employer's response must be provided within a reasonable timeframe; what is reasonable will depend on the particular circumstances.

Note that this section does not require an employee to request a review of their rate of pay as a prerequisite to filing a claim under ESA Part XXII, s. 96(1). In other words, an employee who believes their rate of pay does not comply with s. 42.1(1) may file a claim without ever requesting a review of their rate of pay from their employer.

The requirement in this subsection to adjust the employee's pay rate applies prospectively only; it does not require the employer to retroactively pay the employee what they would have earned had they received equal pay prior to the adjustment. However, an employee may file a claim in order to recover any amounts owing prior to the adjustment (subject to the limitations on recovery set out in section 111).

Transition, Collective Agreement – s. 42.1(7) (REPEALED)

Subsection 42.1(7) was repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. This provision is no longer in force. The discussion of this provision is being maintained for use in situations that arose when it was in force.

42.1(7) If a collective agreement that is in effect on April 1, 2018 contains a provision that permits differences in pay based on employment status and there is a conflict between the provision of the collective agreement and subsection (1), the provision of the collective agreement prevails.

Same, Limit – s. 42.1(8) (REPEALED)

Subsection 42.1(8) was repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. This provision is no longer in force. The discussion of this provision is being maintained for use in situations that arose when it was in force.

42.1(8) Subsection (7) ceases to apply on the earlier of the date the collective agreement expires and January 1, 2020.

These provisions, read together, provide that if a collective agreement that that is in effect on April 1, 2018 contains a provision that permits differences in the rate of pay based on employment status, the provision of the collective agreement will prevail even if it conflicts with the ESA. However, the conflicting provisions will cease to prevail on the earlier of the date the collective agreement expires or January 1, 2020.

ESA Part XII Section 42.2 – Difference in Assignment Employee Status – REPEALED

Section 42.2 of the ESA 2000 was repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. This section is therefore no longer in force. However, employees may still have a complaint relating to section 42.2 that arose during the period of time when the section was in force: from April 1, 2018 to December 31, 2018. For that reason, the Program's interpretation of this section remains as part of this publication, though the text appears in red to highlight that the relevant provisions have been repealed.

Difference in Assignment Employee Status – s. 42.2(1) – REPEALED

Subsection 42.2(1) was repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. This provision is no longer in force. The discussion of this provision is being maintained for use in situations that arose when it was in force.

42.2(1) No temporary help agency shall pay an assignment employee who is assigned to perform work for a client at a rate of pay less than the rate paid to an employee of the client when,

(a) they perform substantially the same kind of work in the same establishment;

(b) their performance requires substantially the same skill, effort and responsibility; and

(c) their work is performed under similar working conditions.

Section 42.2 was added to the ESA 2000 as a result of the *Fair Workplaces, Better Jobs Act, 2017*; it came into effect on April 1, 2018. It was repealed effective January 1, 2019 by the *Making Ontario Open for Business Act, 2018.*

This section prohibits a temporary help agency from paying an assignment employee a lower rate of pay than that paid to an employee of the client, where the employees perform “equal work” as established in clauses (a) through (c). This requirement is subject to the exception set out in s. 42.2(2) of the ESA 2000.

Difference in Assignment Employee Status

Section 42.2 addresses a difference in the rate of pay between an assignment employee and an employee of a client.

ESA Part I, s. 1 defines assignment employee, temporary help agency, and client as follows:

“assignment employee” means an employee employed by a temporary help agency for the purpose of being assigned to perform work on a temporary basis for clients of the agency

“temporary help agency” means an employer that employs persons for the purpose of assigning them to perform work on a temporary basis for clients of the employer

“client”, in relation to a temporary help agency, means a person or entity that enters into an arrangement with the agency under which the agency agrees to assign or attempt to assign one or more of its assignment employees to perform work for the person or entity on a temporary basis

See ESA Part I, s. 1 for a discussion of these definitions.

For this provision to apply, the comparison of work performed must be between an assignment employee and an employee of a client. An assignment employee cannot be paid a lower rate of pay than a client employee, where the two perform “equal work”. The work being compared is work that is being performed by the two employees contemporaneously.

(Note that subject to certain exceptions, s. 42(1) and 42.1(1) prohibit employers from paying employees different rates of pay for “equal work” due to a difference in sex or in employment status. The comparisons under sections 42 and 42.1 are not between an assignment employee and a client employee; in those contexts, an assignment employee would compare himself or herself to another assignment employee employed by the same temporary help agency.)

Rate of Pay

For this provision to apply, there must be a difference in the rate of pay between the assignment employee and the employee of the client who perform “equal work”.

“Rate of pay” is not defined in the legislation.

It is Program policy that, for the purposes of Part XII, rate of pay generally includes:

- Hourly rates
- Salaries
- Piece work rates
- Commission rates
- Overtime pay rates

It is Program policy that, for the purposes of Part XII, rate of pay generally does not include:

- Vacation pay rates

- Tips or other gratuities, including tip pool percentages
- Expenses and travel allowances
- Benefit plans (or payments in lieu of benefits)

There may be other forms of remuneration that could be captured under “rate of pay”, that are not addressed in the list above. For example, there may be situations where certain bonus structures would properly fall under “rate of pay”, whereas other bonus structures would not. In assessing whether particular remuneration contributes to an employee’s “rate of pay”, an employment standards officer will consider all relevant factors, including the specifics of the compensation system, its purpose, and the legislative intent behind Part XII.

When determining whether there is a difference in the rate of pay between employees earning commissions, or employees who are subject to piece work rates, an employment standards officer will compare the *rates* applicable to both employees. For example, if an assignment employee and an employee of the client both earn minimum wage plus 15% commission on all sales, the two individuals will be considered to be paid the same rate of pay even if one takes home a greater dollar amount because that employee made more sales. A similar approach will be taken with respect to overtime. As long as the assignment employee and the client employee are subject to the same overtime rate and overtime threshold, there would not be a difference in the rate of overtime pay between the two. One person may earn more overtime pay than another because they work more hours, but this would not mean that there is a difference in the overtime rate between them.

One question that might arise is how to conduct a comparison in “rate of pay” between an assignment employee and a client employee who do “equal work” but who are paid pursuant to different compensation schemes. Comparing a set hourly rate or yearly salary to earnings that may fluctuate based on employee performance, such as commission or piece work, is not a viable assessment. It is Program policy that, generally, comparisons can only be made between two employees with the same remuneration scheme – in other words, only by comparing “apples to apples”. For example, if an assignment employee earns $24 an hour, an employment standards officer will not compare her rate of pay with that of a client employee who earns $18 an hour plus a commission rate. One exception, however, is the comparison between employees earning an hourly, weekly, or monthly rate, or a yearly salary; the comparison becomes “apples to apples” once it is established what each employee earns as an hourly rate and thus a direct comparison is possible. Similarly, an “apples to apples” comparison is possible where two employees, for example, both earn $25 per hour but one of the two also earns a 10% commission on sales. In this case, though there are different remuneration schemes, a direct comparison is possible because the employees earn exactly the same rate in one element of the remuneration scheme. In this example, the obvious outcome is that the rates of pay are not the same.

“Equal Work”

For this provision to apply, the assignment employee and employee of the client who are being compared must perform “equal work”. The elements that make up “equal work” are established in clauses 42.2(a) through (c). In order for work to be considered equal, all of the following must be present:

1. The assignment employee and client employee perform substantially the same kind of work;
2. The work is performed in the same establishment;
3. The work being performed requires substantially the same skill, effort and responsibility; and
4. The work is performed under similar working conditions.

Each of these elements is examined individually in the analysis below.

1. Substantially the Same Kind of Work

The assignment employee and client employee being compared must perform substantially the same kind of work. The *Fair Workplaces Better Jobs Act, 2017* introduced a definition to Part XII of the ESA 2000 that took effect on April 1, 2018. Section 41.2 defines “substantially the same” to mean substantially the same but not necessarily identical.

In other words, jobs do not have to be identical for this standard to apply. "Substantially the same kind of work" refers to the main characteristics or the core duties of the work. Jobs do not have to be identical for this standard to apply. Minor differences in job content do not, in and of themselves, make the section inapplicable.

When considering whether the kind of work is “substantially the same”, the work to be compared is work that is being performing contemporaneously. The comparison is to be made on the basis of the actual work the employees perform, not the terms of hiring, or the job descriptions.

An officer must look at the jobs as a whole and consider all information that is relevant in the particular circumstances. There are a number of different possible scenarios where a finding of substantially the same kind of work may be made.

For example, where two employees perform identical tasks 90% of the time and different tasks only 10% of the time, an officer may conclude that they perform substantially the same kind of work – i.e. the time spent on different tasks is not so extensive as to support a finding that the overall kind of work being performed is not substantially the same.

Similarly, a finding that substantially the same kind of work is being performed may be made where 90% of the employees' time is spent performing tasks that, although not identical, are so alike as to warrant that finding even though 10% of their time is spent on tasks that are different. Note that in the context of these provisions, it is the work itself that is being compared, not the value of the work (as is the case in the pay equity context).

The examples above are provided as illustrations of possible scenarios where a finding of substantially the same kind of work may be made. They are not intended to be an exhaustive list of such scenarios or to suggest that, as a threshold, 90% of the employees’ time must be spent on work that is identical or so alike before a finding that substantially the same kind of work is being performed can be made. Rather, the examples are provided as a point of reference only and are meant to assist in achieving general consistency in the interpretation of this provision. The examples do not establish a “rule” or a “test” and they should not be applied in a formulaic way without consideration of all relevant information. There may be situations where a higher or lower percentage of time may be spent on tasks that are identical or so alike, such that a finding that substantially the same kind of work is being performed is appropriate.

2. In the Same Establishment

The term "establishment" is defined in s. 1 of the ESA 2000 as follows:

"establishment", with respect to an employer, means a location at which the employer carries on business but, if the employer carries on business at more than one location, separate locations constitute one establishment if,

(a) the separate locations are located within the same municipality, or

(b) 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 another employee of the same employer.

"Establishment" means a location where the employer carries on business. However, two or more locations of the employer will be considered a single establishment if:

1. They are in the same municipality; or
2. There are common bumping rights for at least one employee across municipal boundaries.

See ESA Part I, s. 1 of the Manual for further information regarding the definition of establishment.

3. Performance Requires Substantially the Same Skill, Effort and Responsibility

Per s. 42.2(1)(b), the performance of the work must require substantially the same skill, effort and responsibility. These are three separate requirements, each of which must be met in order for s. 42.2 to apply.

The *Fair Workplaces Better Jobs Act, 2017* introduced a definition in Part XII of the ESA 2000 that took effect on April 1, 2018. Section 41.2 defines “substantially the same” to mean substantially the same but not necessarily identical.

This clarifies that the skill, effort and responsibilities do not need to be exactly the same or identical in every respect to be considered substantially the same. Minor or inconsequential differences do not render the standard inapplicable.

The requirement for skill, effort and responsibility are applied to the actual work that the employees perform, and not their terms of hiring, job description or job title. The work that is to be compared is work that the employees are performing contemporaneously. The jobs must be evaluated as a whole.

The fact that there are some differences in tasks between two jobs would not be a sufficient reason, in and of itself, to establish that the jobs do not require the same skill, effort or responsibility.

(i) Performance Requires Substantially the Same Skill

Skill refers to the degree or amount of knowledge or physical or motor capability needed to perform the job. It includes factors such as education, manual dexterity, experience and training, and is measured in terms of performance requirements.

(ii) Performance Requires Substantially the Same Effort

Effort is the physical or mental exertion needed to perform a job. An example of physical effort is the amount of strength a labourer needs to lift packed boxes. An example of mental effort is the amount of thinking and concentration required by a bookkeeper to balance the books.

When determining whether the performance of the work requires substantially the same effort, the evaluation is based on the effort required for the work itself, and not on the effort expended by a particular individual. For example, where two employees lift 50 pound boxes, it is irrelevant that one employee finds the task to be very physically demanding while the other employee finds the same task to be quite effortless. However, it would take substantially more effort for an employee to lift 80 pound boxes as compared to an employee who lifts boxes that weigh only 10 pounds. As a result, where two jobs have

different weight lifting requirements (e.g. 80 pounds versus 10 pounds), they may not satisfy the requirement that the work require substantially the same amount of effort.

The sporadic performance of an activity that may require extra physical or mental effort does not suffice to establish that the jobs require substantially different levels of effort.

(iii) Performance Requires Substantially the Same Responsibility

Responsibility is measured by the number and nature of an employee's job obligations, the degree of accountability and the degree of authority exercised by an employee in the performance of the job. Some factors to consider include:

- Responsibility for the safety of others;
- Supervision of others;
- Handling of cash;
- Safeguarding of confidential or restricted information; and
- Supervision received by the employee.

For example, an employee who always performs assigned tasks and duties in accordance with specific, detailed instructions would not have substantially the same degree of responsibility as an employee who works only from general policy objectives and refers to superiors on an infrequent basis only, when interpretations of organizational policy are in question.

As another example, where one employee is responsible for collecting and providing the money from individual cash registers to the accounting department, that employee would likely have more responsibility than an employee who does not handle any cash, or who handles cash only rarely in the performance of their job.

4. Similar Working Conditions

The working conditions between the two jobs being compared must be “similar”. (Note this is a lower threshold than “substantially the same” as defined in s. 41.2 and applied in in the “substantially the same kind of work” and “substantially the same skill, effort and responsibility” parts of the test).

"Working conditions" generally refer to factors such as:

- the working environment, such as an office or warehouse
- exposure to the elements, such as work that must be performed in severe weather conditions
- health and safety hazards, such as working at heights or exposure to chemicals

For example, appliance repairers who spend all their time on the employer’s premises do not have similar working conditions to appliance repairers who do their work attending at customers’ homes.

The performance of work in different departments generally does not, in and of itself, make the working conditions dissimilar.

Whether working at different times of the day makes the working conditions dissimilar depends on the particular circumstances. For example, it could be that an employee who works at night is regularly exposed to safety risks than an employee who works during the day is not, such that the working conditions may be dissimilar.

Note that where two employees work at different times of the day, but the working conditions remain similar, the difference in the timing of the shifts might still provide a basis for a differential in pay pursuant

to the exception in s. 42.2(2). This might arise, for example, if an employer pays a premium to an employee for working a particular shift (e.g. the night shift). See s. 42.2(2) for more discussion on this point.

Exception – s. 42.2(2) (REPEALED)

Subsection 42.2(2) was repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. This provision is no longer in force. The discussion of this provision is being maintained for use in situations that arose when it was in force.

42.2(2) Subsection (1) does not apply when the difference in the rate of pay is made on the basis of any other factor other than sex, employment status or assignment employee status.

The prohibition against paying different rates of pay to an assignment employee and an employee of the client who perform "equal work", per s. 42.2(1) does not apply if the difference in the rate of pay is made on the basis of any other factor other than sex, employment status or assignment employee status.

The broad scope of this exception acknowledges the myriad of factors other than sex, employment status or assignment employee status that come into play when pay rates are determined. In practice, this exception allows for a differentiation in rate of pay based on a wide variety of factors, including those that are subjective. Note, however, that the factor (or factors) that the employer provides as the reason(s) for the pay differential must be the actual reason(s). Employment standards officers will review and assess the credibility of any available evidence (which may in some cases be limited to the employer's assertions) in order to satisfy themself that the reason(s) provided are in fact the actual reason(s) for the pay differential. Note that it is possible for a "factor" used to support a difference in the rate of pay to fit within the s. 42.2(2) exception, but to be prohibited by legislation that is not administered by the Ministry of Labour, such as the *Ontario Human Rights Code*.

The key determination to be made in applying this provision is whether the "factor" used to support the difference in rate of pay is sex, employment status, or assignment employee status. If it is, this exception does not apply. If the factor is anything other than sex or employment status, this exception generally does apply.

When determining whether the difference in rate of pay is based on "sex", the question to be answered is whether the employee is earning a particular rate of pay ***because*** he is male or she is female.

When determining whether the difference in rate of pay is based on "employment status", the question to be answered is whether the employee is earning a particular rate of pay ***because*** of the number of hours they regularly work or ***because*** of the term of their employment (such as permanent, temporary, seasonal, or casual).

When determining whether the difference in rate of pay is based on "assignment employment status", the question to be answered is whether the employee is earning a particular rate of pay ***because*** she or he is an assignment employee.

If the answer to any of these questions is yes, then the exception does not apply and equal pay is required per subsection 42.2(1).

Some examples of factors that the Program generally considers to fall under "any other factor other than sex, employment status or assignment employee status" include:

Coverage under a Collective Agreement

Where one of the two employees being compared is covered by a collective agreement: the Program considers a difference in rate of pay that arises out of the collective bargaining process to be a "factor other than sex or employment status" such that the requirement for equal pay would not apply. For practical purposes, this means that a non-unionized assignment employee and a unionized employee of the client can receive different rates of pay for performing "equal work".

This policy does not apply where the assignment employee and client employee being compared are covered by the same collective agreement. Note, however, that in this situation, differences in rate of pay might be substantiated under other exceptions.

An Established Seniority System at the Client Business

(Note that where a seniority system at a client business is established through a collective agreement, the discussion under the heading "Coverage Under a Collective Agreement" is applicable.)

In many workplaces that use assignment employees, those assignment employees are not subject to, or covered by, the client employers' systems that establish client employees' eligibility for wage increases.

A difference in rate of pay between an employee of a client and an assignment employee resulting from a seniority system established by the client (outside of a collective agreement) in which its employees' compensation is based solely on a "mechanical" fact-based measurement (for example, length of service or accumulated number of hours of work), and in which increases in rate or pay happen automatically or "mechanically" without any normative assessment/evaluation by the employer, will generally be considered to fall within the exception. As such, a difference in rate of pay would be substantiated where, pursuant to such a system, the client employee has a greater length of service or more accumulated hours than the assignment employee.

For example:

A client employer's employees progress through a wage grid based solely on their length of employment. Employees start at $18 per hour and automatically receive an $1 per hour increase after six months of employment.

Client Employee A started January 1, 2018 at $18 per hour and received a $1 per hour increase after six months of employment, on July 1, 2018.

Assignment Employees B and C perform "equal work" to Client Employee A. Assignment employees B and C are both paid $18 per hour. B has been on assignment in the workplace for seven months. C has been on assignment in the workplace for two months.

The difference in the rate of pay between Client Employee A and Assignment Employee B is *not* considered to fall within the exception. In this situation, the assignment employee is being paid a lower rate because the seniority system does not apply to them by virtue of the agency, and not the client, being their employer. Subsection 42.2(2) provides that an exception to the equal pay requirement cannot be based on the fact that the assignment employee is an assignment employee.

The difference in the rate of pay between Client Employee A and Assignment Employee C *is* considered to fall within the exception of "any other factor other than sex, employment status or assignment employee status"; here the difference in rate of pay is consistent with the established wage grid that

determines employees' compensation pursuant to their length of employment and that awards a $1 per hour increase after six months of employment, which Assignment Employee B has not yet completed. Accordingly, there would be no contravention.

For practical purposes, this means that where the client employer applies a purely mechanical, fact-based system to determine eligibility for wage increases, assignment employees who are doing "equal work" to client employees must be notionally treated as if that system applies to them for the purpose of determining if the exception applies.

Where the client's system for determining pay rate increases for its employees is not based purely on a mechanical, fact-based measurement and instead includes a subjective performance appraisal or a normative assessment of some sort, the Program will generally consider the system to fall within the exception. In practice, this means that assignment employees who are doing "equal work" to client employees do not have to be notionally treated as if such systems apply to them for the purpose of determining their rate of pay. This is due to the nature of the relationship between assignment employees and client businesses: generally, it is not reasonable to require client businesses to conduct subjective performance appraisals/normative assessments on assignment employees. For a more detailed discussion on systems involving such evaluations, please see the heading "An Established Merit System at the Client Business".

Length of Service at the Workplace with the Employer

Where a client does not have an established seniority system, a "seniority-like" factor may be a "factor other than sex, employment status or assignment employee status", such that the requirement for equal pay would not apply. For example, a longer-term employee of the client may earn a greater rate of pay than that given to a newly placed assignment employee.

An Established Merit System at the Client Business

(Note that where a merit system at a client business is established through a collective agreement, the discussion under the heading "Coverage Under a Collective Agreement" is applicable.)

In many workplaces that use assignment employees, those assignment employees are not subject to, or covered by, the client employers' systems that establish employees' eligibility for wage increases.

A difference in pay rate may result from a merit system established by the client employer in which its employees' compensation is at least partially based on their achievements and/or how well they perform their jobs.

If a client employer has a merit system in place that is established outside of a collective agreement, whereby the client formally evaluates employees' performance and that normative evaluation determines, at least in part, their pay rate, then this would generally be considered "any other factor other than sex, employment status or assignment employee status" such that the requirement for equal pay would not apply.

Since an assignment employee is not an employee of the client business, it generally cannot be expected that the assignment employee would be subject to a formal performance review by the client. It would also be completely impractical for the temporary help agency to attempt to review the assignment employee's performance pursuant to the client's evaluation criteria since the agency does not have a presence in the client's workplace, meaning it would not have the necessary information or opportunity to

observe performance on which to base an evaluation. So, due to the nature of the working relationship and the impracticalities of the agency applying the client's evaluation criteria, it is the Program's position that such a performance review cannot be required and the client's merit system therefore cannot be applied to an assignment employee.

For practical purposes, this means that assignment employees who are doing "equal work" to the client employees do not have to be treated as if that system "notionally" applies to them for the purpose of the determination of their rate of pay.

System that Measures Earnings by Quantity or Quality of Production at the Client Business

(Note that where a system that measures earnings by quanity or quality of production is established through a collective agreement, the discussion under the heading "Coverage Under a Collective Agreement" is applicable.)

In many workplaces that use assignment employees, those assignment employees are not subject to, or covered by, the client employers' systems that establish employees' eligibility for wage increases.

A difference in rate of pay between an employee of a client and an assignment employee resulting from a system established by the client (outside of a collective agreement), that measures earnings by quanity or quality of production, in which its employees' compensation is based solely on a mechanical fact-based measurement (for example, the number of widgets completed or the quality of completed widgets), and in which increases in rate or pay happen automatically or "mechanically" without any normative assessment/evaluation by the employer, will generally be considered to fall within the exception. For example, a difference in rate of pay would be substantiated where, pursuant to such a system, the client employee has produced a greater number or more quality widgets than the assignment employee.

An example of a system that measures earnings by quantity of production

A client employer operates a widget factory and employs manufacturing employees. All employees receive $1 per completed widget, and receive a pay increase of 15 cents per widget after they complete 1,000 widgets. If the same compensation system is applied to the assignment employee who enters the workplace, the fact that the client employee earns $1.15 per widget (based on the fact that she has already completed 1000 widgets) while the assignment employee earns only $1.00 per widget (because she has not yet completed 1,000 widgets) would be an exception to per s. 42.2(2). However, note that in order for this exception to apply, the assignment employee must also be paid $1.15 per widget once they have completed 1,000 widgets.

An example of a system that measures earnings by quality of production

A client employer operates a widget factory and employs manufacturing employees. All employees receive $1 per completed widget, and receive a pay increase of 15 cents per widget after the first 1,000 of their completed widgets meet a "mechanical"/objective quality test. If the same compensation system is applied to the assignment employee who enters the workplace, the fact that the client employee earns $1.15 per widget (based on the fact that she has already achieved the threshold of 1,000 quality widgets) while the assignment employee earns only $1.00 per widget (because she has not yet achieved the quality threshold) would be an exception to per s. 42.2(2). However, note that in order for the exception to apply, the assignment employee must also earn $1.15 per widget once they complete 1,000 widgets that meet the quality test.

But, where the client's system for determining pay rate increases for its employee is not based purely on a mechanical, fact-based measurement and instead includes a subjective performance appraisal or a normative assessment of some sort, that system will generally be considered to fall within the exception.

In practice, this means that where the client employer's system involves a normative assessment of some sort, the assignment employees who are doing "equal work" to the client employees do not have to be notionally treated as though that system applies to them for the purpose of determining their rate of pay. This is due to the nature of the relationship between assignment employees and client businesses: it is generally not reasonable to require client businesses to conduct normative assessments on assignment employees. For a more detailed discussion on systems involving involving such evaluations, please see the heading "An Established Merit System at the Client Business".

Differences in experience or educational achievement

Even where the work is "equal", a difference in relevant experience or educational achievement may be a "factor other than sex or employment status", such that the requirement for equal pay would not apply.

Red Circling of a Client Employee

Some employers engage in the practice of "red circling". This means they maintain an employee's rate of pay, even after transferring the employee to a job that normally pays a lower rate. An example of this is an employee transferred to a lower paying job due to a company reorganization. Under a pure "red-circling" system, the higher-paid employee would remain at the present rate of pay until the lower paid employees catch up.

If a client employee has been "red circled", and thus earns a higher rate than what someone normally performing that work would earn, this would generally be considered to be a "factor other than sex, employment status or assignment employee status", meaning that the requirement for equal pay would not apply.

Job Market Conditions

The nature of the job market at a particular point in time may require an employer to offer a higher rate of pay to attract an employee to fill a particular role in its organization if the supply of qualified candidates is low. If a client employee was hired at a higher rate of pay for this reason, this is generally considered to be a "factor other than sex, employment status or assignement employee status", meaning that the requirement for equal pay would not apply.

Wage Premiums

In some cases, a difference in the shifts that are being worked by an assignment employee and an employee of the client may mean that "equal work" is not being performed (e.g. a security guard on the day shift and a security guard on the night shift who have very different duties, level of responsibility and working conditions).

In certain situations, despite work between two employees on different shifts being "equal" per s. 42.2(1), the employer may pay a wage premium. This may be, for example, to compensate employees who work the evening shift for the inconvenience of working at that time. This rationale for providing a wage premium is considered to be a "factor other than sex or employment status", meaning that the requirement for equal pay would not apply.

Other

An employer may pay an employee a higher rate of pay based on a factor such as the employee being well liked by key clients, being particularly friendly or because that employee is seen as always "going the extra mile". Examples such as these, even though they may be based on the subjective opinion of the employer, constitute a "factor other than sex or employment status" meaning the requirement for equal pay would not apply.

Reduction Prohibited – s. 42.2(3) (REPEALED)

Subsection 42.2(3) was repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. This provision is no longer in force. The discussion of this provision is being maintained for use in situations that arose when it was in force.

42.2(3) No client of a temporary help agency shall reduce the rate of pay of an employee in order to assist a temporary help agency in complying with subsection (1).

Section 42.2(3) prohibits a client of a temporary help agency from reducing an employee's rate of pay in order to help a temporary help agency comply with s. 42.2(1). This means that where there is a difference in the rate of pay in contravention of section 42.2, the client cannot lower its higher-paid employee's rate of pay to assist the temporary help agency in complying with its obligation under 42.2(1).

For example, an assignment employee and a client employee both work as administrative assistants performing equal work and none of the exceptions in s. 42.2(2) apply The assignment employee earns $15.00 per hour. The client employee earns $18.00 per hour. The client is prohibited from reducing its employee's pay to $15.00 in order to assist the temporary help agency in meetings its obligations under s. 42.2(1).

Organizations – s. 42.2(4) (REPEALED)

Subsection 42.2(4) was repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. This provision is no longer in force. The discussion of this provision is being maintained for use in situations that arose when it was in force.

42.2(4) No trade union or other organization shall cause or attempt to cause a temporary help agency to contravene subsection (1).

This section reinforces s. 5(1) of the ESA 2000, which states:

5(1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.

A trade union or other organization is prohibited from causing or attempting to cause a temporary help agency to pay an assignment employee a lower rate of pay than that paid to an employee of the client, where they perform "equal work".

Deemed Wages – s. 42.2(5) (REPEALED)

Subsection 42.2(5) was repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. This provision is no longer in force. The discussion of this provision is being maintained for use in situations that arose when it was in force.

42.2(5) If an employment standards officer finds that a temporary help agency has contravened subsection (1), the officer may determine the amount owing to an assignment employee as a result of the contravention and that amount shall be deemed to be unpaid wages for that assignment employee.

This section permits an employment standards officer to determine the amount owed to an assignment employee as a result of the contravention of s. 42.2(1), and deems that amount owing to be unpaid wages. An employment standards officer may consequently issue an order to pay wages under ESA Part XXII, s. 103 against a temporary help agency. This order may include the amount necessary to correct the inequality in the rate of pay and may also include amounts owing under other standards that were calculated in the relevant period using the rate of pay that was found to violate s. 42.2. This may include, for example, vacation pay, public holiday pay, overtime pay, termination pay, etc.

Note that a director order to pay cannot be issued in relation to these deemed wages per s. 81(3).

Section 74.18 imposes joint and several liability on temporary help agencies and the clients of temporary help agencies for certain unpaid wages owed in respect of a pay period where the assignment employee was assigned to perform work for the client. Per s. 74.18(3), the wages to which joint and several liability apply are limited to regular wages, overtime pay, public holiday pay and premium pay that was earned during the relevant pay period.

Section 74.18 applies in the context of wages deemed to be owing as a result of a contravention of s. 42.2(1). Please see the discussion at section 74.18 for more information.

Written Response – s. 42.2(6) (REPEALED)

Subsection 42.2(6) was repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. This provision is no longer in force. The discussion of this provision is being maintained for use in situations that arose when it was in force.

42.2(6) An assignment employee who believes that their rate of pay does not comply with subsection (1) may request a review of their rate of pay from the temporary help agency, and the temporary help agency shall,

(a) adjust the employee's pay accordingly; or

(b) if the employer disagrees with the employee's belief, provide a written response to the employee setting out the reasons for the disagreement.

This subsection provides that assignment employees who believe that the temporary help agency is not complying with s. 42.2(1) may ask the agency to review their rate of pay. In response, the temporary help agency must review the assignment employee's rate of pay and either adjust upwards it to address the contravention, or provide a written response that sets out the reasons why it disagrees with the assignment employee's belief that there is a contravention.

The requirement that the employer's response be in writing is satisfied if the response is provided to the employee on paper (for example, in a printed letter) or electronically.

Section 42.12(6)(b) does not specify a timeline within which the temporary help agency must provide the written response. It is Program policy that the response must be provided within a reasonable timeframe; what is reasonable will depend on the particular circumstances.

Note that this section does not require an assignment employee to request a review of their rate of pay as a prerequisite to filing a claim under ESA Part XXII, s. 96(1). In other words, an employee who believes their rate of pay does not comply with s. 42.2(1) may file a claim without ever requesting a review of their rate of pay from the agency.

The requirement in this subsection to adjust the assignment employee's pay rate applies prospectively only; it does not require the temporary help agency to retroactively pay the employee what they would have earned had they received equal pay prior to the adjustment. However, an assignment employee may file a claim in order to recover any amounts owing prior to the adjustment (subject to the limitations on recovery set out in section 111).

Transition, Collective Agreement – s. 42.2(7) (REPEALED)

Subsection 42.2(7) was repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. This provision is no longer in force. The discussion of this provision is being maintained for use in situations that arose when it was in force.

42.2(7) If a collective agreement that is in effect on April 1, 2018 contains a provision that permits differences in pay between employees of a client and an assignment employee and there is a conflict between the provision of the collective agreement and subsection (1), the provision of the collective agreement prevails.

Same, Limit – s. 42.2(8) (REPEALED)

Subsection 42.2(8) was repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. This provision is no longer in force. The discussion of this provision is being maintained for use in situations that arose when it was in force.

42.2(8) Subsection (7) ceases to apply on the earlier of the date the collective agreement expires and January 1, 2020.

These provisions, read together, provide that if a collective agreement that that is in effect on April 1, 2018 contains a provision that permits differences in the rate of pay between employees of a client and an assignment employee, the provision of the collective agreement will prevail even if it conflicts with the ESA 2000. However, the conflicting provisions will cease to prevail on the the earlier of the date the collective agreement expires or January 1, 2020.

ESA Part XIII - Benefit Plans

Part XIII of the *Employment Standards Act, 2000* is intended to prohibit age, sex and marital status discrimination in respect of: employees, beneficiaries of employees, survivors of employees and dependents of employees in employee benefit plans, except in certain specific instances as set out in O Reg 286/01.

ESA Part XIII Section 43 - Definition

43 In this Part,

"employer" means an employer as defined in subsection 1(1), and includes a group or number of unaffiliated employers or an association of employers acting for an employer in relation to a pension plan, a life insurance plan, a disability insurance plan, a disability benefit plan, a health insurance plan or a health benefit plan.

This definition is substantially the same as the definition in s. 1 of O Reg 321 under the former *Employment Standards Act*.

The definition of employer in s. 43 is supplementary to the definition of "employer" in s. 1 of the *Employment Standards Act, 2000*. For the purposes of Part XIII, the definition in s. 43 also includes a group or association of unaffiliated employers that have combined for the purpose of providing a pension plan, a life insurance plan, a disability insurance plan, a disability benefit plan, a health insurance plan or a health benefit plan to the employers' employees. This practice is common, for example, in the construction industry.

ESA Part XIII Section 44 - Differentiation Prohibited

Differentiation Prohibited - s. 44(1)

44(1) Except as prescribed, no employer or person acting directly on behalf of an employer shall provide, offer or arrange for a benefit plan that treats any of the following persons differently because of the age, sex or marital status of employees:

1. Employees.

2. Beneficiaries.

3. Survivors.

4. Dependants.

Section 44(1) prohibits the employer from providing a benefit plan that differentiates between the employees (or their beneficiaries, survivors or dependants) on the basis of the age, sex or marital status of employees except as allowed in O Reg 286/01. The prohibition in this section applies to any employer or person acting directly on behalf of an employer. A "person acting directly on behalf of an employer" includes persons empowered to act on behalf of the employer such as agents.

It is important to note that differentiations in benefit plans based upon bona fide job classifications or length of service requirements may be violations of s. 44(1) if such differentiations affect persons because of the age, sex or marital status of an employee and if it would not be an undue hardship to the employer to remove the discriminatory provision. In other words, intent to discriminate is not necessary for a violation of s. 44(1) to occur. In this regard, see the Supreme Court of Canada decision in *Ontario Human Rights Commission v Simpsons-Sears*, [1985] 2 SCR 536, 1985 CanLII 18 (SCC) where an employer was found to have committed a breach of human rights legislation on the basis that a rule that it had imposed, while not intentionally discriminatory, had a discriminatory effect and its elimination would not cause "undue hardship" to the employer. In the employment standards context, for example, if all of an employer’s part-time employees are female, and part-time employees are excluded from a benefit plan,

the reasoning in *Ontario Human Rights Commission v Simpsons-Sears* may require that the exclusion of part-time employees be eliminated.

1. Prohibited Grounds of Discrimination

Section 44(1) prohibits discrimination with respect to certain benefit plans on the basis of age, sex and marital status. The terms "age," "sex" and "marital status" are all defined in section 1 of O Reg 286/01 (although only for purposes of Part XIII and O Reg 286/01). For further discussion of these terms, please refer O Reg 286/01.

i. Age

"Age" is defined in s. 1 of O Reg 286/01 as follows:

"age" means any age of 18 years or more and less than 65 years.

Therefore, if a plan discriminates against employees who are under 18, or 65 or over, it will not constitute discrimination on the basis of age within the meaning of Part XIII.

On December 12, 2006 amendments to the *Human Rights Code,* RSO 1990, c H.19 (the "Code") to eliminate, for most employees, mandatory retirement at age 65 or older, came into force. The definition of "age" in the Code which formerly excluded ages 65 and older, was amended to eliminate the upper limit, with the result that in general, discrimination against employees aged 65 or older is no longer permitted. However, the Code still provides (now in subsections 25(2.1) to 25(2.3)) that the right to equal treatment without discrimination on the basis of age is not infringed by benefit, pension, superannuation or group insurance plans or funds that comply with the ESA 2000 and its regulations. Subsection 25(2.3) specifically states that this is so even if the ESA 2000 or its regulations define "age" differently than the definition in the Code. As a result, discrimination on the basis of employee ages of 65 or over is permitted in benefit plans under the ESA 2000 because O Reg 286/01 defines age as any age 18 years or more and less than 65 years. In *Chatham-Kent (Municipality) v Ontario Nurses Association (O'Brian) (Re)* (2010), 202 LAC (4th) 1 (Etherington), the arbitrator was asked to determine whether these provisions violated s. 15(1) of the *Charter of Rights and Freedoms* (the "Charter") because they discriminate on the basis of age. Although the arbitrator concluded that they did indeed violate s. 15(1) of the Charter, he went on to find that they were saved by s. 1 of the Charter which states that rights otherwise protected under s. 15 are subject to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

ii. Sex

"Sex" is defined in s. 1 of O Reg 286/01 as follows:

"sex" includes,

(a) a distinction between employees that excludes an employee from a benefit under a benefit plan or gives an employee a preference to a benefit under a benefit plan because the employee is or is not a head of household, principal or primary wage earner or other similar condition, and

(b) a distinction between employees in a benefit plan because of the pregnancy of a female employee.

"Sex" is defined to include distinctions between employees because the employee "is or is not a head of household, principal or primary wage earner or other similar condition," and "a distinction between employees . . . because of the pregnancy of a female employee."

At one time, a distinction based on pregnancy was not generally considered sex discrimination. For example, in *Bliss v Attorney General of Canada*, [1979] 1 SCR 183, 1978 CanLII 25 (SCC), the Supreme Court of Canada held that unemployment insurance legislation providing special conditions for pregnant women did not constitute discrimination on the grounds of sex. As a result, the definition of "sex" in the predecessor to O Reg 286/01 was amended so as specifically to include a distinction based on pregnancy. The *Bliss v Attorney General of Canada* view was later overturned on the question of whether discriminatory treatment based on pregnancy constitutes discrimination on the basis of sex by the Supreme Court in *Brooks v Canada Safeway Ltd.,* [1989] 1 SCR 1219, 1989 CanLII 96 (SCC).

iii. Marital Status

"Marital status" is defined in s. 1 of O Reg 286/01 as follows:

"marital status" includes,

(a) the condition of being an unmarried person who is supporting, in whole or in part, a dependent child or children, and

(b) the common law status as defined in the relevant benefit plan.

Under this inclusive definition, married employees (including employees married to a person of the same sex), unmarried employees supporting a dependent child or children, as defined in the plan, and employees with "common law" spouses will all be considered to have marital status. After the decision in *Halpern v Canada (Attorney General)*, 2003 CanLII 26403 (ON CA), in which the Court of Appeal ruled that the exclusion of same sex couples from marriage was inconsistent with the equality guarantees in the *Canadian Charter of Rights and Freedoms*, was not saved under section 1 of the Charter ("reasonable limits") and was, therefore, unconstitutional, the Program took the view that "common law status as defined in the relevant benefit plan" must include same-sex as well as opposite-sex common law couples. (See also the discussion of the definition "spouse" in O Reg 286/01, s.1 in the Manual.) On June 13, 2005, clause (b) of the definition of "marital status" was amended so as to eliminate the words "of husband and wife", thereby reflecting *Halpern v Canada (Attorney General)* and the Program position. Any exemption from s. 44(1) in O Reg 286/01 for differentiations on the basis of marital status must be applied equally to all employees with marital status. Likewise, if there is no exemption in the regulation, then all persons with marital status (including employees married to or in a common-law relationship with a person of the same sex and including single employees with supporting a dependent child or children) must be treated equally.

2. Types of Benefit Plans Covered

Part XIII and the prohibition against discrimination in s. 44 can apply to any type of benefit plan offered by an employer as defined in subsection 1(1) of the Act; benefit plans include those listed in s. 43 as well benefit plans such as supplementary unemployment benefits ("SUBS"), whether payable during periods of lay-off or as "top ups" for maternity and parental benefits, as well as deferred profit sharing plans. A deferred profit sharing plan need not be registered under the *Income Tax Act,* RSC 1985, c 1 (5th Supp) in order to be considered a benefit plan within the meaning of s. 44(1).

Note, however, that the definition of "employer" in s. 43, in addition to including employers as defined in subsection 1(1) of the Act, also includes a group of employers or an association acting for an employer in relation to certain types of benefit plans listed within s. 43. Thus, while the prohibition against discrimination in s. 44 applies in respect of any type of benefit plan provided, ordered or arranged for by an employer or person acting on behalf of an employer, the prohibition would apply in respect of a benefit plan offered by a group or association of employers only if it is a pension plan, life insurance plan or health benefit plan.

The use of the words "provide, offer or arrange" indicate that a plan will be covered by Part XIII whether or not employees are required to participate in it or make contributions to it. Thus, Part XIII will cover, among other plans, voluntary, "employee-pay-all" plans provided by an employer.

Section 44(1) applies to benefit plans without any distinction as to how the benefits are payable. For example, s. 44(1) may apply whether the benefits are payable periodically or as a lump sum. In addition a benefit plan described in s. 43 may be subject to the prohibition against discrimination in s. 44(1) even if there is no specific fund set up to provide the benefits. For example, "self-insured" company benefit plans, where the company pays for the benefits itself, rather than paying premiums to an insurance company, will be covered by Part XIII, even though the company has not set up a special segregated fund from which to pay these benefits. Part XIII would not cover an informal, "self-insured" pattern of responses such as where occasional days off with pay are provided on an ad hoc basis. However, once such a plan becomes formalized, i.e., using fixed criteria respecting who is eligible for benefits, it would come under Part XIII.

3. Persons Protected from Discrimination

Section 44(1) protects employees and their beneficiaries, survivors and dependants from discrimination under a benefit plan on the grounds of age, sex or marital status of the employees.

"Dependant" is the only one of these classes of persons defined in s. 1 of O Reg 286/01. It is defined as follows:

"dependant" means a dependant as defined in the relevant benefit plan, and "dependent child" and "dependent spouse" and have corresponding meanings.

For further discussion of the term "dependant", please refer to O Reg 286/01, s. 1.

Causing Contravention Prohibited - s. 44(2)

44(2) No organization of employers or employees and no person acting directly on behalf of such an organization shall, directly or indirectly, cause or attempt to cause an employer to contravene subsection (1).

This provision is substantially the same as s. 33(3) in the former *Employment Standards Act*. Section 44(2) prohibits an organization of employers or employees or a person acting on their behalf from causing or attempting to cause, in any way, an employer to contravene section 44(1), i.e., to discriminate in benefit plans on the basis of age, sex or marital status. For example, a union may be in violation of s. 44(1) if, during collective agreement negotiations, it seeks a benefit plan package that contains a provision contrary to s. 44(1).

ESA Part XIV – Leaves of Absence

The purpose of the leaves of absence provisions in Part XIV is to provide qualified employees with the right to take job protected leaves. The intent of each leave is discussed below.

Note: During the declared emergencies for COVID-19, orders were issued under the *Emergency Management and Civil Protection Act* (EMCPA) that may have limited some employees' rights to take declared emergency leave, infectious disease emergency leave or any other statutory leave. Some of those emergency orders continued as time-limited orders under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*. These orders, including the period of time to which they relate, were published as regulations and can be found by visiting the Ontario government's e-Laws website.

Pregnancy and Parental Leave

The *Employment Standards Amendment Act (Pregnancy & Parental Leave), 1990*, SO 1990, c 26 amended the former *Employment Standards Act* with the intention of improving the rights and protections already afforded to pregnant employees, and to establish a leave for working parents. The provision of a parental leave generally allows parents to spend time with a newborn or newly adopted child and was also intended to enable employees to take advantage of the new parental benefit under the former federal *Unemployment Insurance Act*, RSC 1985, c U-1, effective November 18, 1990 and repealed on July 1, 1996. Similarly, the longer parental leave provided by the ESA 2000 in December 2000 was intended to enable employees to take advantage of the extended parental benefits made available in December 2000 under the federal *Employment Insurance Act*, SC 1996, c 23. A further amendment to the ESA 2000 to support an extension in the time period over which parental EI benefits could be accessed was made effective December 3, 2017 with the *Fair Workplaces, Better Jobs Act*, 2017.

The 1990 amendments were drafted with the intention that qualified employees who availed themselves of the right to take pregnancy leave and parental leave would not be disadvantaged for doing so. As a result, employees on pregnancy or parental leave now have a right to be reinstated to the same position they held prior to going on leave. It is only if that position no longer exists that the employer can reinstate the employee to a comparable position. Under previous pregnancy leave provisions employers could, at their option, reinstate employees who took a leave to the employee's own position or to a comparable one. Employees are also to be reinstated at the greater of the wage rate they were earning prior to going on leave or the rate they would have been earning had they not taken the leave.

Employees are also entitled to continue to participate in certain benefit plans while on leave. The employer is required to continue paying the employer contributions and the employee continues to pay the employee portion of the premiums due unless the employee gives the employer written notice that they do not intend to pay the employee's contributions. In addition, seniority, length of service and length of employment continue to accrue while the employee is on leave.

Sick Leave

The sick leave provisions provide employees who have been employed for at least two consecutive weeks with the right to take up to three days of unpaid leave from work each calendar year because of a personal illness, injury or medical emergency. The sick leave provisions came into force on January 1, 2019 as a result of an amendment to the ESA 2000 by the *Making Ontario Open for Business Act, 2018*.

Family Responsibility Leave

The family responsibility leave provisions provide employees who have been employed for at least two consecutive weeks with the right to take up to three days of unpaid leave from work each calendar year

because of the illness, injury, medical emergency or urgent matter of certain relatives. The family responsibility leave provisions came into force on January 1, 2019 as a result of an amendment to the ESA 2000 by the *Making Ontario Open for Business Act, 2018*.

Bereavement Leave

The bereavement leave provisions provide employees who have been employed for at least two consecutive weeks with the right to take up to two days of unpaid leave from work each calendar year because of the death of certain relatives. The bereavement leave provisions came into force on January 1, 2019 as a result of an amendment to the ESA 2000 by the *Making Ontario Open for Business Act*, *2018*.

Emergency Leave: Declared Emergencies and Infectious Disease Emergencies

The **declared emergency leave** provisions provide employees with the right to an unpaid leave of absence if the employee will not be performing the duties of the employee's position because of an emergency declared by the Lieutenant Governor in Council or the Premier and if one of certain other eligibility criteria is met.

The **infectious disease emergency leave** provisions provide employees with the right to a leave of absence if the employee will not be performing the duties of the employee's position because of certain specified reasons related to a designated infectious disease. The diseases that have been designated as infectious diseases are set out in O. Reg. 228/20. From April 19, 2021 to December 31, 2021, eligible employees are entitled to up to three paid days of infectious disease emergency leave in certain circumstances. Otherwise, the leave is unpaid.

Reservist Leave

The reservist leave provisions are intended to provide employees with the right to unpaid leave from work where the reservist employee, who has worked for their employer for at least six consecutive months, will not be performing the duties of their position because of a deployment to a Canadian Forces operations.

Family Medical Leave

The family medical leave provisions are intended to provide employees with the right to take up to 28 weeks of unpaid leave from work to provide care or support to certain family members who have a serious medical condition and are at significant risk of dying within a period of 26 weeks without penalty. The provision of a family medical leave was also intended to enable employees to take advantage of compassionate care benefits made available under the federal *Employment Insurance Act*, effective January 4, 2004 and expanded from 6 to 26 weeks of benefits on January 3, 2016 (although the provisions giving qualified employees the right to family medical leave under the ESA 2000 did not come into force until June 29, 2004). O Reg 476/06, filed on October 6, 2006 expanded the list of persons in respect of whom the leave could be taken.

Family Caregiver Leave

The family caregiver leave provisions are intended to provide employees with the right to take unpaid time off work to provide care or support to specified family members who have a serious medical condition, even if the family member is not at significant risk of death within a period of 26 weeks, which is a

qualifying criterion for family medical leave. Employees are entitled to up to eight weeks of unpaid leave each year with respect to each specified family member.

Critical Illness Leave

The critical illness leave provisions are intended to provide employees who have been employed by their employer for at least six months with the right to take unpaid time off work to provide care or support to a critically ill minor child or adult who is a family member of the employee. Employees are generally entitled to up to 37 weeks of unpaid leave in relation to a minor child, and 17 weeks in relation to an adult, to be taken in a 52-week period (and may requalify for subsequent 37 or 17 weeks of leave in subsequent 52-week periods). The provision of this leave was also intended to enable employees to avail themselves of federal Employment Insurance benefits for providing care or support to a critically ill minor child or adult who is a family member of the employee.

Child Death Leave

The child death leave provisions are intended to provide employees who have been employed by their employer for at least six months with the right to take unpaid time off work if a child of the employee dies. The leave entitlement is up to 104 weeks of leave. It is required that the leave be taken in a single period. If an employee is charged with a crime in relation to the death of the child or if the child was a party to a crime in relation to their death, there is no entitlement.

Crime-Related Child Disappearance Leave

The crime-related child disappearance leave provisions are intended to provide employees who have been employed by their employer for at least six months with the right to take unpaid time off work if a child of the employee disappears as a probable result of a crime. The leave entitlement is up to 104 weeks of leave. The leave must be taken in a single period. The provision of a crime-related child disappearance leave was also intended to enable employees to apply for a federal income support grant for parents of missing children that became available on January 1, 2013 and that requires that the parent be on leave or have been on leave from work.

Organ Donor Leave

The organ donor leave provisions are intended to provide employees who have been employed by their employer for at least 13 weeks and who undergo surgery for the purpose of donating all or part of certain organs to other persons, with the right to take up to 13 weeks of job-protected, unpaid leave from work. The leave may be extended for medical reasons for a further period of up to 13 weeks.

Domestic or Sexual Violence Leave

The domestic or sexual violence leave provisions are intended to provide employees who have been employed for at least 13 weeks with two separate allotments of 10 days and 15 weeks of leave within each calendar year if the employee or the employee’s child has experienced or been threatened with domestic or sexual violence. The leave must be taken for specific purposes: to seek medical attention, to access professional counselling, to relocate temporarily or permanently, to seek law enforcement and legal assistance, and to access victim services. The first five days of leave are to be paid; the balance of the leave taken within a calendar year is unpaid.

ESA Part XIV Section 45 – Definitions

45 In this Part,

"parent" includes a person with whom a child is placed for adoption and a person who is in a relationship of some permanence with a parent of a child and who intends to treat the child as his or her own, and child has a corresponding meaning;

"spouse" means

(a) a spouse as defined in section 1 of the *Family Law Act*, or

(b) either of two persons who live together in a conjugal relationship outside marriage.

This section contains definitions of some of the terms used in Part XIV: parent, child and spouse.

History of the Defined Terms

The ESA 2000 introduced new definitions of the terms "same-sex partner" and "spouse" in September 2001, at the same time the personal emergency leave provisions, which referenced those terms, were introduced. At the time, same-sex partner was defined to mean unmarried same-sex couples, and spouse was defined to mean unmarried or married opposite-sex couples. After the Ontario Court of Appeal decision in *Halpern v Canada (Attorney General)*, 2003 CanLII 26403 (ON CA), in which the Court ruled that the exclusion of same-sex marriages from the common-law definition of marriage was unconstitutional, the Program read the definition of spouse as if it included married same-sex couples. On June 29, 2004, the *Employment Standards Amendment Act (Family Medical Leave), 2004,* SO 2004, c 15 amended the ESA 2000 to reflect the *Halpern v Canada* decision. It repealed the same-sex partner definition, removed references in the personal emergency leave context to same-sex partner, and amended the definition of the term spouse to mean married and unmarried couples of the same or opposite sex. The *Spousal Relationships Statute Law Amendment Act, 2005,* SO 2005, c 5, which came into force on March 9, 2005, made a subsequent amendment to the definition of spouse in the ESA 2000. This amendment incorporated the amended definition of spouse in s. 1 of the *Family Law Act,* RSO 1990 c F.3 which (also as a result of the *Spousal Relationships Statute Law Amendment Act, 2005*) now refers to either of two persons who are married to each other rather than to "either of a man and woman" who are married to each other.

Parent

The definition of parent is an inclusive one, which means that the term parent could include individuals not specifically mentioned in the definition.

The Program's view of who is and is not a parent for the purposes of Part XIV is set out below - this is not necessarily an exhaustive list:

Birth Parents

It is the Program's position that all birth parents are parents.

This means, for example, that all birth parents who meet the other eligibility criteria are entitled to parental leave, including birth fathers who are not currently in a relationship with the mother of their child, and birth parents who put a child up for adoption. Such individuals could also be eligible for any other Part XIV

leave that is available to employees with respect to the employee's child. For example, an employee may be eligible to take family medical leave to provide care or support to his child even if he is no longer in a relationship with the mother of the child, and even if the parent gave the child up for adoption.

It also means that a surrogate mother is a parent even if she may not be genetically related to the child, which may be the case, depending on the circumstances. Accordingly, a surrogate mother may be eligible for parental leave, and any other Part XIV leave that is available to employees with respect to the employee's child.

Correspondingly, children in circumstances described above will, as an employee, be eligible to take any Part XIV leave that is available to employees vis-a-vis their parent. For example, a child may be eligible to take family medical leave to provide care or support to the child's surrogate mother, or to the child's birth father who gave the child up for adoption.

Adoptive Parents

The definition of parent specifically includes a person with whom a child is placed for adoption.

This means that adoptive parents will be considered to be a parent for parental leave purposes and any other Part XIV leave that is available to employees with respect to the employee's child. Correspondingly, the adopted child will, as an employee, be eligible to take any leave respecting their adoptive parent that is available to employees vis-a-vis a parent. For example, the child could be eligible to take family medical leave to provide care or support to the adoptive father.

The Program's position is that it is sufficient that the adoption proceedings have been commenced in order to demonstrate that the placement is for the purposes of adoption. It is not necessary that adoption proceedings have been finalized.

Foster Parents

The definition of parent will not cover most foster parents, as their relationship to the child is usually based upon a short-term or interim arrangement. Accordingly, most foster parents are not eligible for parental leave, which is available only to parents. They may, however, be eligible for other leaves under Part XIV that are specifically made available to foster parents, for example, family responsibility leave, bereavement leave, critical illness leave, family medical leave, family caregiver leave, domestic or sexual violence leave, child death leave and crime-related child disappearance leave.

Note, however, that if a foster parent commences adoption proceedings, thereby demonstrating an intent to adopt rather than foster the child, they will be considered an adoptive parent and therefore fall within the definition of parent.

In addition, even though they have not commenced adoption proceedings, foster parents may be considered parents if they are participating in certain programs referred to as foster to adopt programs. In such cases, a child is placed with the foster parents for the purposes of adoption by the foster parent. Such programs allow a child to be placed for adoption even though the child is not legally adoptable and adoption proceedings cannot therefore be commenced. For example, the child may be placed prior to the natural parents having consented to the adoption or relinquishing their rights to the child. In those cases, the Program will consider them to be a parent from the date of the placement.

Note it will also be possible for a foster parent to enter a foster to adopt program sometime after the child was originally placed with them as a foster child. In that case, the foster parent would be considered a

parent at the time they entered the program rather than the date of placement. In some cases, foster parents will commit to adopting the foster child in their care if the child cannot be returned to their birth parents or be placed with a family member. Generally, such a foster parent would become a parent only if they commenced adoption proceedings. However, as with foster to adopt programs, such a foster parent may be considered a parent although they are unable to commence adoption proceedings because the child is not yet legally adoptable. In those circumstances, the foster parent will be considered a parent from the date the foster parent intends to adopt the child and considers the placement to be a permanent one.

Legal Guardians

A person who is not a parent can become a legal guardian to a child by a court order or under a will. There are certain leaves under Part XIV that are specifically made available to legal guardians, for example, critical illness leave, family medical leave, child death leave, crime-related child disappearance leave, and domestic or sexual violence leave. Whether a legal guardian who is not a parent is eligible for leaves which apply only to parents such as parental leave would have to be determined on a case by case basis. Note that a legal guardian may be considered a parent through steps taken in adoption proceedings – see the discussion above for more information.

Person in a Relationship of Some Permanence with a Parent and Intends to Treat Child as Their Own

The definition of parent also specifically includes a person who is in a relationship of some permanence with a parent of a child and who intends to treat the child as their own. Such individuals will be considered to be a parent for parental leave purposes, and any other Part XIV leave that is available to employees with respect to the employee's child. Correspondingly, the child of such an individual will, if the child is an employee, be eligible to take any Part XIV leave that is available to employees vis-a-vis a parent.

In the Program's view, this part of the parent definition was intended to cover a person who is in a spousal-like relationship with someone who is the parent of a child, and who, although not being the birth parent or an adoptive parent of that child, intends to assume a parental role with respect to the child. The words "some permanence" connote a relationship that is not temporary or occasional.

Consider the following hypothetical example: Juan who was unattached when he was hired by his employer, meets Demetra who has a child (John) from a previous marriage and they begin dating. Six months later they pool their resources and move in together and shortly after that Juan requests a parental leave from his employer, saying that he needs time off work in order to bond with John.

The employer, who knows only that Juan's personnel file shows him as single with no dependents, is reluctant to grant the leave and contacts the Program to find out what his responsibilities are.

In this situation, there are two critical questions. The first is whether Juan and Demetra are in a relationship of some permanence. The second question is whether Juan intends to treat John as if John was his own child. Both of these questions are questions of fact, and it may well be that the only significant evidence available consists of statements from Juan himself. While the employer may point to the fact that Juan identified himself as single to the employer's human resources department when he was hired, that is easily explained by the fact that Juan and Demetra have only just moved in together.

Relationship of Some Permanence

Cases dealing with the meaning of this phrase under family law legislation need to be approached with a degree of caution, since the cases are usually concerned with support issues and for that reason may look to whether the relationship has been of sufficient duration to create a degree of economic dependence or inter-dependence between the parties. Nevertheless, the family law case law can be helpful. Significantly, in *Abell v Casselman* (1979), 1 FLRAC 449 (Ont Prov Ct) the Court held that the words "some permanence" connote a relationship that is not temporary or occasional. In *Labbe v McCullough,* 1979 CanLII 1204 (ON CJ) the parties had cohabited for only two periods of, respectively, four weeks and two weeks, and yet were found to be in a relationship of some permanence.

In the above example, although Juan and Demetra had been living together a relatively short time, it seems clear that the parties are committed and not just engaged in something temporary or occasional; thus, this part of the test would seem to have been met.

Intends To Treat the Child as Their Own

This aspect of the test looks to the intentions of the person vis-a-vis the child of their partner (i.e., a person with whom they are in a relationship of some permanence). Essentially it looks to whether the person's plans are to assume a parental role with respect to the child. Are they intending to assume a significant degree of responsibility for raising the child, including participation in the support, guidance education and discipline of the child, or will theirs be a "hands-off" approach in which such responsibility is left to the birth or adoptive parent? Here, Juan's perceived need to bond with John is suggestive of an individual who intends to assume a significant degree of responsibility, and in the absence of any evidence to the contrary, might be taken to indicate that this aspect of the test is also met.

Step-Parents

A "step-parent" is considered by the Program to be an individual who is the spouse (within the meaning of the s. 45 definition of spouse) of a child's parent.

Some step-parents will fall within the s. 45 definition of parent and some will not. A step-parent will only be considered to be a parent if the step-parent adopts the child, or if the step-parent intends to treat the child as their own. If neither of those conditions are met, the step-parent will not be considered to be a parent.

Note that while only a parent is eligible to take parental leave, a step-parent is eligible to take other leaves under Part XIV, for example, an employee may take family responsibility leave, bereavement leave, family caregiver leave, child death leave, crime-related child disappearance leave, critical illness leave, domestic or sexual violence leave, or family medical leave to provide care or support to a step-child, even if they would not fall within the definition of parent in s. 45.

Other parents

Because the definition is inclusive, the Part XIV definition of parent could include an individual who is neither a birth parent, nor an adoptive parent nor a person in a relationship of some permanence with a birth or adoptive parent who intends to treat the child of that parent as their own. However, the definition cannot be considered wide open, either. To fall within the definition if none of the categories of parent set out above apply, the position of the Program is that the person must have permanently assumed a parental-like role with respect to a child, even if they would not, strictly speaking, generally be considered to be a parent.

Consider the hypothetical example in which a young birth mother moves in with her own mother (the grandmother of the child), who plays a significant role with respect to caring for the child. One year later, the mother moved out of town, leaving the child with the grandmother, who now assumed complete responsibility for the child's care. After another six months, following a conversation in which the mother indicated she had no interest in having anything to do with the child, the grandmother applied to the courts for a permanent, legal custody order, which she obtained after a further five months.

While such a custody order cannot be equated with an adoption order, there seems to be little doubt on these facts that at the point of applying for a custody order, the grandmother has assumed a parental-like role with respect to her daughter's child, and would therefore be eligible for leaves that are available with respect to the employee's child.

The more difficult issue which is relevant for the purpose of determining the timing of a parental leave entitlement may be to determine at what point the child came into the grandmother's custody, care and control for the first time - the parental leave can begin no later than 52 weeks after the day the child comes into the grandmother's custody, care and control for the first time. During the first six months after the mother moved away, although the grandmother may have assumed a parental-like role, there is no evidence to suggest that she intended this to be permanent; in some ways, her situation is similar to that of a foster parent, providing care on a temporary basis. This obviously changed after a further six months, however, as the grandmother moved to secure the right to legal custody of the child and to divest her daughter of that right. This would seem to be the point at which the grandmother decided that she would permanently treat the child as her own, even though she did not actually get the custody order for another five months. Since this is the first point at which she has custody, care and control of the child, this is the relevant point for purposes of determining when the period for starting parental leave begins. See ESA Part XIV, s. 48(2) for a discussion regarding the window for commencing parental leave.

Child

Although no definition of child appears in s. 45, there are other definitions of child in Part XIV that apply to particular leaves, specifically, critical illness leave, crime-related child disappearance leave, child death leave, and domestic or sexual violence leave that do contain upper age limits and will therefore apply instead of the definition in s. 45. Having regard to the different definitions of child, and the different purposes of the leaves, it is Program policy that:

- With respect to parental leave only: Generally a person is no longer a child when they have reached the age of majority (18 years), as that person is typically no longer subject to care, custody and control exercised by parents. However, there may be situations where the Program would consider someone 18 or older to be a child under the parental leave provisions, such as a person who is developmentally delayed and functioning at the level of someone younger than 18 years old.
- With respect to critical illness leave, crime-related child disappearance leave, child death leave and domestic or sexual violence leave: in accordance with the definitions of child in ss. 49.4(1), 49.5(1), 49.6(1), 49.7(1) the child (or specifically the minor child in the case of critical illness leave) must be under 18 years of age in order for an employee to be eligible for these leaves.
- With respect to family responsibility leave, bereavement leave, family medical leave, family caregiver leave and critical illness leave: an employee may be eligible to take any of these leaves with respect to their child no matter what age the child is. For example, an employee may be eligible to take a critical illness leave or family medical leave to provide care or support to a

critically or terminally ill 30-year old child. However, for critical illness leave, the length of the leave will vary depending on whether the child is a minor child (under 18 years) or an adult child (18 years or older).

Spouse

A person is a spouse as defined in s. 45 if they are a spouse as defined in s. 1 of the *Family Law Act,* RSO 1990, c F.3 (generally this means a person who is legally married to someone of the same or the opposite sex) or if they are living with someone of the same or opposite sex in a conjugal relationship outside marriage.

Section 1 of the *Family Law Act* defines spouse as:

. . . either of two persons who,

a) are married to each other, or

b) have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right.

ESA Part XIV Section 46 – Pregnancy Leave

Pregnancy Leave – s. 46(1)

46(1) A pregnant employee is entitled to a leave of absence without pay unless her due date falls fewer than 13 weeks after she commenced employment.

This provision means that an employee is entitled to pregnancy leave if she would have been employed for a period of at least 13 weeks immediately preceding her due date had she worked until that date.

It is not necessary that the employee be actively working for all or any part of the 13-week qualifying period. For example, if the employee was hired just 13 weeks before her due date but became ill and was unable to work from the day after she started (or went on vacation or was laid-off during that 13 weeks), she will be entitled to the leave. This interpretation of s. 46(1) is reinforced by the fact that the right to commence the leave up to 17 weeks before the expected date of birth pursuant to s. 46(2) would be a nullity if the employee were required to actively be at work in the 13 weeks immediately preceding the expected date of birth. Another example is where, theoretically, an employee who is hired 13 weeks before her due date could begin her pregnancy leave immediately after being hired.

Section 8(2) of O Reg 288/01, which ties together periods of employment that are not more than 13 weeks apart, applies only to the Termination and Severance of Employment context. Therefore, where there has been a clear interruption in the employer-employee relationship during the 13-week qualifying period, the requirement in s. 46(1) will not be met. A clear quit or termination will break the length of employment.

For example, an employee's baby is due on February 19. On August 1 of the previous year, she was hired for a six-month contract that ends on February 1. On February 3 she is rehired as a permanent employee. Does she qualify for a pregnancy leave? In this example, she would not be entitled because there was a severing of the employment relationship on February 1 (when the contract ended) and a gap between that period of employment and the next period of employment, when the employee was hired on

permanently on February 3. She could not be said to have been hired 13 weeks prior to the expected date of birth and is thus not entitled to take a pregnancy leave (although she will be entitled to a parental leave 13 weeks after February 3).

On the other hand, if the employee's contract had ended February 1 and she was hired permanently on February 2, she would be entitled to pregnancy leave, as she is considered to have commenced her employment on August 1, which is at least 13 weeks prior to her February 19 due date.

An employee may move from contract to permanent, or from part-time to full-time status, or vice versa, within the 13-week qualifying period without affecting the entitlement to leave. If the applicant has been the employer's employee for the entire 13-week period, whether active or inactive, contract or permanent, part-time or full-time, she is entitled to the leave. The qualifying condition makes no distinction between contract, permanent, active, inactive, part-time or full-time employees.

When Leave May Begin – s. 46(2); Exception – s. 46(3)

46(2) An employee may begin her pregnancy leave no earlier than the earlier of,

(a) the day that is 17 weeks before her due date; and

(b) the day on which she gives birth.

46(3) Clause (2)(b) does not apply with respect to a pregnancy that ends with a still-birth or miscarriage.

These provisions place restrictions on the earliest a qualified employee can begin her pregnancy leave.

Section 46(2) states that the earliest a pregnancy leave can begin is the earlier of two points in time, namely, 17 weeks before the due date (clause (2)(a)) or the date of birth (clause (2)(b)). Section 46(3) provides that in cases of still-birth or miscarriage, clause (2)(b) will not apply.

Together, ss. 46(2) and 46(3) mean that the earliest day a pregnancy leave can begin is 17 weeks before the due date. However, if there is a live birth (as opposed to a still-birth or miscarriage) more than 17 weeks before the due date, the pregnancy leave can begin as early as the birth date. (This latter result was introduced by the ESA 2000. Previously, women who had live births more than 17 weeks before the due date were not entitled to take a pregnancy leave.) In cases of still-birth or miscarriage, the earliest a pregnancy leave can begin is 17 weeks before the due date. Because an employee cannot begin a pregnancy leave any later than the date of birth (see s. 46(3.1)), a woman whose pregnancy ends in a miscarriage or still-birth more than 17 weeks before the due date is not entitled to take a pregnancy leave (although she may be eligible for sick leave under s. 50 or qualify for some additional leave under her contract of employment, such as short-term disability).

Under predecessor pregnancy leave provisions in the former *Employment Standards Act,* RSO 1980, c 137 (s. 35), an employer could require an employee to stop work at any time during the pregnancy, "at such time as the duties of her position cannot reasonably be performed by a pregnant woman or the performance of her work is materially affected by the pregnancy." This meant that the employee could be "put" on a pregnancy leave. That provision was repealed in 1990 and is not part of the ESA 2000. It is the employee's right to decide when she will commence leave (within the times set out in s.46) or if she will take a leave at all.

Under the Ontario *Human Rights Code*, RSO 1990, c H.19 (the "Code"), employers are required to accommodate the needs of pregnant employees, unless that would cause undue hardship to the business. Therefore, where an employee is unable, because of her pregnancy, to perform some aspect of her job, the Code provisions could require the employer to relieve her of the responsibilities of that aspect of her position but allow her to continue working. It would be inconsistent with this obligation to allow employers to force pregnant employees onto a pregnancy leave where their performance was adversely affected by the pregnancy.

In addition, because employers no longer have the right to "put" an employee on her leave before she had otherwise intended to go, an employee who is sick – even though it is related to or caused by the pregnancy – will be entitled to be treated like any other sick employee until the date she commences her leave. In *James v Craiglee Nursing Home*, 2004 CanLII 30948 (ON LRB) the employee was unable to perform the duties of her job for health reasons related to her pregnancy and went off sick on November 23, 2001. Her baby was born on February 27, 2002. She did not provide the employer with any written notice with respect to the pregnancy leave. On February 12, 2003 when she contacted the employer to ask to be put on the shift schedule she was informed that she had "overstayed" her leave. The employer argued that her pregnancy leave had commenced November 23, 2001 and they no longer had any obligation to reinstate her in February 2003. The Ontario Labour Relations Board found on the evidence that the employee had left on a sick leave with the full knowledge of the employer on November 23, 2001. The Board further held that although the employee gave the employer no written notice with respect to the commencement of the pregnancy leave that it had in fact commenced on the date of the baby's birth (February 27, 2002) in accordance with s. 46(2)(b). The employer therefore had an obligation to reinstate her at the end of February 2003. The Board ordered reinstatement.

Impact of Lay-off on Right to Commence Leave

What if the employee is on lay-off at the point when she would otherwise have commenced the leave? Depending on the timing of the lay-off in relation to her due date, she may have the option to convert from lay-off to pregnancy leave. This is because once the employee commences her leave, the "lay-off clock" for the purposes of Part XV (Termination and Severance of Employment) of the Act stops running. A week of lay-off is defined to exclude weeks in which the employee is unavailable for work, and an employee is unavailable for work if she is on a leave.

(Note: in all of the following examples, it is assumed that the employee gave birth on her due date.)

Example 1 – Employee Can Convert a Lay-off to a Leave

Thirty weeks before the employee's due date, she is laid off. Benefits are not continued. The employee had intended to commence pregnancy leave on her due date. Seventeen weeks before the due date (13 weeks after the lay-off began), her employment would be deemed terminated pursuant to Part XV of the Act, effective the first day of the lay-off. However, she could convert to pregnancy leave on the day her employment was to be terminated (being within 17 weeks of due date).

If the employee did not take any active steps to convert or notify her employer at the time, the principles enunciated in *Re Scott and Roos Family Shoes (Brampton) Ltd. et al.,* 1985 CanLII 2124 (ON SC), a decision under the former *Employment Standards Act,* would apply such that she would not lose her entitlement to take pregnancy leave despite her lack of notice. However, special attention should be paid to the evidence supporting the employee's claim that she had intended to convert from lay-off to pregnancy leave prior to the deemed termination.

Example 2 – Employee Cannot Convert a Lay-off to a Leave

Thirty-six weeks before the employee's due date, she is laid off. Benefits are not continued. Twenty-three weeks before the due date (i.e., 13 weeks after the lay-off began), the employee is deemed terminated for the purposes of Part XV of the Act, effective the first date of lay-off. There is no right to the leave, as the employment relationship has come to an end before the earliest date she could begin a leave. It is important to note that, for the purposes of this example, the termination had nothing to do with the employee's intention to take a leave.

Latest Day for Beginning Pregnancy Leave – s. 46 (3.1)

46(3.1) An employee may begin her pregnancy leave no later than the earlier of,

(a) her due date; and

(b) the day on which she gives birth.

This provision was introduced by the ESA 2000. It codifies Program policy under the former *Employment Standards Act*.

Section 46(3.1) places restrictions on the latest a qualified employee may begin her pregnancy leave. The leave must begin no later than the due date or the birth date, whichever occurs first.

Notice – s. 46(4)

46(4) An employee wishing to take pregnancy leave shall give the employer,

(a) written notice at least two weeks before the day the leave is to begin; and

(b) if the employer requests it, a certificate from a legally qualified medical practitioner stating the due date.

These provisions are similar to the corresponding provision (s. 35(3)) of the former *Employment Standards Act*. One change, however, is that an employee is now only required to produce a medical certificate indicating her due date if asked to do so by her employer.

Section 46(4)(a) requires a pregnant employee to give two weeks' written notice of her intention to take a pregnancy leave. Under s. 46 (4)(b), the employee must submit a medical certificate that shows the due date, if asked to do so by the employer.

An employee's failure to conform to the statutory requirements for notice will not disentitle her to the pregnancy leave. It is the Program's view that the requirement to give notice of the leave is not a condition precedent to the entitlement to the pregnancy leave. An employee's entitlement to leave arises by virtue of having commenced her employment at least 13 weeks prior to the due date and it is the Program's position that the failure to give notice does not negate or diminish that entitlement. The Program's policy is consistent with the Ontario Divisional Court decision in *Re Scott and Roos Family Shoes (Brampton) Ltd. et al.* in which the Court held that the written notice requirement in the former *Employment Standards Act* was a formality only.

Notice to Change Date – s. 46(5)

46(5) An employee who has given notice to begin pregnancy leave may begin the leave,

(a) on an earlier day than was set out in the notice, if the employee gives the employer a new written notice at least two weeks before that earlier day; or

(b) on a later day than was set out in the notice, if the employee gives the employer a new written notice at least two weeks before the day set out in the original notice.

Under s. 46(5), an employee who has given notice to begin a pregnancy leave is entitled to change the date on which the leave will begin.

The employee may begin her leave on an earlier date than set out in her original notice, provided she gives the employer at least two weeks' written notice before the earlier day on which she now wishes to begin her leave.

The employee may begin her leave on a later day than set out in her original notice, provided she gives the employer at least two weeks' written notice before the day that was set out in her original notice.

Note that the options given to an employee by s. 46(5) to change the starting date of her leave remain subject to the limitations on the earliest and latest dates a leave may begin set out in ss. 46(2) and (3.1).

Notice to Change Date: Complications, etc. – s. 46(6)

46(6) If the employee stops working because of a complication caused by her pregnancy or because of a birth, still-birth or miscarriage that occurs earlier than the due date, subsection (4) does not apply and the employee shall, within two weeks after stopping work, give the employer,

(a) written notice of the day the pregnancy leave began or is to begin; and

(b) if the employer requests it, a certificate from a legally qualified medical practitioner stating,

i. in the case of an employee who stops working because of a complication caused by her pregnancy, that she is unable to perform the duties of her position because of the complication and stating her due date,

ii. in any other case, the due date and the actual date of the birth, still-birth or miscarriage.

This provision is similar to the corresponding provision (s. 36(1)) of the former *Employment Standards Act*. The only change is that an employee is now only required to provide a medical certificate if asked to do so by her employer.

If an employee stops work due to complications arising from the pregnancy, or because of a premature birth, still-birth or miscarriage, the alternate notice provisions set out in s. 46(6) will apply instead of those set out in s. 46(4).

Retroactive Notice of the Date the Leave Began

The notice must state the day the pregnancy leave began if the employee stops working because:

- She has given birth, had a still-birth, or suffered a miscarriage before the due date (note that the birth, still-birth or miscarriage will trigger the commencement of the leave); or

- She has stopped work because of pregnancy-related complications and has decided to commence her leave immediately.

Notice that the Employee Will Begin Leave at a Future Date

The notice must state the date the pregnancy leave will begin where the employee has suddenly had to stop work because of complications related to the pregnancy but has not yet given birth and does not wish to commence the leave at this point. (For example, she may intend to commence the leave on the due date and use her sick benefits in the meantime.)

For an employee who stops working due to complications caused by the pregnancy (whether or not she is beginning her pregnancy leave immediately upon stopping work), the medical certificate, if requested by the employer, must confirm that she is unable to perform the duties of her position, and state the employee's due date. In any other case, the medical certificate must state the due date and the actual date of the birth, still-birth or miscarriage.

ESA Part XIV Section 46.1 – Definition

Definition – s. 46.1

46.1 "legally qualified medical practitioner" means,

(a) a person who is qualified to practice as a physician,

(b) a person who is qualified to practice as a midwife,

(c) a registered nurse who holds an extended certificate of registration under the *Nursing Act, 1991*, or

(d) in the prescribed circumstances, a member of a prescribed class of medical practitioners.

This section defines legally qualified medical practitioner for the purposes of ESA Part XIV, s. 46. Subsections 46(4)(b) and 46(6)(b) specify that if the employer requests it, the employee must provide the employer with a certificate from a legally qualified medical practitioner stating the employee's due date, that she is unable to perform the duties of her position due to pregnancy complications, or the actual date of the birth, still-birth or miscarriage to support the commencement of her pregnancy leave.

Person who is qualified to practise as a physician

"A person who is qualified to practise as a physician" generally means a medical doctor who is a member of the College of Physicians and Surgeons of Ontario. A physician of any specialty will meet the definition, however, practically speaking an obstetrician-gynecologist or a family medicine or general practitioner will likely be the person who issues the certificate.

Where care or treatment is provided in a jurisdiction other than Ontario, the question of whether the person is "qualified to practice as a physician" is determined with reference to the laws of that other jurisdiction.

Person who is qualified to practise as a midwife

“A person who is qualified to practise as a midwife” generally means a member of the College of Midwives of Ontario and a holder of a general certificate per the *Midwifery Act*, *1991*.

Where care or treatment is provided in a jurisdiction other than Ontario, the question of whether the person is “qualified to practice as a midwife” is determined with reference to the laws of that other jurisdiction.

Registered nurse who holds an extended certificate of registration

"A registered nurse who holds an extended certificate of registration" means a member of the College of Nurses of Ontario who is a registered nurse and holds an extended certificate of registration in accordance with O Reg 275/94 made under the *Nursing Act, 1991,* SO 1991, c 32. These individuals are generally known as nurse practitioners in Ontario. This definition does not include a registered nurse who is a holder of a general certificate, or a registered practical nurse.

In the prescribed circumstances, a member of a prescribed class of medical practitioners

At the time of writing, no circumstances and no class of medical practitioners have been prescribed.

ESA Part XIV Section 47 - End of Pregnancy Leave

End of Pregnancy Leave – s. 47(1)

47(1) An employee's pregnancy leave ends,

(a) if she is entitled to parental leave, 17 weeks after the pregnancy leave began;

(b) if she is not entitled to parental leave, on the day that is the later of,

i. 17 weeks after the pregnancy leave began, and

ii. 12 weeks after the birth, still-birth or miscarriage.

The *Fair Workplaces, Better Jobs Act, 2017,* SO 2017, c 22, amended s. 47(1)(b)(ii) of the *Employment Standards Act, 2000* on January 1, 2018. Please see s. 47(1.1) below for more information on the application of this provision with respect to a leave commenced prior to January 1, 2018.

Under s. 47(1)(a), the pregnancy leave of an employee who is entitled to a parental leave (e.g., where there has been a live birth) will end 17 weeks after it began.

Section 47(1)(b) only applies where an employee is not entitled to a parental leave. In other words, it only applies where there is no child (i.e., it has not been born yet) or where it is still-born or died before the pregnancy leave ended. The effect of this provision is two-fold. First, it enables an employee who has used all 17 weeks of pregnancy leave before the child is born to remain on pregnancy leave up until the birth. Secondly, it ensures that employees who have a miscarriage, still-birth or whose child dies during the pregnancy leave will have at least 12 weeks after the date of delivery before the employee’s pregnancy leave ends. Similarly, an employee who has had a miscarriage during her pregnancy leave will have at least 12 weeks after the miscarriage before she can be required to return to work.

Example 1

An employee commenced her pregnancy leave 15 weeks before the baby's due date. Two weeks after the due date (which is 17 weeks after the pregnancy leave began) the baby is still not born. The baby is born two weeks later, or 19 weeks after the pregnancy leave first began. Because the employee was not entitled to parental leave after 17 weeks of pregnancy leave (because the baby was not yet born), s. 47(1)(a) would not apply to end the leave at that point. Instead, s. 47(1)(b) would apply to extend the pregnancy leave on the basis that the leave cannot end until the later of the day that is 17 weeks from the date the leave began or 12 weeks after the date of birth. In this example, a live birth would trigger the end of the pregnancy leave because the employee no longer falls under the description in s. 47(1)(b) – that is, she is no longer not entitled to a parental leave. In turn, the end of the pregnancy leave will necessitate the commencement of the parental leave (assuming that the employee wishes to take parental leave) because s. 48(3) states that the parental leave of an employee who takes a pregnancy leave must commence when the pregnancy leave ends. It is Program policy that the pregnancy leave is not extended for 12 weeks after the date of the birth. This employee ends up with 19 weeks of pregnancy leave followed immediately by her parental leave. It is important to note that an extension of the pregnancy leave does not act to reduce an employee's entitlement to parental leave.

In the event the child in the example above had been still-born, s. 47(1)(b) would have applied to give the employee an additional 12 weeks of pregnancy leave after the delivery. In that case, she would have had a total of 31 weeks of pregnancy leave, although she would not get any parental leave.

Example 2

The employee delivered the baby on the due date, which happened to be 15 weeks after the pregnancy leave began, and the child died one week later (i.e., before the pregnancy leave ended). In this case, s. 47(1)(b) would apply. As an employee not entitled to take a parental leave, her pregnancy leave would end on the later of the date that is 17 weeks after the leave began or 12 weeks after the birth of the child. This employee would end up with 27 weeks of pregnancy leave (15 weeks before the birth plus 12 weeks after the birth), but again, would not be entitled to any parental leave.

Transition – s. 47(1.1)

47(1.1) Despite clause (1) (b), if an employee who is not entitled to parental leave began her pregnancy leave before January 1, 2018, her pregnancy leave ends on the day that is the later of,

(a) 17 weeks after the pregnancy leave began, and

(b) six weeks after the birth, still-birth or miscarriage.

The *Fair Workplaces, better Jobs Act, 2017,* SO 2018, c 22 amended the ESA 2000 on January 1, 2018 and extended the entitlement in s. 47(1)(b)(ii) from six weeks after the birth, still-birth or miscarriage to 12 weeks after the birth, still-birth or miscarriage.

As such, if an employee commences a pregnancy leave on or after January 1, 2018 and is ultimately not entitled to a parental leave because of a still-birth, death of a child or miscarriage, she will be able to remain on pregnancy leave until the later of 17 weeks after the leave began or 12 weeks after the birth, still-birth or miscarriage.

For employees whose pregnancy leave commenced prior to January 1, 2018, the reference to 12 weeks in s. 47(1)(b)(ii) must be read as 6 weeks. In other words, if an employee who started her pregnancy leave before January 1, 2018 is not entitled to take a parental leave due to a still-birth, death of a child or

miscarriage, she will be entitled to remain on pregnancy leave until the later of 17 weeks after the leave began or six weeks after the date of the birth, still-birth or miscarriage.

Ending Leave Early - s. 47(2)

47(2) An employee may end her leave earlier than the day set out in subsection (1) by giving her employer written notice at least four weeks before the day she wishes to end her leave.

If the employee intends to return to work either before the end of the 17 weeks set out in s. 47(1)(a), or the potentially longer period of leave as set out in s. 47(1)(b), the employee must give the employer notice in writing at least four weeks in advance of the date she plans on returning.

It should be noted that if the employee has chosen to shorten her pregnancy leave and return to work, she gives up the balance of pregnancy leave she would otherwise have had. Pregnancy leave (like parental leave) cannot be started and stopped and resumed at a later date. An employee has the right to take a pregnancy leave that is at least 17 weeks long, but she may also choose to take any shorter period, which will be considered to represent her full entitlement to the leave. In addition, unless the child is still in hospital on the day the leave ends, she will forfeit her right to parental leave because it must be commenced when the pregnancy leave ends; see ESA Part XIV, s. 48(3).

The employer has no right to require the employee to provide any documentation to prove that she is fit to return to work.

In contrast to the Program's position respecting the notice requirements to commence the leave, it is the Program's position that the employer can refuse to allow the employee to return to work at an earlier date than that provided for in ss. 47(1)(a) and (b) if the employee has not given the employer four weeks' notice in writing.

Changing End Date - s. 47(3)

47(3) An employee who has given notice under subsection (2) to end her pregnancy leave may end the leave,

(a) on an earlier day than was set out in the notice, if the employee gives the employer a new written notice at least four weeks before the earlier day; or

(b) on a later day than was set out in the notice, if the employee gives the employer a new written notice at least four weeks before the day indicated in the original notice.

Under s. 47(3), an employee who has given notice under s. 47(2) to end her leave early is entitled to change her mind and end the leave on an even earlier or later date. If she wishes to end the leave on an earlier date than that set out in her original notice, the employee must give her employer a new written notice at least four weeks before the earlier day on which she now proposes to end the leave.

If the employee wishes to end the leave on a later date than that specified in the original notice, she must give the employer a new written notice at least four weeks before the return date indicated in the original notice.

In contrast to the Program's position respecting the notice requirements to commence a leave, it is the Program's position that the employer can refuse to allow the employee to return to work at an earlier or

later date than the date provided in her notice under s. 47(2) if the employee has not given the employer four weeks' notice in writing.

Employee Not Returning - s. 47(4)

47(4) An employee who takes pregnancy leave shall not terminate her employment before the leave expires or when it expires without giving the employer at least four weeks' written notice of the termination.

Section 47(4) provides that an employee who takes pregnancy leave shall not terminate her employment before the leave expires or when it expires, without giving the employer at least four weeks' written notice of the termination. This section should be read in conjunction with s. 47(5), which creates an exception for employees who are constructively dismissed - see the discussion of s. 47(5) below.

While an employer can file a complaint with the Program if the employee fails to give proper notice, there is no remedy available to it under the ESA 2000 that would allow it to recover any damages that arose from the failure to provide notice. In order to recover such damages, the employer would have to pursue a civil remedy. The employer cannot make a deduction from any outstanding wages due to the employee (for example, commissions that became due to the employee during the leave) in an attempt to recover the damages.

Exception - s. 47(5)

47(5) Subsection (4) does not apply if the employer constructively dismisses the employee.

Section 47(5) creates an exception to the requirement in s. 47(4) that an employee on a pregnancy leave provide four weeks' written notice of their intention to resign before or upon the expiry of the leave. The notice requirement will not apply in situations where the employer has constructively dismissed the employee. See ESA Part XV, s. 56(1) for a discussion of constructive dismissal. The same principles apply here.

ESA Part XIV Section 48 - Parental Leave

Parental Leave – s. 48(1)

48(1) An employee who has been employed by his or her employer for at least 13 weeks and who is the parent of a child is entitled to a leave of absence without pay following the birth of the child or the coming of the child into the employee's custody, care and control for the first time.

The entitlement to a parental leave arises following the birth of a child (as in the case of a birth mother, including a surrogate mother, or a birth father) or the coming of a child into the custody, care and control of an employee for the first time (generally all parents other than birth parents, including adoptive parents). Parental leave may not be commenced before the actual day of birth or the day that the child came into an employee's custody, care and control; in other words, not before the employee is a parent. See ESA Part XIV, s. 45 for a discussion of the definition of parent.

To be eligible for parental leave, the employee has to have been employed for at least 13 weeks prior to the commencement of the leave. Note that the reference date for parental leave eligibility is the date the leave is to begin, whereas the reference date for pregnancy leave eligibility is the due date. As with the pregnancy leave qualifying period, it is not necessary that the employee be actively working for all or any

part of the 13 weeks prior to commencing the leave. For example, the employee could be off sick, on vacation or on lay-off during the qualifying period.

It should be noted that there is no requirement that the employee work 13 weeks after the child is born or comes into custody, care and control of the parent.

A birth father may want to start his parental leave on the actual date of birth. In that case, he should give his employer at least two weeks' notice before the expected date of birth, as required by s. 48(4). If the baby is born prior to that date, he can start his leave on the birth date, but he must then comply with the retroactive notice provisions set out in s. 48(6). If the baby has not yet been born by the due date, he must continue working until the actual birth date; he cannot begin parental leave prior to the birth of the child because he will not yet meet the eligibility criteria of being a parent. In this latter case, after the due date has passed, the employer will essentially be on day-to-day notice that the employee will go on leave, and will not really have received the required two weeks' notice. However, the employer would have known approximately when the employee would leave, and, as with pregnancy leave, an employee's failure to conform to the statutory requirement to provide notice of a leave will not disentitle them to the parental leave. See ESA Part XIV, s. 46(4).

An employee's entitlement to parental leave arises by virtue of being a new parent and having commenced their employment at least 13 weeks prior to taking the leave, and it is the Program's position that the failure to give notice does not negate or diminish that entitlement. The Program's policy is consistent with *Re Scott and Roos Family Shoes (Brampton) Ltd. et al.,* 1985 CanLII 2124 (ON SC) in which the Ontario Divisional Court held that the written notice requirement in the former *Employment Standards Act* was a formality only.

An employee on lay-off may still be entitled to take a parental leave. Refer to the extensive discussion on how lay-off impacts on pregnancy leave in ESA Part XIV, s. 46(2). The same principles apply to parental leave.

When Leave May Begin – s. 48(2)

48(2) An employee may begin parental leave no later than 78 weeks after the day the child is born or comes into the employee's custody, care and control for the first time.

The *Fair Workplaces, Better Jobs Act, 2017,* SO 2017, c 22 amended s. 48(2) on December 3, 2017. The timeframe within which a parental leave may begin for an employee, other than a birth mother who has taken pregnancy leave, was extended from 52 to 78 weeks. See s. 48(2.1) below for more information on the application of this provision prior to December 3, 2017.

This section provides that an employee who is the parent of a child must commence parental leave within 78 weeks of either the date the child was born, or the date the child came into the parent's custody, care and control for the first time.

This section does not require the leave to be completed within the 78-week period. It requires the leave to be commenced within that period.

Other than the requirement to commence the leave within the 78-week period, the parent is not restricted in any other way with respect to the commencement of the leave. Whether the employee's partner or spouse takes a pregnancy or parental leave, or the fact that the employee's partner or spouse may be on either of those leaves will not affect the employee's right to commence a parental leave.

Note that s. 48(3) sets out special rules regarding commencement of parental leave for a birth mother who has taken pregnancy leave. A birth mother who has taken a pregnancy leave will not have the 78-week period as set out in s. 48(2) within which to commence the leave except in special circumstances. See the discussion in s. 48(3) below.

Birth Parents

A birth father, and a birth mother who does not take pregnancy leave, will normally be required to commence the leave within 78 weeks of the date the child is born because typically, the birth date is also the date the child first comes into the custody, care and control of the parents. In the case of a birth without significant complications, the fact that the mother and the baby remain in hospital for a few days does not mean that the hospital, rather than the parents, had custody, care and control of the child.

However, if the child has significant medical problems that necessitate a lengthy hospital stay following birth, the date that the child was actually released from hospital into their parents' care should be regarded as the date that the child came into their custody, care and control for the first time. With one exception, either or both parents could choose to commence the leave within 78 weeks of the date of the birth, or they could defer commencing the leave to some point within the 78-week period following the date the child was released from hospital.

The exception to this is that a birth mother who had taken pregnancy leave and who was still on that leave when the child was released from hospital would be required to commence her parental leave when the pregnancy leave ended. See the discussion in s. 48(3) below regarding commencement of parental leave for birth mothers who have taken pregnancy leave.

Parents other than Birth Parents

Parents other than birth parents must begin parental leave within 78 weeks of the date the child first comes into custody, care and control of the parent, after the employee becomes a parent.

Adoptive Parents

The definition of parent includes a person with whom a child is placed for adoption. It is Program Policy that "placed for adoption" means that adoption proceedings must have been commenced but do not necessarily have to have been completed.

Once the employee is an adoptive parent and therefore entitled to take a leave, the 78-week clock will run from the date the child first comes into the parent's custody, care and control i.e. the date the child was placed for adoption.

Parents other than Birth Parents or Adoptive Parents

Section 48(2) also applies to employees who become parents by virtue of entering into a relationship of some permanence with a person who is already a parent of a child, together with their intent to treat to treat that child as their own.

Once the employee is a parent, the 78-week clock will run from the date the child first comes into that parent's custody, care and control. See ESA Part XIV, s. 45 for a discussion.

Transition – s. 48(2.1)

48(2.1) Despite subsection (2), an employee may begin parental leave no later than 52 weeks after the day the child is born or comes into the employee's custody, care and control for the first time if that day was before the day subsection 23.2(2) of Schedule 1 to the *Fair Workplaces, Better Jobs Act, 2017,* came into force.

The *Fair Workplaces, Better Jobs Act,* 2017, SO 2017 c 22 amended the ESA 2000 to extend the timeframe within which an employee may begin a parental leave to correspond with changes in the way employment insurance benefits could be taken.

Employees who did not take a pregnancy leave and whose child was born or came into their custody, care, or control on or after December 3, 2017, are required to begin their leave within 78 weeks of the date of birth or of the child coming into the employee's custody, care or control.

An employee who did not take pregnancy leave and whose child was born or came into their custody, care or control prior to December 3, 2017 is limited to the previous timeframe of 52 weeks for beginning the leave.

Restriction if Pregnancy Leave Taken – s. 48(3)

48(3) An employee who has taken pregnancy leave must begin her parental leave when her pregnancy leave ends unless the child has not yet come into her custody, care and control for the first time.

Section 48(3) applies only to a birth mother who has taken a pregnancy leave. It requires that she commence her parental leave immediately after the pregnancy leave ends except in special circumstances. As a consequence, she cannot return to work when the pregnancy leave ends and retain a right to parental leave under the ESA 2000.

It is important to note that under federal Employment Insurance legislation, a birth mother may be entitled to return to work for a while after her maternity benefits run out and before starting to receive her parental benefits. Many employees are under the misconception that the requirements for commencement of the leave itself are the same as those regarding entitlements to employment insurance benefits, or they may believe that the right to the employment insurance benefits is the same thing as the right to leave. It should be emphasized that an employee who wishes to avail herself of the right to leave and protect her rights to benefits during the leave and reinstatement afterward must (with one exception) commence the parental leave when the pregnancy leave ends. However, see *Royce v Huan and Danczkay Properties Inc.* (July 12, 1995), ESC 95-136 (Novick), a decision under the former *Employment Standards Act* in which the adjudicator found that although the employee returned to work at the employer's request for a couple of days after her pregnancy leave, she was not disentitled to parental leave. This aspect of the decision is contrary to Program policy.

The exception to this requirement occurs when the child has not come into the custody, care and control of the employee for the first time, by the time the employee has ended her pregnancy leave. In such cases, s. 48(2) will apply and the birth mother must commence the parental leave within 78 weeks of the date of the birth or the date the child first comes into her custody, care and control for the first time. For example, if the child was hospitalized from birth and was still in the hospital's care when her leave ended, the employee could return to work and delay the commencement of her parental leave until the child came home.

Note that the exception will not apply in situations where the child was released from hospital, then subsequently became ill and re-entered the hospital and was still there when the birth mother's pregnancy leave ended. In this situation, the employee would already have had the child in her custody, care and control for the first time prior to the date the pregnancy leave ended.

The application of s. 48(3) is limited to those situations where the birth mother has taken a pregnancy leave. A birth mother who did not take pregnancy leave (e.g., she was ineligible because she had not been hired at least 13 weeks before the expected date of birth, or she was eligible for pregnancy leave but simply chose not to take it) is governed by s. 48(2), and is allowed to commence the parental leave at any time within 78 weeks of the date of birth or date the child first came into her custody, care and control.

Notice – s. 48(4)

48(4) Subject to subsection (6), an employee wishing to take parental leave shall give the employer written notice at least two weeks before the day the leave is to begin.

An employee who wishes to take parental leave is required to give at least two weeks' notice in writing of their intention to take parental leave. For the employee who is on pregnancy leave, this means that she must notify her employer of her intention to take parental leave at least two weeks before the pregnancy leave ends, unless the child has not yet come into her custody, care and control for the first time and she is delaying the start of her parental leave. She cannot be forced to give notice of her intention to take parental leave at the same time she gives notice of her intention to take pregnancy leave.

The Program takes the position that the principle enunciated in the *Re Scott and Roos Family Shoes (Brampton) Ltd. et al.* decision in the pregnancy leave context applies equally to the parental leave context - see the discussion of this case in Part XIV, s. 46(4). In other words, failure to comply with the requirement to provide two weeks' written notice of a parental leave will not diminish the employee's right to the leave.

Notice to Change Date – s. 48(5)

48(5) An employee who has given notice to begin parental leave may begin the leave,

(a) on an earlier day than was set out in the notice, if the employee gives the employer a new written notice at least two weeks before that earlier day; or

(b) on a later day than was set out in the notice, if the employee gives the employer a new written notice at least two weeks before the day set out in the original notice.

Section 48(5) permits an employee who has given notice to begin parental leave to change the date upon which the leave begins if certain conditions are met. Where the employee wishes the leave to begin on an earlier date, s. 48(5)(a) requires a new written notice by the employee at least two weeks before the earlier date. Where the employee wishes the leave to begin on a later date, s. 48(5)(b) requires a new written notice at least two weeks before the date that was set out in the original notice.

An employee wishing to change the date the parental leave will start must, of course, still comply with the restrictions on the earliest and latest the leave can begin as set out in ss. 48(1), (2) and (3).

If Child Earlier than Expected – s. 48(6)

48(6) If an employee stops working because a child comes into the employee's custody, care and control for the first time earlier than expected,

(a) the employee's parental leave begins on the day he or she stops working; and

(b) the employee must give the employer written notice that he or she is taking parental leave within two weeks after stopping work.

This section provides an alternate notice requirement where an employee stops work before giving notice of an intention to take a parental leave, or before the parental leave was scheduled to begin, because the child came into the custody, care and control of the employee earlier than expected. In that case, the leave begins on the day the employee actually stops working, and the employee must provide written notice within two weeks after stopping work.

Note, however, that the Program takes the position that the principle enunciated in the *Re Scott and Roos Family Shoes (Brampton) Ltd. et al.* decision under the former *Employment Standards Act, 2000* in the pregnancy leave context applies equally in the parental leave context. In other words, failure to comply with the requirement to provide written notice of the parental leave will not diminish the employee's right to the leave.

An example of where this provision will apply is where a birth father gave his employer two weeks' notice prior to the estimated date of birth, and the baby was born earlier than expected. The father can commence his leave as early as the birth date, and must comply with the retroactive notice provisions in s. 48(6)(b). Note, however, that this provision won't apply, for example, where the baby is born prematurely and then goes into neo-natal intensive care for weeks or months. In that case, the baby has not yet come into the custody, care and control of the parent.

ESA Part XIV Section 49 - End of Parental Leave

End of Parental Leave – s. 49(1)

49(1) An employee's parental leave ends 61 weeks after it began, if the employee also took pregnancy leave, and 63 weeks after it began, otherwise.

A parental leave will end 61 weeks after it began if the employee also took a pregnancy leave, or 63 weeks after it began if the employee did not take a pregnancy leave, unless the employee provides notice of an earlier return date pursuant to s. 49(2). In other words, the employer must assume that an employee who has taken a parental leave will be gone for the full 61 or 63 weeks unless the employee gives written notice to the contrary. There is no obligation for an employee to take the full amount of the leave. If, for example, an employee opts to receive federal Employment Insurance (“EI”) benefits at a higher rate over a 52 week period instead of a lower rate over an 18 month period, they may wish to take a leave that is shorter than the full entitlement. See remarks on changes to the federal EI program, below.

The length of parental leave was increased on December 3, 2017 in order to enable employees to take advantage of the extended period of time over which EI parental benefits may be taken. It is important to note, however, that there remain significant differences regarding entitlements between the *Employment Standards Act, 2000* and the federal *Employment Insurance Act*, SC 1996, c 23. For example, parents can take some paid work with their employer without losing any EI parental benefits. They can also interrupt the period in which they receive EI benefits and return to work, then begin receiving benefits again at a later date.

However, the ESA 2000 does not contemplate "splitting" parental leave (or pregnancy leave). For example, an employee cannot take 10 weeks of parental leave under the ESA 2000, return to work for some period and then take the balance of 51 or 53 weeks of parental leave. Because the ESA 2000 does not contemplate stopping and restarting the leaves, an employee who returns to work early is considered to have ended their leave under the ESA 2000.

In this regard see a decision of the Ontario Grievance Settlement Board in *Association of Management, Administrative and Professional Crown Employees of Ontario v Ontario (Management Board Secretariat)*, 2005 CanLII 55230 (ON GSB), in which the arbitrator concluded that the "legislature intended to provide employees with the opportunity to take one continuous parental leave of absence following a birth or adoption". In this regard, the arbitrator noted that there was no explicit language in the ESA 2000 to support a right to take the leave in instalments and furthermore, that it was clear that an effort had been made to balance the employee benefit (the leave entitlement) with an employer's interest in avoiding the disruption that could result if employees were permitted to split up parental leave. The arbitrator also rejected the union's argument that the ESA 2000's provisions should be interpreted in a manner consistent with the *Employment Insurance Act* on the basis that there is nothing the ESA 2000 to suggest that entitlement to a leave is dependent only upon an employee receiving EI benefits.

Note that Program policy is that employees will not be considered to have ended their ESA 2000 leave if they take work with an employer from whom they did not take the leave. For example, an employee may take a parental leave from their full-time job with employer A and work part-time with employer B during their leave without losing their entitlement to the ESA 2000 parental leave from their full-time job.

Once employees begin a parental leave, they have the right to take the full 61 or 63 weeks. For example, a birth father whose child dies five weeks into his parental leave has the right to take the remaining 58 weeks of leave if he wishes.

Transition – s. 49(1.1)

49(1.1) Despite subsection (1), if the child in respect of whom the employee takes parental leave was born or came into the employee's custody, care and control for the first time before the day section 23.3 of Schedule 1 of the *Fair Workplaces, Better Jobs Act, 2017,* came into force, the employee's parental leave ends,

(a) 35 weeks after it began, if the employee also took pregnancy leave, and

(b) 37 weeks after it began, otherwise.

The *Fair Workplaces, Better Jobs Act,* 2017 amended the ESA 2000 and extended the amount of parental leave available to employees on December 3, 2017 to correspond with changes in the way EI benefits could be taken. Previously, employees who had taken pregnancy leave were entitled to 35 weeks of parental leave, and employees who had not taken pregnancy leave were entitled to 37 weeks.

This section provides that if the child was born or first came into the employee's custody, care and control for the first time before December 3, 2017, the employee's parental leave ends 35 weeks after it began, if the employee took preganancy leave, or 37 weeks after it began otherwise. If the child was born or first came into the employee's custody, care and control on or after December 3, 2017, the employee is entitled to take the longer leave of up to 61 or 63 weeks.

Ending Leave Early – s. 49(2)

49(2) An employee may end his or her parental leave earlier than the day set out in subsection (1) by giving the employer written notice at least four weeks before the day he or she wishes to end the leave.

Section 49(2) provides that a parental leave may end earlier than 61 or 63 weeks after it began, as provided in s. 49(1), if the employee gives the employer at least four weeks' written notice before the earlier date.

Unlike the Program's position with respect to the notice requirements to commence the leave, it is the Program's position that the employer can refuse to allow the employee to return to work earlier than the 61 or 63 week mark if the employee has not given the employer four weeks' notice in writing.

Changing End Date – s. 49(3)

49(3) An employee who has given notice to end his or her parental leave may end the leave,

(a) on an earlier day then was set out in the notice, if the employee gives the employer a new written notice at least four weeks before the earlier day; or

(b) on a later day than was set out in the notice, if the employee gives the employer a new written notice at least four weeks before the day indicated in the original notice. An employee may have given notice under s. 49(2), or even this section, that they intended to end the parental leave on a date earlier than the maximum or on a different date than the date they set out in a previous notice. However, the employee may then change their mind, and wish to end the leave on a different date. The employee may change the date the leave will end to an earlier date so long as they give at least four weeks' written notice before the new earlier date or to a later date so long as they give at least four weeks' written notice before the original date.

In contrast to the Program's position with respect to the notice requirements to commence the leave, it is the Program's position that the employer can refuse to allow the employee to return to work at a different date than that indicated in their previous notice if the employee has not given the employer four weeks' notice in writing.

However, where an employee does not provide enough notice, an employer that does not accept the new return date must communicate its refusal at the time of the request or shortly thereafter. An employer cannot keep its objection to itself and then rely on the employee's failure to provide proper notice to defeat the employee's right to reinstatement. For example, an employee wants to change her return date to a date that is three weeks later than her original return date, but she gives only two weeks' written notice of this change. The employer does not provide the employee with approval, but neither does it communicate its objection to the employee. The employer cannot claim in these circumstances that the employee has lost her right to reinstatement because of her failure to comply with s. 49(3). In this regard, see *Royce v Huan and Danczkay Properties Inc.* (July 12, 1995), ESC 95-136 (Novick).

Employee Not Returning – s. 49(4)

49(4) An employee who takes parental leave shall not terminate his or her employment before the leave expires or when it expires without giving the employer at least four weeks' written notice of the termination.

Section 49(4) provides that an employee who takes parental leave shall not terminate their employment before the leave expires, or when it expires, without giving the employer at least four weeks' written notice of the termination. This section should be read in conjunction with s. 49(5), which creates an exception to the notice requirement for employees who are constructively dismissed - see the discussion of s. 49(5) below.

While an employer can file a complaint with the Program if the employee fails to give proper notice, there is no remedy available to it under the ESA 2000 that would allow it to recover any damages that arose from the failure to provide notice. In order to recover such damages, the employer would have to pursue a civil remedy. The employer cannot make a deduction from any outstanding wages due to the employee (for example, commissions that became due to the employee during the leave) in an attempt to recover the damages.

Exception – s. 49(5)

49(5) Subsection (4) does not apply if the employer constructively dismisses the employee.

Section 49(5) provides an exception to the requirement in s. 49(4) that an employee on parental leave provide four weeks' written notice of their intention to resign before or upon the expiry of the leave. The requirement does not apply where the employer has constructively dismissed the employee. See ESA Part XV, s. 56 for a discussion of constructive dismissal. The same principles apply here.

ESA Part XIV Section 49.1 – Family Medical Leave

Family Medical Leave – s. 49.1(1)

Qualified Health Practitioner

49.1(1) In this section,

"qualified health practitioner" means,

(a) a person who is qualified to practise as a physician under the laws of the jurisdiction in which care or treatment is provided to the individual described in subsection (3),

(b) a registered nurse who holds an extended certificate of registration under the *Nursing Act, 1991* or an individual who has an equivalent qualification under the laws of the jurisdiction in which care or treatment is provided to the individual described in subsection (3), or

(c) in the prescribed circumstances, a member of a prescribed class of health practitioners.

This section contains definitions of two of the terms used in the family medical leave provisions.

"Qualified health practitioner" is referred to in s. 49.1(2). In order for an employee to be entitled to a family medical leave, a qualified health practitioner must issue a certificate stating that an individual has a serious medical condition with a significant risk of death occurring within a period of 26 weeks, and that individual must be a family member specified in s. 49.1(3).

Qualified health practitioner is defined for the purpose of the family medical leave provisions as:

- A person who is qualified to practise as a physician under the laws of the jurisdiction where the ill family member is being cared for or treated. In Ontario, doctors who are members of the College of Physicians and Surgeons of Ontario will meet the s. 49.1(1)(a) definition of qualified health practitioner.
- A registered nurse who holds an extended certificate of registration, or an equivalent qualification under the laws of the jurisdiction where the ill family member is being cared for or treated. In Ontario, this specifies a member of the College of Nurses of Ontario who is a registered nurse and holds an extended certificate of registration in accordance with O Reg 275/94 made under the *Nursing Act*, *1991*, SO 1991, c 32. These individuals are generally known as nurse practitioners.
- In the prescribed circumstances, a member of a prescribed class of health practitioners. At the time of writing, there are no prescribed circumstances or prescribed classes of health practitioners.

Week

49.1(1) In this section,

"week" means a period of seven consecutive days beginning on Sunday and ending on Saturday.

“Week” means a period of seven consecutive days beginning on Sunday and ending on Saturday. For the purposes of family medical leave, week will always be Sunday to Saturday, even if the employer's work week is different. A Sunday to Saturday week was chosen in order to mirror the Compassionate Care Benefits Program in the *Employment Insurance Act*, SC 1996, c 23 which uses a Sunday to Saturday week for purposes of determining entitlement to, and the paying of, employment insurance benefits.

Entitlement to Leave – s. 49.1(2)

49.1(2) An employee is entitled to a leave of absence without pay of up to 28 weeks to provide care or support to an individual described in subsection (3) if a qualified health practitioner issues a certificate stating that the individual has a serious medical condition with a significant risk of death occurring within a period of 26 weeks or such shorter period as may be prescribed.

Subsection 49.1(2) provides for an entitlement to family medical leave if the eligibility requirements set out in the subsection are met.

Please note that the *Fair Workplaces, Better Jobs Act,* 2017, SO 2017, c 22 made amendments to s. 49.1(2) of the *Employment Standards Act, 2000* on January 1, 2018. These changes, among other things, affected the length of leave and the leave period. See s. 49.1(13) below for more information on how this provision applies to leaves taken with respect to certificates issued prior to January 1, 2018.

The Entitlement

Of Up to 28 Weeks

Employees are entitled to take up to 28 weeks of unpaid family medical leave with respect to a particular individual. Week is defined in s. 49.1(1) as being a period of seven consecutive days beginning on Sunday and ending on Saturday.

Must the weeks of family medical leave be consecutive?

Nothing in the ESA 2000 requires that the weeks of family medical leave be taken consecutively. An employee could, for example, take four weeks of leave, return to work for a while, and then take a further six weeks of leave.

Where an employee provides care or support for only part of a week

Subsection 49.1(7) states that family medical leave must be taken in periods of entire weeks. However, the subsection must be read in conjunction with ESA Part XIV, s. 52.1, which applies to any Part XIV leave that must be taken in periods of entire weeks and which addresses the situation where an employee stops providing care or support part-way through a week. Further, the Program has a policy that addresses the situation where an employee only begins providing care or support part-way through a week. Subsection 49.1(7) below contains a detailed discussion of how s. 49.1(7), s. 52.1 and the Program policy apply where an employee who takes family medical leave provides care or support for only part of a week. Briefly, the combined effect of the two statutory provisions and the Program policy is as follows:

- The first day of any particular week, which is defined to be Sunday to Saturday, that an employee is entitled to start a family medical leave is the first day of that week that they are providing care or support;
- The employer cannot require the employee to take leave on days of the week prior to the day the employee first started providing care or support;
- The employee is considered to have used up a week of their 28-week entitlement even if they are not on leave for the entire week.

Sharing the leave

Section 49.1(6) provides that where more than one employee takes a leave under s. 49.1 in respect of the same family member, the maximum 28 weeks' leave has to be shared by the employees.

Further leaves

Section 49.1(11) provides that employees may take multiple family medical leaves with respect to the same family member if the eligibility criteria are met. However, only one leave of up to 28 weeks may be taken in each 52-week period with respect to the same family member.

An employee is entitled to up to 28 weeks (or more, if the further leave provision of s. 49.1(11) applies) of family medical leave with respect to each individual listed in s. 49.1(3). There is no limit on the number of specified family members for whom an employee may take family medical leave. If, for example, an employee has two specified family members who have a serious medical condition and significant risk of death within a 26-week period, the employee will be entitled to two separate family medical leaves. The timing and duration of each leave, the notice requirements, and the rules regarding eligibility for further leaves with respect to each leave, etc., are governed by s. 49.1 independently of one other.

To Provide Care or Support

The family medical leave entitlement is for providing care or support to the ill family member. This will include, for example, providing psychological or emotional support to the family member, assisting the family member to get their affairs in order, assisting the family member with regular household chores

(e.g., housekeeping, laundry, shopping) as well as arranging for care by a third party provider, and directly providing or participating in the personal care of the family member.

To an Individual Described in Subsection (3)

Employees are entitled to family medical leave with respect to the family members listed in s. 49.1(3).

Eligibility Criteria

Qualified Health Practitioner Issues a Certificate

An employee is eligible for family medical leave if a qualified health practitioner issues a certificate stating that the individual has a serious medical condition with a significant risk of death occurring within a period of 26 weeks or such shorter period as may be prescribed.

Qualified Health Practitioner

See the discussion of the meaning of this term in the family medical leave context in s. 49.1(1) above.

Issues a Certificate

Because s. 49.1(2) uses the present tense - "issues" as opposed to "has issued" - an employee may begin a family medical leave before a certificate is issued.

For example, an employee might obtain the certificate soon after beginning the leave, or after the leave is over, or - if the employer engages in a reprisal against the employee - soon after the reprisal or when asked to by an employment standards officer during the course of a reprisal investigation. Or, an employee may have had a certificate completed by someone who fits within the definition of a qualified health practitioner for family caregiver leave purposes (but not within the narrower definition of that term that applies for family medical leave purposes) and having recognized their mistake during the officer's investigation, subsequently obtained a certificate from the appropriate individual. In all of these cases, because a certificate was ultimately issued - by someone who is eligible to issue it - the employee will be considered to have fulfilled this eligibility criterion. However, if the employee never does obtain a certificate, they will obviously not have an entitlement to family medical leave.

The employee may wish to use the Ministry's "Medical Certificate to Support Entitlement to Family Caregiver Leave, Family Medical Leave, and/or Critical Illness Leave" form when obtaining the medical certificate. It is available on the Ministry of Labour's website.

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

26 weeks or such shorter period as may be prescribed

Pursuant to the definition of week in s. 49.1(1), the 26-week period relating to the significant risk of death will always begin on a Sunday.

If the certificate states that the significant risk of death began on a day other than a Sunday, the 26-week period will begin on the previous Sunday.

For example, if a doctor issues a certificate on Wednesday, June 30, stating that the employee's mother has a serious medical condition and is at significant risk of death within 26 weeks from that date, the 26 week period actually begins on Sunday, June 27, and ends 26 weeks later. The definition of week has implications for when the leave can begin, and the latest date the employee can remain on leave. See ss. 49.1(4) and (5), discussed below.

Note in particular that because the 26-week period begins on the previous Sunday when a certificate states the significant risk of death began on a day other than a Sunday, an employee is eligible for family medical leave immediately upon the significant risk of death arising; they do not have to wait until the next Sunday before beginning family medical leave.

Another example is where the doctor issues the certificate on Saturday, July 10, indicating the employee's father has a serious medical condition and was at significant risk of death from Wednesday, June 30. In this case, the 26-week period begins on Sunday, June 27.

There may be cases in which the certificate indicates that the individual has a serious medical condition with a significant risk of death occurring within a period that is less than 26 weeks. For example, a doctor issues a certificate on Sunday, June 27 stating that the employee's spouse has a serious medical condition and is at significant risk of death within six weeks of that date. It is Program policy to apply the certificate as if it said that the spouse was at significant risk of death within 26 weeks. The employee will not be required to obtain a second certificate if the six week period elapses and the spouse is still alive.

This is because the Program takes the view that the reference to 26 weeks in s. 49.1(2) is intended simply to provide a maximum period in which a risk of death will entitle an employee to family medical leave and not to limit the period in which leave can be taken where the health practitioner anticipates that the individual will die sooner than 26 weeks from the date of the diagnosis/prognosis. The point, in other words, is that the entitlement to family medical leave is based on a reasonably imminent risk of death and not on any particular date specified by the practitioner, so long as the date is within 26 weeks.

Also note the effect of s. 49.1(5) which sets out the latest day an employee can remain on leave. This is either the last day of the week in which the employee’s family member dies, or the last day of a 52 week period starting on the first day of the week in which the 26-week period referred to in s. 49.1(2) begins. Continuing with the example from above, assume that the spouse did not die within six weeks of the date indicated on the certificate; he died 40 weeks after the date indicated on the certificate. The latest date the employee can remain on leave (assuming the employee has not yet used up the full 28 week entitlement), is, pursuant to s. 49.1(5), the last day of the 40th week in the 52-week period, which, in this example, began on Sunday, June 27. If the spouse did not die, the latest date the employee could be on leave pursuant to the same certificate would be Saturday, June 25 of the following year. Note that in both cases, the employee would not be required to get a new certificate within the 52-week period running from the first day of the week in which the original certificate was issued, even if the spouse lived past the original period of 26 weeks established by the certificate - see s. 49.1(5.1).

This policy also has implications for determining when the further leave provision of s. 49.1(11) can be engaged. Assume, in this same example, that the spouse did not die within six weeks of the date indicated on the certificate, and was still alive after 52 weeks. The employee would be required to wait until the end of that first 52-week period before a second certificate could be issued that would make the employee eligible for a second 28 weeks of leave. See s. 49.1(11) below.

At the time of writing, no shorter period than 26 weeks has been prescribed.

Application of Subsection (2) – s. 49.1(3)

49.1(3) Subsection (2) applies in respect of the following individuals:

1. The employee's spouse.

2. A parent, step-parent or foster parent of the employee or the employee's spouse.

3. A child, step-child or foster child of the employee or the employee's spouse.

4. A child who is under legal guardianship of the employee or the employee's spouse.

5. A brother, step-brother, sister or step-sister of the employee.

6. A grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse.

7. A brother-in-law, step-brother-in-law, sister-in-law or step-sister-in-law of the employee.

8. A son-in-law or daughter-in-law of the employee or the employee's spouse.

9. An uncle or aunt of the employee or the employee's spouse.

10. A nephew or niece of the employee or the employee's spouse.

11. The spouse of the employee's grandchild, uncle, aunt, nephew or niece.

12. A person who considers the employee to be like a family member, provided the prescribed conditions, if any, are met.

13. Any individual prescribed as a family member for the purpose of this section.

This section lists the individuals, referred to in s. 49.1(2), for whom an employee is entitled to take a family medical leave.

The list is exhaustive. If the person is not listed in s. 49.1(3), the employee has no entitlement to family medical leave.

At the time of writing, no additional family members have been prescribed.

Note O Reg 535/17, s. 1, which states:

1. For the purposes of paragraph 12 of subsection 49.1 (3) of the ESA 2000 and paragraph 12 of the definition of "family member" in subsection 49.4 (1) of the ESA 2000, the prescribed condition is that the employee must, on the employer's request, provide the employer with a copy of the document provided to an agency or department of the Government of Canada for the purpose of claiming benefits under the Employment Insurance Act (Canada) in which it is stated that the employee is considered to be like a family member.

Employees who wish to access family medical leave employment insurance benefits for a person that is "like a family member" may be required to submit a document to the federal government from the ill individual attesting that the person consider the employee to be like a family member. Pursuant to O Reg 535/17, s. 1, employees wishing to take family medical leave for a person who considers the employee to

be like a family member must provide their employer at the employer's request with a copy of this document. At the time of writing, the document required by the federal government was the Compassionate Care Benefits Attestation form, which is available from Employment and Social Development Canada (“ESDC”). However, whether or not the employee is applying for EI benefits or required to submit the form for EI purposes does not affect the requirement to provide it for family medical leave purposes under the ESA 2000.

Employees wishing to take a family medical leave to provide care or support to any other family member specified in s. 49.1(3) are not required to provide their employer with a completed attestation form.

Note that spouse includes married same-sex couples, married opposite-sex couples, and couples of the same or opposite sex who live together in a conjugal relationship outside marriage - see the definition of spouse and the discussion at ESA Part XIV, s. 45.

Also note that the family members specified for the purposes of s. 49.1(2) in s. 49.1(3) do not have to live in Ontario in order for the employee to be eligible for family medical leave.

Earliest Date Leave Can Begin – s. 49.1(4)

49.1(4) The employee may begin a leave under this section no earlier than the first day of the week in which the period referred to in subsection (2) begins.

This provision establishes the earliest date a family medical leave can begin.

The earliest date family medical leave can begin is the first day of the week in which the 26-week period referred to in s. 49.1(2) begins; that is, the first day of the 26-week period within which the family member has a significant risk of dying. Pursuant to the definition of week in s. 49.1(1), the first day of the 26-week period referred to in s. 49.1(2) will always be Sunday.

For example, a doctor issues a certificate on Wednesday, June 30, stating that an individual (who is the employee's mother) has a serious medical condition and is at significant risk of death within 26 weeks from that date. The 26-week period referred to in s. 49.1(2) actually begins on Sunday, June 27, and ends 26 weeks later. Accordingly, the earliest date the employee's leave can begin is Sunday, June 27.

Another example is where the doctor issues the certificate on Saturday, July 10, indicating that an individual (who is the employee's father) has a serious medical condition and was at significant risk of death from Wednesday, June 30. In this case, the 26-week period referred to in s. 49.1(2) also begins on Sunday, June 27. Accordingly, the earliest date the employee's leave can begin is also Sunday, June 27.

Latest Date Employee Can Remain on Leave – s. 49.1(5)

49.1(5) The employee may not remain on a leave under this section after the earlier of the following dates:

1. The last day of the week in which the individual described in subsection (3) dies.

2. The last day of the 52-week period starting on the first day of the week in which the period referred to in subsection (2) begins.

This provision establishes the latest date an employee can remain on family medical leave. It must be read in conjunction with s. 49.1(2) and (6), which determine the maximum length of the leave. It may also

be read in conjunction with s. 49.1(5.1) which provides clarifying information about the certificate requirement.

The latest date an employee can remain on family medical leave is the earlier of:

- The last day of the week in which the family member dies; and
- The last day of the 52-week period that starts on the first day of the week in which the 26-week period specified by s. 49.1(2) begins.

The last day in either case will always be a Saturday, pursuant to the definition of week in s. 49.1(1).

The following examples illustrate the application of s. 49.1(5).

Example 1

A doctor issues a certificate on Wednesday, June 23, stating that the employee's mother has a serious medical condition and is at significant risk of death within 26 weeks from that date.

The 52-week period begins on Sunday, June 20, and ends 52 weeks later, which is Saturday, June 18.

The mother dies on Tuesday, November 16.

The latest date the employee can remain on leave is Saturday, November 20. Further, pursuant to s. 52.1, if the employee was on leave during the week that started Sunday, November 14, the employee is allowed to return to work before Saturday, November 20 only if the employer agrees (whether or not in writing). See ESA Part XIV, s. 52.1 for a discussion.

Example 2

A doctor issues a certificate on Wednesday, June 23, stating that the employee's mother has a serious medical condition and is at significant risk of death within 26 weeks from that date.

The 52-week period begins on Sunday, June 20 and ends 52 weeks later, on Saturday June 18.

The mother is still alive on January 1 (28 weeks after the issuance of the first certificate).

The latest date the employee can remain on leave is Saturday, June 18. The employee does not need to arrange for a new certificate to be issued at the end of the original 26-week period specified in the certificate and remains eligible to be on leave for the duration of the 52-week period, until such point as the entire 28 week entitlement of leave is used – see s. 49.1(5.1)

Example 3

A doctor issues a certificate on Saturday, July 10, indicating that the employee's father has a serious medical condition and was at significant risk of death from Wednesday, June 23

The 52-week period begins on Sunday, June 20, and ends 52 weeks later, on Saturday, June 18.

The father is still alive on Saturday, June 18.

The latest date the employee can remain on leave is Saturday, June 18.

Note, however, that after June 18, the employee may be entitled to a further leave - see s. 49.1(11), discussed below.

Same – s. 49.1(5.1)

49.1(5.1) For greater certainty, but subject to subsection (5), if the amount of leave that has been taken is less than 28 weeks, it is not necessary for a qualified health practitioner to issue an additional certificate under subsection (2) in order for leave to be taken under this section after the end of the period referred to in subsection (2).

This subsection clarifies that it is not necessary for an employee to arrange for a qualified health practitioner to issue a second certificate within the same 52-week period running from the issuance of the first certificate, if all the requirements for the leave continue to be met, e.g., the ill family member is still alive, still has a serious medical condition and a significant risk of death, and the employee has not yet used the maximum entitlement of 28 weeks of leave.

Two or More Employees – s. 49.1(6)

49.1(6) If two or more employees take leaves under this section in respect of a particular individual, the total of the leaves taken by all the employees shall not exceed 28 weeks during the 52-week period referred to in paragraph 2 of subsection (5) that applies to the first certificate issued for the purpose of this section.

This section provides that where more than one employee takes family medical leave under s. 49.1 with respect to the same family member, the 28 week leave entitlement must be shared by the employees.

There is no requirement that the employees who are sharing the leave entitlement be on leave at the same time, or at different times; the ESA 2000 does not impose any restrictions in this regard.

Note that the entire weeks provisions of s. 49.1(7) and s. 52.1(2) also apply in the context of s. 49.1(6). If one of the employees sharing the leave entitlement takes only three days off in one week, that employee is deemed to have taken an entire week of leave, thereby reducing the total number of weeks of leave remaining for all employees who are taking leave for the same family member by one week.

Note also that the sharing requirement applies only where two or more employees take leave under this section, i.e., s. 49.1. An employee who takes a leave similar to family medical leave pursuant to a contractual provision that provides a greater right than s. 49.1, and which thus prevails over s. 49.1 under ESA Part III, s. 5(2), is not taking leave under this section; therefore the amount of leave that that employee takes does not reduce the amount of leave that other employees can take in respect of the same family member under s. 49.1. Likewise, an employee who takes a leave similar to ESA 2000 family medical leave pursuant to the employment standards legislation of another jurisdiction is not taking leave under this section. Thus, if a father facing a significant risk of death within 26 weeks has one child in Ontario and another child in Manitoba, any leave taken by the latter under Manitoba's legislation to provide care or support to the father would not affect the amount of leave available to the child in Ontario.

Subsection 49.1(6) also provides that where more than one certificate is issued by a qualified health practitioner(s) with respect to the same individual and the certificates set out different 26-week periods, the 26-week that defines the start of the 52-week period within which leave may be taken will be the one specified in the first certificate that was issued.

Full-week Periods – s. 49.1(7)

49.1(7) An employee may take a leave under this section only in periods of entire weeks.

This provision must be read in conjunction with s. 49.1(1), which defines week as seven consecutive days beginning on Sunday and ending on Saturday, and with s. 52.1, which was introduced into the ESA 2000 effective October 29, 2014 and which states:

(1) If a provision in this Part requires that an employee who takes a leave to provide care or support to a person take the leave in periods of entire weeks and, during a week of leave, an employee ceases to provide care or support,

a. the employee's entitlement to leave continues until the end of the week; and

b. the employee may return to work during the week only if the employer agrees, whether in writing or not.

(2) If an employee returns to work under clause (1)(b), the week counts as an entire week for the purposes of any provision in this Part that limits the employee's entitlement to leave to a certain number of weeks.

While there is no requirement that the 28 weeks of family medical leave that an employee is entitled to be taken consecutively, s. 49.1(7) does specify that the leave must be taken in periods of entire weeks.

Despite this entire weeks requirement, the Program's view prior to the coming-into-force of ESA Part XIV, s. 52.1 on October 29, 2014 was that the right to be on leave was contingent on the employee actually providing care or support to the ill family member; this meant that if an employee was not providing care or support for some part of a week, the employee had no right to be on leave during that part and they were both required to be and entitled to be at work during that part. Thus, if an employee was only going to begin providing care or support on, say, a Wednesday, they had no right to begin their leave before Wednesday and the employer could not require them to start the leave before that day. Likewise, if an employee who was on leave stopped providing care or support after, say, Tuesday, they had no right to stay on leave after Tuesday; they had no right to continue on leave after that day and the employer could insist that they return to work for the rest of the week. Notwithstanding this, the Program took the position that because of the s. 49.1(7) entire weeks requirement, the employee in these situations would be deemed to have used up one full week of their total family medical leave entitlement. However, with the coming-into-force of ESA Part XIV, s. 52.1, the Program has had to modify its position insofar as the situation where the employee who is on leave stops providing care or support part-way through a week is concerned.

Section 52.1(1) deals only with the situation where an employee who is on leave *stops* providing care or support at some point during a week. It does not address the situation in which an employee only *begins* providing care or support part-way through a week. With respect to the question as to how the s. 49.1(7) requirement that the leave be taken in periods of entire weeks applies in those circumstances, the Program's view is that **subject to s. 52.1, the right to be on leave is dependent on the employee actually providing care or support,** and since s. 52.1 does not deal with the situation in which the employee only starts providing care or support part-way through the week, the employee is not entitled and cannot be required to take the leave from the start of the week. It should be noted, however, that in this situation the employee will be considered to have used up one week of their 28-week family medical

leave entitlement. This is not because s. 52.1(2) applies—it does not—but because of the entire weeks requirement in s. 49.1(7).

Accordingly it is now Program policy that:

- The first day of any particular week (which is defined to be Sunday to Saturday) that an employee is entitled to start a family medical leave is the first day of that week that they are providing care or support. Further, the employer cannot require the employee to take leave on days of the week prior to the day the employee first started providing care or support. There is no change from previous policy.
- If the employee stops providing care or support before the end of a week in which they took a family medical leave, the employee is - pursuant to s. 52.1(1) - entitled to be on leave until the end of the week. Furthermore, they can return to work before the end of the week only if the employer agrees. The agreement does not have to be in writing.

The employee is considered to have used up a week of their 28-week entitlement even if they are not on leave for the entire week. Note that there is no change from previous policy, based on ss. 49.1(7).

Although an employee is considered to have used up a week of their 28-week entitlement even if not actually off work for the entire week, they are entitled to be paid for the time that was actually worked, and the hours that were worked will be counted for the purposes of, among other things, determining whether or not the relevant overtime threshold has been reached or limits on hours of work per week have been exceeded.

Where an employee takes more than one single day of leave during the same week as defined in s. 49.1(1), only one week of leave will be deemed to have been used up. For example, if an employee takes a single day of leave on Tuesday, May 29, wants to and is permitted by the employer to return to work on May 30 and 31, and takes another single day of leave on Friday, June 1, only one week will be deemed to have been used up, because those two days fell within the same week.

Greater Right or Benefit

An issue arises as to whether an employer has the option of not deeming an entire week of leave to be used up when an employee is away from work for only part of a week. The employment standard provides that a full week of leave will be charged against the employee's 28-week entitlement. However, pursuant to the greater right or benefit provision of ESA Part III, s. 5(2), if what the employer provides amounts to a greater right or benefit than the employment standard, then what the employer provides will supplant the employment standard and will apply instead of the employment standard. Accordingly, the employer is not prevented from charging only part weeks' leave against the employee's 28-week entitlement if the entire family medical leave package provided by the employer amounts to a better deal for the employee than s. 49.1.

Advising Employer – ss. 49.1(8), (9)

49.1(8) An employee who wishes to take leave under this section shall advise their employer in writing that he or she will be doing so.

(9) If the employee must begin the leave before advising the employer, the employee shall advise the employer of the leave in writing as soon as possible after beginning it.

Subsection 49.1(8) requires employees to tell their employers ahead of time that they will be taking family medical leave. In circumstances where that cannot be done, s. 49.1(9) requires the employee to tell the employer as soon as possible after beginning the leave. In either case, this must be done in writing. Note that the ESA 2000 does not require the employee to specify a return date.

The requirement to advise the employer in writing applies with respect to each part of their 28-week leave.

Example 1

An employee takes the available 28-week leave in four separate blocks: six weeks, ten weeks, and two further blocks of six weeks each. The employee is required to advise the employer in writing that they will be taking leave before (or as soon as possible after, if the notice cannot be given before the leave begins) each individual block of leave begins. The notice can be given at four separate times - once before each individual block (or, if notice cannot be given ahead of time, as soon as possible after the beginning of each block). Or, if the employee knows the start dates of all of the individual blocks of leave ahead of time, a single written notice setting out the dates would meet this requirement.

Example 2

An employee takes eight one-day leaves. The employee must advise the employer in writing before (or as soon as possible after) each single day of leave is taken. This is so even if some of the single days are taken in the same we. The notice can be given at separate times, or, if the employee knows the start dates of more than one single day of leave ahead of time, a single notice setting out the multiple dates is sufficient notice for each of those dates.

Failure to Advise Employer

An employee does not lose their right to family medical leave if they fail to comply with ss. 49.1(8) or (9). An employee's entitlement to family medical leave arises by virtue of meeting the eligibility criteria in s. 49.1(2), and it is the Program's position that the failure to advise the employer before or as soon as possible after the leave begins does not negate that entitlement. This approach is consistent with the Program's long-standing policy for all leaves contained in Part XIV where the structure of the entitlement and notice provisions are similar to these. See for example ESA Part XIV, ss. 46(4), 48(4) and 50(3) and (4).

The question may arise as to whether an employer can penalize an employee for failing to give advance notice that they will be absent from work (as may be required under an employer policy), where the time off is a family medical leave under the ESA 2000. Section 49.1(9) provides that if the employee must begin the leave before advising the employer, the employee shall advise the employer of the leave in writing as soon as possible after beginning it. It is thus clear that the ESA 2000 contemplates that circumstances may arise where the employee would be unable to advise the employer in advance of starting family medical leave and that the employee nevertheless has the right to take the leave in such circumstances (although the employee does have an obligation to advise the employer of the leave as soon as possible after starting it). On the other hand, the failure to give notice in advance of taking leave when the employee could have done so can be the subject of disciplinary action by the employer without violating s. 74. However the following points should be borne in mind:

- The employee's failure to give advance notice does not nullify the right to take the family medical leave if the qualifying conditions in s. 49.1(2) have been met. In other words, the failure to give

advance notice does not have the result that the time taken off by the employee is not family medical leave.

- An employer may impose discipline where the employee failed to provide advance notice even though the employee could have done so; however, the reason for the discipline must be because of the failure to give advance notice and not because the employee exercised the right to take leave.
- Likewise, an employer may impose discipline if an employee fails to provide any notice of the leave (before or after the start of the leave); however, the reason for the discipline would have to be because of the failure to provide notice and not because the employee exercised the right to take leave.

Copy of Certificate – s. 49.1(10)

49.1(10) If requested by the employer, the employee shall provide the employer with a copy of the certificate referred to in subsection (2) as soon as possible.

This section provides that if the employer asks the employee for a copy of the certificate referred to in s. 49.1(2), the employee is required to provide it to the employer as soon as possible.

The certificate referred to in s. 49.1(2) is the certificate issued by a qualified health practitioner that states that an individual has a serious medical condition with a significant risk of death occurring within a period of 26 weeks – see s. 49.1(2) above.

An employee's failure to conform to the statutory requirement to provide a copy of the certificate does not disentitle them to the family medical leave. It is the Program's view that the requirement to provide a copy of the certificate is not a condition precedent to the entitlement to family medical leave; the conditions for entitlement are set out in s. 49.1(2). However, as provided in s. 49.1(2), in order to be entitled to the leave, the employee must obtain a certificate. The leave may begin before the certificate is obtained, but the employee must eventually obtain a certificate in order to be entitled to the leave. If they do not eventually obtain a certificate, they are not entitled to the leave.

Further Leave – s. 49.1(11)

49.1(11) If an employee takes a leave under this section and the individual referred to in subsection (3) does not die within the 52-week period referred to in paragraph 2 of subsection (5) the employee may, in accordance with this section, take another leave and, for that purpose, the reference in subsection (6) to "the first certificate" shall be deemed to be a reference to the first certificate issued after the end of that period.

This section provides for the right of an employee to take a further family medical leave of up to 28 weeks if the family member does not die within the 52-week period referred to in s. 49.1(2).

For example, a doctor issues a certificate on Wednesday, June 30, stating that an individual (who is the employee's mother) has a serious medical condition and is at significant risk of death within 26 weeks from that date. Pursuant to s. 49.1(2), the 52-week period begins on Sunday, June 27, and ends 52 weeks later, which is Saturday, June 25. The employee takes a 28-week family medical leave from July to February. The mother is still alive on Sunday, June 26. As of June 26, the employee may be entitled to take a second family medical leave of up to 28 weeks, if the eligibility criteria of s. 49.1(2) are again satisfied by the employee. In particular, the employee will again be required to obtain a certificate from a

qualified health practitioner stating that the mother has a serious medical condition with a significant risk of death occurring within a period of 26 weeks.

An employee could be entitled to a third, fourth, etc. family medical leave of up to 28 weeks after the expiry of each 52-week period, so long as the employee satisfies the eligibility criteria of s. 49.1(2) a third, fourth, etc. time.

This section also stipulates what happens where there is a further leave where:

- The 28 weeks of family medical leave are shared between more than one employee pursuant to s. 49.1(6);
- There is more than one certificate issued with respect to the further 52-week period; and
- The certificates contain different dates respecting the 26-week period in which the family member has a significant risk of dying.

In this case, the 52-week period (which establishes the period during which the leave may be taken) for the purposes of the further leave will be determined using the first certificate that was issued after the end of the first 52-week period.

s. 49.1(12) – REPEALED

Transition – s. 49.1(13)

49(13) If a certificate described in subsection (2) was issued before January 1, 2018, then this section, as it read immediately before January 1, 2018, applies.

The *Fair Workplaces, Better Jobs Act, 2017,* SO 2017, c 22 amended s. 49.1 on January 1, 2018. Among other changes, the amendments extended the maximum period of family medical leave from eight weeks to 28 weeks. The timeframe within which the weeks of leave may be taken was also extended from 26 to 52 weeks.

Subsection 49.1(13) sets out transitional rules that apply with respect to the January 1, 2018 amendments. If an employee is relying on a certificate issued prior to January 1, 2018 to support their entitlement to a leave, then s. 49.1 as it read on December 31, 2017 will apply to that employee. If an employee is relying on a certificate issued on or after January 1, 2018, the current provisions apply.

ESA Part XIV Section 49.2 – Organ Donor Leave

Definitions – s. 49.2(1)

49.2(1) In this section,

"legally qualified medical practitioner" means,

(a) in the case of surgery for the purpose of organ donation that takes place in Ontario, a member of the College of Physicians and Surgeons of Ontario, and

(b) in the case of surgery for the purpose of organ donation that takes place outside Ontario, a person who is qualified to practise medicine under the laws of that jurisdiction;

"organ" means kidney, liver, lung, pancreas, small bowel or any other organ that is prescribed for the purpose of this section;

"organ donation" means the donation of all or part of an organ to a person;

"prescribed" means prescribed by a regulation made under this section.

This section contains definitions of four terms that are used in the organ donor leave provisions.

"Legally qualified medical practitioner" is referred to in ss. 49.2(4), 49.2(6) and 49.2(8). Where the surgery for the purpose of organ donation is taking place in Ontario, doctors who are members of the College of Physicians and Surgeons of Ontario are the only individuals who fall within the definition of legally qualified medical practitioner. Where the surgery takes place outside of Ontario, persons who are qualified to practise medicine under the laws of that jurisdiction are the only individuals who fall within the definition of legally qualified medical practitioner.

"Organ" for the purposes of organ donor leave is defined as the kidney, liver, lung, pancreas, small bowel or any other organ that is prescribed for the purpose of this section. At the time of writing, there are no other organs prescribed.

"Organ donation" for the purposes of organ donor leave includes the donation of all or part of an organ to a person.

"Prescribed" means prescribed by a regulation made under s. 49.2 regarding organ donor leave.

Application to Prescribed Tissue – s. 49.2(2)

49.2(2) References to organs in this section also apply to tissue that is prescribed for the purpose of this section.

This section provides that references to "organ" in the organ donor leave provisions would also apply to tissue that is prescribed by regulation for the purposes of these provisions. At the time of writing, there are no prescribed tissues.

Entitlement to Leave – s. 49.2(3)

49.2(3) An employee who has been employed by his or her employer for at least 13 weeks and undergoes surgery for the purpose of organ donation is entitled to a leave of absence without pay.

To be eligible for organ donor leave, the employee has to have been employed for at least 13 weeks prior to the commencement of the leave and undergo surgery for the purpose of organ donation. It is not necessary that the employee be actively working for all or any part of the 13 weeks prior to commencing the leave. For example, the employee could be off receiving short-term disability benefits, on a Part XIV leave, on vacation or on lay-off during the qualifying period.

In addition, to be eligible for the leave, the employee must be undergoing surgery for the purpose of organ donation which includes the donation of all or part of an organ to a person. For the purposes of organ donor leave, "organ" has been defined as the kidney, liver, lung, pancreas, small bowel or any other organ that is prescribed for the purpose of this section. As of the time of writing, no other organs have been prescribed.

Certificate – s. 49.2(4)

49.2(4) The employer may require an employee who takes leave under this section to provide a certificate issued by a legally qualified medical practitioner confirming that the employee has undergone or will undergo surgery for the purpose of organ donation.

If requested by the employer, an employee who takes an organ donor leave would have to provide a certificate issued by a legally qualified medical practitioner confirming that the employee will be undergoing or has undergone surgery for the purpose of organ donation.

See discussion of the term "legally qualified medical practitioner" in subsection (1) above.

Length of Leave – s. 49.2(5)

49.2(5) The employee is entitled to take leave for the prescribed period or, if no period is prescribed, for up to 13 weeks.

Eligible employees are entitled to take a period of up to 13 weeks of unpaid organ donor leave. As with parental leave, Program policy is that employees must take organ donor leave in one continuous period. There is a regulation making authority to vary the maximum leave period and to prescribe different leave periods with respect to the donation of different organs and prescribed tissue. At the time of writing, there are no other leave periods prescribed.

Extended Leave – s. 49.2(6)

49.2(6) When the leave described in subsection (5) ends, if a legally qualified medical practitioner issues a certificate stating that the employee is not yet able to perform the duties of his or her position because of the organ donation and will not be able to do so for a specified time, the employee is entitled to extend the leave for the specified time, subject to subsection (7).

This subsection provides for the right of an employee to extend the organ donor leave, subject to s. 49.2(7), if the employee is not yet able to perform the duties of his or her position because of the organ donation. In order to extend the leave, the employee is required to obtain a certificate from a legally qualified medical practitioner stating that they are not yet able to perform the duties of his or her position because of the organ donation and will not be able to do so for a specified period of time. The length of the extension to organ donor leave is subject to s. 49.2(7).

Same – s. 49.2(7)

49.2(7) The leave may be extended more than once, but the total extension period shall not exceed 13 weeks.

Subsection 49.2(7) permits the original organ donor leave period to be extended more than once for medical reasons, however the total extension period cannot exceed 13 weeks. For example, an employee is near the end of the original 13 weeks of organ donor leave and has not fully recovered from the organ donation to perform the duties of her position. The employee will be able to extend her leave, if her doctor, who is a member of the College of Physicians and Surgeons of Ontario, issues a certificate stating that she is not yet able to perform the duties of her position because of the organ donation and will not be able to do so for a period of time. If at the end of the additional period of time of organ donor leave, the employee is still unable to perform the duties of her position, the leave may again be extended if her

doctor issues another certificate. However, the total period of time for these extensions cannot exceed 13 weeks. Therefore, where the leave is extended, the maximum amount of time allowed for organ donor leave is 26 weeks in total.

When Leave Begins – s. 49.2(8)

49.2(8) The employee may begin a leave described in subsection (5) on the day that he or she undergoes surgery for the purpose of organ donation, or on the earlier day specified in a certificate issued by a legally qualified medical practitioner.

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

When Leave Ends – s. 49.2(9)

49.2(9) Subject to subsections (10) and (11), a leave under this section ends when the prescribed period has expired or, if no period is prescribed, 13 weeks after the leave began.

Subject to s. 49.2(10) (where an employee extends the leave in accordance with ss. 49.2(6)) and 49.2(11) which set out where an employee may end the leave early), organ donor leave will end when the prescribed period has expired or 13 weeks after it began. At the time of writing, there are no other leave periods prescribed. Therefore, organ donor leave will end 13 weeks after it began, subject to ss. 49.2(10) and 49.2(11).

Same – s. 49.2(10)

49.2(10) If the employee extends the leave in accordance with subsection (6), the leave ends on the earlier of,

(a) the day specified in the most recent certificate under subsection (6); or

(b) the day that is,

- **i. if no period is prescribed for the purposes of subsection (5), 26 weeks after the leave began, or**
- **ii. if a period is prescribed for the purposes of subsection (5), 13 weeks after the end of the prescribed period.**

If an employee has extended an organ donor leave in accordance with s. 49.2(6), the leave would end the earlier of:

- The end of the specified time in the most recent certificate that confirmed that the employee was not yet able to perform the duties of his or her position because of the organ donation;
- If no period for the leave has been prescribed, 26 weeks after the leave began; or
- If a period for the leave has been prescribed, 13 weeks after the end of the prescribed period.

At the time of writing, there have been no leave periods that have been prescribed. Therefore, where there has been an extension to organ donor leave, the leave would end on the earlier of the day specified in the most recent medical certificate or 26 weeks after the leave began.

Ending Leave Early – s. 49.2(11)

49.2(11) The employee may end the leave earlier than provided in subsection (9) or (10) by giving the employer written notice at least two weeks before the day the employee wishes to end the leave.

Section 49.2(11) provides that organ donor leave may end earlier than provided in ss. 49.2(9) or 49.2(10) if the employee gives the employer at least two weeks' written notice before the day the employee wishes to end the leave.

In contrast to the Program's position with respect to the notice requirements to commence the leave, the Program's position is that the employer can refuse to allow the employee to return to work earlier than the date provided for in s. 49.2(9) or 49.2(10) if the employee has not given the employer two weeks' notice in writing.

Advising Employer – ss. 49.2(12), (13)

49.2(12) An employee who wishes to take leave under this section or to extend a leave under this section shall give the employer written notice, at least two weeks before beginning or extending the leave, if possible.

(13) If the employee must begin or extend the leave before advising the employer, the employee shall advise the employer of the matter in writing as soon as possible after beginning or extending the leave.

An employee who wishes to take organ donor leave or wishes to extend an organ donor leave is required to give at least two weeks' notice in writing to the employer of his or her intention to take or extend an organ donor leave. In circumstances where that cannot be done, the employee is required, pursuant to s. 49.2(13), to advise the employer as soon as possible after beginning or extending the leave.

The employee is required to advise the employer in writing.

The ESA 2000 requires that the employee advise the employer that they will be beginning or extending a leave; it does not require the employee to specify a return date.

An employee does not lose his or her right to organ donor leave if they fail to comply with ss. 49.2(12) or (13). An employee's entitlement to organ donor leave arises by virtue of meeting the eligibility criteria in s. 49.2(3), and it is the Program's position that the failure to advise the employer before or as soon as possible after the leave begins or is extended does not negate that entitlement. This approach is consistent with the Program's long-standing policy for all leaves contained in Part XIV where the structure of the entitlement and notice provisions is similar to those relating to organ donor leave. See for example, ESA Part XIV, s. 46(4) and s. 48(4).

Duty to Provide Certificate – s. 49.2(14)

49.2(14) When the employer requires a certificate under subsection (4), (6) or (8), the employee shall provide it as soon as possible.

This section provides that if the employer requires a certificate referred to in ss. 49.2(4), (6) or (8), the employee is required to provide it to the employer as soon as possible.

The certificate referred to in ss. 49.2(4), (6) or (8), is the certificate issued by a legally qualified medical practitioner as defined in s. 49.2(1) stating either:

- That the employee has undergone or will undergo surgery for the purpose of organ donation;
- That the employee is not yet able to perform the duties of their position because of the organ donation and will not be able to do so for a specified period of time; or
- That the employee is to start an organ donor leave on an earlier date specified by a legally qualified medical practitioner before the surgery.

An employee's failure to conform to the statutory requirement to provide a copy of the certificate does not disentitle them to the organ donor leave. It is the Program's view that the requirement to provide a certificate is not a condition precedent to the entitlement to organ donor leave; the conditions for entitlement are set out in s. 49.2(3).

s. 49.2(15) – REPEALED

ESA Part XIV Section 49.3 – Family Caregiver Leave

Definitions – s. 49.3(1)

Qualified Health Practitioner

49.3(1) In this section,

"qualified health practitioner" means,

(a) a person who is qualified to practise as a physician, a registered nurse or a psychologist under the laws of the jurisdiction in which care or treatment is provided to the individual described in subsection (5), or

(b) in the prescribed circumstances, a member of a prescribed class of health practitioners;

Where care or treatment is provided in Ontario:

- "A person who is qualified to practise as a physician" means a member of the College of Physicians and Surgeons of Ontario (this includes psychiatrists);
- "A person who is qualified to practise as a registered nurse" means a member of the College of Nurses of Ontario who holds a general or extended certificate of registration as a registered nurse in accordance with O Reg 275/94 made under the *Nursing Act, 1991*, SO 1991, c 32, (nurse practitioners hold extended certificates); and
- "A person who is qualified to practise as a psychologist" means an individual who is a member of the College of Psychologists of Ontario.

Where care or treatment is provided in a jurisdiction other than Ontario, the question of whether the person providing it is a qualified health practitioner is determined with reference to the laws of that other jurisdiction.

At the time of writing, there are no prescribed circumstances or prescribed classes of health practitioners.

Week

49.3(1) In this section,

"week" means a period of seven consecutive days beginning on Sunday and ending on Saturday.

"Week" means a period of seven consecutive days beginning on Sunday and ending on Saturday. For the purposes of family caregiver leave, week will always be Sunday to Saturday, even if the employer's work week is different.

Entitlement to Leave – s. 49.3(2); Serious Medical Condition – s. 49.3(3); Same – s. 49.3(4)

49.3(2) An employee is entitled to a leave of absence without pay to provide care or support to an individual described in subsection (5) if a qualified health practitioner issues a certificate stating that the individual has a serious medical condition.

49.3(3) For greater certainty, a serious medical condition referred to in subsection (2) may include a condition that is chronic or episodic.

49.3(4) An employee is entitled to take up to eight weeks leave under this section for each individual described in subsection (5) in each calendar year.

These subsections provide for an entitlement to family caregiver leave if the eligibility requirements set out in the subsections are met.

The Entitlement

Up to Eight Weeks . . . in Each Calendar Year with Respect to Each Specified Family Member

Employees are entitled to take up to eight weeks of family caregiver leave in each calendar year with respect to each specified family member. Week is defined in s. 49.3(1) as being a period of seven consecutive days beginning on Sunday and ending on Saturday.

Nothing in the *Employment Standards Act, 2000* requires that the weeks of family caregiver leave be taken consecutively. Further, unlike the case with family medical leave, the ESA 2000 does not require that family caregiver leave be taken in periods of entire weeks. However, where an employee takes any part of a week as leave, s. 49.3(7.1) permits the employer to deem the employee to have taken one full week of leave. In other words, there are eight weeks in which the employee may take leave and thus where an employee takes any time off during a week as family caregiver leave - even as little as one day – they may be considered to have used up one week of their eight weeks of entitlement.

Additionally, because the ESA 2000 does not require that family caregiver leave be taken in periods of entire weeks, ESA Part XIV, s. 52.1 - which applies only to leaves that must be taken in entire weeks - does not apply.

Section 52.1, which applies to family medical leave (since that leave must be taken in periods of entire weeks) provides that an employee who ceases to provide care or support before the end of a week is entitled to stay on family medical leave for the rest of the week, and can return to work before the end of the week only if the employer agrees. In contrast, in the case of family caregiver leave, because s. 52.1

does not apply, an employee who ceases to provide care or support before the end of a week is required to return to work and the employer has no right to prevent the employee from returning to work.

Accordingly, it is Program policy that the entitlement to family caregiver leave is as follows:

- There are eight weeks in each calendar year in which an employee is entitled to be on leave with respect to each individual listed in s. 49.3(5);
- The eight weeks in which leave is taken can be consecutive, or they can be separated;
- The employee may take leave for periods less than a full week (e.g., single days, at the beginning, middle, or end of a week), but if they do, the employer may consider the employee to have used up one week of their eight-week entitlement. If the employee is on leave for two or more periods within the same week (e.g., on leave on Monday and on Thursday of the same week), only one week of the eight-week entitlement may be deemed to be used up;
- The employee is entitled to be on leave only when the employee is providing care or support to an individual listed in s. 49.3(5); and
- The employer cannot require the employee to take an entire week of leave, cannot prevent the employee from working prior to taking a single day(s) of leave during a week, and cannot prevent the employee from returning to work after a single day(s) of leave during the week.

There is no limit on the number of family members for whom family caregiver leave can be taken per calendar year. If, for example, an employee has two specified family members who have a serious medical condition, the employee will be entitled to two family caregiver leaves of up to eight weeks each. The timing and duration of each leave, the notice requirements, etc., are governed by s. 49.3 independently of one other.

Note that the ESA 2000 does not require that family caregiver leave entitlements be pro-rated for part-time employees or employees who started their employment partway through a calendar year.

When a new calendar year starts on a day other than a Sunday

Because week is defined as running from Sunday to Saturday, the question arises as to how to attribute family caregiver leave absences when a week crosses over into the next calendar year. Specifically, what happens if an employee is on a family caregiver leave during such a week, on at least one day before the end of the calendar year and on at least one day into the new calendar year? For example, an employee takes family caregiver leave from Sunday, December 28 to Saturday, January 3. Because the family caregiver leave entitlement is on a calendar year basis, it is Program policy that in this situation, the employee is considered to have used up one of their eight weeks of leave entitlement for the calendar year that is ending AND one of their eight weeks of leave entitlement for the calendar year that is beginning.

To Provide Care or Support

The family caregiver leave entitlement is for providing care or support to the family member with the serious medical condition. This includes, for example, providing psychological or emotional support to the family member, assisting the family member with regular household chores (e.g., housekeeping, laundry, shopping) as well as arranging for care by a third party provider, and directly providing or participating in the personal care of the family member. Care or support also includes assisting the family member to get their affairs in order, where, for example, the family member is at risk of death.

To an Individual Described in Subsection (5)

Employees are entitled to family caregiver leave with respect to the family members listed in s. 49.3(5). See s. 49.3(5) below.

Eligibility Criteria

Qualified Health Practitioner Issues a Certificate

An employee is eligible for family caregiver leave if a qualified health practitioner issues a certificate stating that the individual has a serious medical condition.

Qualified Health Practitioner

See the discussion of this term in s. 49.3(1) above.

Issues a Certificate

Because s. 49.3(2) uses the present tense "issues" (as opposed to "has issued"), an employee may begin a family caregiver leave before a certificate is issued.

For example, an employee might obtain the certificate soon after beginning the leave, or after the leave is over, or – if the employer engages in a reprisal against the employee – soon after the reprisal or when asked to by an employment standards officer during the course of a reprisal investigation. In all of these cases, because a certificate was ultimately issued, the employee will be considered to have fulfilled this eligibility criterion. However, if the employee never does obtain a certificate, they will not have an entitlement to family caregiver leave.

The employee may wish to use the Ministry's "Medical Certificate to Support Entitlement to Family Caregiver Leave, Family Medical Leave, and/or Critical Illness Leave" form when obtaining the medical certificate. It is available on the Ministry of Labour's website.

Period over which a certificate will support absences as family caregiver leave

A medical certificate will authorize absences as protected family caregiver leave absences (up to eight weeks per calendar year) from the date it is issued until the end of the calendar year in which it was issued. However, if the certificate sets out a period over which the individual has / will be expected to have a serious medical condition that is different from the period between the date it is issued to the end of the calendar year, the period set out in the certificate determines the period over which absences can be protected as family caregiver leave.

The period in the certificate could:

- Protect absences that took place before the certificate was issued, including those in the prior calendar year;
- Extend the period over which absences will be protected to beyond the end of the calendar year in which the certificate was issued; or
- Shorten the period over which absences will be protected to prior to the end of the calendar year in which the certificate was issued.

Examples:

1. A certificate was issued September 1, 2017. It was silent on the date the individual's serious medical condition arose, and on the date it is expected to end. That certificate will support absences as family caregiver leave - up to eight weeks per calendar year – during the period between September 1, 2017 to December 31, 2017.
2. A certificate was issued January 1, 2017. It stated that the individual's serious medical condition arose on October 1, 2016 and is expected to last until April 1, 2017. That certificate will support absences as family caregiver leave as follows:
    - Up to eight weeks during the period between October 1, 2016 and December 31, 2016; and
    - Up to eight weeks during the period between January 1, 2017 and April 1, 2017.
3. A certificate was issued September 1, 2017. It was silent on the date the individual's serious medical condition arose, and states that the serious medical condition is expected to last until April 1, 2018. That certificate will support absences as family caregiver leave as follows:
    - Up to eight weeks during the period between September 1, 2017 and December 31, 2017; and
    - Up to eight weeks during the period between January 1, 2018 and April 1, 2018.

Stating that the individual has a serious medical condition

The certificate must name the individual and state that they have a serious medical condition. Pursuant to s. 49.3(3), a serious medical condition includes a condition that is chronic or episodic. There is no requirement that the note specify what the medical condition is; it need only indicate that it is "serious".

It is for the health practitioner, and no one else, to make an assessment as to whether the individual's medical condition is serious; if they issue a certificate stating that the individual has a serious medical condition, the s. 49.3(2) requirement is fulfilled. In other words, it is not an employment standards officer's role to determine whether the individual does in fact have a serious medical condition.

It is Program policy that a certificate will not satisfy the eligibility criteria if it names or describes the medical condition without explicitly stating that it is serious. Note, however, that nothing in the ESA 2000 prevents the employee in question from returning to the health practitioner and obtaining another certificate that does state that the family member concerned has a medical condition that is serious. It is Program policy that this eligibility criterion will be met if the certificate does not contain the word “serious” but instead contains words that are synonymous with the notion that the individual could die or is expected to die. Although there is no requirement that the individual be expected to die in order for the employee to have an entitlement to family caregiver leave, this policy recognizes that any illness or injury that causes or could cause the individual to die is serious. So, for example, if the certificate contains the words "life-threatening" or "terminally ill", or something else that is synonymous with the expectation that the individual could die or is expected to die, this criterion will be met.

An employee's entitlement to family caregiver leave is in addition to any entitlement the employee may have with respect to the same relative to family medical leave, critical illness leave, personal emergency leave, child death leave, crime-related child disappearance leave, and domestic or sexual violence leave. A single certificate may satisfy the requirements for a certificate under more than one leave. For example, a single certificate that indicates that a named individual has a serious medical condition with a significant risk of death occurring within a period of 26 weeks will satisfy the requirements for both family medical leave (which is available only if the individual has a serious medical condition with a significant risk of

dying within 26 weeks) and family caregiver leave; an employee is not required to obtain separate certificates for each leave if the wording used in a single certificate meets the requirements for both leaves.

Application of Subsection (2) – s. 49.3(5)

49.3(5) Subsection (2) applies in respect of the following individuals:

1. The employee's spouse.

2. A parent, step-parent or foster parent of the employee or the employee's spouse.

3. A child, step-child or foster child of the employee or the employee's spouse.

4. A grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse.

5. The spouse of a child of the employee.

6. The employee's brother or sister.

7. A relative of the employee who is dependent on the employee for care or assistance.

8. Any individual prescribed as a family member for the purpose of this section.

This subsection lists the individuals for whom a family caregiver leave can be taken; the list of individuals mirrors the list of individuals with respect to whom personal emergency leave may be taken.

The list is exhaustive. If the person who has the serious medical condition is not an individual referred to in s. 49.3(5), the employee will not be entitled to take family caregiver leave in respect of that person.

The terms "parent" (which indirectly expands the ordinary meaning of child) and "spouse" are defined in ESA Part XIV, s. 45.

With respect to paragraph 7, "a relative of the employee who is dependent on the employee for care or assistance" in paragraph 7, see the discussion of this phrase in ESA Part XIV, s. 50. Section 50 deals with the personal emergency leave provisions, which use the same phrase.

Paragraph 8 refers to "any individual prescribed as a family member for the purpose of this section". At the time of writing no individuals have been prescribed.

Advising Employer – s. 49.3(6); Same – s. 49.3(7)

49.3(6) An employee who wishes to take a leave under this section shall advise his or her employer in writing that he or she will be doing so.

49.3(7) If the employee must begin the leave before advising the employer, the employee shall advise the employer of the leave in writing as soon as possible after beginning it.

Section 49.3(6) requires employees to tell their employers ahead of time that they will be taking family caregiver leave. In circumstances where that cannot be done s. 49.3(7) requires the employee to tell the

employer as soon as possible after beginning the leave. In both cases, the employee is required to advise the employer in writing.

The ESA 2000 requires that the employee advise the employer that they will be beginning a leave; it does not require the employee to specify a return date.

The requirement to advise the employer in writing applies with respect to each part of their eight-week leave.

Example 1

An employee takes the available eight-week leave in two separate four-week blocks. The employee is required to advise the employer in writing that they will be taking leave before (or as soon as possible after, if the notice cannot be given before the leave begins) each four-week block of leave begins. The notice can be given at two separate times, once before each four-week block (or, if notice cannot be given ahead of time, as soon as possible after the beginning of each four-week block). Or, if the employee knows the start dates of both four-week blocks of leave ahead of time, a single written notice setting out the dates would meet this requirement.

Example 2

An employee takes eight one-day leaves. The employee must advise the employer in writing before (or as soon as possible after) each single day of leave is taken. This is so even if some of the single days are taken in the same week. The notice can be given at separate times, or, if the employee knows the start dates of more than one single day of leave ahead of time, a single notice setting out the multiple dates is sufficient notice for each of those dates.

Failure to Advise Employer

An employee does not lose their right to family caregiver leave if they fail to comply with ss. 49.3(6) or (7). An employee's entitlement to family caregiver leave arises by virtue of meeting the eligibility criteria in s. 49.3(2), and it is the Program's position that the failure to advise the employer before or as soon as possible after the leave begins does not negate that entitlement. This approach is consistent with the Program's long-standing policy for all leaves contained in Part XIV where the structures of the entitlement and notice provisions are similar to these. See for example ss. 46(4) (pregnancy leave) and 48(4) (parental leave) in Part XIV.

The question may arise as to whether an employer can penalize an employee for failing to give advance notice that they will be absent from work (as may be required under an employer policy) where the time off is a family caregiver leave under the ESA 2000. Section 49.3(7) provides that "if the employee must begin the leave before advising the employer, the employee shall advise the employer of the leave in writing as soon as possible after beginning it." It is thus clear that the ESA 2000 contemplates that circumstances may arise where the employee would be unable to advise the employer in advance of starting family caregiver leave and that the employee nevertheless has a right to take the leave in such circumstances (although the employee does have an obligation to advise the employer of the leave as soon as possible after beginning it). On the other hand, the failure to give notice in advance of taking leave when the employee could have done so can be the subject of disciplinary action by the employer without violating section 74. However, the following points should be borne in mind:

- The employee's failure to give advance notice does not nullify the right to take family caregiver leave if the qualifying conditions in s. 49.3(2) have been met. In other words, the failure to give advance notice does not have the result that the time taken off by the employee is not family caregiver leave.
- An employer may impose discipline where the employee failed to provide advance notice even though the employee could have done so; however, the reason for the discipline must be because of the failure to give advance notice and not because the employee exercised the right to take leave.
- Likewise, an employer may impose discipline if an employee fails to provide any notice of the leave (before or after the start of the leave). Again, however, the reason for the discipline would have to be because of the failure to provide notice and not because the employee exercised the right to take leave.

Leave Deemed to be Taken in Entire Weeks – s. 49.3(7.1)

49.3(7.1) For the purposes of an employee's entitlement under subsection (4), if an employee takes any part of a week as leave, the employer may deem the employee to have taken one week of leave.

The *Fair Workplaces, Better Jobs Act, 2017,* SO 2017, c 22 added this provision to s. 49.3 on January 1, 2018.

The provision must be read in conjunction with s. 49.3(1), which defines week as seven consecutive days beginning on Sunday and ending on Saturday.

Employees may not need an entire work week to provide the care or support that gave rise to the family caregiver leave, and will only take part of a week off as family caregiver leave. Section 49.3(7.1) allows an employer in this situation to count the part-week off work as an entire week's leave for the purpose of the eight-week leave entitlement. This is the only purpose for which the employer can deem the part work week as an entire week's leave. It cannot deem the employee not to have worked at all during the week. The employee is entitled to be paid for the time that was actually worked, and the hours that were worked will be counted for the purposes of, among other things, determining whether the relevant overtime threshold has been reached, whether the limits on, for example, the daily and weekly hours of work have been reached, and whether the daily, weekly/bi-weekly and in-between shifts rest requirements have been met.

Where an employee takes more than one single day of leave during the same week as defined in s. 49.3(1), the employer may deem only one week of leave to have been used up. For example, if an employee takes a single day of leave on Tuesday, May 29, returns to work on May 30 and 31, and takes another single day of leave on Friday, June 1, only one week will be deemed to have been used up, because those two days fell within the same week.

Note that while this provision allows the employer to deem the employee to have taken one week of leave if the employee takes part of a week as leave, it does not require the employer to do so.

The issue may arise as to whether an employer could exercise its discretion and deem a partial week absence as a full week for some employees, but not for others, or whether this might allow employers to selectively punish employees who have too many absences in violation of the reprisal provisions of the ESA 2000.

The answer will depend on the facts. In particular, why did the employer treat the employees differently? Where an employer deems a full week's absence for some employees, but not for others, it is a question of fact as to whether the employer would be in violation of the ESA 2000. For instance, if the employer counts a one-day family caregiver leave as a full week's leave for Employee A but not for Employee B, who also takes a one-day family caregiver leave because the employer considers Employee B to be a better worker than Employee A, this might be unfair as between employee A and B, but it would not be a violation of the ESA 2000, as it would not be reprisal for exercising a right under the ESA 2000. If, on the other hand, the motivation for the differential treatment was that Employee A frequently took family caregiver leave of only a few days, and the employer assigned a full week's absence to these short leaves as a way to ensure Employee A used up all of their statutory entitlement as soon as possible because the employer found it inconvenient for the employee to be away for many short periods of time, that would be an unlawful reprisal.

Copy of Certificate – s. 49.3(8)

49.3(8) If requested by the employer, the employee shall provide the employer with a copy of the certificate referred to in subsection (2) as soon as possible.

This section provides that if the employer asks the employee for a copy of the certificate referred to in s. 49.3(2), the employee is required to provide it to the employer as soon as possible.

The certificate referred to in s. 49.3(2) is the certificate issued by a qualified health practitioner that states that an individual has a serious medical condition.

An employee's failure to conform to the statutory requirement to provide a copy of the certificate does not disentitle them to the family caregiver leave. It is the Program's view that the requirement to provide a copy of the certificate is not a condition precedent to the entitlement to family caregiver leave; the conditions for entitlement are set out in s. 49.3(2). However, as provided in s. 49.3(2), in order to be entitled to the leave, the employee must obtain a certificate. The leave may begin before the certificate is obtained, but the employee must eventually obtain a certificate in order to be entitled to the leave. If they do not eventually obtain a certificate, they are not entitled to the leave.

s. 49.3(9) – REPEALED

ESA Part XIV Section 49.4 – Critical Illness Leave

Definitions – s. 49.4(1)

49.4(1) In this section,

“adult” means an individual who is 18 years or older;

"critically ill " ,with respect to a minor child or adult , means a minor child or adult whose baseline state of health has significantly changed and whose life is at risk as a result of an illness or injury;

“family member”, with respect to an employee, means the following;

1. **The employee’s spouse.**
2. **A parent, step-parent or foster parent of the employee or the employee’s spouse.**

3. **A child, step-child or foster child of the employee or the employee's spouse.**
4. **A child who is under legal guardianship of the employee or the employee's spouse.**
5. **A brother, step-brother, sister or step-sister of the employee.**
6. **A grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse.**
7. **A brother-in-law, step-brother-in-law, sister-in-law or step-sister-in-law of the employee.**
8. **A son-in-law or daughter-in-law of the employee or the employee's spouse.**
9. **An uncle or aunt of the employee or the employee's spouse.**
10. **A nephew or niece of the employee or the employee's spouse.**
11. **The spouse of the employee's grandchild, uncle, aunt, nephew or niece.**
12. **A person who considers the employee to be like a family member, provided the prescribed conditions, if any, are met.**
13. **Any individual prescribed as a family member for the purpose of this definition.**

"minor child" means an individual who is under 18 years of age;

"qualified health practitioner" means,

(a) a person who is qualified to practise as a physician, a registered nurse or a psychologist under the laws of the jurisdiction in which care or treatment is provided to the individual described in subsection (2) or (5), or

(b) in the prescribed circumstances, a member of a prescribed class of health practitioners;

"week" means a period of seven consecutive days beginning on Sunday and ending on Saturday.

This section defines six terms used in the critical illness leave provisions.

Adult

An "adult" is defined as an individual who is 18 years or older. An employee who meets the eligibility requirements in s. 49.4(5) will be entitled to a leave of up to 17 weeks per s. 49.4(6) to provide care or support to a critically ill adult.

Critically Ill

In order for an employee to be entitled to a critical illness leave, the employee must be providing care or support to a critically ill minor child or adult who is a family member of the employee. "Minor child", "adult" and "family member" are defined terms.

"Critically ill" is defined, with respect to a minor child or adult, to mean the minor child or adult's baseline state of health has significantly changed and whose life is at risk as a result of an illness or injury.

"Baseline state of health" (or of wellness) is a medical term and it is for a qualified health practitioner (also a defined term) to make the assessment as to whether a minor child or adult's "baseline state of health has significantly changed". This same phrase appears in the federal government's policy statement regarding eligibility for "special benefits" for parents of critically ill children under the *Employment*

Insurance Act, SC 1996, c 23, and consistent with the federal government's policy. The Program takes the position that the phrase is intended to exclude a minor child or adult with a chronic illness or condition that is their normal state of health, even if that normal state is considered to be life-threatening in the medium to long term.

However, when an employment standards officer is making a determination as to whether an employee was entitled to critical illness leave, the issue with respect to the critically ill criterion is simply whether a qualified health practitioner has issued a certificate that meets the requirements of s. 49.4(2) or (5); the officer does not inquire as to whether the person in question was one "whose baseline state of health has significantly changed and whose life is at risk as a result of an illness or injury". See the discussion under the heading "Stating that the minor child or adult family member is critically ill". In other words, if a qualified health practitioner has issued such a certificate, the officer does not "go behind it" and make inquiries as to whether the practitioner was actually justified in doing so.

Family Member

This definition lists the individuals for whom an employee is entitled to take a critical illness leave. The list is exhaustive. If the minor child or adult is not in a relationship with the employee as listed in the definition, the employee has no entitlement to critical illness leave. Note that there are two types of critical illness leave, one for a minor child “who is a family member” of the employee, and one for an adult “who is a family member” of the employee. With respect to a critical illness leave for a minor child, the minor child does not have to be the employee’s own child in order for the employee to be entitled to the leave; for example, an employee could take a leave to care for a niece, nephew or grandchild who meets the definition of minor child (see below).

Section 49.4(1) defines the following individuals as family members:

- The employee’s spouse;
- A parent, step-parent or foster parent of the employee or the employee’s spouse;
- A child, step-child or foster child of the employee or the employee’s spouse;
- A child who is under legal guardianship of the employee or the employee’s spouse;
- A brother, step-brother, sister or step-sister of the employee;
- A grandparent, step-grandparent, grandchild or step-grandchild of the employee or employee's spouse;
- A brother-in-law, step-brother-in-law, sister-in-law or step-sister-in-law of the employee;
- A son-in-law or daughter-in-law of the employee or employee's spouse;
- An uncle or aunt of the employee or employee's spouse;
- A nephew or niece of the employee or the employee's spouse;
- The spouse of the employee's grandchild, uncle, aunt, nephew or niece;
- A person who considers the employee to be like a family member, provided the prescribed conditions, if any, are met;
- Any individual prescribed as a family member for the purpose of this definition.

Note that "spouse" includes married same-sex couples, married opposite-sex couples, and couples of the same or opposite sex who live together in a conjugal relationship outside marriage – see the definition of spouse and the discussion at ESA Part XIV, s. 45.

Also note that the family members as defined by s. 49.4(1) do not have to live in Ontario in order for the employee to be eligible for critical illness leave.

With respect to “a person who considers the employee to be like a family member”, the legislation provides that if any conditions are set out in regulation, those conditions must be met. O Reg 535/17 section 1 prescribes the following condition: “the employee must, on the employer’s request, provide the employer with a copy of the document provided to an agency or department of the Government of Canada for the purpose of claiming benefits under the *Employment Insurance Act* (Canada) in which it is stated that the employee is considered to be like a family member.”

The employee must provide a copy of this document whether or not the employee applies or intends to apply for EI benefits to support critical illness leave. See O Reg 535/17 section 1 for more details.

At this time, there are no additional family members that have been prescribed.

Minor Child

In order to be considered a minor child for the purpose of entitlements to critical illness leave, the individual must have been under 18 years of age on the first day of the period during which the child requires care or support as indicated in the certificate issued by the qualified health practitioner. The fact that the critically ill individual turns 18 years old after the first day of this period does not extinguish the employee's right to the 37 weeks of leave. Also see subsections (13) and (14) below in this section for guidance on the situation where an employee takes a leave in relation to a minor child who turns 18 during the leave.

Qualified Health Practitioner

In order for an employee to be entitled to critical illness leave, a "qualified health practitioner" must issue a certificate stating that the minor child or adult is critically ill and requires the care or support of one or more family members and setting out the period during which the minor child or adult requires the care or support. The term "qualified health practitioner" is defined for the purposes of critical illness leave as:

a) A person who is qualified to practise as a physician, a registered nurse or a psychologist under the laws of the jurisdiction in which care or treatment is provided to the individual described in subsection (2) or (5), or
b) In the prescribed circumstances, a member of a prescribed class of health practitioners.

Where care or treatment is provided in Ontario:

- "A person who is qualified to practise as a physician" means a member of the College of Physicians and Surgeons of Ontario (this includes psychiatrists);
- "A person who is qualified to practise as a registered nurse" means in accordance with O Reg 275/94 of the Nursing Act, 1991, SO 1991, c 32, a member of the College of Nurses of Ontario who holds a general or extended certificate of registration as a registered nurse (nurse practitioners hold extended certificates); and
- "A person who is qualified to practise as a psychologist" means an individual who is a member of the College of Psychologists of Ontario.

Where care or treatment is provided in a jurisdiction other than Ontario the question of whether the person providing it is a qualified health practitioner is determined with reference to the laws of that other jurisdiction.

At the time of writing, there are no prescribed circumstances or prescribed classes of health practitioners.

Week

"Week" means a period of seven consecutive days beginning on Sunday and ending on Saturday. For the purposes of critical illness leave, week will always be Sunday to Saturday, even if the employer's work week is different.

Entitlement to Leave – Critically Ill Minor Child – s. 49.4(2)

49.4(2) An employee who has been employed by their employer for at least six consecutive months is entitled to a leave of absence without pay to provide care or support to a critically ill minor child who is a family member of the employee if a qualified health practitioner issues a certificate that,

(a) states that the minor child is a critically ill minor child who requires the care or support of one or more family members; and

(b) sets out the period during which the minor child requires the care or support.

This subsection provides for an entitlement to critical illness leave in respect of a minor child if the eligibility requirements set out in the subsection are met (note the entitlement provisions with respect to a critical illness leave for an adult are set out in subsection (5) below).

Employed by their Employer for at Least Six Consecutive Months

To be eligible for critical illness leave, the employee has to have been employed for at least six consecutive months prior to the first day of the leave. It is not necessary that the employee have been actively working for the six-month period, so long as they were an employee during this time. For example, the employee could have been off receiving short-term disability benefits, on vacation, or on layoff during this period. The employee could also be on another statutory leave, including, for example, a family caregiver leave to care for the critically ill minor child during the period.

To Provide Care or Support to a critically ill minor child who is a family member of the employee

Critical illness leave under subsection (2) is for providing "care or support" to the critically ill minor child who is a family member of the employee. Care or support could include, for example, providing psychological or emotional support to the child, or providing or participating in their personal care. The care or support must be provided to a critically ill minor child (i.e. an individual under 18) who is a family member of the employee. This could be the employee’s child but is not limited to this relationship. It could be taken for any of the relationships listed in the definition of family member in s. 49.4(1) such as the employee’s grandchild, niece, nephew etc.

Qualified Health Practitioner Issues a Certificate

An employee is eligible for critical illness leave if a qualified health practitioner issues a certificate stating that a minor child who is a family member of the employee is critically ill and requires the care or support of one or more family members, and setting out the period during which the child requires the care or support.

Qualified Health Practitioner

See the discussion of this term at subsection (1) above.

Issues a Certificate

Because s. 49.4(2) uses the present tense "issues" (as opposed to "has issued"), an employee may begin a critical illness leave before a certificate is issued.

For example, an employee might obtain the certificate soon after beginning the leave, or after the leave is over, or – if the employer engages in a reprisal against the employee – soon after the reprisal or when asked to by an employment standards officer during the course of a reprisal investigation. In all of these cases, because a certificate ultimately was issued, the employee will be considered to have fulfilled this eligibility criterion. However, if the employee never does obtain a certificate, they will not have an entitlement to critical illness leave.

The employee may wish to use the Ministry's "Medical Certificate to Support Entitlement to Family Caregiver Leave, Family Medical Leave, and/or Critical Illness Leave" form when obtaining the medical certificate. It is available on the Ministry of Labour's website.

If an employee is applying for Employment Insurance (EI) benefits in respect of the same critically ill minor child, a copy of the medical certificate submitted to Employment and Social Development Canada may also be used for the purposes of critical illness leave.

Stating that the minor child is a critically ill minor child

The certificate must name the minor child, and indicate that they are critically ill (or, given the s. 49.4(1) definition of critically ill, that they have been critically injured). There is no requirement that the certificate specify what the illness (or injury) is; it need only indicate that it is critical.

It is for the health practitioner, and no one else, to make an assessment as to whether the minor child is critically ill (see the discussion of the definition of critically ill in subsection (1) above). If they issue a certificate stating that the minor child is a critically ill (or injured) minor child, the s. 49.4(2) requirement is fulfilled. In other words, it is not an employment standards officer's role to determine whether the minor child is in fact critically ill or injured.

It is Program policy that a certificate will not satisfy the eligibility criteria if it states what illness or injury the minor child has without also stating that the minor child is a critically ill or critically injured minor child (or that the illness or injury from which the minor child is suffering is critical). This is so even if the certificate names an illness or injury that sounds critical. (Note, however, that nothing in the ESA 2000 prevents the employee in question from returning to the health practitioner and obtaining another certificate that does state that the minor child is a critically ill - or injured – minor child, or that the illness or injury from which the child is suffering is critical). It is Program policy that this eligibility criteria will be met if the certificate doesn’t contains the words critically ill (or critical illness) or critically injured (or critical injury) but instead contains words that are synonymous with the notion that the child's life is at risk. So, for example, if the certificate contains the words "life threatening", "terminally ill", or something else that is synonymous with the expectation that the child could die or is expected to die, this criterion will be met. Furthermore, it is Program policy that the eligibility criteria will be met if the certificate doesn’t contain the specific words minor child but instead references only a child where some other evidence is available to establish that the child is under the age of 18, or where the age of the individual is contained in the certificate and they are under 18 years of age.

An employee's entitlement to critical illness leave is in addition to any entitlement the employee may have with respect to the same child to family medical leave, family caregiver leave, personal emergency leave, and child death leave, crime-related child disappearance leave, domestic or sexual violence leave and personal emergency leave. A single certificate may satisfy the requirements for a certificate under more than one leave. An employee is not required to obtain separate certificates for each leave if the wording used in a single certificate meets the requirements for more than one leave.

Who requires the care or support of one or more family members

The certificate must state that the critically ill (or injured) minor child requires the care or support of at least one family member. Family member is a defined term.

Sets out the period during which the minor child requires the care or support

The certificate must set out the period during which the minor child requires the care or support of one or more family members. The period would typically be described by specifying a start date and an end date. However, in some cases it may not be possible to specify an end date, and in other cases it may be that the health practitioner does not foresee the child ever recovering. Recognizing this, the Program takes the position that it is acceptable if the certificate, instead of specifying an end date, states that care or support will be required indefinitely or that it will be required to the end of the minor child's life.

Same – s. 49.4(3)

49.4(3) Subject to subsections (4), an employee is entitled to take up to 37 weeks leave under this section to provide care or support to a critically ill minor child.

This subsection establishes what the critical illness leave entitlement is under subsection (2): up to 37 weeks of leave to provide care or support to the critically ill minor child who is a family member of the employee: up to 37 weeks of leave .

The subsection must be read in conjunction with s. 49.4(14), which provides for additional leaves in certain circumstances.

Nothing in the ESA 2000 requires that the weeks of critical illness leave be taken consecutively. Further, unlike the case with family medical leave, the ESA 2000 does not require that critical illness leave be taken in periods of entire weeks. However, because the critical illness leave entitlement is expressed in terms of a number of weeks, rather than a number of days (as is the case with personal emergency leave), it is Program policy that the entitlement is that there are 37 weeks in which the employee may take leave and thus where an employee takes any time off during a week as critical illness leave – even as little as one day – they are considered to have used up one week of their 37 weeks of entitlement.

Additionally, because the ESA 2000 does not require that critical illness leave be taken in periods of entire weeks, s. 52.1 of the ESA 2000 – which applies only to leaves that must be taken in entire weeks – does not apply*.

In summary, it is Program policy that the entitlement to critical illness leave in relation to a minor child who is a family member of the employee is as follows:

- There are 37 weeks (which is defined as Sunday to Saturday) in which an employee is entitled to be on critical illness leave.
- The 37 weeks in which the leave may be taken can be consecutive, or they can be separated.

- The employee is entitled to be on leave only when the employee is providing care or support to the critically ill minor child.
- The employee may take leave for periods less than a full week (e.g. single days, at the beginning, middle, or end of a week), but if they do, they are considered to have used up one week of their 37-week entitlement. If the employee is on leave for two or more periods within the same week (e.g. on leave on Monday and on Thursday of the same week), only one week of the 37-week entitlement is used up.
- The employer cannot require the employee to take an entire week of leave, cannot prevent the employee from working prior to taking a single day(s) of leave during a week, and cannot prevent the employee from returning to work after a single day(s) of leave during the week.

This subsection must be read in conjunction with other relevant subsections of s. 49.4, particularly (4)(8)(9)-(10), (16) and (19) which address the following issues/scenarios:

- Subsection (4): the entitlement if the period during which the minor child requires care or support is less than 37 weeks.
- Subsections (8) and (9): the latest date the employee can remain on leave.
- Subsection (10): the latest date the employee can remain on leave if a minor child dies.
- Subsection (16): eligibility for additional leaves.
- Subsection (19): deviation from the plan originally provided to the employer setting out when leave would be taken.

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*Section 52.1, which applies to family medical leave (since *that* leave is a leave that must be taken in periods of entire weeks) provides that an employee who ceases to provide care or support before the end of a week is entitled to stay on family medical leave for the rest of the week and can return to work before the end of the week only if the employer agrees. In contrast, in the case of critical illness leave, because section 52.1 does not apply, an employee who ceases to provide care or support before the end of a week is required to return to work and the employer has no right to prevent the employee from returning to work.

Same – Period Less Than 37 Weeks – s. 49.4(4)

49.4(4) If the certificate described in subsection (2) sets out a period of less than 37 weeks, the employee is entitled to take a leave only for the number of weeks in the period specified in the certificate.

While subsection (3) provides that an employee is entitled to take up to 37 weeks of critical illness leave to provide care or support to a critically ill minor child, subsection (4) provides an exception where the medical certificate indicates that the number of weeks during which the minor child will require care or support is a number less than 37 weeks. In that case, the employee can only take a leave for the number of weeks indicated. (Note, however, that if the minor child is still critically ill and in need of care or support after the period specified in the certificate has expired, the employee may be eligible for a further leave pursuant to subsection (14)).

Entitlement to Leave – Critically Ill Adult – s. 49.4(5)

49.4(5) An employee who has been employed by their employer for at least six consecutive months is entitled to a leave of absence without pay to provide care or support to a critically ill adult who is a family member of the employee if a qualified health practitioner issues a certificate that,

a) states that the adult is a critically ill adult who requires the care or support of one or more family members; and

b) sets out the period during which the adult requires the care or support.

This subsection provides for an entitlement to critical illness leave in respect of an adult if the eligibility requirements set out in the subsection are met. (Note the entitlement provisions with respect to a critical illness leave for a minor child are set out in subsection (2) above.)

Employed by their Employer for at Least Six Consecutive Months

To be eligible for critical illness leave, the employee has to have been employed for at least six consecutive months prior to the first day of the leave. It is not necessary that the employee have been actively working for the six-month period, so long as they were an employee during this time. For example, the employee could have been off receiving short-term disability benefits, on vacation, or on layoff during this period. The employee could also be on another statutory leave, including, for example, a family caregiver leave to care for the critically ill adult during the period.

To Provide Care or Support to a critically ill adult who is a family member of the employee

Critical illness leave under subsection (5) is for providing care or support to the critically ill adult who is a family member of the employee. This could include, for example, providing psychological or emotional support to the adult, or providing or participating in their personal care. The list of family members for whom the employee can take the leave is set out in the definition of “family member” in subsection 49.4(1).

Qualified Health Practitioner Issues a Certificate

An employee is eligible for critical illness leave if a qualified health practitioner issues a certificate stating that an adult who is a family member of the employee is critically ill and requires the care or support of one or more family members, and setting out the period during which the adult requires the care or support.

a) Qualified Health Practitioner

See the discussion of this term at subsection (1) above.

b) Issues a Certificate

Because s. 49.4(5) uses the present tense "issues" (as opposed to "has issued"), an employee may begin a critical illness leave before a certificate is issued.

For example, an employee might obtain the certificate soon after beginning the leave, or after the leave is over, or – If the employer engages in a reprisal against the employee – soon after the reprisal or when asked to by an employment standards officer during the course of a reprisal investigation. In all of these cases, because a certificate ultimately was issued, the employee will be considered to have fulfilled this

eligibility criterion. However, if the employee never does obtain a certificate, they will not have an entitlement to critical illness leave.

The employee may wish to use the Ministry's "Medical Certificate to Support Entitlement to Family Caregiver Leave, Family Medical Leave, and/or Critical Illness Leave" form when obtaining the medical certificate. It is available on the Ministry of Labour's website.

If an employee is applying for Employment Insurance (EI) benefits in respect of the same critically ill adult, a copy of the medical certificate submitted to Employment and Social Development Canada may also be used for the purposes of critical illness leave.

c) Stating that the adult is a critically ill adult

The certificate must name the adult, and indicate that they are critically ill (or, given the s. 49.4(1) definition of critically ill, that they have been critically injured). There is no requirement that the certificate specify what the illness (or injury) is; it need only indicate that it is critical.

It is for the health practitioner, and no one else, to make an assessment as to whether the adult is critically ill (see the discussion of the definition of critically ill in subsection (1) above). If they issue a certificate stating that the adult is a critically ill (or injured) adult, the s. 49.4(5) requirement is fulfilled. In other words, it is not an employment standards officer's role to determine whether the adult is in fact critically ill or injured.

It is Program policy that a certificate will not satisfy the eligibility criteria if it states what illness or injury the adult has without also stating that the adult is a critically ill or critically injured adult (or that the illness or injury from which the adult is suffering is critical). This is so even if the certificate names an illness or injury that sounds critical (note, however, that nothing in the ESA 2000 prevents the employee in question from returning to the health practitioner and obtaining another certificate that does state that the adult is a critically ill - or injured – adult, or that the illness or injury from which the adult is suffering is critical). It is Program policy that this eligibility criteria will be met if the certificate doesn’t contains the words critically ill (or critical illness) or critically injured (or critical injury) but instead contains words that are synonymous with the notion that the adult's life is at risk. So, for example, if the certificate contains the words "life threatening", "terminally ill", or something else that is synonymous with the expectation that the adult could die or is expected to die, this criterion will be met.

An employee's entitlement to critical illness leave is in addition to any entitlement the employee may have with respect to the same adult to domestic or sexual violence leave, family medical leave, family caregiver leave or personal emergency leave. A single certificate may satisfy the requirements for a certificate under more than one leave. An employee is not required to obtain separate certificates for each leave if the wording used in a single certificate meets the requirements for more than one leave.

d) Who requires the care or support of one or more family members

The certificate must state that the critically ill (or injured) adult requires the care or support of at least one family member. Family member is a defined term.

e) Sets out the period during which the adult family member requires care or support

The certificate must set out the period during which the adult requires the care or support of one or more family members. The period would typically be described by specifying a start date and an end date. However, in some cases it may not be possible to specify an end date, and in other cases it may be that

the health practitioner does not foresee the adult ever recovering. Recognizing this, the Program takes the position that it is acceptable if the certificate, instead of specifying an end date, states that care or support will be required indefinitely or that it will be required to the end of the adult's life.

Same – s. 49.4(6)

49.4(6) Subject to subsection (7), an employee is entitled to take up to 17 weeks of leave under this section to provide care or support to a critically ill adult.

This subsection establishes what the critical illness leave entitlement is under subsection (5): up to 17 weeks of leave to provide care or support to the critically ill adult who is a family member of the employee.

The subsection must be read in conjunction with s. 49.4(15), which provides for additional leaves in certain circumstances.

Nothing in the ESA 2000 requires that the weeks of critical illness leave be taken consecutively. Further, unlike the case with family medical leave, the ESA 2000 does not require that critical illness leave be taken in periods of entire weeks. However, because the critical illness leave entitlement is expressed in terms of a number of weeks, rather than a number of days (as is the case with personal emergency leave), it is Program policy that the entitlement is that there are 17 weeks in which the employee may take leave and thus where an employee takes any time off during a week as critical illness leave – even as little as one day – they are considered to have used up one week of their 17 weeks of entitlement.

Additionally, because the ESA 2000 does not require that critical illness leave be taken in periods of entire weeks, s. 52.1 of the ESA 2000 – which applies only to leaves that must be taken in entire weeks – does not apply.

In summary, it is Program policy that the entitlement to critical illness leave in relation to an adult who is a family member of the employee is as follows:

- There are 17 weeks (which is defined as Sunday to Saturday) in which an employee is entitled to be on critical illness leave.
- The 17 weeks in which the leave may be taken can be consecutive, or they can be separated.
- The employee is entitled to be on leave only when the employee is providing care or support to the critically ill adult.
- The employee may take leave for periods less than a full week (e.g. single days, at the beginning, middle, or end of a week), but if they do, they are considered to have used up one week of their 17-week entitlement. If the employee is on leave for two or more periods within the same week (e.g. on leave on Monday and on Thursday of the same week), only one week of the 17-week entitlement is used up.
- The employer cannot require the employee to take an entire week of leave, cannot prevent the employee from working prior to taking a single day(s) of leave during a week, and cannot prevent the employee from returning to work after a single day(s) of leave during the week.

This subsection must be read in conjunction with other relevant subsections of s. 49.4, particularly (7)-(10), (15) and (19) which address the following issues/scenarios:

- Subsection (7): the entitlement if the period during which the adult requires care or support is less than 17 weeks.

- Subsection (8) and (9): the latest date the employee can remain on leave.
- Subsection (10): the latest date the employee can remain on leave if an adult dies.
- Subsection (15): eligibility for "additional leaves".
- Subsection (19): deviation from the plan originally provided to the employer setting out when leave would be taken.

Period of Less Than 17 Weeks – s. 49.4(7)

(7) If the certificate described in subsection (5) sets out a period of less than 17 weeks, the employee is entitled to take a leave only for the number of weeks in the period specified in the certificate.

While subsection (6) provides that an employee is entitled to take up to 17 weeks of critical illness leave to provide care or support to a critically ill adult, subsection (7) provides an exception where the medical certificate indicates that the number of weeks during which the adult will require care or support is a number less than 17 weeks. In that case, the employee can only take a leave for the number of weeks indicated (note, however, that if the adult is still critically ill and in need of care or support after the period specified in the certificate has expired, the employee may be eligible for a further leave pursuant to subsection (15)).

When Leave Must End – s. 49.4(8); Limitation Period – s. 49.4(9)

49.4(8) Subject to subsection (9), a leave under this section ends no later than the last day of the period specified in the certificate described in subsection (2) or (5).

(9) If the period specified in the certificate described in subsection (2) or (5) is 52 weeks or longer, the leave ends no later than the last day of the 52-week period that begins on the earlier of,

(a) the first day of the week in which the certificate is issued; and

(b) the first day of the week in which the minor child or adult in respect of whom the certificate was issued became critically ill.

These subsections establish the latest date an employee can remain on critical illness leave; in other words, they set out the date the window for taking a critical illness leave closes. These subsections must be read in conjunction with the provisions that set out the maximum length of the leave, which is 37 weeks in relation to a minor child, and 17 weeks in relation to an adult. These subsections must also be read in conjunction with subsections (9) and (10), which establish the latest date an employee can remain on leave if the minor child or adult dies while the employee is on leave. In addition, regard should be had to subsections (14), (15) and (16); those subsections provide for further leaves if a critically ill minor child or adult remains critically ill.

Window for Taking Leave Closes on Last Day for Care/Support Set Out in Certificate – s. 49.4(8)

The general rule is that an employee's right to be on leave ends on the last day of the period the minor child or adult requires care or support as specified in the certificate issued by the qualified health practitioner.

If Care/Support is 52 Weeks or More: Window for Taking Leave Ends at End of 52nd Week – s. 49.4(9)

If the certificate states that the minor child or adult requires care or support for a period of 52 weeks or longer, the employee's right to be on leave ends on the last day of the 52-week period that starts the earlier of:

- The first day of the week the certificate was issued; and
- The first day of the week the minor child or adult became critically ill.

Example:

- A minor child became critically ill on Friday, February 8.
- A qualified health practitioner issued a certificate on Tuesday, February 12.
- The certificate stated that the child will require care or support indefinitely.

Pursuant to subsection (9), the employee's right to be on leave will end on the last day of the 52-week period that starts the first day of the week the child became critically ill.

The definition of a week is a period of seven consecutive days beginning on Sunday and ending on Saturday (see s. 49.4(1)).

Accordingly:

- The first day of the week the minor child became critically ill is Sunday, February 3.
- The employee's right to be on leave ends on the last day of the 52-week period that starts Sunday, February 3.
- That day is the 52nd Saturday that follows Sunday, February 3, which will be Saturday, February 1 (in a non-leap year).

Note, however, that while the right to be on the leave ends on Saturday, February 1, the employee may qualify for an additional leave after the original leave ends, in accordance with subsection (16).

Death of Minor Child or Adult – s. 49.4(10)

49.4(10) If a critically ill minor child or adult dies while an employee is on a leave under this section, the employee's entitlement to be on leave under this section ends on the last day of the week in which the minor child or adult dies.

This subsection establishes the latest date an employee can be on critical illness leave if the critically ill minor child or adult for whom the leave was taken dies. In effect, it establishes an exception to the rules regarding the last day an employee can be on leave that are established by subsections (8) and (9).

Subsection (10) provides that if an employee is on critical illness leave and the minor child or adult dies, the employee's right to be on leave ends at the end of the week (which, in accordance with the definition of a week in s. 49.4(1), will be a Saturday) in which the person dies.

Note that if an employee's minor child dies, the employee will generally be entitled to take child death leave per s.49.5. In other cases, the employee may be entitled to take personal emergency leave if the individual who dies is an individual listed in s. 50(2).

Total Amount of Leave – Critically Ill Minor Child – s. 49.4(11)

49.4(11) The total amount of leave that may be taken by one or more employees under this section in respect of the same critically ill minor child is 37 weeks.

Total Amount of Leave – Critically Ill Adult – s. 49.4(12)

49.4(12) The total amount of leave that may be taken by one or more employees under this section in respect of the same critically ill adult is 17 weeks.

Sharing the Leave

Under subsection (11) and (12), the maximum amount of leave available to an employee or employees in respect of the same minor child or adult who is critically ill is 37 weeks in relation to a minor child, and 17 weeks in relation to an adult.

Where more than one employee takes critical illness leave with respect to the same person the 37 or 17 week maximum (whichever applies) has to be shared by the employees. The employees who are sharing the leave can be on leave at the same time, or at different times; the ESA 2000 does not impose any restrictions in this regard (the sharing requirement applies whether or not the employees work for the same employer).

The sharing requirement applies only where the two or more employees take leave under this section, i.e., s. 49.4 of the ESA 2000. An employee who takes a leave similar to critical illness leave pursuant to a contractual provision that provides a greater right than s. 49.4 (which thus prevails over s. 49.4 pursuant to s. 5(2) of the ESA 2000) is not taking leave under this section; therefore the amount of leave that employee takes does not reduce the amount of leave that other employees can take in respect of the same minor child or adult under s. 49.4.

Likewise, an employee who takes a leave similar to ESA 2000 critical illness leave pursuant to the employment standards legislation of another jurisdiction is not taking leave under this section. So, for example, if one family member of a critically ill minor child works in Ontario and the other family member works in, say, Manitoba, and they each take critical illness leave to care for the minor child pursuant to their respective provincial employment standards statutes, the Ontario employee has the full 37-week leave entitlement; they will not have to share the 37 weeks with the other family member.

Subsection (11) and (12) Do Not Displace Limits Set out in Subsections (4) or (7)

Note that in accordance with principles of statutory interpretation, s. 49.4 (11) and (12), like other subsections in s. 49.4, must be read within the context of s. 49.4 as a whole; it does not, therefore, displace the limits set out in s. 49.4(4) and (7). Section 49.4(4) states that if the certificate issued by the qualified health practitioner specifies the number of weeks the critically ill minor child will require care or support as a number less than 37, then it is that number of weeks of leave (and not 37 weeks) that the employee will be entitled to. S. 49.4(7) performs the same function for a certificate issued in relation to a critically ill adult that provides a lesser number of weeks than 17. Simply put, s. 49.4(11) and (12) do not

give an employee or employees a longer period of leave than the period specified in the certificate where that period is less than 37 weeks for a minor child or 17 weeks for an adult.

Additional Leaves

Lastly, subsections (11) and (12) also apply with respect to any additional leaves taken under subsections (14) or (15). Subsection (14) allows for additional leaves of up to 37 weeks after each 52-week period described in subsection (9) for a minor child, if the eligibility criteria are met for a second, third, etc. time. Subsection (15) allows for additional leaves of up to 17 weeks after each 52-week period described in subsection (9) for an adult, if the eligibility criteria are met for a second, third, etc. time.

Subsection (13) below addresses the situation where a minor child turns 18 within 52 weeks of the certificate issuance and for whom the full 37 weeks of leave have not been taken.

Limitation Where Child Turns 18 – s. 49.4(13)

49.4(13) If an employee takes leave in respect of a critically ill minor child under subsection (2), the employee may not take leave in respect of the same individual under subsection (5) before the 52-week period described in subsection (9) expires.

This subsection addresses the scenario where an employee begins a leave in relation to a minor child who turns 18 before the full entitlement to the leave is taken. In this case, the employee will be entitled to take the full duration of the original 37-week leave, but will not be entitled to a leave under subsection (5) until the original limitation period established by subsection (9) has expired.

For example, if a certificate is issued under subsection (2) on Thursday, January 5th, the 52-week period described in subsection (9) will start on Sunday, January 1. If the minor child turns 18 on March 1, the employee remains entitled to take up to 37 weeks of leave within the 52-week period between January 1 and December 31. However, if the employee uses all 37 weeks by September 30, and the now-adult family member remains critically ill, the employee will have to wait until January 1 for a new certificate to be issued under subsection (5) and become entitled to a new leave of 17 weeks in relation to a critically ill adult.

Further Leave – Critically Ill Minor Child – s. 49.4(14)

49.4(14) If a minor child in respect of whom an employee has taken a leave under this section remains critically ill while the employee is on leave or after the employee returns to work, but before the 52-week period described in subsection (9) expires, the employee is entitled to take an extension of the leave or a new leave if,

(a) a qualified health practitioner issues an additional certificate described in subsection (2) for the minor child that sets out a different period during which the minor child requires care or support;

(b) the amount of leave that has been taken and the amount of leave the employer takes under this subsection does not exceed 37 weeks in total; and

(c) the leave ends no later than the last day of the 52-week period described in subsection (9).

In general terms, subsection (14) is meant to result in an appropriate solution where the health practitioner's certificate that was originally issued did not accurately predict (i.e. underestimated) the period during which the minor child would require care or support.

Subsection (14) addresses the situation where a minor child remains critically ill and requires care or support beyond the period specified in the certificate, but only up to the end of the 52-week period (subsection (16) addresses the situation where a minor child remains critically ill beyond the 52 weeks. In general terms, subsection (16) permits employees to take additional leaves of up to 37 weeks in subsequent 52-week periods).

This subsection – subsection (14) – addresses the situation in which:

- An employee wishes to extend their leave for a period longer than that which they originally intended to take because the minor child remains critically ill; or
- An employee who has returned to work at the end of their leave wishes to take a new leave because the minor child remains critically ill.

In this situation, s. 49.4(14) allows the employee to do so, subject to certain limitations:

- First, a qualified health practitioner must issue a subsequent certificate after the first certificate was issued setting out a care or support period that differs from the period set out in the first certificate. It will typically be just the end date of the care or support period that will be different in the subsequent certificate; there is no requirement that both the start date and the end date be different in order to meet this requirement (the rationale here, presumably, is that the period for which the employee originally planned to take leave was based on a certificate that had underestimated the length of the period for which the minor child would require care or support).
- Second, the total amount of leave taken must not exceed 37 weeks.
- Third, the leave must end no later than the last day of the 52-week period that begins on the earlier of (a) the first day of the week in which the first certificate was issued and (b) the first day of the week in which the minor child became critically ill*.

Child Turns 18 Before Subsequent Certificate Issued

An employee does not become ineligible for a further leave pursuant to subsection (14) solely because the minor child turned 18 before a subsequent certificate is issued.

Example:

- A health practitioner's certificate is issued stating that a child requires care or support from January 1 to February 1.
- The child turns 18 on January 15.
- He continues to require care or support on February 1, and a subsequent certificate is issued on February 1 stating that he requires care or support until June 1.

The employee in this situation will be entitled to a further leave, despite the fact that the individual in respect of whom the leave is being taken is 18 years old (and no longer falls within the definition of a minor child in s. 49.4) at the point the employee is qualifying for a further leave. Note that subsection (13) will not prevent an employee from becoming eligible to take further leave under subsection (14). As stated above, subsection (14) is meant to result in an appropriate solution where the health practitioner's

certificate underestimated the period during which the child or children require care or support. Had the first certificate accurately predicted the period of care or support, the employee would have been eligible for leave until June 1. Note, however, that an employee will be ineligible for an additional leave pursuant to subsection (16) if the child is 18 years old at the time the employee is attempting to qualify for an additional leave. This is because subsection (16), unlike subsection (14), provides that “the requirements of this section apply” to the additional leave, and this includes the requirement that the individual in respect of whom the employee wants to take the leave meet the definition of minor child by being under 18 years of age. In that case, the employee could qualify for a new, shorter 17 week leave on the basis of a certificate issued pursuant to subsection (5), but the employee would need to wait until the original 52-week period started by the issuance of the most recent certificate had elapsed per subsection (13).

There is no limit to the number of extensions or new leaves an employee is entitled to under s. 49.4(14), but the subsection does limit the total number of weeks of leave that can be taken in the 52-week period to no more than 37 weeks and requires that the end of the leave or leaves be no later than the last day of the 52-week period that begins on the earlier of (a) the first day of the week in which the first certificate was issued and (b) the first day of the week in which the minor child became critically ill. Note, however, that this does not prevent an employee from taking additional leaves under subsection 49.4(16) after the 52-week period expires.

Example: Minor Child – Two Certificates Whose Periods Total 37 Weeks or Less

- A minor child became critically ill on January 1.
- A qualified health practitioner issued a certificate on January 1.
- The certificate stated that the child will require care or support for four weeks (until January 28).
- The child was still critically ill on January 28.
- A qualified health practitioner issued another certificate on January 29, stating that the child will require care or support for another four weeks (until February 25).
- The child was not critically ill beyond February 25.

In this scenario, the employee would be entitled to take critical illness leave pursuant to subsection (2) during the four week period of January 1 to January 28, and a "further" four-week leave pursuant to subsection (14) during the period January 29 to February 25.

This provides the employee the same entitlement they would have had if the first certificate accurately predicted the period the child would require care or support.

Example: Minor Child - Two Certificates Whose Periods Total Between 37 and 52 Weeks

- A minor child became critically ill on January 1.
- A qualified health practitioner issued a certificate on January 1.
- The certificate stated that the child will require care or support for 30 weeks (until July 29).
- The child was still critically ill on July 29.
- A qualified health practitioner issued another certificate on July 30, stating that the child will require care or support for another ten weeks (until October 6).
- The child was not critically ill beyond October 6.

In this scenario, the employee would be entitled to take critical illness leave pursuant to subsection (2) during the 30-week period January 1 to July 29, and a further leave pursuant to subsection (14) during the 10-week period July 30 to October 6. However, pursuant to paragraph (b) of subsection (14), the employee is only entitled to be on leave for a maximum of 37 weeks during that 40-week period.

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*This is the meaning of the reference in subsection 49.4(14) to the “52-week period described in subsection (9)”. It does **not** mean that the first certificate must have specified a care or support period of 52 weeks or longer. Among other things, this also means that if a medical certificate obtained by an employee specified a period of less than 37 weeks, but the employee then obtained a second medical certificate that specified a longer period than was specified in the first certificate, the employee could extend the leave or take a new leave, provided that the total amount of leave taken did not exceed 37 weeks and that the leave ends no later than the last day of the 52-week period that begins on the earlier of (a) the first day of the week in which the first certificate was issued and (b) the first day of the week in which the minor child became critically ill.

Further Leave – Critically Ill Adult – s. 49(15)

49.4(15) If an adult in respect of whom an employee has taken a leave under this section remains critically ill while the employee is on leave or after the employee returns to work, but before the 52-week period described in subsection (9) expires, the employee is entitled to take an extension of the leave or a new leave if,

> **(a)a qualified health practitioner issues an additional certificate described in subsection (5) for the adult that sets out a different period during which the adult requires care or support;**
>
> **(b) the amount of leave that has been taken and the amount of leave the employee takes under this subsection does not exceed 17 weeks in total; and**
>
> **(c) the leave ends no later than the last day of the 52-week period described in subsection (9).**

In general terms, subsection (15) is meant to result in an appropriate solution where the health practitioner's certificate that was originally issued did not accurately predict (i.e. underestimated) the period during which the adult would require care or support.

Subsection (15) addresses the situation where an adult remains critically ill and requires care or support beyond the period specified in the certificate, but only up to the end of the 52-week period. (Subsection (16) addresses the situation where an adult remains critically ill beyond the 52 weeks. In general terms, subsection (16) permits employees to take additional leaves of up to 17 weeks in subsequent 52-week periods).

This subsection - subsection (15) - addresses the situation in which:

- An employee wishes to extend their leave for a period longer than that which they originally intended to take because the adult remains critically ill; or
- An employee who has returned to work at the end of their leave wishes to take a new leave because the adult remains critically ill.

In this situation, s. 49.4(15) allows the employee to do so, subject to certain limitations:

- First, a qualified health practitioner must issue a subsequent certificate after the first certificate was issued setting out a care or support period that differs from the period set out in the first certificate. It will typically be just the end date of the care or support period that will be different in the subsequent certificate; there is no requirement that both the start date and the end date be different in order to meet this requirement (he rationale here, presumably, is that the period for which the employee originally planned to take leave was based on a certificate that had underestimated the length of the period for which the adult would require care or support).
- Second, the total amount of leave taken must not exceed 17 weeks.
- Third, the leave must end no later than the last day of the 52-week period that begins on the earlier of (a) the first day of the week in which the first certificate was issued and (b) the first day of the week in which the adult became critically ill.

There is no limit to the number of extensions or new leaves an employee is entitled to under s. 49.4(15), but the subsection does limit the total number of weeks of leave that can be taken in the 52-week period to no more than 17 weeks and requires that the end of the leave or leaves be no later than the last day of the 52-week period that begins on the earlier of (a) the first day of the week in which the first certificate was issued and (b) the first day of the week in which the adult became critically ill. Note, however, that this does not prevent an employee from taking additional leaves under subsection 49.4(16) after the 52-week period expires.

Example: Adult – Two Certificates Whose Periods Total 17 Weeks or Less

- An adult became critically ill on January 1.
- A qualified health practitioner issued a certificate on January 1.
- The certificate stated that the adult will require care or support for four weeks (until January 28).
- The adult was still critically ill on January 28.
- A qualified health practitioner issued another certificate on January 29, stating that the adult will require care or support for another four weeks (until February 25).
- The adult was not critically ill beyond February 25.

In this scenario, the employee would be entitled to take critical illness leave pursuant to subsection (5) during the four week period of January 1 to January 28, and a further four-week leave pursuant to subsection (15) during the period January 29 to February 25.

This provides the employee the same entitlement they would have had if the first certificate accurately predicted the period the child would require care or support.

Example: Adult – Two Certificates Whose Periods Total Between 17 and 52 Weeks

- An adult became critically ill on January 1.
- A qualified health practitioner issued a certificate on January 1.
- The certificate stated that the adult will require care or support for 10 weeks (until March 11).
- The adult was still critically ill on March 11.

- A qualified health practitioner issued another certificate on March 12, stating that the adult will require care or support for another ten weeks (until May 20).
- The adult was not critically ill beyond May 20.

In this scenario, the employee would be entitled to take critical illness leave pursuant to subsection (5) during the 10-week period January 1 to March 11, and a further leave pursuant to subsection (15) during the 10-week period March 12 to May 20. However, pursuant to paragraph (b) of subsection (15), the employee is only entitled to be on leave for a maximum of 17 weeks during that 20-week period.

Additional Leaves – s. 49.4(16)

49.4(16) If a minor child or adult in respect of whom an employee has taken a leave under this section remains critically ill after the 52-week period described in subsection (9) expires, the employee is entitled to take another leave and the requirements of this section apply to the new leave.

In general terms, this subsection addresses the situation where a minor child or adult is still critically ill 52 weeks or more after first developing a critical illness. It provides that employees are able to re-qualify for additional critical illness leave(s) of up to 37 weeks for a minor child or up to 17 weeks for an adult in subsequent 52-week periods.

Subsection (16) provides that if an employee took critically ill child care leave for a minor child or an adult, and the person remains critically ill after the end of the 52-week period described in subsection (9) (i.e., the 52-week period that begins on the earlier of (a) the first day of the week in which the first certificate was issued and (b) the first day of the week in which the minor child or adult became critically ill), the employee is entitled to take another critical illness leave if they again meet the requirements of s. 49.4 (see subsection (9) above for details regarding the 52-week period).

Note that if a minor child or adult that was critically ill develops a new critical illness, the employee will be entitled to another critically ill child care, critical illness leave. However, the entitlement will arise simply by virtue of meeting the qualifying condition in s. 49.4(2) or (5); the entitlement does not arise from subsection (13) (since it only applies to employees whose child remains critically ill) and, accordingly, the restrictions in subsection (13) as to the earliest date an additional leave may be taken do not apply with respect to a leave taken because of a new, subsequent critical illness. This means that, for example, if an employee who took leave for the first 37 weeks in a 52-week period to care for a minor child and then that same minor whose child develops developed a new critical illness in week 40 will, the employee would, assuming the qualifying criteria of subsection (2) are met, be entitled to begin a new leave as of week 40. There is no upper limit to the number of additional leaves an employee is entitled to under this subsection. After each 52-week period described above elapses, if the minor child or adult the employee has taken leave in relation to remains critically ill, then the employee may qualify for a fresh critical illness leave by again meeting the requirements of s. 49.4.

One of the requirements of s. 49.4(2) is that the individual in respect of whom the employee wants to take the leave is under 18 years of age. Accordingly, an employee is not eligible for an additional leave under that subsection if the individual in respect of whom the employee wants to take the leave is, at the time the eligibility for an additional leave is being assessed, already 18 years of age – in that case, the employee may qualify for a new leave under subsection (5) but will be subject to the requirements of subsection (13) However, an employee will be eligible for a further leave pursuant to subsection (14) even if the individual is 18 years at the time the employee is trying to qualify for a further leave. This is

because, unlike subsection (16), subsection (14) does not provide that “the requirements of this section apply” to the further leave (see subsection (14) above).

Each additional leave an employee is entitled to is governed by the restrictions of s. 49.4 as they pertain to that additional leave. For example, the provisions regarding when the leave must end, what happens if a minor child or adult dies, the total amount of each leave in subsections (11) and (12), eligibility for a further leave under subsections (14) and (15) and eligibility for more additional leaves under subsection (16).

Note that subsections (11) and (12) apply each time an employee takes a leave under this section and any additional leaves must be shared if they are taken by more than one employee in relation to the same critically ill person. In other words, an employee is entitled to no more than 37 weeks of leave (for a minor child) or 17 weeks of leave (for an adult) with respect to the original leave and to no more than 37 or 17 weeks of leave with respect to each additional leave in subsequent 52 week periods. There is no cap on the number of leaves (each of which may be up to 37 or 17 weeks in a 52-week period) an employee may be entitled to.

Advising Employer – s. 49.4(17); Same – s. 49.4(18)

49.4(17) An employee who wishes to take a leave under this section shall advise their employer in writing that they will be doing so and shall provide the employer with a written plan that indicates the weeks in which they will take the leave.

(18) If an employee must begin a leave under this section before advising the employer, the employee shall advise the employer of the leave in writing as soon as possible after beginning it and shall provide the employer with a written plan that indicates the weeks in which they will take the leave.

S. 49.4(17) requires employees to advise their employers in writing before starting the leave that they will be taking critical illness leave. This subsection also requires employees to, before starting the leave, provide a written plan setting out the weeks in which the leave will be taken. Where employees will be taking some of the leave in single days, the requirement is that the written plan must indicate the weeks in which the leave will be taken; it need not indicate which days in those weeks.

In circumstances where the employee cannot advise the employer before the leave commences, the employee is required, pursuant to s. 49.4(18), to advise the employer (in writing) and provide the written plan as soon as possible after beginning the leave.

If an employee wants to take a leave at a time other than that indicated in the plan, the employee has to meet the requirements of subsection (19).

An employee does not lose their right to critical illness leave if they fail to comply with ss. 49.4(17) or (18). An employee's entitlement to critical illness leave arises by virtue of meeting the eligibility criteria in s. 49.4(2) or (5), and it is the Program's position that the failure to advise the employer before or as soon as possible after the leave begins or the failure to provide a written plan does not negate that entitlement. This approach is consistent with the Program's long-standing policy for all leaves contained in Part XIV where the structures of the entitlement and notice provisions are similar to these. See for example ESA Part XIV, ss. 46(4) (pregnancy leave) and 48(4) (parental leave).

The question may arise as to whether an employer can penalize an employee for failing to give advance notice that they will be absent from work (as may be required under an employer policy), where the time

off is a critical illness leave under the ESA 2000. S. 49.4(18) provides that "if an employee must begin a leave before advising the employer, the employee shall advise the employer of the leave in writing as soon as possible after beginning it." It is thus clear that the ESA 2000 contemplates situations where the employee would be unable to advise the employer in advance of starting the leave and that the employee nevertheless has a right to take leave in such situations (although the employee does have an obligation to advise the employer of the leave as soon as possible after beginning it). On the other hand, the failure to give notice in advance of taking leave, when the employee could have done so, can be the subject of disciplinary action by the employer without violating s. 74. However, the following points should be borne in mind:

- The employee's failure to give advance notice or a written plan does not nullify the right to take the leave if the qualifying conditions in subsections 49.4(2) or (5) have been met (in other words, the failure to give advance notice does not have the result that the time taken off by the employee is not critical illness leave).
- An employer may impose discipline where the employee failed to provide written notice or a written plan before starting the leave in situations where the employee could have done so; however, the reason for the discipline must be because of the failure to give written notice or a written plan before starting the leave and not because the employee exercised the right to take leave.
- Likewise, an employer may impose discipline if an employee fails to provide any notice of the leave or any written plan (before or after the start of the leave). Again, however, the reason for the discipline must be because of the failure to provide any notice or to provide any plan and not because the employee exercised the right to take leave.

Same – Change in Employee's Plan – s. 49.4(19)

49.4(19) An employee may take a leave at a time other than that indicated in the plan provided under subsection (17) or (18) if the change to the time of the leave meets the requirements of this section and,

(a) the employee requests permission from the employer to do so in writing and the employer grants permission in writing; or

(b) the employee provides the employer with such written notice of the change as is reasonable in the circumstances.

This subsection provides that once an employee provides the employer with a written plan that indicates the weeks in which they will take the leave, as required by subsection (17) or (18), the employee is permitted to deviate from that plan only if:

- The employee asks for permission for the change in writing and the employer grants permission in writing; or
- The employee gives such written notice of the change as is reasonable in the circumstances. When determining what is reasonable in the circumstances, the circumstances of the both the employee and the employer are taken into account.

Examples of the employee's circumstances that may impact on how much advance notice of the change is reasonable include:

- The unpredictability of the progress of a minor child or adult's illness or injury that may have made it extremely difficult to establish with any certainty the dates of the leave; and
- The suddenness of any change in the minor child or adult's condition, whether for the better or for the worse.

An example of the employer's circumstances that may impact on how much advance notice of the change is reasonable is the cost and disruption of having to accommodate the change in plans, for example, if the employer hired a long-term replacement for an employee who originally advised he would be on leave for 37 consecutive weeks but now wishes to return to work after 15 weeks and alternate weeks of leave with weeks at work, the amount of advance notice of the change required would be greater than if the employer had not hired a replacement.

It is the Program's position that the employer can refuse to allow the employee to deviate from the dates provided in the original written plan if neither condition set out in clause (a) or (b) are met.

The requirements of these subsections apply whenever the employee is deviating from the plan. This includes, for example, situations where the employee gave the employer a written plan that advised that she will be on leave for the next two weeks, but which was silent about any other dates or advised that more leave would be taken in the future but that the dates are yet unknown and will be provided in the future. Taking leave beyond those initial two weeks is a change in the employee's plan; accordingly, the requirements of paragraph (a) or (b) will apply.

An employee can make multiple changes to their written plan, so long as they meet the requirements of paragraph (a) or (b) each time.

Subsection (19) does not apply if the change to the dates of the leave is required by the ESA 2000 itself. For example, if the employee advised the employer that he would be on leave for 37 consecutive weeks but the minor child dies in the 15th week, the ESA 2000 (s. 49.4(10)) provides that the leave ends at the end of the week in which the minor child dies. The employee is entitled to return to work at the end of that week - the employee does not have to meet the requirements of subsection (19) in order to return to work at the end of that week.

Copy of Certificate – s. 49.4(20)

49.4(20) If requested by the employer, the employee shall provide the employer with a copy of the certificate referred to in subsection (2) or (5) or clause 14(a) or 15(a) as soon as possible.

This section provides that if the employer asks the employee for a copy of the s. 49.4(2), (5), (14) or (15) certificate (i.e., a certificate issued by a qualified health practitioner that states that a minor child or an adult is a critically ill minor child or adult who requires care or support and that sets out the period during which the person requires the care or support), the employee is required to provide it as soon as possible.

This subsection applies to all of the certificates referred to in section 49.4. For example, if an employee takes a further leave under subsections (14) or (15) or an additional leave under subsection (16) and accordingly obtained a second, third, fourth, etc. certificate, the employee is required to provide the employer with a copy of any subsequent certificate that is requested by the employer.

An employee's failure to provide a copy of the certificate does not disentitle them to critical illness leave. It is the Program's view that the requirement to provide a copy of the certificate is not a condition precedent to the entitlement to critical illness leave; the conditions for entitlement are set out in s. 49.4(2) and (5).

However, as provided in s. 49.4(2) and (5), in order to be entitled to the leave, the employee must obtain a certificate. In other words, while the failure to provide a copy of the certificate to the employer does not disentitle the employee, a failure to have obtained the required certificate will do so.

That is not to say the leave cannot begin before the certificate is obtained. If the employee has not obtained a certificate before commencing the leave, they may do so at a later date and thereby retroactively qualify for the leave. If, for example, an employer penalizes an employee on the basis that they did not have a certificate prior to commencing the leave, such conduct would constitute a reprisal if the employee subsequently obtained the certificate.

s. 49.4(21) – REPEALED

Transition – s. 49.4(22)

49.4(22) If a certificate mentioned in subsection (2) or (12), as those subsections read immediately before the day section 26 of Schedule 1 to the *Fair Workplaces, Better Jobs Act, 2017* came into force, was issued before that day, then this section, as it read immediately before that day, applies.

The current critical illness leave provisions came into force on December 3, 2017. Prior to this date, section 49.4 was titled “critically ill child care leave” and only employees whose own children were critically ill were eligible for a leave of up to 37 weeks if a qualified health practitioner issued the appropriate certificate.

If an employee has a certificate issued by a qualified health practitioner to support critically ill child care leave, and the certificate was issued before December 3, 2017, then the employee’s leave will be governed by the provisions of section 49.4 as they existed before that day. Note that the employee will be bound by the provisions of the previous leave even if the certificate had been issued, but the employee had not yet commenced the leave on December 3, 2017.

ESA Part XIV Section 49.5 – Child Death Leave

Child death leave came into force on January 1, 2018 as a result of the *Fair Workplaces, Better Jobs Act*, *2017,* SO 2017, c 22 which amended the ESA 2000. The ESA 2000 previously provided a crime-related child death or disappearance leave, which entitled employees who were parents of a child who had disappeared or who died as a probable result of a crime to a leave of absence. If the child of the employee had died as the probable result of crime, the employee was entitled to 104 weeks of leave. If the child of the employee had disappeared as the probable result of a crime, the employee was entitled to 52 weeks of leave. If the child who had disappeared as the probable result of crime was subsequently found dead, the employee was then entitled to 104 weeks of leave running from the time the employee began the original leave.

Child death leave provides the same entitlements for a child’s death as the previous crime-related child death or disappearance leave, although there is no longer a requirement that the child died as a result of (or as a probable result of) a crime. In other words, child death leave can be taken in respect of the death of an employee’s child, no matter the circumstances of the death. Please see s. 49.5(12) below for transitional information relating to a crime-related child death leave that commenced before January 1, 2018.

Definitions – s. 49.5(1)

49.5(1) In this section,

"child" means a child, step-child, foster child or child who is under legal guardianship, and who is under 18 years of age;

"crime" means an offence under the *Criminal Code* (Canada), other than an offence prescribed by the regulations made under paragraph 209.4 (f) of the *Canada Labour Code* (Canada);

"week" means a period of seven consecutive days beginning on Sunday and ending on Saturday.

This section contains definitions of three terms that are used in the child death leave provisions.

Child

For the purpose of the child death leave provisions, a child is the employee's child (which includes an adopted child, even if the adoption proceedings have not been finalized), step-child, foster child or child for whom the employee has been appointed as a legal guardian and who is under 18 years of age.

Crime

An employee is not entitled to a leave if the child's death was the result of a crime and the employee has been charged with a crime in relation to the death. Additionally, the employee will not be entitled to a leave if it is probable, considering the circumstances, that the child was a party to a crime in relation to their own death.

"Crime" is defined to mean an offence under the federal *Criminal Code*, other than offences that are prescribed by regulations that are made under s. 209.4(f) of the *Canada Labour Code*, RSC 1985, c L-2.

The *Canada Labour Code* provides for a crime-related child death or disappearance leave if it is probable, considering the circumstances, that the child's death or disappearance was as a result of a crime. Note that the federal leave is similar to the previous crime-related child death or disappearance leave under the ESA 2000. The *Canada Labour Code* defines crime as an offence under the *Criminal Code*, and provides that regulations may be made under the *Canada Labour Code* to exclude some *Criminal Code* offences from the definition of crime. Any offences that are excluded from the *Canada Labour Code'*s definition of crime through a regulation made under s. 209.4(f) of the *Canada Labour Code* are similarly excluded from the ESA 2000's definition of crime for the purposes of s. 49.5.

Week

"Week" means a period of seven consecutive days beginning on Sunday and ending on Saturday. For the purposes of child death leave, week will always be Sunday to Saturday, even if the employer's work week is different.

Entitlement to Leave – s. 49.5(2)

49.5(2) An employee who has been employed by an employer for at least six consecutive months is entitled to a leave of absence without pay of up to 104 weeks if a child of the employee dies.

Subsection 49.5(2) provides an entitlement for an employee who has been employed by their employer for at least six consecutive months to a leave of absence without pay if the employee's child dies. The employee may take a leave of up to 104 weeks.

The question has arisen as to whether an employee who has experienced a still-birth would be entitled to take child death leave. Given that still-births are legally distinct and treated differently than live births and deaths under the *Vital Statistics Act* (i.e. in the province of Ontario, per Regulation 1094 of the *Vital Statistics Act*, a death certificate is not issued in the case of a still-birth), it's Program policy that the answer is no. As such, it is Program policy that an employee would not be eligible to take child death leave in this circumstance. Note, though, that the employee who had the still-birth would – if the stillbirth occurred no more than 17 weeks before the due date – be entitled to take pregnancy leave (which would end either 17 weeks after the leave began, or 12 weeks after the still-birth, whichever day is later – see s. 47(1)(b). The employee may also be eligible for Sick Leave. Other employees may also be eligible for other leave entitlements – e.g. an employee who is a family member of the employee who had the still-birth may be eligible for Family Responsibility Leave to provide care for the employee who had the still-birth if the eligibility criteria for that leave are met.

Exception – s. 49.5(3)

49.5(3) An employee is not entitled to a leave of absence under this section if the employee is charged with a crime in relation to the death of the child or if it is probable, considering the circumstances, that the child was a party to a crime in relation to his or her death.

Subsection 49.5(3) provides that there is no entitlement to a leave under s. 49.5 if:

- The employee is charged with a crime in relation to the child's death; or
- It is probable, considering the circumstances, that the child was a party to a crime in relation to their death.

Single Period – s. 49.5(4)

49.5(4) An employee may take a leave under this section only in a single period.

Subsection 49.5(4) provides that an employee can take a leave under s. 49.5 only in one single period. A return to work prior to the expiry of the maximum length of the leave would end the entitlement to the leave.

Limitation Period – s. 49.5(5)

49.5(5) An employee may take a leave under this section only during the 105-week period that begins in the week the child dies.

Subsection 49.5(5) provides that the entitlement of up to 104 weeks of leave available under s. 49.5(2) because of the death of a child can be taken only during the 105-week period that begins in the week the child died.

Total Amount of Leave – s. 49.5(6)

49.5(6) The total amount of leave that may be taken by one or more employees under this section in respect of a death, or deaths that are the result of the same event, is 104 weeks.

Under s. 49.5(6), the maximum amount of leave available to an employee or employees in respect of the same child, or children who died as the result of the same event, is 104 weeks.

Sharing the Leave

Where more than one employee takes leave under s. 49.5(2) because of the death of the same child - or the same children who died as the result of the same event - the 104 week maximum has to be shared by the employees. The employees who are sharing the leave can be on leave at the same time, or at different times; the ESA 2000 does not impose any restrictions in this regard. The sharing requirement applies whether or not the employees work for the same employer.

The sharing requirement applies only where the two or more employees take leave under this section, i.e., s. 49.5 of the ESA 2000. An employee who takes a leave similar to child death leave pursuant to a contractual provision that provides a greater right than s. 49.5, which thus prevails over s. 49.5 under ESA Part III, s. 5(2), is not taking leave under this section; therefore, the amount of leave that employee takes does not reduce the amount of leave that other employees can take in respect of the same child under s. 49.5. Likewise, an employee who takes a leave similar to ESA 2000 child death leave under the employment standards legislation of another jurisdiction is not taking leave under s. 49.5. Thus, if one parent of a child who has died works in Ontario and the other parent works in, say, Manitoba, and they each take child death leave pursuant to their respective employment standards statutes, the Ontario employee has the full 104-week entitlement; they will not have to share the entitlement with the other parent.

Advising Employer – s. 49.5(7); Same – s. 49.5(8)

49.5(7) An employee who wishes to take a leave under this section shall advise the employer in writing and shall provide the employer with a written plan that indicates the weeks in which the employee will take the leave.

(8) If an employee must begin a leave under this section before advising the employer, the employee shall advise the employer of the leave in writing as soon as possible after beginning it and shall provide the employer with a written plan that indicates the weeks in which the employee will take the leave.

Subsection 49.5(7) requires employees to advise their employers in writing that they will be taking child death leave, and to provide a written plan setting out the weeks in which the leave will be taken.

This subsection must be read in conjunction with s. 49.5(4), which establishes that a leave under s. 49.5 can be taken only in a single period. In other words, they must provide the start and end dates for the leave.

In circumstances where the employee cannot advise the employer before the leave commences, the employee is required, pursuant to s. 49.5(8), to advise the employer in writing as soon as possible after beginning the leave and to provide the written plan setting out the weeks in which the leave will be taken.

If an employee wants to take a leave at a time other than that indicated in the plan, the employee has to meet the requirements of s. 49.5(9).

An employee does not lose their right to child death leave if they fail to comply with ss. 49.5(7) or (8). An employee's entitlement to child death leave arises by virtue of meeting the eligibility criteria in s. 49.5(2), and it is the Program's position that the failure to advise the employer before or as soon as possible after the leave begins, or the failure to provide a written plan, does not negate that entitlement. This approach is consistent with the Program's long-standing policy for all leaves contained in Part XIV where the

structures of the entitlement and notice provisions are similar to these. See for example ESA Part XIV, s. 46(4) and s. 48(4).

The question may arise as to whether an employer can penalize an employee for failing to give advance notice that they will be absent from work (as may be required under an employer policy) where the time off is a child death leave under the ESA 2000. Section 49.5(8) provides that "if an employee must begin a leave . . . before advising the employer, the employee shall advise the employer of the leave in writing as soon as possible after beginning it." It is clear that the ESA 2000 contemplates situations where the employee would be unable to advise the employer in advance of starting the leave and that the employee nevertheless has a right to take leave in such situations, although the employee does have an obligation to advise the employer of the leave as soon as possible after beginning it. On the other hand, the failure to give notice in advance of taking leave, when the employee could have done so, can be the subject of disciplinary action by the employer without violating ESA Part XVIII, s. 74. However, the following points should be borne in mind:

- The employee's failure to give advance notice or a written plan does not nullify the right to take the leave if the qualifying conditions in ss. 49.5(2) have been met. In other words, the failure to give advance notice does not have the result that the time taken off by the employee is not child death leave.
- An employer may impose discipline where the employee failed to provide written notice or a written plan before starting the leave in situations where the employee could have done so; however, the reason for the discipline must be because of the failure to give written notice or a written plan before starting the leave and not because the employee exercised the right to take leave.
- Likewise, an employer may impose discipline if an employee fails to provide any notice of the leave or any written plan (before or after the start of the leave); however, the reason for the discipline must be because of the failure to provide any notice or to provide any plan and not because the employee exercised their right to take leave.

Same – Change in Employee's Plan – s. 49.5(9)

49.5(9) An employee may take a leave at a time other than that indicated in the plan provided under subsection (7) or (8) if the change to the time of the leave meets the requirements of this section and,

(a) the employee requests permission from the employer to do so in writing and the employer grants permission in writing; or

(b) the employee provides the employer with four weeks written notice before the change is to take place.

Subsection 49.5(9) provides that once an employee provides the employer with a written plan that indicates the weeks in which they will take the leave, as required by ss. 49.5(7) or (8), the employee is permitted to deviate from that plan only if:

a) The employee asks for permission for the change in writing and the employer grants permission in writing; or

b) The employee gives written notice of the change four weeks before the change is to take place.

It is the Program's position that the employer can refuse to allow the employee to deviate from the dates provided in the original written plan if neither condition set out in clause (a) or (b) are met.

An employee can make multiple changes to their written plan, so long as they meet the requirements of paragraph (a) or (b) each time.

This subsection must be read in conjunction with s. 49.5(4), which requires that leave under s. 49.5 can be taken only in a single period.

Evidence – s. 49.5(10)

49.5(10) An employer may require an employee who takes a leave under this section to provide evidence reasonable in the circumstances of the employee's entitlement to the leave.

This provision gives an employer some ability to require an employee to provide proof that they are or were entitled to take child death leave. The employer can require an employee to provide evidence that is reasonable in the circumstances that they are or were entitled to take the leave, for example, a death certificate.

s. 49.5(11) – REPEALED

Transition – s. 49.5(12)

49.5(12) If, on December 31, 2017, an employee was on a crime-related child death or disappearance leave under this section, as it is read on that date, then the employee's entitlement to the leave continues in accordance with this section as it read on that date.

If an employee was on a crime-related child death or disappearance leave on December 31, 2017, the employee does not lose the right to continue that leave; an employee in that situation would continue on the leave in accordance with the provisions as they read on that date.

ESA Part XIV Section 49.6 – Crime-Related Child Disappearance Leave

Definitions – s. 49.6(1)

49.6(1) In this section,

"child" means a child, step-child, foster child or child who is under legal guardianship, and who is under 18 years of age;

"crime" means an offence under the *Criminal Code* (Canada), other than an offence prescribed by the regulations made under paragraph 209.4 (f) of the *Canada Labour Code* (Canada);

"week" means a period of seven consecutive days beginning on Sunday and ending on Saturday.

This section contains definitions of three terms that are used in the crime-related child disappearance leave provisions.

Child

For the purpose of the crime-related child disappearance leave provisions, a child is the employee's child (which includes an adopted child, even if the adoption proceedings have not been finalized), step-child, foster child, or child for whom the employee has been appointed as a legal guardian, and who is under 18 years of age.

Crime

Employees are entitled to a leave only if, among other things, it is probable, considering the circumstances, that the child's disappearance was the "result of a crime".

Crime is defined to mean an offence under the federal *Criminal Code*, other than offences that are prescribed by regulations that are made under s. 209.4(f) of the *Canada Labour Code*, RSC 1985, c L-2.

Like the *Employment Standards Act, 2000*, the *Canada Labour Code* provides for a crime-related child disappearance leave if it is probable, considering the circumstances, that the child's disappearance was as a result of a crime. The *Canada Labour Code* defines crime as an offence under the *Criminal Code*, and provides that regulations may be made under the *Canada Labour Code* to exclude some *Criminal Code* offences from the definition of crime. Any offences that are excluded from the *Canada Labour Code'*s definition of crime through a regulation made under s. 209.4(f) of the *Canada Labour Code* are similarly excluded from the ESA 2000's definition of crime for the purposes of s. 49.6.

Week

Week means a period of seven consecutive days beginning on Sunday and ending on Saturday. For the purposes of crime-related disappearance leave, week will always be Sunday to Saturday, even if the employer's work week is different.

Entitlement to Leave – Disappearance of Child – s. 49.6(2)

49.6(2) An employee who has been employed by an employer for at least six consecutive months is entitled to a leave of absence without pay of up to 104 weeks if a child of the employee disappears and it is probable, considering the circumstances, that the child disappeared as a result of a crime.

This subsection provides an entitlement for an employee who has been employed by their employer for at least six consecutive months to a leave of absence without pay if the employee's child disappears and it is probable, considering the circumstances, that the child disappeared as a result of a crime. The employee may take a leave of up to 104 weeks.

Crime is a defined term: see s. 49.6(1) above for details.

Transition – s. 49.6(3)

Despite subsection (2), if the disappearance occurred before January 1, 2018, the employee is entitled to a leave of absence without pay in accordance with section 49.5 as it read on December 31, 2017.

The crime-related child disappearance leave provisions came into force on January 1, 2018 as a result of the *Fair Workplaces, Better Jobs Act*, *2017*, which amended the ESA 2000 by dividing the previously existing crime-related child death or disappearance leave into two separate leaves: crime-related child

disappearance leave and child death leave. Under the previous crime-related child death or disappearance leave, an employee whose child disappeared as the likely result of a crime was entitled to a leave of 52 weeks. Under the new crime-related child disappearance leave, a leave may be taken for up to 104 weeks.

If the disappearance of a child, which triggers the leave entitlement, occurred prior to January 1, 2018, the employee is entitled to a leave of up to 52 weeks. If the disappearance of a child, which triggers the leave entitlement, occurs on or after January 1, 2018 the employee is entitled to a leave of up to 104 weeks pursuant to s. 49.6(2). Any employee who was on crime-related child disappearance leave as of December 31, 2017 will be entitled to complete the remaining period of the leave (to a maximum of 52 weeks).

Exception – s. 49.6(4), Change in Circumstance – s. 49.6(5)

49.6(4) An employee is not entitled to a leave of absence under this section if the employee is charged with the crime or if it is probable, considering the circumstances, that the child was a party to the crime.

(5) If an employee takes a leave of absence under this section and the circumstances that made it probable that the child of the employee disappeared as a result of a crime change and it no longer seems probable that the child disappeared as a result of a crime, the employee's entitlement to leave ends on the day on which it no longer seems probable.

Subsection 49.6(4) provides that there is no entitlement to a leave under this section if:

- The employee is charged with the crime that is the cause of the child's disappearance; or
- It is probable, considering the circumstances, that the child was a party to the crime that caused their disappearance.

Subsection 49.6(5) provides that if an employee started a leave under s. 49.6 but it subsequently no longer seems probable that the child's disappearance was a result of a crime, the entitlement to leave ends on the day on which it no longer seems probable.

Child Found – s. 49.6(6); Same – s. 49.6(7)

49.6(6) The following rules apply if an employee takes a leave of absence under this section and the child is found within the 104-week period that begins in the week the child disappears:

1. If the child is found alive, the employee is entitled to remain on leave for 14 days after the child is found.

2. If the child is found dead, the employee's entitlement to be on leave under this section ends at the end of the week in which the child is found.

(6) For greater certainty, nothing in paragraph 2 of subsection (6) affects the employee's eligibility for child death leave under section 49.5.

These subsections establish the entitlements where a leave is taken because of the crime-related disappearance of the child and the child is subsequently found.

If the child is found alive in the 104-week period that begins the week the child disappeared, the employee is entitled to remain on leave for 14 days after the day the child is found.

If the child is found dead in the 104-week period that begins the week the child disappeared, the employee is no longer entitled to remain on leave past the end of the week in which the child is found. Note that week is defined in s. 49.6(1). However, s. 49.6(7) explicitly states that the employee's entitlement to Child Death Leave per s. 49.5 is unaffected by the previous leave taken. So, the employee may be eligible to begin a leave under s. 49.5. Section 49.5 contains provisions requiring the employee to give notice to the employer of their intention to take the leave; however, if the employee cannot give written notice in advance of taking the leave, notice can be given as soon as possible after beginning it. Failure to do so will not disentitle the employee to the leave.

Single Period – s. 49.6(8)

49.6(8) An employee may take a leave under this section only in a single period.

Subsection 49.6(8) provides that an employee can take a leave under s. 49.6 only in one single period. A return to work prior to the expiry of the maximum length of the leave would end the entitlement to the leave.

Limitation Period – s. 49.6(9)

49.6(9) Except as otherwise provided for in subsection (8), an employee may take a leave under this section only during the 105-week period that begins in the week the child disappears.

This subsection provides that, subject to s. 49.6(8), the entitlement of up to 104 weeks of leave available because of the crime-related disappearance of a child can be taken only during the 105-week period that begins in the week the child disappeared. Note that the term week is defined for the purposes of this provision in s. 49.6(1).

Total Amount of Leave – s. 49.6(10)

49.6(10) The total amount of leave that may be taken by one or more employees under this section in respect of a disappearance, or disappearances that are the result of the same event, is 104 weeks.

Sharing the Leave

Under s. 49.6(10), the maximum amount of leave available to an employee - or employees - in respect of the same child, or children who disappeared as the result of the same event, is 104 weeks.

Where more than one employee takes a leave because of the crime-related disappearance of the same child – or the same children who disappeared as the result of the same event – the 104 week maximum has to be shared by the employees. The employees who are sharing the leave can be on leave at the same time, or at different times; the ESA 2000 does not impose any restrictions in this regard. The sharing requirement applies whether or not the employees work for the same employer.

The sharing requirement applies only where the two or more employees take leave "under this section" i.e., s. 49.6 of the ESA 2000. An employee who takes a leave similar to crime-related child disappearance leave pursuant to a contractual provision that provides a greater right than s. 49.6, which thus prevails

over s. 49.6 under ESA Part III, s. 5(2), is not taking leave under this section; therefore, the amount of leave that employee takes does not reduce the amount of leave that other employees can take in respect of the same child under s. 49.6. Likewise, an employee who takes a leave similar to ESA 2000 crime-related child disappearance leave under the employment standards legislation of another jurisdiction is not taking leave under s. 49.6. Thus, if one parent of a child who has disappeared as a probable result of crime works in Ontario and the other parent works in, say, Manitoba, and they each take crime-related disappearance leave pursuant to their respective employment standards statutes, the Ontario employee has the full 104-week entitlement; they will not have to share the entitlement with the other parent.

Advising Employer – s. 49.6(11); Same – s. 49.6(12)

49.6(11) An employee who wishes to take a leave under this section shall advise the employer in writing and shall provide the employer with a written plan that indicates the weeks in which the employee will take the leave.

(12) If an employee must begin a leave under this section before advising the employer, the employee shall advise the employer of the leave in writing as soon as possible after beginning it and shall provide the employer with a written plan that indicates the weeks in which the employee will take the leave.

Section 49.6(11) requires employees to advise their employers that they will be taking crime-related child disappearance leave, and to provide a written plan setting out the weeks in which the leave will be taken.

This subsection must be read in conjunction with s. 49.6(9), which establishes when the leave may be taken and s. 49.6(8), that provides the leave must be taken only in a single period.

In circumstances where the employee cannot advise the employer before the leave commences, the employee is required, pursuant to s. 49.6(12), to advise the employer in writing as soon as possible after beginning the leave and to provide the written plan setting out the weeks in which the leave will be taken.

If an employee wants to take a leave at a time other than that indicated in the plan, the employee has to meet the requirements of s. 49.6(13).

An employee does not lose their right to crime-related child disappearance leave if they fail to comply with ss. 49.6(11) or (12). An employee's entitlement to crime-related child disappearance leave arises by virtue of meeting the eligibility criteria in s. 49.6(2), and it is the Program's position that the failure to advise the employer before or as soon as possible after the leave begins, or the failure to provide a written plan, does not negate that entitlement. This approach is consistent with the Program's long-standing policy for all leaves contained in Part XIV where the structures of the entitlement and notice provisions are similar to these. See for example ESA Part XIV, s. 46(4) and s. 48(4).

The question may arise as to whether an employer can penalize an employee for failing to give advance notice that they will be absent from work (as may be required under an employer policy) where the time off is a crime-related child disappearance leave under the ESA 2000. Section 49.6(12) provides that "if an employee must begin a leave . . . before advising the employer, the employee shall advise the employer of the leave in writing as soon as possible after beginning it." It is clear that the ESA 2000 contemplates situations where the employee would be unable to advise the employer in advance of starting the leave and that the employee nevertheless has a right to take leave in such situations (although the employee does have an obligation to advise the employer of the leave as soon as possible after beginning it). On the other hand, the failure to give notice in advance of taking leave, when the employee could have done

so, can be the subject of disciplinary action by the employer without violating s. 74. However, the following points should be borne in mind:

1. The employee's failure to give advance notice or a written plan does not nullify the right to take the leave if the qualifying conditions in s. 49.6(2) have been met. In other words, the failure to give advance notice does not have the result that the time taken off by the employee is not crime-related child disappearance leave.
2. An employer may impose discipline where the employee failed to provide written notice or a written plan before starting the leave in situations where the employee could have done so; however, the reason for the discipline must be because of the failure to give written notice or a written plan before starting the leave and not because the employee exercised the right to take leave.
3. Likewise, an employer may impose discipline if an employee fails to provide any notice of the leave or any written plan (before or after the start of the leave); however, the reason for the discipline must be because of the failure to provide any notice or to provide any plan and not because the employee exercised their right to take leave.

Same – Change in Employee's Plan – s. 49.6(13)

49.6(13) An employee may take a leave at a time other than that indicated in the plan provided under subsection (11) or (12) if the change to the time of the leave meets the requirements of this section and,

(a) the employee requests permission from the employer to do so in writing and the employer grants permission in writing; or

(b) the employee provides the employer with four weeks written notice before the change is to take place.

This subsection establishes that once an employee provides the employer with a written plan indicating the weeks in which they will take the leave, as required by ss. 49.6(11) or (12), the employee is permitted to deviate from that plan only if:

a. The employee asks for permission for the change in writing and the employer grants permission in writing; or
b. The employee gives written notice of the change four weeks before the change is to take place.

It is the Program's position that the employer can refuse to allow the employee to deviate from the dates provided in the original written plan if neither condition set out in clause (a) or (b) are met.

An employee can make multiple changes to their written plan, so long as they meet the requirements of paragraph (a) or (b) each time.

This subsection must be read in conjunction with s. 49.6(8), which requires that leave under s. 49.6 can be taken only in a single period.

Evidence – s. 49.6(14)

49.6(14) An employer may require an employee who takes a leave under this section to provide evidence reasonable in the circumstances of the employee's entitlement to the leave.

This provision gives an employer some ability to require an employee to provide proof that they are or were entitled to take crime-related child disappearance leave. The employer can require an employee to provide evidence that is reasonable in the circumstances that they are or were entitled to take the leave.

s. 49.6(15) – REPEALED

ESA Part XIV Section 49.7 – Domestic or Sexual Violence Leave

The domestic or sexual violence leave provisions came into force on January 1, 2018 as a result of the *Fair Workplaces, Better Jobs Act*, 2017, which amended the ESA 2000. The intention of the section is to provide job-protected leave of up to 10 days and 15 weeks per calendar year to an employee for particular enumerated purposes if the employee or the employee's child has experienced or been threatened with domestic or sexual violence.

Definitions – s. 49.7(1)

49.7 (1) In this section,

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

"week" means a period of seven consecutive days beginning on Sunday and ending on Saturday. ("semaine")

This subsection contains two definitions of terms used in s. 49.7

For the purposes of the domestic violence or sexual violence leave provisions, a "child" means someone who is under 18 years of age and who is the employee's child (which includes an adopted child, even if the adoption proceedings have not been finalized), step-child, foster child, or child who is under the employee's legal guardianship.

Note this is the same definition of child used for the purposes of child death leave in ESA Part XIV, s. 49.5(1) and crime-related child disappearance leave in ESA Part XIV, s. 49.6(1).

In order to be considered a child for the purpose of entitlements to domestic or sexual violence leave, the child must be under 18 years of age when they experienced or were threatened with domestic or sexual violence, and when the employee takes the leave for any of the enumerated purposes if the leave is being taken in relation to the child.

"Week" means a period of seven consecutive days beginning on a Sunday and ending on a Saturday. For the purposes of s. 49.7, week will always be Sunday to Saturday even if the employer's work week is different.

Entitlement to Leave – s. 49.7(2)

49.7(2) An employee who has been employed by an employer for at least 13 consecutive weeks is entitled to a leave of absence if the employee or a child of the employee experiences domestic or sexual violence, or the threat of domestic or sexual violence, and the leave of absence is taken for any of the following purposes:

1. To seek medical attention for the employee or the child of the employee in respect of a physical or psychological injury or disability caused by the domestic or sexual violence.

2. To obtain services from a victim services organization for the employee or the child of the employee.

3. To obtain psychological or other professional counselling for the employee or the child of the employee.

4. To relocate temporarily or permanently.

5. To seek legal or law enforcement assistance, including preparing for or participating in any civil or criminal legal proceeding related to or resulting from the domestic or sexual violence.

6. Such other purposes as may be prescribed.

This subsection provides for an entitlement to domestic or sexual violence leave if the eligibility requirements set out in the provision are met.

Employed by an employer for at least 13 consecutive weeks

To be eligible for a domestic or sexual violence leave, the employee must have been employed by the same employer for a minimum of 13 weeks before taking the leave. It is not necessary that the employee have been actively working, so long as they were an employee during this time. For example, the employee could have been off receiving short-term disability benefits, on vacation, or on lay-off, or on a statutory leave during this period.

Employee or their child experiences domestic or sexual violence, or the threat of it

In order to be eligible for this leave, either the employee or the employee's child must have experienced or been threatened with sexual or domestic violence. It is Program policy that an employee will be eligible to take the leave even if the incident or threat of domestic or sexual violence occurred prior to January 1, 2018, the coming into force date of this provision, as long as the eligibility requirements (such as length of employment, etc.) are satisfied.

"Domestic or sexual violence" is not a defined term.

However, as a guideline, domestic violence may include physical, emotional or psychological abuse or an act of coercion, stalking, harassment or financial control. A threat of such abuse is also covered by this provision.It may be committed by an employee's current or former spouse or intimate partner, or between an individual and a child who resides with the individual or between an individual and an adult or child who is related to the individual by blood, marriage, foster care or adoption.

Sexual violence can include acts such as sexual assault, harassment, stalking, indecent exposure, voyeurism, sexual exploitation and sexual solicitation. It can be committed by anyone, whether or not they have any relationship to the employee. A threat of sexual violence is also covered by this provision.

It is Program policy to take an employee's statement that domestic or sexual violence has occurred or was threatened at face value. In other words, an employment standards officer need not "look behind" the statement to determine whether the violence actually occurred or was threatened. However, note that

an employer is entitled to request evidence reasonable in the circumstances to support an employee's right to take domestic or sexual violence leave for specific defined purposes.

Leave of absence is taken for any of the following purposes:

1. To seek medical attention for the employee or the child of the employee in respect of a physical or psychological injury or disability caused by the domestic or sexual violence;
2. To obtain services from a victim services organization for the employee or the child of the employee;
3. To obtain psychological or other professional counselling for the employee or the child of the employee;
4. To relocate temporarily or permanently;
5. To seek legal or law enforcement assistance, including preparing for or participating in any civil or criminal legal proceeding related to or resulting from the domestic or sexual violence;
6. Such other purposes as may be prescribed.

In order to be eligible for a domestic or sexual violence leave, the leave must be taken for one or more of the specific purposes listed in this subsection.

In other words, even though the employee or the employee's child may have experienced or been threatened with domestic or sexual violence, the employee will not be entitled to take the leave unless it is taken for at least one of the purposes set out above.

Note that in some cases, a single period of leave may be taken for multiple purposes (i.e., counselling provided by a rape crisis centre could be considered to fall under both paragraphs 2 and 3 below). An employee may also take more than one period of leave for a single purpose, for example to attend weekly psychological counselling sessions. And lastly, an employee may take different periods of leave for different purposes, for example to seek medical attention at one point, and to seek legal assistance or participate in a Family Court or criminal trial at a later point in time.

Finally, it should also be noted that where an employee is entitled to take domestic violence or sexual violence leave, the employee (within the constraints imposed under this section) has the right to determine when or if to commence the leave. In other words, the employer does not have the right to schedule a leave for the employee. The employee's right also effectively overrides an employer's right to schedule vacation.

As per ESA Part XI, ss. 35 and 35.1, an employer is otherwise entitled to schedule the employee's vacation time, subject to the limits created by those sections. The Program's policy concerning an employee's right to choose when to commence a leave (within the parameters of that specific leave) is consistent with ESA Part XIV, s. 51.1, which applies where there is a conflict between an employer's obligation to schedule vacation within the time limits set out within the ESA 2000 or where vacation entitlements would be lost under a contract of employment, because of a Part XIV leave. In accordance with that section, any vacation that would otherwise be lost is deferred to the end of the leave.

Seek medical attention

An employee or their child may need medical attention as a result of physical or psychological injury sustained during an act or threat of domestic or sexual violence. In some cases, there may be an initial treatment and then a follow up visits or treatments at a later date. Medical attention would include, for example, any medical consultation, medical treatment, dental care, rehabilitative therapies such as

physiotherapy, massage therapy or chiropractic treatments and consultation with a counsellor, psychologist or psychiatrist as long as the consultations/treatments were related to an original injury caused by domestic or sexual violence.

Obtain services from a victim services organization

Services from organizations that assist victims may be provided over a short period of time for initial intake, making referrals, assessment or treatment or longer periods to provide ongoing counselling or assistance with relocation or other practical needs arising from an incident or threat of domestic or sexual violence. For example, meeting with staff at a local shelter to arrange accommodations would be captured under this paragraph. Note, though, that, pursuant to Program Policy, simply residing in a domestic violence shelter, while itself a service contemplated under this paragraph would generally not be considered an act of "obtaining" such a service. Ongoing residency therefore would not generally by itself qualify the employee to take a leave under this paragraph. See the description about relocating below for more details.

A victim services organization might also include a referral service for victims of domestic or sexual violence, a community housing corporation or a community legal aid clinic.

Obtain psychological or other professional counselling

Psychological or other professional counselling may include counselling provided by a psychologist or psychological associate, psychotherapist, family counsellor, relationship counsellor, or social worker. Counselling or treatment by a qualified psychiatrist may also fall under either this purpose, or alternatively under medical attention. Psychological counselling may also include native healing circles or peer support in the form of a group or individual counselling. It is possible that professional counselling may be of a non-medical nature.

Relocate temporarily or permanently

Relocating temporarily or permanently may include the process of seeking accommodations, inspecting premises and meeting potential landlords or municipal housing authorities, or going through the intake process at a short or medium-term domestic violence shelter, as well as the actual process of moving furniture and possessions at the point of relocation or at a later date. It could include a period of time in which an employee moves to stay with relatives or friends. It would not include relocating to a new residence with the intimate partner or person who was responsible for the sexual or domestic violence or threat thereof, or relocating if it is unrelated to domestic or sexual violence or the threat thereof.

Seek legal or law enforcement assistance

Seeking legal or law enforcement assistance includes preparing for or participating in any civil or criminal legal proceeding related to or resulting from the violence. As examples, an employee may wish to make a police report*, may be required to appear as a witness in a criminal or civil matter or may meet with legal counsel in advance of such a proceeding. An employee may also wish to consult with a lawyer or legal clinic to consider their options without proceeding further, or decide to commence a civil action.

*Note: Whether or not criminal charges were laid as a result of a report made to the police by an employee would not be a relevant consideration under this paragraph; the process of seeking legal enforcement assistance would be considered a valid purpose to take the leave.

Such other purposes as may be prescribed

At this time, there are no regulations in force relating to this section and hence no other purposes have been prescribed.

Exception – s. 49.7(3)

49.7(3) Subsection (2) does not apply if the domestic or sexual violence is committed by the employee.

This subsection provides that an employee is not entitled to a domestic or sexual violence leave if the employee committed the domestic or sexual violence (or threatened such action) themselves. Note that a criminal charge does not have to be laid for this subsection to apply.

Length of Leave – 49.7(4)

49.7(4) An employee is entitled to take, in each calendar year,

a) Up to 10 days of leave under this section; and
b) Up to 15 weeks of leave under this section.

This subsection creates the entitlement to take leave of up to 10 days (taken intermittently or in a single block) and up to 15 weeks (taken either in single weeks or a continuous period or multiple periods totalling no more than 15 weeks) within a calendar year if an employee meets the eligibility requirements of s. 49.7(2). An employee may take further leaves if the employee qualifies for the leave in a subsequent calendar year.

Note that whenever an employee meets all of the requirements for the leave, i.e. the employee has been employed for at least 13 weeks and the employee or the employee's child has experienced domestic or sexual violence or the threat thereof and needs to take the leave for any of the enumerated purposes in s. 49.7(2), the employee will be entitled to a maximum of 10 days plus 15 weeks of leave within a calendar year under ss. 49.7(4)(a) and (b).

It is up to the employee to determine which leave is being used in relation to any particular absence, and communicate to the employer, by complying with the notice requirements of s. 49.7(10),(11),(13) and (14), whether they are drawing on the leave entitlement under either s. 49.7(4) clause (a) or (b). For example, if the employee takes a single day of leave and notifies the employer that they are taking the leave under s.49.7(4)(a), the employer is not entitled to deem the absence as an entire week of leave (but can deem a part day as a full day of leave pursuant to s. 49.7(9). Whereas if the employee takes a single day of leave and notifies the employer that they are taking the leave under s. 49.7(4)(b), the employer is entitled to deem the absence as an entire week of leave - see s. 49.7(12).

Entitlement to Paid Leave – s. 49.7(5)

49.7(5) If an employee takes a leave under this section, the employee is entitled to take the first five such days as paid days of leave in each calendar year and the balance of their entitlement under this section as unpaid leave.

This section provides that the employee is entitled to be paid for the first five days of domestic or sexual violence leave taken within a calendar year. Any further days or weeks that are taken will be unpaid. The

first five days of leave are to be paid whether the employee takes leave per s. 49.7(4)(a) (10 days of leave), or (b) (15 weeks). If an employee normally works a five day week and takes three weeks of leave under s. 49.7(4)(b) and this is the first period of leave to be taken within the calendar year, then the first 5 days of the first week would be paid, while the second and third week would not. Similarly, if in a calendar year, an employee takes three days of leave under s. 49.7(4)(a) in March and two weeks of leave under s.49.7(4)(b) in June, the employee would be entitled to be paid for all three days of the s. 49.7(4)(a) leave in March and the first two days of the s. 49.7(4)(b) leave taken in June.

Domestic or Sexual Violence Leave Pay – s. 49.7(6)

49.7(6) Subject to subsections (7) and (8), if an employee takes a paid day of leave under this section, the employer shall pay the employee,

(a) either,

> **(i) the wages the employee would have earned had they not taken the leave, or**
>
> **(ii) if the employee receives performance-related wages, including commissions or a piece work rate, the greater of the employee's hourly rate, if any, and the minimum wage that would have applied to the employee for the number of hours the employee would have worked had they not taken the leave; or**

(b) if some other manner of calculation is prescribed, the amount determined using that manner of calculation.

This section sets out the manner of calculating the amount of domestic or sexual violence leave pay.

Note that, subject to ss. 49.7(7) and (8), the calculation entitles employees only to wages they would have earned if they were at work and not on domestic or sexual violence leave. If an employee takes any part of a day as leave under s. 49.7(4)(a) and the employer deems the employee to have taken one day of leave in accordance with s. 49.7(9), the employer is required to pay domestic or sexual violence leave pay for the time taken as domestic or sexual violence leave (i.e., when the employee is absent) plus any wages the employee earns while actively working during the day in question. The same would apply to situations where an employee takes any part of a week as leave under s. 49.7(4)(b) and the employer deems the employee to have taken one week of leave in accordance with s. 49.7(12).

This provision is also read subject to ss. 49.7(7) and (8). Per s. 49.7(7), overtime pay and shift premium amounts are not to be included in domestic or sexual violence leave pay even if the employee "would have earned" these if the employee worked. Subsection 49.7(8) provides that if a paid day of domestic or sexual violence leave falls on a public holiday, the employee is not entitled to premium pay for any leave taken.

Domestic or sexual violence leave pay for a work day can be any amount from a single hour's pay or less to an entire day of wages, depending on how much leave is taken.

At this time, no other manner of calculating domestic or sexual violence leave pay has been prescribed.

In order to determine how much domestic or sexual violence leave pay an employee is entitled to, two things need to be established:

1) How much domestic or sexual violence leave was taken, or the number of hours in a work day, minus the number of hours worked, if any, and
2) How domestic or sexual violence leave pay will be calculated, either as
    a. What an employee's wages would have been for the day had they not taken the leave, or
    b. For employees paid by performance-related wages, either an hourly rate if there is one set by contract, or the applicable minimum wage if not.

Length of the work day

If the employee works a regular work day, with set hours, this is the length of the day for the purpose of calculating domestic or sexual violence leave pay.

If the employee is scheduled to work a particular number of hours on the day on which domestic or sexual violence leave is taken, the length of the day will be what was scheduled, even if the employee regularly works a set number of hours that is different from the scheduled shift.

Amount of domestic or sexual violence leave taken

The amount of domestic or sexual violence leave taken on a single day is calculated by deducting the number of hours actually worked, if any, from the total number of hours in the day. For example, if it is determined that the employee was scheduled to work nine hours on the day, and they took five hours to attend a medical appointment and counselling session, they would be entitled to four hours of wages and five hours of domestic or sexual violence leave pay.

If the same employee did not work but took the entire day as domestic or sexual violence leave, they would be entitled to nine hours of domestic or sexual violence leave pay.

Wages the employee would have earned that day had they not taken the leave

For employees who are <u>not</u> paid by performance-related wages:

Hourly Wage (Non-Salaried Employees)

If the employee is paid by an hourly wage, the amount of domestic and sexual violence leave pay is the number of hours of domestic and sexual violence leave x the hourly rate.

Example 1: Employee with a single rate of pay

- Employee's wage rate is $17.25 per hour
- Employee normally works 8.5 hours in a day
- Employee left work to take domestic or sexual violence leave after working 1.5 hours
- Employee normally works 8.5 hours per day, but worked 1.5 hours and took domestic or sexual violence leave for the rest of the day = 7 hours of domestic or sexual violence leave
- **Domestic or sexual violence leave ("DSVL") pay:** 7 hours x $17.25 = $120.75
- In addition to DSVL pay, employee is entitled to wages for hours actually worked on the same day = 1.5 hours x $17.25)

Example 2: Employee with more than one rate of pay

- Employee is paid $16.00 per hour for Job A and $17.50 per hour for Job B
- Employee is scheduled to work 10 hours: first five hours on Job A and second five hours on Job B.
- Employee worked for the first three hours doing Job A, and took the rest of the day as domestic or sexual violence leave: 10 hours – 3 hours = 7
- Of the 7 hours of domestic or sexual violence leave, two were Job A and 5 were Job B
- **DSVL pay:** (2 hours x $16.00 = $32.00) + (5 hours x $17.50 = $87.50) = $119.50
- In addition to the DSVL pay, employee is also entitled to wages for hours actually worked

Salaried Employees

If the employee is paid by salary and has a regular number of days within a pay period and regular hours, the amount of leave pay is

- If the employee took a full day or shift as domestic or sexual violence leave, the employee's daily rate (salary ÷ number of days in a pay period)
- If the employee took part of a day or shift as domestic or sexual violence leave, the employee's hourly rate (salary ÷ number of hours in a pay period) x number of hours of domestic or sexual violence leave

This is, in effect, simple salary continuance. If an employer pays an employee with a fixed salary the normal amount of pay for a week with a day of full or partial domestic or sexual violence leave in it, the domestic or sexual violence leave pay provisions of the ESA 2000 will be satisfied.

Examples: Salaried employees with regular number of days and hours within pay period

Example 1:

- Employee earns $1500.00 per bi-weekly pay period and works a five day week
- Employee takes one day of domestic or sexual violence leave
- **DSVL pay:** $1500.00 ÷ 10 = $150.00

Example 2:

- Employee earns $1500.00 per bi-weekly pay period and works a 40 hour week
- Employee takes take four hours of domestic or sexual violence leave
- Hourly rate: $1500.00 ÷ 80 = $18.75 per hour
- **DSVL pay**: $18.75 x 4 = $75.00
- Note that employee is also entitled to wages earned for the part of the day that they worked

Performance-related wages

The amount of domestic or sexual violence leave pay for an employee paid fully or partly by a system of wage calculation related to performance is the greater of the employee's "hourly rate, if any" and the minimum wage that would have applied to the employee. Performance-related wages can include commission only, commission plus an hourly wage, piece work, or compensation as a flat-rate mechanic. An hourly rate refers to an hourly rate set by an employment contract.

Example 1: Employee earns an hourly rate + commission

- Employee earns $16.00 per hour plus 2% commission on sales
- Employee takes 6.5 hours of domestic or sexual violence leave
- **DSVL pay**: $16.00 x 6.5 = $104.00
- In addition to DSVL pay, employee is entitled to their hourly wage for any hours worked plus commission earned while working that day, if any

Example 2: Employee paid entirely by commission

- Employee earns 10% commission on all sales, plus expenses and a car allowance
- Employee is scheduled to work 8 hours, works 5 hours and makes sales of $500.00 and then takes 3 hours of domestic or sexual violence leave
- **DSVL pay:** $applicable minimum wage rate x 3
- In addition to the DSVL pay, employee is entitled to 10% commission on the $500.00 of sales that the employee made on that day.

Example 3: Employee is a homeworker paid by piece work

- Employee earns $3.50 per phone call answered
- Employee is scheduled to work 8.5 hours, works two hours, answers 9 phone calls, and takes 6.5 hours of domestic or sexual violence leave
- **DSVL pay**: $applicable minimum wage x 6.5
- In addition to the DSVL pay, employee is entitled to $3.50 x 9 for actual work performed on the day.

Domestic or Sexual Violence Leave Where Higher Rate of Wages – s. 49.7(7)

49.7(7) If a paid day of leave under this section falls on a day or at a time of day when overtime pay, a shift premium, or both would be payable by the employer,

(a) the employee is not entitled to more than their regular rate for any leave taken under this section; and

(b) the employee is not entitled to the shift premium for any leave taken under this section.

This section excludes overtime pay or a shift premium (for example, an amount paid or an increase in hourly wage for working evenings or weekends) from inclusion when calculating domestic or sexual violence leave pay. The employee would be entitled to be paid for hours of domestic or sexual violence leave using the “regular” rate of pay, and not for example 1.5 times the regular rate per the overtime provisions of the ESA 2000.

Example: Employee scheduled to work overtime hours on a day when domestic or sexual violence leave was taken

- Employee is paid $16.00 per hour, has already worked 40 hours in a work week and is scheduled to work an additional shift of 8.5 hours (with a 30 minute unpaid meal break) on a Saturday.
- Employee does not work any of the scheduled shift and takes domestic or sexual violence leave

- Employee would have earned wages for 8 hours of work had they not taken the leave (4 of which would have exceeded the overtime threshold of 44 in a week)
- **DSVL pay**: 8 hours x $16.00 per hour = $128.00

Similarly, if an employee is scheduled to work hours that would normally attract a shift premium, and if the employee misses all or some of the shift to take domestic or sexual violence leave, then domestic or sexual violence leave pay will be calculated on the employee's base rate and would not include the shift premium.

Example: Employee entitled to shift premium pay on a day when domestic or sexual violence leave was taken

- Employee is paid $15.50 per hour, plus an additional $2.50 per hour for weekend shifts
- Employee is scheduled to work a Saturday shift (7.5 hours with a 30 minute unpaid meal break), takes domestic or sexual violence leave and does not work any hours
- Employee would have earned wages for 7 hours of work had they not taken the leave
- **DSVL pay:** 7 hours x $15.50 = $108.50

Domestic or Sexual Violence Leave on Public Holiday – s. 49.7(8)

49.7(8) If a paid day of leave under this section falls on a public holiday, the employee is not entitled to premium pay for any leave taken under this section.

Under ESA Part X Public Holidays, employees who agree to, or are required to work on a public holiday may be entitled to receive premium pay of at least one and one half their regular rate for hours worked on that day. The effect of this subsection is that despite the entitlement in s. 49.7(6) to be paid "the wages the employee would have earned had they not taken the leave", the employee is not entitled to any premium pay that they would have earned by working on the public holiday had the leave not been taken.

Example:

- Employee scheduled to work on public holiday for 9 hours and paid public holiday pay plus premium pay for 9 hours
- Employee worked three hours and took six hours as DSVL
- Employees earns $15.00 per hour
- Premium pay for hours worked on the public holiday: $15.00 x 1.5 x 3 = $67.50
- **DSVL pay:** public holiday pay calculated in accordance with s. 24
- Note that the employee is not entitled to premium pay for the six hours taken as domestic or sexual violence leave

For more information on public holiday entitlements, please see ESA Part X.

Leave Deemed to Be Taken in Entire Days – s. 49.7(9)

49.7(9) For the purposes of an employee's entitlement under clause 4(a), if an employee takes any part of a day as leave, the employer may deem the employee to have taken one day of leave on that day.

Employees may or may not need an entire day to attend to the issue that gave rise to the sexual or domestic violence leave. For example, an employee may need only a part day in order to meet with legal counsel to discuss an upcoming legal matter.

Section 49.7(9) allows an employer in this circumstance to count a part day off work as an entire day's leave for the purpose of the 10 day entitlement where the leave is taken under s. 49.7(4)(a). However, this is the only purpose for which the employer can deem the part day off work as an entire day's leave. It cannot deem the employee not to have worked at all on the day. The employee is entitled to be paid for the time that was actually worked, and the hours that were worked will be counted for the purposes of, among other things, determining whether the relevant overtime threshold has been reached, whether the limits on, for example, the daily and weekly hours of work have been reached, and whether the daily, weekly/bi-weekly and in-between shifts rest requirements have been met.

Note that this provision allows the employer to attribute one day's leave to a part day of absence, but it does not require the employer to do so.

Note also that the employee is entitled to be on leave only during the time they are engaging in one of the activities enumerated in s. 49.7(2).

Advising Employer – s. 49.7(10)

49.7(10) An employee who wishes to take leave under clause (4)(a) shall advise the employer that the employee will be doing so.

Subsection 49.7(10) requires an employee to advise their employer that the employee will be taking domestic or sexual violence leave under s. 49.7(4)(a), which establishes the 10 day portion of the leave. The subsection does not specify that the notice must be writing, and hence, if it is not, the employee will not be disentitled to the leave, oral notice is sufficient.

Same – s. 49.7(11)

49.7(11) If an employee must begin a leave under clause (4)(a) before advising the employer, the employee shall advise the employer of the leave as soon as possible after beginning it.

This subsection provides that where the employee must begin a leave under s. 49.7(4)(a) before providing the employer with the notice otherwise required under s. 49.7(10), the employee must advise the employer as soon as possible after beginning the leave. The subsection does not specify that the notice must be writing, and hence, the notice can be provided orally.

Further, an employee does not lose their right to domestic or sexual violence leave if they fail entirely to comply with ss. 49.7(10) or (11). An employee's entitlement to domestic or sexual violence leave arises by virtue of meeting the eligibility criteria in s. 49.7(2), and it is the Program's position that the failure to advise the employer before or as soon as possible after the leave begins does not negate that entitlement. This approach is consistent with the Program's long-standing policy for all leaves contained in Part XIV where the structures of the entitlement and notice provisions are similar to these.

The question may arise as to whether an employer can penalize an employee for failing to give advance notice that they will be absent from work (as may be required under an employer policy) where the time off is taken as a domestic or sexual violence leave. Section 49.7(11) provides that "if an employee must begin a leave… before advising the employer, the employee shall advise the employer of the leave in

writing as soon as possible after beginning it." It is clear that the ESA 2000 contemplates situations where the employee would be unable to advise the employer in advance of starting the leave and that the employee nevertheless has a right to take leave in such situations, although the employee does have an obligation advise the employer of the leave as soon as possible after beginning it. On the other hand, the failure to give notice in advance of taking leave when the employee could have done so can be the subject of disciplinary action by the employer without violating ESA Part XVIII, s. 74. However the following points should be borne in mind:

1. As noted above, the employee's failure to give advance notice does not nullify the right to take the leave if the qualifying conditions in s. 49.7(2) have been met. In other words, the failure to give advance notice does not have the result that the time taken off by the employee is not domestic or sexual violence leave.
2. An employer may impose discipline where the employee failed to provide advance even though the employee could have done so; however, the reason for the discipline must be because of the failure to give advance notice and not because the employee exercised the right to take leave.
3. Likewise, an employer may impose discipline if an employee fails to provide any notice of the leave (before or after the start of the leave); however, the reason for the discipline would have to be because of the failure to provide notice and not because the employee exercised the right to take leave.

Leave Deemed to Be Taken in Entire Weeks – s. 49.7(12)

49.7(12) For the purposes of an employee's entitlement under clause 4(b), if an employee takes any part of a week as leave, the employer may deem the employee to have taken one week of leave.

Where the leave is taken under s. 49.7(4)(b), employees may or may not need an entire week to attend to the issue that gave rise to the domestic or sexual violence leave.

Section 49.7(12) allows an employer in this circumstance to count a part week off work as an entire week's leave for the purpose of the 15-week entitlement. However, this is the only purpose for which the employer can deem the part week off work as an entire week's leave. It cannot deem the employee not to have worked at all during the week. The employee is entitled to be paid for the time that was actually worked, and the hours that were worked will be counted for the purposes of, among other things, determining whether the relevant overtime threshold has been reached, whether the limits on, for example, the daily and weekly hours of work have been reached, and whether the daily, weekly/bi-weekly and in-between shifts rest requirements have been met.

While that this provision allows the employer to attribute one week's leave to a part week of absence, it does not require the employer to do so.

Note also that the employee is entitled to be on leave only during the time they are engaging in one of the activities enumerated in s. 49.7(2).

Advising Employer – s. 49.7(13)

49.7(13) An employee who wishes to take leave under clause (4)(b) shall advise the employer in writing that the employee will be doing so.

Subsection 49.7(13) requires an employee to advise their employer that the employee will be taking domestic or sexual violence leave under clause (4)(b), which is the 15-week portion of the leave. Unlike the requirements under s. 49.7(10), s. 49.7(13) specifies that the notice must be writing.

Same – s. 49.7(14)

49.7(14) If an employee must begin a leave under clause (4)(b) before advising the employer, the employee shall advise the employer of the leave in writing as soon as possible after beginning it.

This subsection provides that where the employee must begin a leave under clause (4)(b) before providing the employer with the notice otherwise required under s. 49.7(13), that the employee must advise the employer as soon as possible after beginning the leave. Unlike s. 49.7(11), s. 49.7(14) specifies that the notice must be writing.

Further, an employee does not lose their right to domestic or sexual violence leave if they fail entirely to comply with ss. 49.7(13) or (14). An employee's entitlement to domestic or sexual violence leave arises by virtue of meeting the eligibility criteria in s. 49.7(2), and it is the Program's position that the failure to advise the employer before or as soon as possible after the leave begins does not negate that entitlement. This approach is consistent with the Program's long-standing policy for all leaves contained in Part XIV where the structures of the entitlement and notice provisions are similar to these.

The question may arise as to whether an employer can penalize an employee for failing to give advance notice that they will be absent from work (as may be required under an employer policy) where the time off is taken as a domestic or sexual violence leave. Section 49.7(14) provides that "if an employee must begin a leave…before advising the employer, the employee shall advise the employer of the leave in writing as soon as possible after beginning it." It is clear that the ESA 2000 contemplates situations where the employee would be unable to advise the employer in advance of starting the leave and that the employee nevertheless has a right to take leave in such situations, although the employee does have an obligation advise the employer of the leave in writing as soon as possible after beginning it. On the other hand, the failure to give notice in advance of taking leave when the employee could have done so can be the subject of disciplinary action by the employer without violating ESA Part XVIII, s. 74. However the following points should be borne in mind:

1. As noted above, the employee's failure to give advance written notice does not nullify the right to take the leave if the qualifying conditions in s. 49.7(2) have been met. In other words, the failure to give advance written notice does not have the result that the time taken off by the employee is not domestic or sexual violence leave.
2. An employer may impose discipline where the employee failed to provide advance written notice even though the employee could have done so; however, the reason for the discipline must be because of the failure to give advance written notice and not because the employee exercised the right to take leave.
3. Likewise, an employer may impose discipline if an employee fails to provide any written notice of the leave (before or after the start of the leave); however, the reason for the discipline would have to be because of the failure to provide written notice and not because the employee exercised the right to take leave.

Evidence – s. 49.7(15)

49.7(15) An employer may require an employee who takes a leave under this section to provide evidence reasonable in the circumstances of the employee's entitlement to the leave.

This provision gives an employer some ability to require an employee to provide proof that they are entitled to take domestic or sexual violence leave. The employer can require an employee to provide evidence that is “reasonable in the circumstances” that they are or was entitled to take the leave.

Evidence of entitlement to domestic or sexual violence leave may take many forms, though what is reasonable in the circumstances will be situation-specific. For example, it could be an email relating to an appointment for legal, professional or counselling services, an invoice or receipt if any of the professional services are provided on a “pay for service” or reimbursement basis, or a rental agreement or lease. There is nothing in the legislation that prohibits an employer from asking for a medical certificate, and there could be scenarios where it would be reasonable in the circumstances to ask for a medical note.

Employers are not permitted to require detailed medical certificates citing the diagnosis and/or treatment of an employee’s medical condition that gave rise to the domestic or sexual violence leave entitlement. It is Program policy that it is reasonable to request only the following information on a medical certificate:

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

Note that it is Program policy that the employee is not required to provide evidence relating to the fact that they have experienced domestic violence or sexual violence (or the threat thereof) to an employment standards officer during the course of a claim investigation: the employee would be required to provide evidence only relating to the defined purpose(s) for which the leave was taken.

What will be reasonable in the circumstances will depend on all the circumstances in a given situation, and the general approach to what is reasonable refers to both the timelines in which the evidence is provided to the employer as well as the evidence itself. In some cases, no evidence may be available, a third party may refuse to provide evidence (for example, a domestic violence shelter may decline to issue any document that would reveal its location), or evidence may involve a security risk that a reasonable employee would not be expected to take, (for example, providing information to an employer about a temporary residence location). See ESA Part XIV, s. 50 for a discussion on what reasonable in the circumstances means in the context of evidence to support a sick leave.

s. 49.7(16) – REPEALED

Confidentiality – s. 49.7(17); Disclosure Permitted – s. 49.7(18)

(17) An employer shall ensure that mechanisms are in place to protect the confidentiality of records given to or produced by the employer that relate to an employee taking a leave under this section.

(18) Nothing in subsection (17) prevents an employer from disclosing a record where,

(a) the employee has consented to the disclosure of the record;

(b) disclosure is made to an officer, employee, consultant or agent of the employer who needs the record in the performance of their duties;

(c) the disclosure is authorized or required by law;

(d) the disclosure is prescribed as a permitted disclosure.

Section 49.7(17) creates the requirement for an employer to have mechanisms in place to protect the confidentiality of any records given to the employer related to an employee taking domestic or sexual violence leave and any employer-created records relating to an employee taking the leave. Note that this provision applies to domestic or sexual violence leave only, not to other Part XIV leaves. Section 49.7(18) clarifies under what circumstances an employer may release or share this type of information.

Mechanisms

Mechanisms may refer to various things put in place by the employer to prevent records related to an employee taking domestic or sexual violence leave from being seen by anyone not authorized to receive the information by s. 49.7(18). It may include a secure password set to protect electronic information, or a physical location for records storage with limited access, such as a filing cabinet in a restricted area. It may also refer to a particular method of receiving the information, such as designating a particular human resources employee as a single point of contact to limit the risk of confidential information becoming public.

Disclosure

Section 49.7(18) clarifies under what circumstances an employer may disclose records relating to domestic or sexual violence leave. The employer may release records if the employee has provided consent: although s. 49.7(18)(a) does not state that the consent should be in writing, for record-keeping purposes consent in writing is preferred. Disclosure may also be made to an officer, another employee, consultant or agent of the employer if the information is required for the person to do their job, for example, securing evidence or checking information such as start and end dates of periods of leave for the purpose of processing payroll. In general, the information disclosed by an employer to any of these individuals is limited to only as much information as the other employee, consultant, or agent requires to perform their duties and no more.

Section 49.7(18)(c) also permits an employer to disclose information or records as authorized or required by law. This may include release of information to an employment standards officer in the course of a claim investigation, or a police officer if a criminal investigation is commenced and the officer has a warrant for the information. It may also include a situation where an employer has a positive obligation under the *Occupational Health and Safety Act* to provide limited information to workers who are at risk of physical violence in the workplace due to another employee's history of violent behaviour.

Note that at the time of writing, no permitted disclosure per s. 49.7(18)(d) has been prescribed.

ESA Part XIV Section 50 – Sick Leave

Sick Leave – s. 50(1)

50(1) An employee who has been employed by an employer for at least two consecutive weeks is entitled to a leave of absence without pay because of a personal illness, injury or medical emergency.

The sick leave provisions were introduced into the ESA 2000 effective January 1, 2019 by the *Making Ontario Open for Business Act*, *2018*.

Note that, pursuant to O Reg 285/01, s. 3, certain employees who meet the qualifying criteria for a sick leave will not be entitled to take it if taking it would constitute an act of professional misconduct or a dereliction of professional duty. Section 3 of O Reg 285/01 reads:

3. Sections 50, 50.0.1 and 50.0.2 of the Act do not apply to any of the following persons in circumstances in which the exercise of the entitlement would constitute an act of professional misconduct or a dereliction of professional duty:

> **1. A person described in clause 2(1) (a), (c), (d) or (e).**
>
> **2. A person employed as a registered practitioner of a health profession set out in Schedule 1 to the *Regulated Health Professions Act*, *1991*, including a person described in clause 2(1)(b).**

See O Reg 285/01, s. 3 for more information.

What Triggers an Entitlement to Sick Leave

Section 50(1) sets out the qualifying conditions an employee must meet in order to be entitled to sick leave. To qualify, the employee must have been employed by the employer for at least two consecutive weeks and the need for the leave must be because of one of the following events:

- personal illness
- personal injury, or
- personal medical emergency.

Sick leave is an unpaid leave. If an event is not listed in s. 50(1), the employee is not entitled to sick leave for that event. If the employee has not been employed for at least two consecutive weeks, the employee is not entitled to sick leave.

Injury, Illness or Medical Emergency

For the most part, the meaning of these terms is self-evident.

One issue that arises with respect to leaves taken because of illness, injury or medical emergency is whether an employee is entitled to take sick leave for pre-planned or so-called "elective" surgery. Because the surgery is scheduled ahead of time, it is not a medical "emergency". However, because, generally speaking, people undergo surgery for the treatment or prevention of a medical condition, it is Program policy that most surgeries, including those that are pre-planned or elective, that are performed to address or prevent manifestation of a medical condition (e.g., laser eye surgery to correct poor distance vision) are because of an illness or injury and, consequently, entitle an employee to sick leave. This does not include medically unnecessary plastic surgeries that are performed for purely cosmetic reasons and that are not related to an underlying illness or injury; these types of surgeries are not because of an illness or injury.

Another issue that arises concerns doctor's appointments. An appointment for an annual check-up would generally not trigger an entitlement to leave unless it has been scheduled in respect of an illness, injury or medical emergency. However, if an employee had regularly scheduled appointments for the treatment or management of a chronic medical condition such as Crohn's disease or diabetes, those appointments would trigger an entitlement because they are absences related to an illness.

Regular prenatal appointments scheduled for an employee during the course of a normal, healthy pregnancy would not trigger an entitlement to sick leave because a healthy pregnancy is not an illness. Note that in this regard, consideration should also be given to the Ontario *Human Rights Code,* RSO 1990, c H.19 obligations to accommodate pregnant employees. Pursuant to the Code, an employer may be required to accommodate a pregnant employee's need for regular prenatal visits up to the point of undue hardship. However, if a pregnant employee has an illness or medical condition (even if related to or exacerbated by the pregnancy) they would be entitled to sick leave as the doctor's appointments would be considered to be related to an illness.

Whether an illness, injury or medical emergency was caused by the employee's own actions or by external factors beyond the employee's control is irrelevant to the question of an employee's entitlement to sick leave. For example, an employee who broke their tailbone while tobogganing at night in an inebriated state would not be disentitled to sick leave just because the injury was caused by their own carelessness. While some may argue that in such cases the employee should not be entitled to sick leave days, there is no basis in the legislation to support such a view, and it is Program policy that absences for illness or injury, caused by the employee's own action can qualify as sick leave days.

Designating Absences as Sick Leave

For employees who are entitled to sick leave as provided for in s. 50, questions have arisen as to whether an employee who is absent from work for one of the reasons listed in s. 50(1) **must** use one of their three days of sick leave. For further information on this issue refer to the discussion under ss. 50 (3) and (4).

Limit – s. 50(2)

50(2) An employee's entitlement to leave under this section is limited to a total of three days in each calendar year.

This section provides that an employee is entitled to take up to three days of sick leave every calendar year. The entitlement is to a *total* of three days of sick leave per calendar year, not three days per personal illness, injury or medical emergency.

The ESA 2000 does not place any restrictions on whether the three days have to be taken consecutively or individually. Employees can take sick leave in part days (although see s. 50(5), which allows employers to deem one day's leave to be taken when an employee takes part of a day off work for sick leave), entire days, or in periods of more than one day.

The question arises as to whether the three-day entitlement should be prorated for employees who are part-time, or who started their employment partway through a calendar year but have been employed for at least two consecutive weeks. There is nothing in the legislation to suggest that employees who are eligible for sick leave should be entitled to less than three days a calendar year in any of these situations. Accordingly, it is Program policy that pro-rating of the three-day entitlement for part-time employees or employees who were hired partway through a calendar year is not permitted.

The ESA 2000 does not provide for the carryover of unused days of sick leave from one calendar year into the next calendar year. In other words, employees do not have a statutory right to "bank" unused sick leave days year over year.

It is Program policy that an employee who quits or is terminated and who is subsequently re-hired by the same employer during the same calendar year is entitled to a new three-day entitlement after two

consecutive weeks of employment upon their re-hire. This is the case even if the employee took some sick leave during their first term of employment in that calendar year.

See ESA Part III, s. 5(2) for a discussion of the application of the greater right or benefit provision to sick leave. See also the discussion at ss. 50(7)–(9) for information regarding the interplay between contractual leave entitlements and statutory entitlements to sick leave where the contractual leave does not amount to a greater right or benefit.

Advising employer – s. 50(3) and 50(4)

50(3) An employee who wishes to take a leave under this section shall advise his or her employer that he or she will be doing so.

50(4) If the employee must begin the leave before advising the employer, the employee shall advise the employer of the leave as soon as possible after beginning it.

Advising Employer

Section 50(3) requires employees to tell their employers ahead of time that they will be taking sick leave. In circumstances where that cannot be done, the employee is required, pursuant to s. 50(4), to inform the employer as soon as possible after beginning the leave.

The ESA 2000 does not require the employee to advise the employer of the sick leave in writing. Oral notice is sufficient.

The ESA 2000 does not specify any particular method by which the employer is to be advised that the employee will be taking sick leave. Consequently, an employee would be complying with this section whether the employee, for example, advised the employer by phone, left a note on the manager's desk or had a colleague take a message to the employer on their behalf.

Employees do not lose their right to sick leave if they fail to comply with ss. 50(3) or (4). An employee's entitlement to sick leave arises by virtue of one of a number of triggering events arising, and it is the Program's position that the failure to advise the employer before or as soon as possible after the leave begins does not negate that entitlement. This approach has been affirmed in a grievance arbitration decision by the Ontario Labour Relations Board in the context of the former personal emergency leave, which used identical language to subsections (3) and (4) and which had similarly-structured entitlement provisions to those found in sick leave – see International Brotherhood of Electrical Workers, Local 115 v The State Group Inc., 2019 CanLII 22129 (ON LRB). In that decision, the Vice-Chair found that notice to the employer is not a prerequisite to exercising the right to the leave. Note that this approach is also consistent with the Program's long-standing policy in the pregnancy and parental leave context, where the structure of the entitlement and notice provisions are also similar to these. See ESA Part XIV, s. 46(4) and s. 48(4).

An issue has arisen as to whether an employer can penalize an employee for failing to give advance notice that they will be absent from work (as may be required under an employer policy), where the time off is a sick leave under the ESA 2000. Section 50(1) describes the employee's entitlement. Section 50(3) requires the employee taking sick leave to advise the employer that they are taking the leave, and s. 50(4) provides that "if the employee must begin the leave before advising the employer, the employee shall advise the employer of the leave as soon as possible after beginning it." It is clear from s. 50(4) that the ESA 2000 contemplates situations where the employee would be unable to advise the employer in

advance of commencing the sick leave. Part of the sick leave entitlement under the ESA 2000 is the right to take the sick leave even if advance notice cannot be given, with the proviso that the employee must advise the employer of the leave as soon as possible after beginning it.

The failure to give notice in advance of taking leave, when it would have been possible for the employee to do so, can be the subject of disciplinary action by the employer without violating ESA Part XVIII, s. 74, the anti-reprisal provision. However, the following points should be considered: The employee's failure to give advance notice would not be a lawful basis on which to deprive the employee of the right to take the leave if the qualifying conditions in s. 50(1) have been met. An employer could not, for example, take the position that failure to give advance notice when it would have been possible for the employee to do so will result in the time taken off not being counted as a sick leave day.

Any discipline for failing to provide notice in situations where such notice is required under s. 50(3) (i.e., where s. 50(4) does not apply) would have to be appropriately linked to the failure to give advance notice and must not, in effect penalize the employee for exercising the right to leave. The motive for any discipline that the employer does impose must clearly be the employee's failure to give advance notice and not the taking of the leave itself.

In addition, an employer would be able to impose discipline if an employee fails to provide any notice of the sick leave, or if the employee provides notice of the leave so late that one wouldn't reasonably be able to say that it falls within s. 50(4). Again, however, the employer's disciplinary action would have to be appropriate, and in no way a penalty or reprisal for the employee having taken the leave, but only for the failure to give notice. In this regard see *Ryding-Regency Meat Packers Ltd. v. U.F.C.W., Local 1000A*. In that case, the arbitrator concluded that s. 50(1) establishes an entitlement to leave when the qualifying events have occurred (this case referred to the former personal emergency leave, which an employee could become entitled to take when a defined relative became ill and the employee took time off work to care for the relative). The fact that the employee's grandmother was ill was not disputed. Because s. 50(1) separate from the notice requirements, the employee could be disciplined for not giving notice that he was taking or had taken leave but did not lose his entitlement to the leave itself.

Designating Absences as Sick Leave

For employees who are entitled to sick leave as provided for in s. 50, questions have arisen as to whether an employee who is absent from work for one of the reasons listed in s. 50(1) **must** use one of their three days of sick leave.

Impact of Subsections (7) – (9)

Subsection (7) provides that where an employee takes a paid or unpaid leave of absence under an employment contract in circumstances for which the employee would also be entitled to take a leave under s. 50, the employee is deemed to have taken a leave under s. 50. Subsections (8) and (9) establish rules that apply to the deemed leave.

Accordingly, **if** subsections (7) to (9) apply to an absence, i.e. an employee takes paid or unpaid leave under the contract of employment in circumstances in which sick leave could be taken, the employee **will be deemed** pursuant to ss. 50(7) to have taken ESA sick leave and drawn down against the three-day s. 50 entitlement. See the discussion under ss. 50 (7) to (9) for more information regarding the impact of contractual entitlements on the statutory right to sick leave.

Result Where Subsections (7) – (9) Do Not Apply

On the other hand, if subsections (7) to (9) **do not** apply, i.e. an employee who is entitled to sick leave is absent due to one of the reasons listed in s. 50(1) but does not take a paid or unpaid leave of absence under an employment contract for that absence (either because the employee does not have a contractual right or does not exercise it), **it is the employee (not the employer) who decides whether to designate the absence as a statutory sick leave**.

If the employee who is entitled to sick leave and who is absent from work due to one of the reasons listed in s. 50(1) wishes to designate the absence as a statutory sick leave, then the absence is a sick leave that draws down against the three-day statutory entitlement and attracts the corresponding reprisal protections, and all of the other ancillary rights that attach to statutory leaves that are set out in ss. 51-53.1.

In the case where ss. (7) to (9) **do not** apply, an employee may be entitled to statutory sick leave and be absent from work due to one of the reasons listed in s. 50(1) and decide not to claim the absence as a sick leave day. This is not considered as contracting out of the ESA 2000 if an employee does not take advantage of their leave entitlements; the employee has merely chosen not to exercise them.

If the employee who is entitled to sick leave by virtue of being absent from work due to one of the reasons listed in s. 50(1) does not wish to designate the absence as a sick leave, and the absence cannot be considered an authorized absence on some other ground (e.g., another leave under the ESA 2000 or vacation authorized by the employer), the absence would have no statutory reprisal protection. For this reason, an employee who takes a day off for a reason that would qualify under s. 50 but who would prefer not to have the day charged against their sick leave allotment may feel effectively forced into designating the day as such a leave. This in itself does not constitute any violation of the ESA 2000: it is not unlawful for an employer to inform an employee that should the employee not designate an absence as a statutory sick leave day, then it would be considered an unexcused absence that will lead to disciplinary action.

Note that if the employee did not know of the right to take sick leave, the default is that the absence is considered to be statutory sick leave with the corresponding reprisal protection. An employee does not lose their right to any of the leaves provided for under the ESA 2000 because they were unaware of their entitlements.

Leave deemed to be taken in entire days – s. 50(5)

50(5) For the purposes of an employee's entitlement under subsection (1), if an employee takes any part of a day as leave under this section, the employer may deem the employee to have taken one day of leave on that day.

Employees may not need an entire work day to attend to the event that gave rise to the sick leave and might only take part of a day off as sick leave. Section 50(5) allows an employer in this situation to count a part-day off work as an entire day's leave **for the purpose of counting the absence against the statutory three-day leave entitlement**. **This is the only purpose for which the employer can deem the part day off work as an entire day's leave.** The employer cannot deem the employee not to have worked at all on the day. Where an employee worked a partial day and took a part-day of sick leave, the employee is entitled to be paid the earnings for the time that was actually worked that day. As well, the hours that were worked will be counted for the purposes of, among other things, determining whether the relevant overtime threshold has been reached, whether the limits on, for example, the daily and weekly hours of work have been reached, and whether the daily, weekly/bi-weekly and in-between shifts rest requirements have been met.

For clarity, this provision does not require employees to take sick leave in full day periods. It simply allows an employer to reduce the employee's three-day entitlement by a day if an employee is on sick leave for only part of a day.

Note that this provision *allows* the employer to attribute one day's leave to a part day of absence. It does not require the employer to do so.

For example, an employee goes home early from work because of the stomach flu. They worked a four-hour day rather than their usual eight hours and takes sick leave. In that case, the employer may consider the employee to have used up one of their three days of sick leave and the employee would be paid her earnings for the four hours that she actually worked.

Just because an employer may consider an employee to have used one day of leave due to a part day of absence does not mean that the employee then has the right to take the entire day off if the triggering event did not last the entire day. For example, an employee's shift is from 9 a.m. to 5 p.m. From 10 a.m. to 11 a.m., they have to attend a medical appointment in relation to a chronic medical condition they live with. The employee claims the absence as a sick leave. Their employer is entitled to reduce the employee's sick leave entitlement by one day, but the employee must nevertheless return to work after the appointment is over. Employees have the right to be away from work under the sick leave provisions of the ESA 2000 only for as long as the event that triggered the entitlement lasts. After the triggering event is over, the employee's normal obligations to attend at work are resumed.

In addition, employers cannot prohibit employees who took a part day of leave from returning to work for the remainder of their shift. This is because of, among other reasons, the employer's obligation to reinstate the employee at the end of the leave in ESA Part XIV and the prohibition against penalizing employees for having taken a leave in ESA Part XVIII, s. 74.

An issue has arisen as to whether an employer could exercise its discretion and deem a partial day absence as a full day for some employees, but not for others, or whether this might allow employers to selectively punish employees who have too many absences in violation of the reprisal provisions of the ESA 2000.

The answer will depend on the facts. In particular, why did the employer treat the employees differently? Where an employer deems a full day's absence for some employees, but not for others, it is a question of fact as to whether the employer would be in violation of the ESA 2000.

For instance, an employer counts a three-hour sick leave as a full day's leave for employee A but not for employee B, who also takes a three-hour sick leave because the employer considers employee B to be a better worker than employee A. Although this might be unfair as between employee A and B, it would not be a violation of the ESA 2000, as it would not be a reprisal for exercising a right under the ESA 2000.

If, on the other hand, the motivation for the differential treatment was that employee A frequently took sick leave every year of only a few hours, and the employer assigned a full day's absence to these short leaves as a way to ensure employee A used up all of their statutory entitlement as soon as possible because the employer found it inconvenient for the employee to be away for many short periods of time, that would be an unlawful reprisal.

As another example, it would also be an unlawful reprisal if the motive for the differential treatment was because employee A made inquiries about ESA rights or refused to agree to average hours for overtime pay purposes.

Evidence – s. 50(6)

50(6) An employer may require an employee who takes leave under this section to provide evidence reasonable in the circumstances that the employee is entitled to the leave.

Subsection 50(6) gives an employer the ability to require an employee to provide proof that they are or were entitled to take sick leave. The employer can require an employee to provide evidence that is reasonable in the circumstances that they are or were entitled to take the leave.

Evidence of entitlement to sick leave may take many forms. For example, if it is reasonable in the circumstances, it could take the form of a receipt from a drugstore or pharmacy or a medical bracelet from a hospital.

What will be reasonable in the circumstances will depend on all of the circumstances in any given situation. In FAG Bearings Ltd. v Francis, 2005 CanLII 35873 (ON LRB), a decision made in relation to the former personal emergency leave provisions, the employer had a disciplinary policy that provided for a four-step progression for any infraction of a company rule or policy. Under the disciplinary policy, an employee's employment would be terminated if there was a fourth disciplinary incident in a rolling twelve-month period. In this case, the third disciplinary incident was a response to the claimant failing to provide a doctor's note when he left work early because of back pain. The employer argued that the discipline was a consequence of the employee's failure to provide a doctor's note within a reasonable period of time following the absence, and not because he had exercised a right to emergency leave under the ESA 2000. The employee argued that he should have been provided with more time to provide a note. The Ontario Labour Relations Board concluded that the requirement to provide evidence reasonable in the circumstances contemplates that both the evidence required and the timelines for providing it be reasonable in the circumstances. The Board noted that the right to leave would be defeated if an employee who is legitimately entitled to it could be disciplined for failing to comply with an unreasonable time frame set by their employer. Conversely, the employer's right to verify entitlement to a leave would also be defeated if it could not require the employee to provide the evidence within a reasonable period of time. In this case, the Board found that the time to provide the evidence had been reasonable and the discipline was imposed solely as a consequence of the employee's failure to provide evidence as required under the ESA 2000. On that basis, the Board found the employer had not violated ESA Part XVIII, s. 74 since the discipline was not related to the exercise of the employee's right to leave under s. 50(1).

Another helpful decision relating to evidence in the context of the former personal emergency leave is *Re Tilbury Assembly Ltd. and United Auto Workers, Local 251*. There, an employee with an absenteeism problem had left her shift early complaining of a severe headache. The employer had a policy that this employee was required to provide a physician's note in all cases of absence due to personal illness because of her history of absenteeism. In this instance, the employee did not obtain such a note, but instead bought some extra-strength pain relievers and took them and went to bed in a dark room, which was how she customarily dealt with this type of headache, which she experienced two or three times a year. Although the employee provided a note and receipt from the pharmacist from whom she purchased the pain relievers, the employer disciplined her for the failure to produce a physician's note. The employee grieved. The arbitrator held that the ESA 2000 gives an employer a right to require an employee to produce evidence, but only such evidence as was reasonable in the circumstances. While the employee's record of absences was one circumstance to be taken into account in determining what was reasonable, it was outweighed by the fact that the employee did have a note and receipt from a pharmacist, by the fact that her experience with the type of headache she had indicated that taking the pain relievers and going to bed in a dark room would provide effective treatment and by the fact that

employee would likely face a considerable wait in a hospital emergency facility in order to see a doctor for her headache. The arbitrator found that the employer's requirement of a note from a physician was not reasonable in these circumstances and reversed the discipline.

What evidence is reasonable in the circumstances, including whether it is reasonable for the employer to require a medical note, will be fact-specific. The factors and principles that may be relevant when assessing reasonableness are listed below.

- The duration of the leave. For example, it may not be reasonable, *depending on all the circumstances*, for an employer to require an employee who was away from work for only one day with a cold to provide a doctor's note.
- Whether there is a pattern of absences or a record of absenteeism. For example, if an employee claims to be ill and takes sick leave only on Friday afternoons during the summer, it may be reasonable for the employer to require some proof of the illness even though the leave is of short duration.
- Whether any evidence is available. For example, an employer did not ask an employee who was on a sick leave for a doctor's note until after the employee had returned to work. If the employee is no longer ill at that point, it may be impossible for them to get any evidence of the illness.
- Where evidence is available, but only with some difficulty, whether it is reasonable to expect the employee to obtain the evidence (See the *Tilbury Assembly* decision, discussed above.)
- The cost of the evidence. For example, it may not be reasonable, *depending on all the circumstances*, for an employer to require an employee who earns minimum wage to obtain a doctor's note if the doctor charges the employee $25 for it.
- The employee had earlier asked for the time off for non-sick leave reasons for the time at which the absence occurred but was denied.
- The employee had announced plans in advance to miss work.

In circumstances where it is reasonable to require a medical certificate to support an employee's entitlement to sick leave under the ESA, it is Program policy that employers are not permitted to require detailed medical certificates citing the diagnosis and/or treatment of the medical condition of the employee that gave rise to the sick leave entitlement. It is Program policy that it is reasonable to request only the following information on a medical certificate:

- The expected duration of the absence (or, if the absence is over, the date(s) of the absence addressed by the certificate),
- The date the employee was seen by a health care professional, and
- Whether the patient was examined in person by the health care professional issuing the certificate.

Note that any evidence the employee provides to support the employee's claim of an entitlement to sick leave is just that – evidence – and is not necessarily determinative of the question of whether the employee had an entitlement. Depending on the circumstances, it may be reasonable for the employer to require additional evidence from the employee.

Note also that the Program policy restrictions on what an employer can require on medical certificates apply only to medical certificates as evidence in support of an employer's entitlement to statutory sick leave. The Program's policy does not apply to the content of medical certificates in the context of other employment issues such as return-to-work situations or for accommodation purposes.

Sick Leave Taken Under Employment Contract – s. 50(7)

Same, Application of Act to Deemed Leave – s. 50(8)

Same, Application of Subs. (5) to Deemed Leave – s. 50(9)

50(7) If an employee takes a paid or unpaid leave of absence under an employment contract in circumstances for which he or she would also be entitled to take a leave under this section, the employee is deemed to have taken the leave under this section.

50(8) All applicable requirements and prohibitions under this Act apply to a leave deemed to have been taken under subsection (7).

50(9) Subsection (5) applies with necessary modifications to a leave deemed to have been taken under subsection (7).

These provisions, when read together, establish what happens when an employee takes a leave of absence under an employment contract (which includes a collective agreement) in circumstances that would also entitle the employee to a leave under ESA Part XIV, s. 50.

“Circumstances” refers only to the triggering event that would entitle the employee to statutory sick leave, i.e., the employee is absent because of personal illness, injury or medical emergency.

It is Program policy that “circumstances” does not include the two-week employment eligibility criterion. Accordingly, these provisions will be triggered when an employee takes a leave of absence under an employment contract due to personal illness, injury or medical emergency even during the first two weeks of employment; this is the case regardless of the fact that the employee does not have the right to take statutory sick leave during this time.

Subsections (7) to (9) codify the long-standing Program policy on the interplay between contractual leave entitlements and statutory leave entitlements where the contractual leave does *not* amount to a greater right or benefit than statutory sick leave under ESA Part III, s. 5(2).

Note that if a contract *does* provide a greater right or benefit than the statutory sick leave entitlement – the determination of which includes consideration of reprisal protections and the entitlements under general provisions concerning leaves such as the right to reinstatement – the contractual leave provision applies and s. 50, including these subsections, does not apply. See the discussion of ESA Part III, s. 5(2) for details.

In general terms, subsections (7) to (9) provide that an employee who claims a contractual benefit for an absence – in circumstances in which the employee would also be entitled to take sick leave - does not give the employee an entitlement to those contractual absences *plus* an additional three days of sick leave.

Sick Leave Taken Under Employment Contract

50(7) If an employee takes a paid or unpaid leave of absence under an employment contract in circumstances for which he or she would also be entitled to take a leave under this section, the employee is deemed to have taken the leave under this section.

If an employee takes a paid or unpaid leave of absence under an employment contract in circumstances for which the employee would also be entitled to take a leave under ESA Part XIV, s. 50, the employee is deemed to have taken a day of sick leave and the absence will reduce the employee’s three-day per

calendar year sick leave allotment accordingly. Note that this provision must be read in conjunction with subsections (8) and (9), discussed below.

For this provision to apply, the reason for the absence (the “triggering event”) must qualify for both the contractual leave and the statutory leave.

Some examples:

- An employee’s contract of employment provides three paid “flex days” that can be used for any reason. The employee is absent from work for three days because they are ill. They claim the benefit of these flex days because they are a paid leave. Subsection 50(7) deems the employee to have used three ESA sick leave days. As a result, the employee will have no further entitlement to sick leave under the ESA 2000.
- An employee’s contract of employment offers flex days that can be used for any reason, and the employee uses one of those days to deal with a matter that is unrelated to a personal illness or medical emergency (for example, to attend a child’s dance recital). In this situation, the employee would **not** be deemed to have taken a day of sick leave pursuant to this provision. This is because an employee is not entitled to take a statutory sick leave day to attend a child’s dance recital , and, therefore, the contractual leave was not taken in circumstances for which the employee would also be entitled to take a sick leave.

This provision has the potential to deem a statutory leave to be taken when a contractual leave is taken. It does not do the converse: it does not deem a contractual leave to be taken if a statutory leave is taken in circumstances for which the employee would also be entitled to take a contractual leave. The question as to whether statutory absences will also draw down against the contractual right is not a matter for the employment standards program.

Application of Act to Deemed Leaves

50(8) All applicable requirements and prohibitions under this Act apply to a leave deemed to have been taken under subsection (7).

If an absence has been deemed to be a statutory leave under s. 50(7), this provision establishes that all requirements and prohibitions under the ESA 2000 apply to the absence.

This includes all requirements and prohibitions in ESA Part XIV, s. 50 as well as general rights and obligations found in other sections and parts of the ESA 2000.

Examples include: the right to reinstatement, maintenance of benefits (if relevant), protection from reprisal, obligations on the employee with respect to advising the employer of the leave and providing evidence reasonable in the circumstances to demonstrate an entitlement to the leave (where required by the employer).

Application of ESA Part XIV, s. 50(5) to Deemed Leaves

50(9) Subsection (5) applies with necessary modifications to a leave deemed to have been taken under subsection (7).

This provision states that subsection (5) applies, with necessary modifications, to a leave that is deemed to be a sick leave pursuant to subsection (7).

This means that if an employee takes a partial-day leave pursuant to their contract of employment, and that leave is deemed to be a day of sick leave under subsection (7), the employer may deem the absence to be a *full day* of sick leave and reduce the employee's three-day per calendar year allotment of sick days accordingly.

ESA Part XIV Section 50 – Personal Emergency Leave – REPEALED

The personal emergency leave (PEL) provisions in ESA Part XIV, s. 50 were repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. The PEL provisions are therefore no longer in force. However, employees may still have a complaint relating to PEL that arose during the period of time when that leave was in force. For that reason, the Program's interpretation of the s. 50 PEL provisions remains as part of this publication.

Definitions – s. 50(0.1)

Subsection 50(0.1) was repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. The discussion of this provision is being maintained in this publication since employees may still have a complaint relating to a situation that arose when the provision was in force.

50 (0.1) In this section,

a) **"qualified health practitioner" means,a person who is qualified to practise as a physician, a registered nurse or a psychologist under the laws of the jurisdiction in which care or treatment is provided to the employee or to an individual described in subsection (2), or**

b) **in the prescribed circumstances, a member of a prescribed class of health practitioners.**

This subsection defines the term "qualified health practitioner" for the purposes of s. 50. This term is used in subsection (13), which provides that an employer cannot require an employee to provide a certificate from a qualified health practitioner as evidence that the employee is entitled to take a leave under this section.

Where care or treatment is provided in Ontario:

- "A person who is qualified to practise as a physician" means a member of the College of Physicians and Surgeons of Ontario (this includes psychiatrists);
- "A person who is qualified to practise as a registered nurse" means in accordance with O Reg 275/94 of the *Nursing Act*, 1991, SO 1991, c 32, a member of the College of Nurses of Ontario who holds a general or extended certificate of registration as a registered nurse (nurse practitioners hold extended certificates); and
- "A person who is qualified to practise as a psychologist" means an individual who is a member of the College of Psychologists of Ontario.

Where care or treatment is provided in a jurisdiction other than Ontario the question of whether the person providing it is a qualified health practitioner is determined with reference to the laws of that other jurisdiction. At this time, there are no additional prescribed classes of qualified health practitioners.

Personal Emergency Leave – ss. 50(1) & (2) – REPEALED

Subsections 50(1) and (2) were repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. The discussion of these provisions is being maintained in this publication since employees may still have a complaint relating to a situation that arose when the provisions were in force.

50(1) An employee is entitled to a leave of absence because of any of the following:

1. A personal illness, injury or medical emergency.

2. The death, illness, injury or medical emergency of an individual described in subsection (2).

3. An urgent matter that concerns an individual described in subsection (2).

(2) Paragraphs 2 and 3 of subsection (1) apply with respect to the following individuals:

1. The employee's spouse.

2. A parent, step-parent or foster parent of the employee or the employee's spouse.

3. A child, step-child or foster child of the employee or the employee's spouse.

4. A grandparent, step-grandparent, grandchild or step-grandchild of the employee or of the employee's spouse.

5. The spouse of a child of the employee.

6. The employee's brother or sister.

7. A relative of the employee who is dependent on the employee for care or assistance.

The personal emergency leave provisions were introduced by the ESA 2000.

Sections 50(1) and 50(2) set out the qualifying conditions an employee must meet in order to be entitled to a personal emergency leave of absence. To qualify, the need for the leave must be due to one of the specified events and the event must relate to one of the specified individuals.

Note that, pursuant to O Reg 285/01, s. 3 certain employees who meet the qualifying criteria for a personal emergency leave will not be entitled to take it if taking it would constitute an act of professional misconduct or a dereliction of professional duty. Section 3 of O Reg 285/01 reads:

3. Section 50 of the Act does not apply to any of the following persons in circumstances in which the exercise of the entitlement would constitute an act of professional misconduct or a dereliction of professional duty:

1. A person described in clause 2(1) (a), (c), (d) or (e).

2. A person employed as a registered practitioner of a health profession set out in Schedule 1 to the Regulated Health Professions Act, 1991, including a person described in clause 2(1)(b).

See O Reg 285/01, s. 3 for more information.

Events That Trigger an Entitlement to Personal Emergency Leave

Sections 50(1) and 50(2) list the events, and the people to whom the events must relate, that entitle employees to take personal emergency leave. The list is exhaustive. If an event or the person to whom the event relates is not listed in ss. 50(1) and 50(2), the employee is not entitled to personal emergency leave.

Employees can take a personal emergency leave of absence for the following reasons:

- A personal illness, injury or medical emergency.

One of the following if it relates to certain specified individuals:

- Death,
- Illness,
- Injury,
- Medical emergency, or
- Urgent matter.

The events described in subsection (2) above must relate to any of the following people:

- The employee's spouse (which includes a same-sex spouse);
- A parent, step-parent, foster parent, child, step-child, foster child, grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse (which includes a same-sex spouse);
- The spouse (which includes a same sex spouse) of the employee's child;
- The employee's brother or sister; and
- Any relative of the employee not listed above who is dependent on the employee for care or assistance.

The terms "parent" and "spouse" are defined in ESA Part XIV, s. 45.

If the event or person to whom the event relates is not contained in the above list, the employee is not entitled to a personal emergency leave. For example, while an "urgent matter" in respect of a person specified in s. 50(2) entitles an employee to personal emergency leave, a personal urgent matter does not (unless the urgent matter also falls into the category of "illness, injury or medical emergency").

Death, Illness, Injury or Medical Emergency

For the most part, the meaning of these terms is self-evident. One issue that arises in respect of personal emergency leave taken because of the death of a specified family member or dependent relative is whether the leave days must be taken coincident with the death or can be taken at some later time. Section 50(1) states that an employee is entitled to the leave "because" of the death, illness, injury or medical emergency of an individual described in s. 50(2). As a result, time off work to attend a burial, internment of ashes or memorial service for the deceased that occurs at any time after the death qualifies as a personal emergency leave as it is taken because of the death.

An issue that arises with respect to leaves taken because of illness, injury or medical emergency is whether an employee is entitled to take personal emergency leave for pre-planned or so-called "elective" surgery. Because the surgery is scheduled ahead of time, it is not a medical "emergency". However, because, generally speaking, people undergo surgery for the treatment or prevention of a medical condition, it is Program policy that most surgeries, including those that are pre-planned or elective, that are performed to address or prevent manifestation of a medical condition (e.g., laser eye surgery to correct poor distance vision) are because of an illness or injury and, consequently, entitle an employee to

personal emergency leave. This does not include medically unnecessary plastic surgeries that are performed for purely cosmetic reasons and that are not related to an underlying illness or injury; these types of surgeries are not because of an illness or injury.

Another issue that arises concerns doctor's appointments. An appointment for an annual check-up would generally not trigger an entitlement to leave unless it has been scheduled in respect of an illness, injury or medical emergency. However, if an employee had regularly scheduled appointments for the treatment or management of a chronic medical condition such as Crohn's disease or diabetes, those appointments would trigger an entitlement because they are absences related to an illness.

Regular prenatal appointments scheduled for an employee during the course of a normal, healthy pregnancy would not trigger an entitlement to personal emergency leave because a healthy pregnancy is not an illness. Note that in this regard, consideration should be given to the Ontario *Human Rights Code,* RSO 1990, c H.19 obligations to accommodate pregnant employees. Pursuant to the Code, an employer may be required to accommodate a pregnant employee's need for regular prenatal visits up to the point of undue hardship. However, if a pregnant employee has an illness or medical condition (even if related to or exacerbated by the pregnancy) they would be entitled to personal emergency leave as the doctor's appointments would be considered to be related to an illness.

However, see the discussion at subsections (12) and (13) below regarding evidence that an employee may be required to provide an employer to show that they are entitled to a personal emergency leave.

Whether an illness, injury or medical emergency was caused by the employee's own actions or by external factors beyond the employee's control is irrelevant to the question of an employee's entitlement to personal emergency leave. For example, an employee who broke her tailbone while tobogganing at night in an inebriated state would not be disentitled to the personal emergency leave just because the injury was caused by her own carelessness. While some may argue that in such cases the employee should not be entitled to personal emergency leave days, there is no basis in the legislation to support such a view, and it is Program policy that absences for illness or injury, caused by the employee's own action can count as personal emergency leave days.

See below for a discussion on "Designating Absences as Personal Emergency Leave."

Urgent Matter

One of the events that entitle an employee to personal emergency leave is an "urgent matter" that concerns any of the people listed in s. 50(2). Urgent matter is not defined in the ESA 2000. It is Program policy that one of the traits of an "urgent matter" is that the event be unplanned or out of the employee's control, and raise the possibility of serious negative consequences, including emotional harm, if it is not responded to. For example, it is an urgent matter if:

- An employee's nanny or babysitter calls in sick;
- The basement of an elderly parent floods and the parent is unable to deal with the situation; or

An employee has an appointment to meet with their child's counselor to discuss behaviour problems at school. The appointment is during the employee's shift, and the appointment could not be rescheduled outside of the employee's working hours.

Some examples of situations that are not an urgent matter include:

- An employee wishing to attend a brother's wedding; or

- An employee wishing to attend a child's play.

While both of these events are out of the employee's control, the employee's inability to attend these events does not raise the possibility of serious negative consequences.

When determining whether an event is an urgent matter, an objective standard is applied. That is, the employee's subjective perception of the urgency of the matter is not determinative. However, subjective factors and circumstances that are particular to the individual employee should be taken into account. The question to ask is, would a reasonable employee in the same circumstances as the employee in question have felt that the matter was an urgent one?

Relative of the Employee Who is Dependent on the Employee for Care or Assistance

Section 50(1) entitles employees to a personal emergency leave if there is a death, illness, injury, medical emergency or urgent matter concerning a person specified in paragraphs 1 to 6 of subsection 50(2), as well as a person described in paragraph 7 of subsection 50(2), that is, "a relative of the employee who is dependent on the employee for care or assistance".

Relative

The ESA 2000 does not specify how close the familial relationship has to be in order to meet this criterion. The person must only be a relative. In the absence of a definition of relative, the term must be interpreted in accordance with its plain, ordinary grammatical sense and general acceptance.

Black's Law Dictionary, 10th ed., defines a relative as “a person connected with another by blood or affinity; a person who is kin with another.”

Accordingly, it is Program policy that to be a relative of an employee, the individual should be related through blood or through marriage, adoption or common law relationships between people of the same or opposite sex who are not married. Conversely, it is Program policy that "relative" in s. 50(2), paragraph 7 will not include those individuals who are not connected either by blood or through marriage, adoption or a common law relationship, since including them would be extending the meaning of relative beyond the ordinary, commonly understood meaning.

With respect to common law relationships, the question arises as to how long the individuals have to live together in a conjugal relationship before it can be said that a spousal relationship exists, thus granting relative status to relatives of the employee's spouse. The answer is that there is no minimum amount of time that the individuals must be together in order to qualify as a common law spouse for the purpose of entitlement to personal emergency leave. Unlike the *Family Law Act*, RSO 1990, c F.3 which, for the purposes of support obligations, limits the definition of unmarried "spouse" to those people who have lived together continuously for three years or are in a relationship of some permanence if they are the birth or adoptive parents of a child, ESA Part XIV, s. 45 requires only that the individuals "live together in a conjugal relationship outside marriage".

Accordingly, it is Program policy that the relationship of relative can be established through a common law relationship between people of the same or opposite sex once there is a conjugal relationship, regardless of how long it has been. (Note that the entitlement to personal emergency leave does not arise solely by virtue of the illness, injury, medical emergency, death or urgent matter of a relative. If that relative is not in a category specified in paragraphs 1 through 6, that relative must be dependent on the employee for care or assistance before there is an entitlement to personal emergency leave. See the discussion below).

Dependent

An employee is entitled to take personal emergency leave with respect to the illness, injury, medical emergency, death or urgent matter of an individual not in a category specified in paragraphs 1 through 6, only where that individual is a relative who is "dependent on the employee for care or assistance". The ESA 2000 does not specify how dependent a relative has to be on the employee for this provision to apply. It only requires that there be a dependence for care or assistance. As individuals can be dependent on one another for care or assistance without being entirely dependent on that person, it is Program policy that this provision will apply to any relative who is reliant on the employee to some degree for care or assistance in meeting their basic living needs. The relative does not have to be completely reliant on the employee for all of their needs for this provision to apply.

There is no requirement that the relative be living with the employee for this provision to apply.

The type of event that entitles an employee to a personal emergency leave does not have to relate to the particular type of dependence the relative has on the employee in order to meet this criteria. For example, an employee's great-uncle depends on the employee to purchase his prescriptions and ensure he takes his medication. The employee wants to take personal emergency leave because her great-uncle's house is broken into and he needs assistance. The employee will be entitled to personal emergency leave even though the matter that is being responded to (a break-in) is unrelated to the type of dependence (ensuring that medication is taken).

Designating Absences as Personal Emergency Leave

For employees who are entitled to personal emergency leave as provided for in s. 50, questions have arisen as to whether an employee who is absent from work for one of the reasons listed in s. 50(1) must use one of their 10 days of personal emergency leave. It is Program policy that where an employee is entitled to personal emergency leave and is absent due to one of the reasons listed in s. 50(1), it is the employee (not the employer) that decides whether to designate an absence a personal emergency leave. An employee may be entitled to personal emergency leave and be absent from work due to one of the reasons listed in s. 50(1) and decide not to claim the absence as a personal emergency leave day. This would not be considered as contracting out of the ESA 2000 if an employee does not take advantage of their leave entitlements; the employee has merely chosen not to exercise them.

Step 1: The employee entitled to personal emergency leave is absent due to one of the reasons listed in s. 50(1).

Step 2: Did the employee know of their right to personal emergency leave?

If the answer is no, then the default is that the absence is considered to be personal emergency leave with the corresponding reprisal protection. An employee does not lose their right to any of the leaves provided for under the ESA 2000 because they were unaware of their entitlements.

If the employee is aware of their right to personal emergency leave go to step 3.

Step 3: Does the employee wish to designate the absence as personal emergency leave?

If the answer is yes, then the absence is a personal emergency leave with the corresponding reprisal protections.

If the employee does not wish to designate the absence as a personal emergency leave, and the absence cannot be considered an authorized absence on some other ground (e.g., another leave under the ESA 2000 or vacation authorized by the employer), the absence would have no statutory reprisal protection. For this reason, an employee who takes a day off for a reason that would qualify under s. 50 but who would prefer not to have the day charged against their personal emergency leave allotment may feel effectively forced into designating the day as such a leave. However, this in itself does not constitute any violation of the ESA 2000; it is not unlawful for an employer to inform an employee that should they not designate an absence as a personal emergency leave day, then it would be considered an unexcused absence that will lead to disciplinary action.

Note that if an employer offers a benefit plan for sick days, bereavement days or for any other event that any leave under the ESA 2000 can be taken, and the employee opts to claim benefits under the plan, it is Program policy that the employee has in effect designated the absence as a day of statutory leave and it will reduce the employee's ESA 2000 entitlement to that particular statutory leave accordingly. For example, if an employer offers four paid bereavement days under a benefits plan and the employee is absent four days because of the death of a parent and claims benefits under the plan, the employee is considered to have used four of their PEL days. Note also that there is nothing in the ESA 2000 that would prohibit an employer from subtracting any personal emergency leave days that are taken from any paid days provided by a benefit plan offered by an employer or from any other contractual leave entitlement (e.g. "flex days"). Notably, while this is not prohibited under the ESA 2000, an employment contract may address the issue of whether any PEL days count against any contractual leave entitlements.

Where a benefit plan offered by the employer constitutes a true greater right or benefit than the personal emergency leave standard, then the terms of the contract will apply instead of the standard (as the employee will have a greater contractual entitlement) and the issue of an employer drawing down on personal emergency days leave becomes moot.

While not prohibited under the ESA 2000, an employment contract may address the issue of whether any work-related injury governed by the *Workplace Safety and Insurance Act* (WSIA) may count against PEL days.

Advising Employer – ss. 50(3) & (4) – REPEALED

Subsections 50(3) and (4) were repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. The discussion of these provisions is being maintained in this publication since employees may still have a complaint relating to a situation that arose when the provisions were in force.

50(3) An employee who wishes to take leave under this section shall advise their employer that they will be doing so.

(4) If the employee must begin the leave before advising the employer, the employee shall advise the employer of the leave as soon as possible after beginning it.

Section 50(3) requires employees to tell their employers ahead of time that they will be taking personal emergency leave. In circumstances where that cannot be done, the employee is required, pursuant to s. 50(4), to inform the employer as soon as possible after beginning the leave.

The ESA 2000 does not require the employee to advise the employer of the personal emergency leave in writing. Oral notice is sufficient.

In fact, the ESA 2000 does not specify any particular method by which the employer is to be advised that the employee will be taking personal emergency leave. Consequently, an employee would be complying with this section whether they, for example, advised the employer by phone, left a note on the manager's desk or had a colleague take a message to the employer on their behalf.

An employee does not lose their right to emergency leave if they fail to comply with ss. 50(3) or (4). An employee's entitlement to emergency leave arises by virtue of having one of a number of defined "emergencies", and it is the Program's position that the failure to advise the employer before or as soon as possible after the leave begins does not negate that entitlement. This approach has been affirmed in a grievance arbitration decision by the Ontario Labour Relations Board – see *International Brotherhood of Electrical Workers, Local 115 v The State Group Inc.,* 2019 CanLII 22129 (ON LRB). In that decision, the Vice-Chair found that notice to the employer is not a prerequisite to exercising the right to the leave. This approach is also consistent with the Program's long-standing policy in the pregnancy and parental leave context, where the structure of the entitlement and notice provisions are similar to these. See ESAPart XIV, s. 46(4) and s. 48(4).

An issue has arisen as to whether an employer can penalize an employee for failing to give advance notice that they will be absent from work (as may be required under an employer policy), where the time off is a personal emergency leave under the ESA 2000. Sections 50(1) and (2) describe the employee's entitlement, i.e., the type of emergency situation and with respect to which individuals. Section 50(3) requires the employee taking personal emergency leave to advise the employer that they are taking the leave, and s. 50(4) provides that "if the employee must begin the leave before advising the employer, the employee shall advise the employer of the leave as soon as possible after beginning it." It is clear from s. 50(4) that the ESA 2000 contemplates situations where the employee would be unable to advise the employer in advance of commencing the personal emergency leave. Part of the personal emergency leave entitlement under the ESA 2000 is the right to take the personal emergency leave even if advance notice cannot be given, with the proviso that the employee must advise the employer of the leave as soon as possible after beginning it. The failure to give notice in advance of taking leave, when it would have been possible for the employee to do so, can be the subject of disciplinary action by the employer without violating ESA Part XVIII, s. 74. However, the following points should be borne in mind:

The employee's failure to give advance notice would not be a lawful basis on which to deprive the employee of the right to take the leave if the qualifying conditions in ss. 50(1) and (2) have been met. An employer could not, for example, take the position that failure to give advance notice when it would have been possible for the employee to do so will result in the time taken off not being counted as a personal emergency leave day.

Any discipline for failing to provide notice in situations where such notice is required under s. 50(3) (i.e., where s. 50(4) does not apply) would have to be appropriately linked to the failure to give advance notice and must not, in effect penalize the employee for exercising the right to leave. The motive for any discipline that the employer does impose must clearly be the employee's failure to give advance notice and not the taking of the leave itself.

In addition, an employer would be able to impose discipline if an employee fails to provide any notice of the personal emergency leave (before or after the leave), or if the employee provides notice of the leave so late that one wouldn't reasonably be able to say that it falls within s. 50(4). However, the employer's disciplinary action would have to be appropriate, and in no way a penalty or reprisal for the employee

having taken the leave, but only for the failure to give notice. In this regard see *Ryding-Regency Meat Packers Ltd. v. U.F.C.W., Local 1000A*. In that case, the arbitrator concluded that s. 50(1) establishes an entitlement to leave where a person described in s. 50(2) is ill. The fact that the employee's grandmother was ill was not disputed. Because s. 50(1) and (2) are in no way linked to the notice requirements, the employee could be disciplined for not giving notice that he was taking or had taken leave but did not lose his entitlement to the emergency leave.

Limit – s. 50(5) – REPEALED

Subsection 50(5) was repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. The discussion of this provision is being maintained in this publication since employees may still have a complaint relating to a situation that arose when the provision was in force.

50(5) Subject to subsection (6) an employee is entitled to take a total of two days of paid leave and eight days of unpaid leave under this section in each calendar year.

This section provides that an employee is entitled to take up to ten days of personal emergency leave every calendar year, and that two of the days of leave are to be paid. This provision also references s. 50(6) which limits the entitlement to paid leave to employees who have been employed for at least one week.

The ESA 2000 does not place any restrictions regarding whether the ten days have to be taken consecutively or individually. Employees can take personal emergency leave in part days (although see s. 50(7), which allows employers to deem one day's leave to be taken when an employee takes part of a day off work for personal emergency leave), entire days, or in periods of more than one day.

The question arises as to whether the tenday entitlement should be prorated for employees who are part-time, or who started their employment partway through a calendar year. There is nothing in the legislation to suggest that employees who are eligible for personal emergency leave should be entitled to less than ten days a calendar year in any of these situations. Accordingly, it is Program policy that there should be no pro-rating of the 10-day entitlement. The ESA 2000 does not provide for employees to be able to carry unused days of personal emergency leave from one calendar year over into the next calendar year.

It is also Program policy that an employee who quits or is terminated and who is subsequently re-hired by the same employer during the same calendar year is entitled to a "fresh" ten-day entitlement (including two paid days once employed for a week).

See "Greater Right or Benefit" at ESA Part III, s. 5 for a discussion of the relationship between the right to ten days' leave under this Part and rights to leaves under contracts and collective agreements. See subsection (1) above for a discussion on Designating Absences as Personal Emergency Leave.

Special rules relating to personal emergency leave pay

Automobile manufacturing/marshalling: per O Reg 502/06, s. 4, employees who work in the defined industry of automobile and automobile parts manufacturing, automobile marshalling and automobile parts warehousing have a different entitlement to personal emergency leave. These employees are entitled to seven days of personal emergency leave for an illness, injury or medical emergency related either to the employee or one of the individuals listed in O Reg 502/06, s. 4(4) or an urgent matter for any of the specified individuals. In addition, these defined industry employees are entitled to up to three days of leave because of the death of any of the specified individuals in O Reg 502/06, s. 4(4) each time there is

such a death. O Reg 502/06 also establishes an exception to the requirement that the first two days of personal emergency leave are to be paid if certain criteria are met. See O Reg 502/06, s. 4 for more details.

Construction employees: per O Reg 285/01, s. 3.0.1, a "construction employee who works in the construction industry" is not entitled to personal emergency leave pay if the employee receives 0.8% of their hourly rate or wages for "personal emergency pay". However, the employee will remain entitled to 10 days of personal emergency leave per calendar year. See O Reg 285/01, s. 3.0.1 for more details.

When this section originally came into force on September 4, 2001, it provided that the entitlement was to 10 days' leave each year. This section was amended by the *Employment Standards Amendment Act (Hours of Work and Other Matters), 2004*, SO 2004, c 21 (which came into force on March 1, 2005) to provide that the entitlement is to ten days of leave each ***calendar*** year. The section was further amended by *the Fair Workplaces, Better Jobs Act, 2017* SO 2017, c22 on January 1, 2018 to provide for two days of paid leave.

Same, Entitlement to Paid Leave – s. 50(6) – REPEALED

Subsection 50(6) was repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. The discussion of this provision is being maintained in this publication since employees may still have a complaint relating to a situation that arose when the provision was in force.

50(6) If an employee has been employed by an employer for less than one week, the following rules apply:

1. The employee is not entitled to paid days of leave under this section.

2. Once the employee has been employed by the employer for one week or longer, the employee is entitled to paid days of leave under subsection (5), and any unpaid days of leave that the employee has already taken in the calendar year shall be counted against the employee's entitlement under that subsection.

3. Subsection (8) does not apply until the employee has been employed by the employer for one week or longer.

This section limits the entitlement to paid leave to employees who have been employed by the employer for one week or more. An employee who takes personal emergency leave within the first week of employment will not be entitled to be paid for it, but will retain the entitlement to two paid days if further leave is taken later in the calendar year. The provision also clarifies that any unpaid days of leave that have been taken by an employee before they were employed for one week will be counted against the total entitlement of 10 days per calendar year. This section must be read in conjunction with s. 50(8), which requires that the first two days of leave within the calendar year must be paid; employees who have been employed for less than one week are specifically excluded from that rule until they have been employed for one week or longer.

For example, an employee takes two days of personal emergency leave in the first week of employment, and then two further days of leave in the sixth week of employment: the employee will be entitled to an unpaid, job-protected leave for the first two days, and will be entitled to paid, job-protected leave for days three and four (even though they are not the first two days of leave taken within the year).

Note that if the employer has a policy or the employee's contract of employment that provides, for example, three days of paid sick leave per year regardless of the length of employment and the employee was absent during the first week of employment for a reason that triggered both the policy/contract's sick leave provisions as well as personal emergency leave, the employee will be considered to have received their paid PEL entitlements. In other words, if an employee in the scenario above uses all three days of paid sick leave during the first week of employment for a personal illness, the employer is not prohibited by anything in the ESA 2000 from counting the paid sick days against the employee's entitlement per the employment contract, ***as well as*** three personal emergency leave days and two days of personal emergency leave pay from the employee's statutory entitlement. However, note that the amount of pay the employee received under the contract must at least equal the employee's entitlement to personal emergency leave pay under the ESA 2000.

Leave Deemed to be Taken in Entire Days – s. 50(7) – REPEALED

Subsection 50(7) was repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. The discussion of this provision is being maintained in this publication since employees may still have a complaint relating to a situation that arose when the provision was in force.

50(7) If an employee takes any part of a day as paid or unpaid leave under this section, the employer may deem the employee to have taken one day of paid or unpaid leave on that day, as applicable, for the purposes of subsection (5) or (6).

Employees frequently do not need an entire work day to attend to the event that gave rise to the personal emergency leave, and will only take part of a day off as personal emergency leave. Section 50(6) allows an employer in this situation to count the part-day off work as an entire day's leave for the purpose of the 10-day leave entitlement. This is the only purpose for which the employer can deem the part day off work as an entire day's leave. It cannot deem the employee not to have worked at all on the day. The employee is entitled to be paid for the time that was actually worked and personal emergency leave pay with respect to the time that was not worked (if the partial absence was on a day for which the employee was entitled to personal emergency leave pay). As well, the hours that were worked will be counted for the purposes of, among other things, determining whether the relevant overtime threshold has been reached, whether the limits on, for example, the daily and weekly hours of work have been reached, and whether the daily, weekly/bi-weekly and in-between shifts rest requirements have been met.

For example, an employee goes home early from work because of the stomach flu (e.g., a four-hour day rather than his usual eight hours) and takes PEL In that case, the employer may attribute a full personal emergency leave day to the partial day's absence.

Just because an employer may attribute an entire day's leave to a part day of absence does not mean that the employee then has the right to take the entire day off if the emergency did not last the entire day. For example, an employee's shift is from 9 a.m. to 5 p.m. They have to meet with his son's school principal on an urgent matter from 10 a.m. to 11 a.m. Their employer is entitled to count the absence as an entire day's personal emergency leave, but the employee must nevertheless return to work after the meeting is over. Employees have the right to be away from work under the personal emergency leave provisions of the ESA 2000 only for as long as the emergency lasts. After the emergency is over, the employee's normal obligations to attend at work are resumed.

Note that this provision allows the employer to attribute one day's leave to a part day of absence. It does not require the employer to do so.

An issue has arisen as to whether an employer could exercise its discretion and deem a partial day absence as a full day for some employees, but not for others, or whether this might allow employers to selectively punish employees who have too many absences in violation of the reprisal provisions of the ESA 2000.

The answer will depend on the facts. In particular, why did the employer treat the employees differently? Where an employer deems a full day's absence for some employees, but not for others, it is a question of fact as to whether the employer would be in violation of the ESA 2000. For instance, if the employer counts a three-hour personal emergency leave as a full day's leave for employee A but not for employee B, who also takes a three-hour personal emergency leave because the employer considers employee B to be a better worker than employee A, although this might be unfair as between employee A and B, it would not be a violation of the ESA 2000, as it would not be reprisal for exercising a right under the ESA 2000. If, on the other hand, the motivation for the differential treatment was that Employee A frequently took personal emergency leave of only a few hours, and the employer assigned a full day's absence to these short leaves as a way to ensure employee A used up all of their statutory entitlement as soon as possible because the employer found it inconvenient for the employee to be away for many short periods of time, that would be an unlawful reprisal.

Paid Days First – s. 50(8) – REPEALED

Subsection 50(8) was repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. The discussion of this provision is being maintained in this publication since employees may still have a complaint relating to a situation that arose when the provision was in force.

50(8) The two paid days must be taken first in a calendar year before any of the unpaid days can be taken under this section.

This section requires that the employee be paid for the first two days of leave. The employer does not have the discretion to pay the employee, for example, for the ninth and tenth days of leave (or any other days) instead of the first two days (unless s. 50(6) applies).

The entitlement would exist regardless of when the paid leave days are taken, for example, if an employee took the first two days of leave on the last two days of a calendar year, the employee could also take the first two days of the following calendar year as paid leave providing a qualifying event had occurred involving either the employee or a person described in s. 50(2). In this case, the employee could be entitled to up to four days of paid leave, potentially within the same week.

Note also that there is no requirement for an employee to *request* payment for either of the first two days of the leave; the entitlement to personal emergency leave pay flows automatically from the ESA 2000. See International Brotherhood of Electrical Workers, Local 115 v The State Group Inc., 2019 CanLII 22129 (ON LRB).

Personal Emergency Leave Pay – s. 50(9) – REPEALED

Subsection 50(9) was repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. The discussion of this provision is being maintained in this publication since employees may still have a complaint relating to a situation that arose when the provision was in force.

50(9) Subject to subsections (10) and (11), if an employee takes a paid day of leave under this section, the employer shall pay the employee,

(a) either,

1. **the wages the employee would have earned had they not taken the leave, or**
2. **if the employee receives performance-related wages, including commissions or a piece work rate, the greater of the employee's hourly rate, if any, and the minimum wage that would have applied to the employee for the number of hours the employee would have worked had they not taken the leave; or**

(b) if some other manner of calculation is prescribed, the amount determined using that manner of calculation,

This section sets out the manner of calculating the amount of personal emergency leave pay.

Note, subject to subsection (10) and (11), the calculation entitles employees only to wages they would have earned if they were at work and not on personal emergency leave: this is read in conjunction with s. 50(7), and will allow an employer to deem a partial day personal emergency leave absence as a complete day of leave, but only require the employer to pay personal emergency leave pay representing the amount of time at work missed as well as any wages the employee earns while actively at work on that day. Per s. 50(10), overtime pay and shift premium amounts are not to be included in personal emergency leave pay even if the employee "would have earned" these if the employee worked. Per s. 50(11), if a paid day of personal emergency leave falls on a public holiday, the employee is not entitled to premium pay for any leave taken. Personal emergency leave pay for a day can be any amount from a single hour's pay or less to an entire day of wages, depending on how much leave is taken.

At this time, no other manner of calculating personal emergency leave pay has been prescribed.

Calculating Personal Emergency Leave Pay

In order to determine how much personal emergency leave pay an employee is entitled to, two things need to be established:

1. How much personal emergency leave was taken, or the number of hours in a "work day" minus the number of hours worked, if any, and
2. How personal emergency leave pay will be calculated, either as
    i. What an employee's wages would have been for the work day or
    ii. For employees paid by "performance-related wages", either an hourly rate if there is one, or the applicable minimum wage if not.

Length of the Work Day

If the employee:

- Works a regular work day, with set hours, this is the length of the day for the purpose of calculating personal emergency leave pay.
- Is scheduled to work a particular number of hours on the day on which personal emergency leave is taken, the length of the work day will be what was scheduled, even if the employee regularly works a set number of hours that is different from the scheduled shift.

Amount of Personal Emergency Leave Taken

The amount of personal emergency leave taken on a single day is calculated by deducting the number of hours actually worked, if any, from the total number of hours in the work day. For example, if it is determined that the employee was scheduled to work nine hours on the day, and they took five hours to deal with a personal illness, they would be entitled to four hours of wages and five hours of personal emergency leave pay. If the same employee missed the entire day, they would be entitled to nine hours of personal emergency leave pay.

The situation may arise when an employee may be required to report to work at a particular time, but does not have a shift or work period of a specified length. In that case, when assessing the amount of wages an employee would have earned had they not taken PEL in order to determine the amount of PEL pay owing, the employer must make a reasonable estimate of how long the employee would have worked on that day. For example, it could be reasonable for an employer to take an average of the number of hours worked by all the employees in the same position as the employee who took leave on the day, or if another employee was called in to replace the employee on the day, it could be reasonable to refer to the length of that employee's shift.

When an employment standards officer is investigating a claim from an employee who believes they received less personal emergency leave pay than the ESA 2000 requires (perhaps because the employer took the position that the business was not busy on that particular day and the employer intended to send the employee home early) the officer makes a determination on whether the amount paid by the employer was reasonable. Evidence may include direct evidence from other employees, receipts, point of sale records, customer or production logs, or the staff schedule from the day in question. If the employer has a staff rotation policy and employees are sent home early in a particular order when the business is not busy, was the employee the next person on the list?

Wages the employee would have earned that day had they not taken the leave"

For employees who are not paid by performance-related wages:

Hourly Wage (Non-Salaried Employees)

If the employee is paid by an hourly wage, the amount of personal emergency leave pay is the number of hours of personal emergency leave x the hourly rate.

Example 1: Employee with a single rate of pay

- Employee's wage rate is $17.25 per hour.
- Employee normally works 8.5 hours in a day. The employee left work to take personal emergency leave after working 1.5 hours

Entitlement:

- Employee normally works 8.5 hours per day, but worked 1.5 hours and took personal emergency leave for the rest of the day = 7 hours of personal emergency leave
- **Personal Emergency Leave ("PEL") Pay:** 7 hours x $17.25 = $120.75
- Note that the employee is also entitled to wages for hours actually worked on the same day = 1.5 hours x $17.25)

Example 2: Employee with more than one rate of pay

- Employee is paid $16.00/hour for Job "A" and $17.50/hour for Job "B"

- Employee is scheduled to work 10 hours: first five hours on Job "A" and second five hours on Job "B"

Entitlement:

- The employee worked for the first three hours doing Job A, and took the rest of the day as personal emergency leave: 10 hours – 3 hours = 7
- Of the 7 hours of personal emergency leave, 2 were Job A and 5 were Job B
- **PEL Pay:** (2 hours x $16.00 = $32.00) + (5 hours x $17.50 = $87.50) = $119.50
- Note that the employee is also entitled to wages for hours actually worked: (3 hours x $16.00 = $48.00)

Salaried employees

If the employee is paid by salary and has a regular number of days within a pay period and regular hours, the amount of personal emergency leave pay is:

- If the employee took a full day or shift as personal emergency leave, the employee's daily rate (salary ÷ number of days in a pay period)
- If the employee took part of a day or shift as personal emergency leave, the employee's hourly rate (salary ÷ number of hours in a pay period) x number of hours of personal emergency leave

This is, in effect, salary continuance. If an employer pays an employee with a fixed salary the normal amount of pay for a week with a day of full or partial personal emergency leave in it, the personal emergency leave pay provisions of the ESA 2000 will be satisfied.

Examples: Salaried employees with regular number of days and hours within pay period

Example 1:
An employee is paid $1500.00 per bi-weekly pay period and works a five-day week. One day of personal emergency leave is taken. Personal emergency leave pay = $1500.00 ÷ 10 = $150.00.

Example 2:
An employee is paid $1500.00 per bi-weekly pay period and works a 40 hour week. The employee takes four hours of personal emergency leave. Hourly rate: $1500.00 ÷ 80 = $18.75/hour. Personal emergency leave pay: $18.75 x 4 = $75.00. Note that the employee is also entitled to wages earned for the part of the day that they worked.

Impact of top-ups on the PEL pay calculations

A situation may arise where the employee receives a "top-up" or subsidy from a third party in addition to an hourly rate of pay or salary. For example, an employee who works in a daycare centre may be paid $16.00/hour plus $2.00/hour as part of a municipal or provincial government initiative to raise wages for workers in the sector. Depending on how the subsidy is structured, it may or may not be considered wages the employee would have earned for the purposes of personal emergency leave pay. If the employee is paid the subsidy directly by an entity other than the employer, then the subsidy may not be considered wages that the employee would have earned because they are not wages being paid by the employer. If, however, the subsidy and the hourly rate are a term of the contract of employment with the employer (oral or written, express or implied), then the subsidy amount must be included in the calculation of personal emergency leave pay.

Impact of partial payments by benefit plan providers on PEL pay

Another situation that may arise where the employer has a benefit plan in place that pays benefits to employees when events occur that trigger both an entitlement to benefits under the plan as well as personal emergency leave pay under the ESA 2000. It is Program policy that the employer may take benefit plan payments into account when fulfilling its obligation to provide personal emergency leave pay. What is key is that the employee receives pay for any paid days of leave in accordance with s. 50.

For example, a benefit plan pays a benefit that equals 75% of an employee's wages when the employee takes a day off for personal illness. In order to comply with s. 50(9), the employer would be required to ensure that the employee received their full entitlement to personal emergency leave pay: if the employee missed an entire day of work to take the leave, the employer would be required to pay the additional 25% of the wages that the employee would have earned had they not taken the leave.

Performance-related wages

The amount of personal emergency leave pay for an employee paid fully or partly by a system of wage calculation related to performance is the greater of the employee's "hourly rate, if any" and the minimum wage that would have applied to the employee. "Performance-related wages" can include commission only, commission plus an hourly wage, piece work, or compensation as a flat-rate mechanic. An "hourly rate" refers to an hourly rate set by an employment contract.

Example 1: Employee earns an hourly rate plus commission

- Employee earns $16.00/hour plus 2% commission on sales,
- Employee takes 6.5 hours of personal emergency leave
- **PEL Pay**: $16.00 x 6.5 = $104.00
- Note that the employee is also entitled to his/her hourly wage for any hours worked + commission earned while working that day, if any

Example 2: Employee paid entirely by commission

- Employee earns 10% commission on all sales
- Employee is scheduled to work eight hours, works five hours and makes sales of $500.00 and then takes three hours of personal emergency leave
- **PEL Pay:** $Applicable minimum wage rate x 3
- Note that the employee is also entitled to the 10% commission on the $500.00 sales that the employee made that day

Example 3: Employee is a homeworker paid by piece work

- Employee earns $3.50 per phone call answered
- Employee is scheduled to work 8.5 hours, works two hours, answers nine phone calls, and takes 6.5 hours of personal emergency leave
- **PEL Pay**: $Applicable minimum wage x 6.5
- Note that the employee is also entitled to $3.50 x 9 for actual work performed on the day

Example 4: Employee is a Flat Rate Mechanic

- Employee is scheduled to work nine hours
- Employee is paid a flat book rate of $16.00/hour for tune ups (calculated to take two hours to complete). Employee completes two tune ups in three hours and takes the rest of the shift as personal emergency leave.
- **PEL Pay:** $Applicable minimum wage x 6
- Note that the employee is also entitled to $16.00 x 4 = $64.00, wages earned on the day)

Personal Emergency Leave Where Higher Rate of Wages – s. 50(10) – REPEALED

Subsection 50(10) was repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. The discussion of this provision is being maintained in this publication since employees may still have a complaint relating to a situation that arose when the provision was in force.

50(10) If a paid day of leave under this section falls on a day or at a time of day when overtime pay, a shift premium, or both, would be payable by the employer,

(a) the employee is not entitled to more than their regular rate for any leave taken under this section; and

(b) the employee is not entitled to the shift premium for any leave taken under this section.

This section excludes overtime pay or a shift premium (for example, an extra amount paid for working evenings or weekends) from inclusion when calculating personal emergency leave pay. The employee would be entitled to be paid for hours of personal emergency leave using their regular rate of pay, and not for example 1.5 times their regular rate per the overtime provisions of the ESA 2000.

Example 1: Employee scheduled to work overtime hours on a day when personal emergency leave was taken

- Employee is paid $16.00/hour, has already worked 40 hours in a work week and is scheduled to work an additional shift of eight hours on a Saturday.
- Employee does not work any of the scheduled shift and takes personal emergency leave
- Employee would have earned wages for eight hours of work had they not taken the leave (4 of which would have exceeded the overtime threshold of 44 in a week)
- **PEL Pay**: 8 hours x $16.00/hour = $128.00

Similarly, if an employee is scheduled to work hours that would normally attract a shift premium, if the employee misses all or some of the shift to take personal emergency leave, then personal emergency leave pay will be calculated on the employee's base rate and would not include the shift premium.

Example 2: Employee entitled to shift premium pay on a day where personal emergency leave was taken

- Employee is paid $15.50/hour, plus an additional $2.50/hour for night shifts.

- Employee is scheduled to work a midnight to 8:00am shift, calls in sick and does not work any hours.
- Employee would have earned wages for eight hours of work had they not taken the leave
- **PEL Pay:** 8 hours x $15.50 = $124.00

Personal Emergency Leave on Public Holiday – s. 50(11) – REPEALED

Subsection 50(11) was repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. The discussion of this provision is being maintained in this publication since employees may still have a complaint relating to a situation that arose when the provision was in force.

50(11) If a paid day of leave under this section falls on a public holiday, the employee is not entitled to premium pay for any leave taken under this section.

Under ESA Part X, Public Holidays, employees who agree to, or are required to work on a public holiday may be entitled to receive premium pay of at least one and one half times their regular rate for hours worked on that day. The effect of this subsection is that – despite the entitlement in s. 50(9) to be paid "the wages the employee would have earned had they not taken the leave" – the employee is not entitled to any premium pay that they would have earned by working on the public holiday had the leave not been taken.

Note that in certain situations, per ESA Part X, Public Holidays, the onus is on the employee to prove that they had "reasonable cause" for not working all or part of a scheduled shift either on a public holiday, or the "first and last" shifts before or after a public holiday. Also note that it is Program policy that if an employee takes personal emergency leave, this will constitute reasonable cause for the purposes of Part X. This is subject to s. 50(13) which prohibits an employer from requiring that the employee provide a certificate from a qualified health practitioner as evidence of an entitlement to PEL. Therefore an employer can only require an employee to provide other evidence "reasonable in the circumstances" per s. 50(12).

Example:

An employee was scheduled to work on a public for nine hours and was going to be paid public holiday pay plus premium pay for the nine hours. The employee worked for three hours and took six hours as personal emergency leave. The employee earns $15.00/hour.

- Entitlement: Premium pay for hours worked on the public holiday: $15.00 x 1.5 x 3 = $67.50
- Personal emergency leave pay: public holiday pay calculated in accordance with s. 24
- Note that the employee is not entitled to premium pay for the six hours taken as PEL

For more information on public holiday entitlements, please see ESA Part X.

Evidence – s. 50(12), Same – s. 50(13) – REPEALED

Subsections 50(12) and (13) were repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*. The discussion of these provisions is being maintained in this publication since employees may still have a complaint relating to a situation that arose when the provisions were in force.

50(12) Subject to subsection (13), an employer may require an employee who takes leave under this section to provide evidence reasonable in the circumstances that the employee is entitled to the leave.

50(13) An employer shall not require an employee to provide a certificate from a qualified health practitioner as evidence under subsection (12).

Section 50(12) gives an employer some ability to require an employee to provide proof that they are or were entitled to take personal emergency leave, subject to the limitation imposed by subsection (13). The employer can require an employee to provide evidence that is reasonable in the circumstances that they are or were entitled to take the leave.

Evidence of entitlement to personal emergency leave may take many forms. For example, it could be a death certificate, or a note from a daycare provider, school or other care facility. Receipts could also constitute proof of the emergency, e.g., an invoice from a plumber who was called in to deal with a flooded basement.

However, an employee cannot be required to provide a "certificate" (or medical note) from a qualified health practitioner – see s. 50(0.1) for more information on the definition of a qualified health practitioner. Note that s. 50(13) states that an employer "shall not require" a medical certificate from a qualified health practitioner: this prohibition applies to both a single request in relation to a specific absence, or the inclusion of such a requirement in an absenteeism management policy established by an employer. An employee may provide a certificate or medical certificate, but any evidence that an employee was threatened with discipline for failing to provide a note "voluntarily" would contribute to a finding that a reprisal under ESA Part XVIII, s. 74 had occurred.

It may, however, be reasonable in the circumstances for an employee taking personal emergency leave relating to their own illness, injury or medical emergency to be required to provide something other than a certificate or medical note issued by a qualified health practitioner.

What will be reasonable in the circumstances will depend on all of the circumstances in any given situation. In *FAG Bearings Ltd. v Francis*, 2005 CanLII 35873 (ON LRB) the employer had a disciplinary policy that provided for a four-step progression for any infraction of a company rule or policy. Under the disciplinary policy, an employee's employment would be terminated if there was a fourth disciplinary incident in a rolling twelve-month period. In this case, the third disciplinary incident was a response to the claimant failing to provide a doctor's note when he left work early because of back pain (note that, at the time, the ESA 2000 permitted an employer to require "evidence reasonable in the circumstances" of entitlement to the leave, which could include medical evidence). The employer argued that the discipline was a consequence of the employee's failure to provide a doctor's note within a reasonable period of time following the absence, and not because he had exercised a right to emergency leave under the ESA 2000. The employee argued that he should have been provided with more time to provide a note. The Ontario Labour Relations Board concluded that the requirement to provide evidence reasonable in the circumstances contemplates that both the evidence required and the timelines for providing it be reasonable in the circumstances. The Board noted that the right to leave would be defeated if an employee who is legitimately entitled to it could be disciplined for failing to comply with an unreasonable time frame set by their employer. Conversely, the employer's right to verify entitlement to a leave would also be defeated if it could not require the employee to provide the evidence within a reasonable period of time. In this case, the Board found that the time to provide the evidence had been reasonable and the discipline was imposed solely as a consequence of the employee's failure to provide evidence as required under the ESA 2000. On that basis, the Board found the employer had not violated

ESA Part XVIII, s. 74, since the discipline was not related to the exercise of the employee's right to leave under s. 50(1).

Another helpful decision in this regard is *Re Tilbury Assembly Ltd. and United Auto Workers, Local 251*. This decision also pre-dates the coming into force of subsection (13) and the limit placed on medical evidence. There, an employee with an absenteeism problem had left her shift early complaining of a severe headache. The employer had a policy that this employee was required to provide a physician's note in all cases of absence due to personal illness because of her history of absenteeism. In this instance, the employee did not obtain such a note, but instead bought some extra-strength pain relievers and took them and went to bed in a dark room, which was how she customarily dealt with this type of headache, which she experienced two or three times a year. Although the employee provided a note and receipt from the pharmacist from whom she purchased the pain relievers, the employer disciplined her for the failure to produce a physician's note. The employee grieved. The arbitrator held that the ESA 2000 gives an employer a right to require an employee to produce evidence, but only such evidence as was reasonable in the circumstances. While the employee's record of absences was one circumstance to be taken into account in determining what was reasonable, it was outweighed by the fact that the employee did have a note and receipt from a pharmacist, by the fact that her experience with the type of headache she had indicated that taking the pain relievers and going to bed in a dark room would provide effective treatment and by the fact that employee would likely face a considerable wait in a hospital emergency facility in order to see a doctor for her headache. The arbitrator found that the employer's requirement of a note from a physician was not reasonable in these circumstances and reversed the discipline.

Evidence Reasonable in the Circumstances

Evidence that is reasonable in the circumstances will be fact-specific. The factors and principles that may be relevant when assessing "reasonableness" are:

- The duration of the leave. For example, it may not be reasonable, depending on all of the circumstances, for an employer to require an employee who was away from work for only one day to provide evidence.
- Whether there is a pattern of absences or a record of absenteeism. For example, if an employee claims to need repeated dental work and takes a personal emergency leave every Friday afternoon in the summer, it may be reasonable for the employer to require some proof of the procedures even though the leave is of short duration.
- Whether any evidence is available.
- Where evidence is available, but only with some difficulty, whether it is reasonable to expect the employee to obtain the evidence – see the *Re Tilbury Assembly Ltd. and United Auto Workers, Local 251*, discussed above, although note that this decision pre-dates subsection (11). Another example might be where an employee took a leave for medical reasons after seeing a doctor or other person who falls into the definition of "qualified health practitioner"; it likely would not be reasonable for the employer to expect the employee to see a non-"qualified health practitioner" in addition for the sole purpose of getting a note.
- The cost of the evidence. For example, it may not be reasonable, depending on all of the circumstances, for an employer to require an employee who earns minimum wage to obtain a copy of a police report for a motor vehicle accident if the police station charges $25 for it.
- The employee had earlier asked for the time off for non-emergency leave reasons for the time at which the absence occurred but was denied.

- The employee had announced plans in advance to miss work.

Evidence relating to court proceedings

In addition, the *Youth Criminal Justice Act*, SC 2002, c 1("YCJA") prohibits the disclosure of any information that may identify a young person who has committed or is alleged to have committed an offence, a young person who is a victim of the offence, or a young person who is called as a witness in any proceeding in connection with the alleged offence. Employees who take a personal emergency leave because a young person specified in s. 50(2) is involved in a YCJA matter are not obliged to divulge to the employer (or officer) any information regarding the identity of the young person (e.g., the name or their relationship to the employee). Instead, it is Program policy that it would be reasonable in the circumstances that the employee state that a relative was involved in a court proceeding.

Evidence relating to reasonable cause for PEL before, after, or on a public holiday

Note that, in certain situations per ESA Part X, Public Holidays, the onus is on the employee to prove that they had reasonable cause for not working all or part of a scheduled shift either on a public holiday, or the first and last shifts before or after a public holiday. Also note that it is Program policy that if an employee takes personal emergency leave, this will constitute reasonable cause for the purposes of ESA Part X. This is subject to s. 50(13) which prohibits an employer from requiring that the employee provide a certificate from a qualified health practitioner as evidence of an entitlement to PEL. Therefore, an employer can only require an employee to provide other evidence reasonable in the circumstances per s. 50(12).

Evidence relating to return to work requirements

In some circumstances, an employee may be required by an employer to provide evidence that they are fit to return to work after an illness or injury. While s. 50(13) prohibits an employer from requiring an employee to provide a certificate from a qualified health practitioner, this is in relation to determining the employee's eligibility for s. 50 entitlements only. If an employer requires the employee to provide a medical note or certificate only for the purpose of confirming that the employee is capable of performing regular or modified duties before the employee returns to work, this would not be a violation of s. 50(13).

Evidence relating to benefits under a contract of employment that exceed ESA 2000 entitlements

If an employer provides paid sick days in excess of the requirement under the ESA 2000 for two days of personal emergency leave taken in the calendar year to be paid, whether or not the prohibition against requiring a certificate from a qualified health practitioner (a "medical note") applies depends on whether the contract of employment offers a greater right or benefit under ESA Part III, s. 5(2).

If the sick day provisions contained in the employee's contract of employment are a greater right or benefit after all of its features have been compared with the personal emergency leave provisions in the ESA 2000, then the terms of the employment contract will apply and the prohibition contained in ss. 50(13) will not apply to any of the absences. In that case, if the terms include a requirement for the employee to provide a medical note upon request, the employee will be required to do so in accordance with the contract of employment and the prohibition contained in s. 50(13) will not apply.

If the benefit offered by the contract of employment is not a greater right or benefit, then the provisions of the ESA 2000 will apply. Per s. 50(13) the employer cannot require the employee to provide a medical note for the purpose of proving the employee's entitlement to PEL for any of the ten statutory personal emergency leave days – paid or unpaid – to which the employee is entitled. If, however, a contract of

employment provides for paid sick days over and above the two days of paid PEL an employee is entitled to under the ESA 2000, the employer is not prohibited from requiring a medical note as a condition for providing pay for those additional paid sick days. The employer may not require the note as evidence that the employee is entitled to take the time off as personal emergency leave.

Consider the example of a contract of employment that offers a benefit of six paid sick days per calendar year. Assume that the contract does not provide a greater right or benefit and that s. 50 therefore applies. If an employee takes their first two days of personal emergency leave in the calendar year for personal illness, the employer would be prohibited from requiring a medical note from the employee and the employee would be entitled to two paid days of personal emergency leave pay (provided they have worked for the employer for one week or longer). If the same employee takes the four more days of personal emergency leave in the same calendar year for personal illness, although the employer is prohibited from requiring a medical note to support the employee's eligibility for the leave, the employer is not prohibited from requiring a medical note to support the employee's ***contractual*** entitlement to the **pay** for the remaining four sick days. Because the **pay** for the last four sick days are over and above the employee's entitlement to personal emergency leave pay under the ESA 2000, the prohibition in s. 50(13) does not apply to that pay. However, the prohibition in s. 50(13) will continue to apply to the entitlement to take the leave of absence.

Another example is where an employer offers 12 days of personal leave or sick leave under the contract of employment within a calendar year. Assume that the contract does not provide a greater right or benefit and that s. 50 therefore applies. The prohibition applies only to the ten statutory personal emergency leave days the employee is entitled to. The prohibition in s. 50(13) would not apply to the 11th or 12th absences.

ESA Part XIV Section 50.0.1 – Family Responsibility Leave

Family Responsibility Leave – s. 50.0.1(1)

50.0.1 (1) An employee who has been employed by an employer for at least two consecutive weeks is entitled to a leave of absence without pay because of any of the following:

1. The illness, injury or medical emergency of an individual described in subsection (3).

2. An urgent matter that concerns an individual described in subsection (3).

See one section below for the discussion of subsection (2).

Family Members – s. 50.0.1(3)

50.0.1 (3) Subsection (1) applies with respect to the following individuals:

1. The employee's spouse.

2. A parent, step-parent or foster parent of the employee or the employee's spouse.

3. A child, step-child or foster child of the employee or the employee's spouse.

4. A grandparent, step-grandparent, grandchild or step-grandchild of the employee or of the employee's spouse.

5. The spouse of a child of the employee.

6. The employee's brother or sister.

7. A relative of the employee who is dependent on the employee for care or assistance.

The family responsibility leave provisions were introduced into the ESA 2000 effective January 1, 2019 by the *Making Ontario Open for Business Act, 2018*.

Sections 50.0.1(1) and 50.0.1(3) set out the qualifying conditions an employee must meet in order to be entitled to an unpaid family responsibility leave. To qualify, the employee must have been employed by the employer for at least two consecutive weeks, the need for the leave must be because of one of the events specified in subsection (1) and the event must relate to one of the individuals specified in subsection (3).

Note that, pursuant to O Reg 285/01, s. 3, certain employees who meet the qualifying criteria for a family responsibility leave will not be entitled to take it if taking it would constitute an act of professional misconduct or a dereliction of professional duty. Section 3 of O Reg 285/01 reads:

3. Sections 50, 50.0.1 and 50.0.2 of the Act do not apply to any of the following persons in circumstances in which the exercise of the entitlement would constitute an act of professional misconduct or a dereliction of professional duty:

1. A person described in clause 2(1) (a), (c), (d) or (e).

2. A person employed as a registered practitioner of a health profession set out in Schedule 1 to the *Regulated Health Professions Act*, 1991, including a person described in clause 2(1)(b).

See O Reg 285/01. s. 3 for more information.

What Triggers an Entitlement to Family Responsibility Leave

Sections 50.0.1(1) and 50.0.1(3) list the events, and the people to whom the events must relate, that entitle employees who have been employed for at least two consecutive weeks to take family responsibility leave. The list is exhaustive. If an event or the person to whom the event relates is not listed in ss. 50.0.1(1) and 50.0.1(3), the employee is not entitled to family responsibility leave. If the employee has not been employed for at least two consecutive weeks, the employee is not entitled to family responsibility leave.

Employees can take a family responsibility leave of absence because of the following events:

- Illness,
- Injury,
- Medical emergency, or
- Urgent matter.

The events described in the list above must relate to one of the following people:

- The employee's spouse (which includes a same-sex spouse);
- A parent, step-parent, foster parent, child, step-child, foster child, grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse (which includes a same-sex spouse);

- The spouse (which includes a same sex spouse) of the employee's child;
- The employee's brother or sister; and
- Any relative of the employee not listed above who is dependent on the employee for care or assistance.

The terms "parent" and "spouse" are defined ESA Part XIV, s. 45.

If the event or person to whom the event relates is not contained in the above list, the employee is not entitled to a family responsibility leave. For example, while an urgent matter in respect of a person specified in s. 50.0.1(3) entitles an employee to family responsibility leave, a personal urgent matter does not.

Illness, Injury or Medical Emergency

In general, the meaning of these terms is self-evident.

One issue that arises with respect to leaves taken because of illness, injury or medical emergency is whether an employee is entitled to take family responsibility leave because their relative has a pre-planned or so-called "elective" surgery. Because the surgery is scheduled ahead of time, it is not a medical emergency. However, because, generally speaking, people undergo surgery for the treatment or prevention of a medical condition, it is Program policy that most surgeries, including those that are pre-planned or elective, that are performed to address or prevent manifestation of a medical condition (e.g., laser eye surgery to correct poor distance vision) are because of an illness or injury. Consequently, an employee is entitled to family responsibility leave if a specified relative of the employee undergoes pre-planned or elective surgery. This does not include medically unnecessary plastic surgeries that are performed for purely cosmetic reasons and that are not related to an underlying illness or injury; these types of surgeries are not because of an illness or injury.

Another issue that arises concerns doctor's appointments. An employee's relative who has an appointment for an annual check-up would generally not trigger an entitlement to leave for the employee unless it has been scheduled in respect of an illness, injury or medical emergency. However, if the relative had regularly scheduled appointments for the treatment or management of a chronic medical condition such as Crohn's disease or diabetes, those appointments would trigger an entitlement for the employee because they are absences related to an illness.

In the case of a relative for whom an employee may take family responsibility leave, the employer's right to request evidence that the employee is eligible to take the leave will be limited. See s. 50.0.1(7) for more details.

For employees who are entitled to family responsibility leave as provided for in s. 50.0.1, questions have arisen as to whether an employee who is absent from work for one of the events listed in s. 50.0.1(1) in relation to a person specified in s. 50.0.1(3) **must** use one of their three days of family responsibility leave. A discussion of this issue is set out at s. 50.0.1(4) below – see Designating Absences as Family Responsibility Leave.

Urgent Matter

One of the events that entitle an employee to family responsibility leave is an urgent matter that concerns any of the people listed in s. 50.0.1(3). "Urgent matter" is not defined in the ESA 2000. It is Program policy that one of the traits of an urgent matter is that the event be unplanned or out of the employee's

control, and raise the possibility of serious negative consequences, including emotional harm, if it is not responded to. For example, it is an urgent matter if:

- An employee's nanny or babysitter calls in sick;
- The basement of an elderly parent floods and the parent is unable to deal with the situation; or
- An employee has an appointment to meet with their child's counselor to discuss behaviour problems at school. The appointment is during the employee's shift, and the appointment could not be rescheduled outside of the employee's working hours.

Some examples of situations that are not an urgent matter include:

- An employee wishing to attend a brother's wedding; or
- An employee wishing to attend a child's play.

While both of these events are out of the employee's control, the employee's inability to attend these events does not raise the possibility of serious negative consequences.

When determining whether an event is an urgent matter, an objective standard is applied. That is, the employee's subjective perception of the urgency of the matter is not determinative. However, subjective factors and circumstances that are particular to the individual employee should be taken into account. The question to ask is, would a reasonable employee in the same circumstances as the employee in question have felt that the matter was an urgent one?

Relative of the Employee Who is Dependent on the Employee for Care or Assistance

Section 50.0.1(1) entitles employees to a family responsibility leave if there is an illness, injury, medical emergency or urgent matter concerning a person specified in paragraphs 1 to 7 of s. 50.0.1(3), including "a relative of the employee who is dependent on the employee for care or assistance".

Relative

The ESA 2000 does not specify how close the familial relationship has to be in order to meet this criterion. The person must only be a "relative". In the absence of a definition of relative, the term must be interpreted in accordance with its plain, ordinary grammatical sense and general acceptance.

Black's Law Dictionary, 10th ed., defines a relative as “a person connected with another by blood or affinity; a person who is kin with another.”

Accordingly, it is Program policy that to be a relative of an employee, the individual should be related through blood or through marriage, adoption or common law relationships between people of the same or opposite sex who are not married. Conversely, it is Program policy that “relative” in s. 50(2), paragraph 7 will not include those individuals who are not connected either by blood or through marriage, adoption or a common law relationship, since including them would be extending the meaning of relative beyond the ordinary, commonly understood meaning.

With respect to common law relationships, the question arises as to how long the individuals have to live together in a conjugal relationship before it can be said that a spousal relationship exists, thus granting relative status to relatives of the employee's spouse. The answer is that there is no minimum amount of time that the individuals must be together in order to qualify as a common law spouse for the purpose of entitlement to personal emergency leave. Unlike the *Family Law Act*, RSO 1990, c F.3 which, for the purposes of support obligations, limits the definition of unmarried "spouse" to those people who have lived together continuously for three years or are in a relationship of some permanence if they are the birth or

adoptive parents of a child, ESA Part XIV, s. 45 requires only that the individuals "live together in a conjugal relationship outside marriage".

Accordingly, it is Program policy that the relationship of relative can be established through a common law relationship between people of the same or opposite sex once there is a conjugal relationship, regardless of how long it has been.

Note that the entitlement to family responsibility leave does not arise solely by virtue of the illness, injury, medical emergency or urgent matter of a relative. If that relative is not in a category specified in paragraphs 1 through 6, that relative must be dependent on the employee for care or assistance before there is an entitlement to family responsibility leave. See the discussion below.

Dependent

An employee is entitled to take family responsibility leave with respect to the illness, injury, medical emergency or urgent matter of an individual not in a category specified in paragraphs 1 through 6, only where that individual is a relative who is "dependent on the employee for care or assistance". The ESA 2000 does not specify how dependent a relative has to be on the employee for this provision to apply. It only requires that there be a dependence for care or assistance. As individuals can be dependent on one another for care or assistance without being entirely dependent on that person, it is Program policy that this provision will apply to any relative who is reliant on the employee to some degree for care or assistance in meeting their basic living needs. The relative does not have to be completely reliant on the employee for all of their needs for this provision to apply.

There is no requirement that the relative be living with the employee for this provision to apply.

The type of event that entitles an employee to a family responsibility leave does not have to relate to the particular type of dependence the relative has on the employee in order to meet this criterion. For example, an employee's great-uncle depends on the employee to purchase his prescriptions and ensure he takes his medication. The employee wants to take family responsibility leave because their great-uncle's house is broken into and he needs assistance. The employee will be entitled to family responsibility leave even though the matter that is being responded to (a break-in) is unrelated to the type of dependence (ensuring that medication is taken).

Same, Limit – s. 50.0.1(2)

50.0.1(2) An employee's is entitlement to leave under this section is limited to a total of three days in each calendar year.

This section provides that where an employee qualifies for a leave under this section, the employee is entitled to take up to three days of family responsibility leave every calendar year. The entitlement is to *a total* of three days of family responsibility leave per calendar year, not three days per relative.

The ESA 2000 does not place any restrictions with respect to whether the three days have to be taken consecutively or individually. Employees can take family responsibility leave in part days (although see s. 50.0.1(6), which allows employers to deem one day's leave to be taken when an employee takes part of a day off work for family responsibility leave), entire days, or in periods of more than one day.

The question arises as to whether the three-day entitlement should be prorated for employees who are part-time, or who started their employment partway through a calendar year but have been employed for at least two consecutive weeks. There is nothing in the legislation to suggest that employees who are

eligible for family responsibility leave should be entitled to less than three days per calendar year in any of these situations. Accordingly, it is Program policy that pro-rating of the three-day entitlement for part-time employees or employees who were hired partway through a calendar year is not permitted.

The ESA 2000 does not provide for the carryover of unused days of family responsibility leave from one calendar year into the next calendar year. In other words, employees do not have a statutory right to "bank" unused family responsibility leave days year over year.

It is Program policy that an employee who quits or is terminated and who is subsequently re-hired by the same employer during the same calendar year is entitled to a new three-day entitlement after two consecutive weeks of employment upon their re-hire. This is the case even if the employee took some family responsibility leave during their first term of employment in that calendar year.

See ESA Part III, s. 5(2) for a discussion of the application of the "greater right or benefit" provision to family responsibility leave. See also the discussion at ss. 50.0.1(8) – (10) for information regarding the interplay between contractual leave entitlements and statutory entitlements to family responsibility leave where the contractual leave does not amount to a greater right or benefit.

Advising Employer – ss. 50.0.1(4) & (5)

50.0.1(4) An employee who wishes to take leave under this section shall advise his or her employer that he or she will be doing so.

50.0.1(5) If the employee must begin the leave before advising the employer, the employee shall advise the employer of the leave as soon as possible after beginning it.

Advising Employer

Section 50.0.1(4) requires employees to tell their employers ahead of time that they will be taking family responsibility leave. In circumstances where that cannot be done, the employee is required, pursuant to s. 50.0.1(5), to inform the employer as soon as possible after beginning the leave.

The ESA 2000 does not require the employee to advise the employer of the family responsibility leave in writing. Oral notice is sufficient.

The ESA 2000 does not specify any particular method by which the employer is to be advised that the employee will be taking family responsibility leave. Consequently, an employee would be complying with this section whether the employee, for example, advised the employer by phone, left a note on the manager's desk or had a colleague take a message to the employer on their behalf.

Employees do not lose their right to family responsibility leave if they fail to comply with ss. 50.0.1(4) or (5). An employee's entitlement to family responsibility leave arises by virtue of one of a number of "triggering events" arising involving a particular family member, and it is the Program's position that the failure to advise the employer before or as soon as possible after the leave begins does not negate that entitlement. This approach has been affirmed in a grievance arbitration decision by the Ontario Labour Relations Board in the context of the former personal emergency leave, which used identical language to subsections (4) and (5) and which had similarly-structured entitlement provisions to those found in family responsibility leave – see *International Brotherhood of Electrical Workers, Local 115 v The State Group Inc.,* 2019 CanLII 22129 (ON LRB). In that decision, the Vice-Chair found that notice to the employer is not a prerequisite to exercising the right to the leave. Note that this approach is consistent with the

Program's long-standing policy in the pregnancy and parental leave context, where the structure of the entitlement and notice provisions are also similar to these. See ESA Part XIV, s. 46(4) and s. 48(4).

An issue has arisen as to whether an employer can penalize an employee for failing to give advance notice that they will be absent from work (as may be required under an employer policy), where the time off is a family responsibility leave under the ESA 2000. Sections 50.0.1(1) and (3) describe the employee's entitlement, i.e., the triggering event and with respect to which individuals. Section 50.0.1(4) requires the employee taking family responsibility leave to advise the employer that they are taking the leave, and s. 50.0.1(5) provides that "if the employee must begin the leave before advising the employer, the employee shall advise the employer of the leave as soon as possible after beginning it." It is clear from s. 50.0.1(5) that the ESA 2000 contemplates situations where the employee would be unable to advise the employer in advance of commencing the family responsibility leave. Part of the family responsibility leave entitlement under the ESA 2000 is the right to take the family responsibility leave even if advance notice cannot be given, with the proviso that the employee must advise the employer of the leave as soon as possible after beginning it.

The failure to give notice in advance of taking leave, when it would have been possible for the employee to do so, can be the subject of disciplinary action by the employer without violating ESA Part XVIII, s. 74, the anti-reprisal provision. However, the following points should be considered:

- The employee's failure to give advance notice would not be a lawful basis on which to deprive the employee of the right to take the leave if the qualifying conditions in ss. 50.0.1(1) and (3) have been met. An employer could not, for example, take the position that failure to give advance notice when it would have been possible for the employee to do so will result in the time taken off not being counted as a family responsibility leave day.
- Any discipline for failing to provide notice in situations where such notice is required under s. 50.0.1(4) (i.e., where s. 50.0.1(5) does not apply) would have to be appropriately linked to the failure to give advance notice and must not, in effect penalize the employee for exercising the right to leave. The motive for any discipline that the employer does impose must clearly be the employee's failure to give advance notice and not the taking of the leave itself.

In addition, an employer would be able to impose discipline if an employee fails to provide any notice of the family responsibility leaveor if the employee provides notice of the leave so late that one wouldn’t reasonably be able to say that it falls within s. 50.0.1(5). Again, however, the employer's disciplinary action would have to be appropriate, and in no way a penalty or reprisal for the employee having taken the leave, but only for the failure to give notice. In this regard see *Ryding-Regency Meat Packers Ltd. v. U.F.C.W., Local 1000A*. In that case, the arbitrator concluded that in relation to the former personal emergency leave, the ESA 2000 established an entitlement to leave where a person described under the personal emergency leave provisions was ill. The fact that the employee's grandmother was ill was not disputed. Because the sections of the ESA 2000 that created the entitlement were separate from the notice requirements, the employee could be disciplined for not giving notice that he was taking or had taken leave but did not lose his entitlement to take the leave itself.

Designating Absences as Family Responsibility Leave

For employees who are entitled to family responsibility leave as provided for in s. 50.0.1, questions have arisen as to whether an employee who is absent from work for one of the events listed in s. 50.0.1(1) in relation to a person specified in s. 50.0.1(3) **must** use one of their three days of family responsibility leave.

Impact of Subsections (8) – (10)

Subsection (8) provides that where an employee takes a paid or unpaid leave of absence under an employment contract in circumstances for which the employee would also be entitled to take a leave under s. 50.0.1, the employee is deemed to have taken a leave under s. 50.0.1. Subsections (9) and (10) establish rules that apply to the deemed leave.

Accordingly, **if** subsections (8) to (10) apply to an absence, i.e. an employee takes paid or unpaid leave under the contract of employment in circumstances in which family responsibility leave could be taken, the employee **will be deemed** pursuant to ss. 50(8) to have taken ESA family responsibility leave and drawn down against the three-day s. 50.0.1 entitlement. See the discussion under ss. 50 (8) to (10) for more information regarding the impact of contractual entitlements on the statutory right to family responsibility leave.

Result Where Subsections (8) – (10) DO NOT apply

On the other hand, if subsections (8) to (10) **do not** apply, i.e. an employee who is entitled to family responsibility leave is absent due to one of the reasons listed in s. 50.0.1(1) but does not take a paid or unpaid leave of absence under an employment contract for that absence (either because the employee does not have a contractual right or does not exercise it), **it is the employee (not the employer) who decides whether to designate the absence as a statutory family responsibility leave**.

If the employee who is entitled to family responsibility leave and who is absent from work due to one of the reasons listed in s. 50.0.1(1) wishes to designate the absence as a statutory family responsibility leave, then the absence is a family responsibility leave that draws down against the three-day statutory entitlement and attracts the corresponding reprisal protections and all of the other ancillary rights that attach to statutory leaves that are set out in ESA Part XIV, ss. 51 to 53.1.

In the case where ss. (8) to (10) **do not** apply, an employee may be entitled to statutory family responsibility leave and be absent from work due to one of the reasons listed in s. 50.0.1(1) in relation to a person specified in s. 50.0.1(3) and decide not to claim the absence as a family responsibility leave day. This is not considered as contracting out of the ESA 2000 if an employee does not take advantage of their leave entitlements; the employee has merely chosen not to exercise them.

If the employee who is entitled to family responsibility leave by virtue of being absent from work due to one of the reasons listed in s. 50.0.1(1) in relation to a person specified in s. 50.0.1(3) does not wish to designate the absence as a family responsibility leave, and the absence cannot be considered an authorized absence on some other ground (e.g., another leave under the ESA 2000 or vacation authorized by the employer), the absence would have no statutory reprisal protection. For this reason, an employee who takes a day off for a reason that would qualify under s. 50.0.1 but who would prefer not to have the day charged against their family responsibility leave allotment may feel effectively forced into designating the day as such a leave. This in itself does not constitute any violation of the ESA 2000: it is not unlawful for an employer to inform an employee that should the employee not designate an absence as a statutory family responsibility leave day, then it would be considered an unexcused absence that will lead to disciplinary action.

Note that if the employee did not know of the right to take family responsibility leave, the default is that the absence is considered to be statutory family responsibility leave with the corresponding reprisal protection. An employee does not lose their right to any of the leaves provided for under the ESA 2000 because they were unaware of their entitlements.

Leave Deemed to be Taken in Entire Days – s. 50.0.1(6)

50.0.1(6) For the purposes of an employee's entitlement under subsection (1), if an employee takes any part of a day as leave under this section, the employer may deem the employee to have taken one day of leave on that day.

Employees may not need an entire work day to attend to the event that gave rise to the family responsibility leave and might only take part of a day off as family responsibility leave. Section 50.0.1(6) allows an employer in this situation to count the part-day off work as an entire day's leave for the purpose of counting the absence against the statutory three-day leave entitlement. This is the only purpose for which the employer can deem the part day off work as an entire day's leave. The employer cannot deem the employee not to have worked at all on the day. Where an employee worked a partial day and took a part-day of family responsibility leave, the employee is entitled to be paid the earnings for the time that was actually worked that day. As well, the hours that were worked will be counted for the purposes of, among other things, determining whether the relevant overtime threshold has been reached, whether the limits on, for example, the daily and weekly hours of work have been reached, and whether the daily, weekly/bi-weekly and in-between shifts rest requirements have been met.

For clarity, this provision does not require employees to take family responsibility leave in full day periods. It simply allows an employer to reduce the employee's three-day entitlement by a day if an employee is on family responsibility leave for only part of a day.

Note that this provision *allows* the employer to attribute one day's leave to a part-day absence. It does not require the employer to do so.

For example, an employee goes home early from work because their child has the stomach flu. They worked a four-hour day rather than their usual eight hours and takes family responsibility leave. In that case, the employer may consider the employee to have used up one of their three days of family responsibility leave and the employee would be paid their earnings for the four hours they actually worked.

Just because an employer may consider an employee to have used one day of leave due to a part day of absence does not mean that the employee then has the right to take the entire day off if the triggering event did not last the entire day. For example, an employee's shift is from 9 a.m. to 5 p.m. They have to meet with their son's school principal on an urgent matter from 10 a.m. to 11 a.m. The employee claims the absence as family responsibility leave. Their employer is entitled to count the absence as an entire day's family responsibility leave, but the employee must nevertheless return to work after the meeting is over. Employees have the right to be away from work under the family responsibility leave provisions of the ESA 2000 only for as long as the need lasts. After the triggering event is over, the employee's normal obligations to attend at work are resumed.

In addition, employers cannot prohibit employees who took a part day of leave from returning to work for the remainder of their shift. This is because, among other reasons, the employer's s. 53 obligation to reinstate the employee at the end of the leave in ESA Part XIV, s. 53 and the prohibition against penalizing employees for having taken a leave in ESA Part XVIII, s. 74.

An issue has arisen as to whether an employer could exercise its discretion and deem a partial day absence as a full day for some employees, but not for others, or whether this might allow employers to selectively punish employees who have too many absences in violation of the reprisal provisions in ESA Part XVIII, s. 74.

The answer will depend on the facts. In particular, why did the employer treat the employees differently? Where an employer deems a full day's absence for some employees, but not for others, it is a question of fact as to whether the employer would be in violation of the ESA 2000.

For instance, an employer counts a three-hour family responsibility leave as a full day's leave for employee A but not for employee B who also takes a three-hour family responsibility leave because the employer considers employee B to be a better worker than employee A. Although this might be unfair as between employee A and B, it would not be a violation of the ESA 2000, as it would not be a reprisal for exercising a right under the ESA 2000.

If, on the other hand, the motivation for the differential treatment was that employee A frequently took family responsibility leave every year of only a few hours, and the employer assigned a full day's absence to these short leaves as a way to ensure employee A used up all of their statutory entitlement as soon as possible because the employer found it inconvenient for the employee to be away for short periods of time, that would be an unlawful reprisal.

As another example, it would also be an unlawful reprisal if the motive for the differential treatment was because employee A made inquiries about ESA rights or refused to agree to average hours for overtime pay purposes.

Evidence – s. 50.0.1(7)

50.0.1(7) An employer may require an employee who takes leave under this section to provide evidence reasonable in the circumstances that the employee is entitled to the leave.

Subsection 50.0.1(7) gives an employer an ability to require an employee to provide proof that they are or were entitled to take family responsibility leave. The employer can require an employee to provide evidence that is reasonable in the circumstances that they are or were entitled to take the leave.

Evidence of entitlement to family responsibility leave may take many forms. For example, it could be a note from a daycare provider, school or other care facility. Receipts could also constitute proof, e.g., an invoice from a plumber who was called in to deal with a parent’s flooded basement.

Where the family responsibility leave was for the illness, injury or medical emergency of a person listed in s. 50.0.1(3), the employer cannot require a medical certificate or note in respect of that person – that person is not the employee of the employer and has no obligation to share their medical information. Note that it is different in the family medical leave, family caregiver leave, and critical illness leave contexts. In those cases, the ESA 2000 specifically states that the employee must obtain a medical certificate providing certain information about the family member and provide a copy of the certificate to the employer upon request.

Evidence Reasonable in the Circumstances

Evidence that is reasonable in the circumstances will be fact-specific. The factors and principles that may be relevant when assessing reasonableness are:

- The duration of the leave. For example, it may not be reasonable, depending on all of the circumstances, for an employer to require an employee who was away from work for only one day to provide evidence.

- Whether there is a pattern of absences or a record of absenteeism. For example, if an employee takes a family responsibility leave day only on Fridays before a long weekend, it may be reasonable for the employer to require some proof of entitlement to the leave even though the leave is of short duration.
- Whether any evidence is available. In some circumstances, third parties to whom the leave relates may refuse to provide employees with the evidence the employer has requested.
- Where evidence is available, but only with some difficulty, whether it is reasonable to expect the employee to obtain the evidence – see the *Re Tilbury Assembly Ltd. and United Auto Workers, Local 251*, although note that this decision was made under the previous personal emergency leave provisions.
- The cost of the evidence. For example, it may not be reasonable, depending on all of the circumstances, for an employer to require an employee who earns minimum wage to obtain a copy of a police report for a motor vehicle accident if the police station charges $25 for it.
- The employee had earlier asked for the time off for non-family responsibility leave reasons for the time at which the absence occurred but was denied.
- The employee had announced plans in advance to miss work.

Note that any evidence the employee provides to support the employee's claim of an entitlement to family responsibility leave is just that – evidence – and is not necessarily determinative of the question of whether the employee had an entitlement. Depending on the circumstances, it may be reasonable for the employer to require additional evidence from the employee.

Evidence relating to court proceedings

The *Youth Criminal Justice Act*, SC 2002, c 1 ("YCJA") prohibits the disclosure of any information that may identify a young person who has committed or is alleged to have committed an offence, a young person who is a victim of the offence, or a young person who is called as a witness in any proceeding in connection with the alleged offence. Employees who take a family responsibility leave because a young person specified in s. 50.0.1(3) is involved in a YCJA matter are not obliged to divulge to the employer (or employment standards officer) any information regarding the identity of the young person (e.g., the name or their relationship to the employee). Instead, it is Program policy that it would be reasonable in the circumstances that the employee state that a relative was involved in a court proceeding.

Family Responsibility Leave Taken Under Employment Contract – s. 50.0.1(8)

Same, Application of Act to Deemed Leave – s. 50.0.1(9)

Same, Application of Subs. (6) to Deemed Leave – s. 50.0.1(10)

50.0.1(8) If an employee takes a paid or unpaid leave of absence under an employment contract in circumstances for which he or she would also be entitled to take a leave under this section, the employee is deemed to have taken the leave under this section.

50.0.1(9) All applicable requirements and prohibitions under this Act apply to a leave deemed to have been taken under subsection (8).

50.0.1(10) Subsection (6) applies with necessary modifications to a leave deemed to have been taken under subsection (8).

These provisions, when read together, establish what happens when an employee takes a leave of absence under an employment contract in circumstances that would also entitle the employee to a leave under s. 50.0.1.

“Circumstances” refers only to the triggering event that would entitle the employee to statutory family responsibility leave, i.e., the employee is absent because of an event listed in s. 50.0.1(1) and the event relates to a person listed in s. 50.0.1(3).

It is Program policy that “circumstances” does not include the two-week employment eligibility criterion. Accordingly, these provisions will be triggered when an employee takes a leave of absence under an employment contract due to an event listed in s. 50.0.1(1) where the event relates to a person listed in s. 50.0.1(3), even during the first two weeks of employment; this is the case regardless of the fact that the employee does not have the right to take statutory family responsibility leave during this time.

Subsections 8 to 10 codify the long-standing Program policy on the interplay between contractual leave entitlements and statutory leave entitlements where the contractual leave does ***not*** amount to a greater right or benefit than statutory family responsibility leave under ESA Part III, s. 5(2).

Note that if a contract *does* provide a greater right or benefit than the statutory family responsibility leave entitlement – the determination of which includes consideration of reprisal protections and the entitlements under general provisions concerning leaves such as the right to reinstatement – the contractual leave provision applies and s. 50.0.1, including these subsections, does not apply. See the discussion of ESA Part III, s. 5(2) for details.

In general terms, subsections (8) to (10) provide that an employee who claims a contractual benefit for an absence - in circumstances in which the employee would also be entitled to take family responsibility leave - does not have an entitlement to those contractual absences *plus* an additional three days of family responsibility leave.

Family Responsibility Leave Taken Under Employment Contract

50.0.1(8) If an employee takes a paid or unpaid leave of absence under an employment contract in circumstances for which he or she would also be entitled to take a leave under this section, the employee is deemed to have taken the leave under this section.

If an employee takes a paid or unpaid leave of absence under an employment contract in circumstances for which the employee would also be entitled to take a leave under s. 50.0.1, the employee is deemed to have taken a day of family responsibility leave and the absence will reduce the employee’s three-day per calendar year family responsibility leave allotment accordingly. Note that this provision must be read in conjunction with subsections (9) and (10), discussed below.

For this provision to apply, the reason for the absence (the triggering event) and the person in respect of whom the absence is related, must qualify for both the contractual leave and the statutory leave.

Some examples:

- An employer offers three paid sick days under a benefit plan which may be used either for the employee or their child. The employee is absent for three days because of a sick child and claims benefits under the plan. Subsection 50(8) deems the employee to have used three ESA family responsibility leave days. As a result, the employee will have no further entitlement to family responsibility leave under the ESA 2000.

- The contract of employment provides the employee with a paid flex day that can be used for any reason. The employee misses a day of work because they are assisting their mother with a flooded basement and uses a flex day to avoid a loss in pay. The employee is deemed to have also taken one day of family responsibility leave.
- If, however, the contract of employment offers a flex day that can be used for any reason, and the employee uses that day to deal with an event that is not set out in s. 50.0.1(1) or to deal with an event that relates to a family member who is not set out in s. 50.0.1(3) , the employee would **not** be deemed to have taken a day of family responsibility leave pursuant to this provision. For example, an employee uses the flex day to attend their child's dance recital. They will not be deemed to have taken a day of family responsibility leave pursuant to this provision. This is because an employee is not entitled to take family responsibility leave to attend a child's dance recital because attending a dance recital is not an urgent matter Therefore, the contractual leave was not taken in circumstances for which the employee would also be entitled to take a family responsibility leave.

This provision only has the potential to deem a statutory leave to be taken when a contractual leave is taken. It does not do the converse: it does not deem a contractual leave to be taken if a statutory leave is taken in circumstances for which the employee would also be entitled to take a contractual leave. The question as to whether statutory absences will also draw down against the contractual right is not a matter for the employment standards program.

Application of Act to Deemed Leaves

50.0.1(9) All applicable requirements and prohibitions under this Act apply to a leave deemed to have been taken under subsection (8).

If an absence has been deemed to be a statutory leave under ss. 50.0.1(8), this provision establishes that all requirements and prohibitions under the ESA 2000 apply to the absence.

This includes all requirements and prohibitions in s. 50.0.1 as well as general rights and obligations found in other sections and parts of the ESA 2000.

Examples include:

- the right to reinstatement,
- maintenance of benefits (if relevant),
- protection from reprisal,
- obligations on the employee with respect to advising the employer of the leave, and
- providing evidence reasonable in the circumstances to demonstrate an entitlement to the leave (where required by the employer).

Application of s. 50.0.1(6) to Deemed Leaves

50.0.1(10) Subsection (6) applies with necessary modifications to a leave deemed to have been taken under subsection (8).

This provision states that subsection (6) applies, with necessary modifications, to a leave that is deemed to be a family responsibility leave pursuant to subsection (8).

This means that if an employee takes a partial-day leave pursuant to their contract of employment, and that leave is deemed to be a day of family responsibility leave under subsection (8), the employer may deem the absence to be a *full day* of family responsibility leave and reduce the employee's three-day per calendar year allotment of family responsibility days accordingly.

ESA Part XIV Section 50.0.2 – Bereavement Leave

Bereavement Leave – ss. 50.0.2(1)

50.0.2 (1) An employee who has been employed by an employer for at least two consecutive weeks is entitled to a leave of absence without pay because of the death of an individual described in subsection (3).

See one section below for the discussion of s. 50.0.2 (2).

Family Members – s. 50.0.2(3)

50.0.2 (3) Subsection (1) applies with respect to the following individuals:

1. The employee's spouse.

2. A parent, step-parent or foster parent of the employee or the employee's spouse.

3. A child, step-child or foster child of the employee or the employee's spouse.

4. A grandparent, step-grandparent, grandchild or step-grandchild of the employee or of the employee's spouse.

5. The spouse of a child of the employee.

6. The employee's brother or sister.

7. A relative of the employee who is dependent on the employee for care or assistance.

The bereavement leave provisions were introduced into the ESA 2000 effective January 1, 2019 by the *Making Ontario Open for Business Act,* 2018.

Sections 50.0.2(1) and 50.0.2(3) set out the qualifying conditions an employee must meet in order to be entitled to an unpaid bereavement leave. To qualify, the employee must have been employed by the employer for at least two consecutive weeks, and the need for the leave must be because of the death of an individual specified in subsection (3).

Note that, pursuant to O Reg 285/01, s. 3, certain employees who meet the qualifying criteria for a bereavement leave will not be entitled to take it if taking it would constitute an act of professional misconduct or a dereliction of professional duty. Section 3 of O Reg 285/01 reads:

3. Sections 50, 50.0.1 and 50.0.2 of the Act do not apply to any of the following persons in circumstances in which the exercise of the entitlement would constitute an act of professional misconduct or a dereliction of professional duty:

1. A person described in clause 2(1) (a), (c), (d) or (e).

2. A person employed as a registered practitioner of a health profession set out in Schedule 1 to the *Regulated Health Professions Act*, 1991, including a person described in clause 2(1)(b).

See O Reg 285/01, s. 3 for more information.

What Triggers an Entitlement to Bereavement Leave

Subsections 50.0.2(1) and 50.0.2(3) lists the event ("because of" a death), and the people to whom the event must relate, that entitle employees who have been employed for at least two consecutive weeks to take bereavement leave. The list of relatives in subsection (3) is exhaustive. If it was not a listed relative who has died, the employee is not entitled to bereavement leave. If the employee has not been employed for at least two consecutive weeks, the employee is not entitled to a bereavement leave.

Employees can take a bereavement leave, without pay, because of the death of certain listed individuals. "Because of" is broad wording and can capture many different reasons for requiring time off work. For example, an employee may need time off work to attend a funeral or memorial service; in the case of an employee who is an estate trustee, the employee may need time off to deal with the estate; or the employee may simply be in mourning.

One issue that arises in respect of bereavement leave taken because of the death of a specified family member or dependent relative is whether the leave days must be taken coincident with the death or can be taken at some later time. Section 50.0.2(1) states that an employee is entitled to the leave because of the death of an individual listed in s. 50.0.2(3). As a result, time off work to attend a burial, interment of ashes or memorial service for the deceased that occurs at any time after the death qualifies as a bereavement leave as it is taken because of the death.

To be entitled to a bereavement leave, the person who died must be listed in subsection (3):

- The employee's spouse (which includes a same-sex spouse);
- A parent, step-parent, foster parent, child, step-child, foster child, grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse (which includes a same-sex spouse);
- The spouse (which includes a same sex spouse) of the employee's child;
- The employee's brother or sister; and
- Any relative of the employee not listed above who is dependent on the employee for care or assistance.

The terms "parent" and "spouse" are defined in ESA Part XIV, s. 45.

If a person in the list above has not died, or if the person who has died is not found in the above-list, the employee is not entitled to take a bereavement leave.

Relative of the Employee Who is Dependent on the Employee for Care or Assistance

Section 50.0.2(1) entitles employees to a bereavement leave because of the death of a person specified in paragraphs 1 to 7 of s. 50.0.2(3), including "a relative of the employee who is dependent on the employee for care or assistance".

Relative

The ESA 2000 does not specify how close the familial relationship has to be in order to meet this criterion. The person must only be a relative. In the absence of a definition of relative, the term must be interpreted in accordance with its plain, ordinary grammatical sense and general acceptance.

Black's Law Dictionary, 10th ed., defines a relative as “a person connected with another by blood or affinity; a person who is kin with another.”

Accordingly, it is Program policy that to be a relative of an employee, the individual should be related through blood or through marriage, adoption or common law relationships between people of the same or opposite sex who are not married. Conversely, it is Program policy that “relative” in s. 50.0.2(3), paragraph 7 will not include those individuals who are not connected either by blood or through marriage, adoption or a common law relationship, since including them would be extending the meaning of relative beyond the ordinary, commonly understood meaning.

With respect to common law relationships, the question arises as to how long the individuals have to live together in a conjugal relationship before it can be said that a spousal relationship exists, thus granting relative status to relatives of the employee's spouse. The answer is that there is no minimum amount of time that the individuals must be together in order to qualify as a common law spouse for the purpose of entitlement to personal emergency leave. Unlike the *Family Law Act*, RSO 1990, c F.3 which, for the purposes of support obligations, limits the definition of unmarried "spouse" to those people who have lived together continuously for three years or are in a relationship of some permanence if they are the birth or adoptive parents of a child, ESA Part XIV, s. 45 requires only that the individuals "live together in a conjugal relationship outside marriage".

Accordingly, it is Program policy that the relationship of relative can be established through a common law relationship between people of the same or opposite sex once there is a conjugal relationship, regardless of how long it has been. Note that the entitlement to bereavement leave does not arise solely because of the death of a relative. If that relative is not in a category specified in paragraphs 1 through 6, that relative must have been dependent on the employee for care or assistance before their death in order for there to be an entitlement to bereavement leave. See the discussion below.

Dependent

An employee is entitled to take bereavement leave because of the death of an individual not in a category specified in paragraphs 1 through 6, only where that individual is a relative who is "dependent on the employee for care or assistance". It is Program policy, that in the bereavement leave context, the question to answer is whether the individual is a relative who was dependent on the employee for care or assistance at some point when the relative was alive. The ESA 2000 does not specify how dependent a relative had to have been on the employee for this provision to apply. It only requires that there have been a dependence for care or assistance. As individuals can be dependent on one another for care or assistance without being entirely dependent on that person, it is Program policy that this provision will apply to any relative who had been reliant on the employee to some degree for care or assistance in meeting their basic living needs. The relative did not have to be completely reliant on the employee for all of their needs when they were alive for this provision to apply.

There is no requirement that the deceased relative have previously lived with the employee for this provision to apply.

1. Designating Absences as Bereavement Leave

For employees who are entitled to bereavement leave as provided for in s. 50.0.2, questions have arisen as to whether an employee who is absent from work for the reason listed in s. 50.0.2(1) **must** use one of their two days of bereavement leave. A discussion of this issue is set out at ss. 50.0.2(4) below – see Designating Absences as Bereavement Leave.

Same, Limit – s. 50.0.2(2)

50.0.2(2) An employee's is entitlement to leave under this section is limited to a total of two days in each calendar year.

This section provides that where an employee qualifies for a leave under this section, the employee is entitled to take up to two days of bereavement leave each calendar year. The entitlement is to a *total* of two days of bereavement leave per calendar year, not two days per relative.

The ESA 2000 does not place any restrictions with respect to whether the two days have to be taken consecutively or individually. Employees can take bereavement leave in part days (although see s. 50.0.2(6), which allows employers to deem one day's leave to be taken when an employee takes part of a day off work for bereavement leave), entire days, or in periods of more than one day.

The question arises as to whether the two-day entitlement should be prorated for employees who are part-time, or who started their employment partway through a calendar year but have been employed for at least two consecutive weeks. There is nothing in the legislation to suggest that employees who are eligible for bereavement leave should be entitled to less than two days a calendar year in any of these situations. Accordingly, it is Program policy that pro-rating of the two-day entitlement for part-time employees or employees who were hired partway through a calendar year is not permitted.

The ESA 2000 does not provide for the carryover of unused days of bereavement leave from one calendar year over into the next calendar year. In other words, employees do not have a statutory right to "bank" unused bereavement leave days year over year.

It is Program policy that an employee who quits or is terminated and who is subsequently re-hired by the same employer during the same calendar year is entitled to a new two-day entitlement after two consecutive weeks of employment upon their re-hire. This is the case even if the employee took some bereavement leave during their first term of employment in that calendar year.

See ESA Part III, s. 5(2) for a discussion of the application of the greater right or benefit provision to bereavement leave. See also the discussion at ss. 50.0.2(8) to (10) for information regarding the interplay between contractual leave entitlements and statutory entitlements to bereavement leave where the contractual leave does not amount to a greater right or benefit.

Advising Employer – ss. 50.0.2(4) & (5)

50.0.2(4) An employee who wishes to take a leave under this section shall advise his or her employer that he or she will be doing so.

50.0.2(5) If the employee must begin the leave before advising the employer, the employee shall advise the employer of the leave as soon as possible after beginning it.

Advising Employer

Section 50.0.2(4) requires employees to tell their employers ahead of time that they will be taking a bereavement leave. In circumstances where that cannot be done, the employee is required, pursuant to s. 50.0.2(5), to inform the employer as soon as possible after beginning the leave.

The ESA 2000 does not require the employee to advise the employer of the bereavement leave in writing. Oral notice is sufficient.

The ESA 2000 does not specify any particular method by which the employer is to be advised that the employee will be taking bereavement leave. Consequently, an employee would be complying with this section whether the employee, for example, advised the employer by phone, left a note on the manager's desk or had a colleague take a message to the employer on their behalf.

Employees do not lose their right to bereavement leave if they fail to comply with ss. 50.0.2(4) or (5). An employee's entitlement to bereavement leave arises by virtue of one of a number of particular family members having died and the employee taking leave because of the death; it is the Program's position that the failure to advise the employer before or as soon as possible after the leave begins does not negate that entitlement. This approach has been affirmed in a grievance arbitration decision by the Ontario Labour Relations Board in the context of the former personal emergency leave, which used identical language to subsections (4) and (5) and which had similarly-structured entitlement provisions to those found in bereavement leave – see *International Brotherhood of Electrical Workers, Local 115 v The State Group Inc.,* 2019 CanLII 22129 (ON LRB). In that decision, the Vice-Chair found that notice to the employer is not a prerequisite to exercising the right to the leave. Note that this approach is consistent with the Program's long-standing policy in the pregnancy and parental leave context, where the structure of the entitlement and notice provisions are also similar to these. See ESA 2000 Part XIV, s. 46(4) and s. 48(4).

An issue has arisen as to whether an employer can penalize an employee for failing to give advance notice that they will be absent from work (as may be required under an employer policy), where the time off is a bereavement leave under the ESA 2000. Sections 50.0.2(1) and (3) describe the employee's entitlement (i.e., that the employee takes a leave because of the death of a particular family member). Section 50.0.2(4) requires the employee taking bereavement leave to advise the employer that they are taking the leave, and s. 50.0.2(5) provides that "if the employee must begin the leave before advising the employer, the employee shall advise the employer of the leave as soon as possible after beginning it." It is clear from s. 50.0.2(5) that the ESA 2000 contemplates situations where the employee would be unable to advise the employer in advance of commencing the bereavement leave. Part of the bereavement leave entitlement under the ESA 2000 is the right to take bereavement leave even if advance notice cannot be given, with the proviso that the employee must advise the employer of the leave as soon as possible after beginning it.

The failure to give notice in advance of taking leave, when it would have been possible for the employee to do so, can be the subject of disciplinary action by the employer without violating ESA Part XVIII, s. 74, the anti-reprisal provision. However, the following points should be considered:

- The employee's failure to give advance notice would not be a lawful basis on which to deprive the employee of the right to take the leave if the qualifying conditions in ss. 50.0.2(1) and (3) have been met. An employer could not, for example, take the position that failure to give advance notice when it would have been possible for the employee to do so will result in the time taken off not being counted as a bereavement leave day.

- Any discipline for failing to provide notice in situations where such notice is required under s. 50.0.2(4) (i.e., where s. 50.0.2(5) does not apply) would have to be appropriately linked to the failure to give advance notice and must not, in effect penalize the employee for exercising the right to leave. The motive for any discipline that the employer does impose must clearly be the employee's failure to give advance notice and not the taking of the leave itself.

In addition, an employer would be able to impose discipline if an employee fails to provide any notice of the bereavement leave, or if the employee provides notice of the leave so late that one wouldn't reasonably be able to say that it falls within s. 50.0.2(5). Again, however, the employer's disciplinary action would have to be appropriate, and in no way a penalty or reprisal for the employee having taken the leave, but only for the failure to give notice. In this regard see *Ryding-Regency Meat Packers Ltd. v. U.F.C.W., Local 1000A*. In that case, the arbitrator concluded that in relation to the former personal emergency leave, the ESA established an entitlement to leave where a person described under the personal emergency leave provisions was ill. The fact that the employee's grandmother was ill was not disputed. Because the sections of the ESA that created the entitlement were separate from the notice requirements, the employee could be disciplined for not giving notice that he was taking or had taken leave but did not lose his entitlement to take the leave itself.

Designating Absences as Bereavement Leave

For employees who are entitled to bereavement leave as provided for in s. 50.0.2, questions have arisen as to whether an employee who is absent from work because of the death of a family member listed in ss. (3) **must** use one of their two days of bereavement leave.

Impact of Subsections (8) – (10)

Subsection (8) provides that where an employee takes a paid or unpaid leave of absence under an employment contract in circumstances for which the employee would also be entitled to take a leave under s. 50.0.2, the employee is deemed to have taken a leave under s. 50.0.2. Subsections (9) and (10) establish rules that apply to the deemed leave.

Accordingly, **if** subsections (8) to (10) apply to an absence, i.e. an employee takes paid or unpaid leave under the contract of employment in circumstances in which bereavement leave could be taken, the employee **will be deemed** pursuant to ss. 50(8) to have taken ESA bereavement leave and drawn down against the two-day s. 50.0.2 entitlement. See the discussion under ESA Part XIV, ss. 50(8) **to** 10) for more information regarding the impact of contractual entitlements on the statutory right to bereavement leave.

Result Where Subsections (8) to (10) Do Not Apply

On the other hand, if subsections (8) to (10) **do not** apply, i.e., an employee who is entitled to bereavement leave is absent because of the death of a family member who is listed in ss. (3) but does not take a paid or unpaid leave of absence under an employment contract for that absence (either because the employee does not have a contractual right or does not exercise it), **it is the employee (not the employer) who decides whether to designate the absence as a statutory bereavement leave**.

If the employee who is entitled to bereavement leave and who is absent from work because of the death of a family member who is listed in ss. (3) wishes to designate the absence as a statutory bereavement leave, then the absence is a bereavement leave that draws down against the two-day statutory entitlement and attracts the corresponding reprisal protections, and all of the other ancillary rights that attach to statutory leaves that are set out in ESA Part XIV, ss. 51 to 53.1.

In the case where ss. (8) to (10) **do not** apply, an employee may be entitled to statutory bereavement leave and be absent from work because of the death of a family member listed in ss. (3) and decide not to claim the absence as a bereavement leave day. This is not considered as contracting out of the ESA 2000 if an employee does not take advantage of their leave entitlements; the employee has merely chosen not to exercise them.

If the employee who is entitled to bereavement leave by virtue of being absent from work because of the death of a family member listed in ss. (3) does not wish to designate the absence as a bereavement leave, and the absence cannot be considered an authorized absence on some other ground (e.g., another leave under the ESA 2000 or vacation authorized by the employer), the absence would have no statutory reprisal protection. For this reason, an employee who takes a day off for a reason that would qualify under s. 50.0.2 but who would prefer not to have the day charged against their bereavement leave allotment may feel effectively forced into designating the day as such a leave. This in itself does not constitute any violation of the ESA 2000: it is not unlawful for an employer to inform an employee that should the employee not designate an absence as a statutory bereavement leave day, then it would be considered an unexcused absence that will lead to disciplinary action.

Note that if the employee did not know of the right to take bereavement leave, the default is that the absence is considered to be statutory bereavement leave with the corresponding reprisal protection. An employee does not lose their right to any of the leaves provided for under the ESA 2000 because they were unaware of their entitlements.

Leave Deemed to be Taken in Entire Days – s. 50.0.2(6)

50.0.2(6) For the purposes of an employee's entitlement under subsection (1), if an employee takes any part of a day as leave under this section, the employer may deem the employee to have taken one day of leave on that day.

Employees may not need an entire day off work because of the death of a listed relative. As such, an employee may take only part of a day off as bereavement leave. Section 50.0.2(6) allows an employer in this situation to count the part-day off work as an entire day's leave for the purpose of counting the absence against the statutory two-day leave entitlement. This is the only purpose for which the employer can deem the part day off work as an entire day's leave. The employer cannot deem the employee not to have worked at all on the day. Where an employee worked a partial day and took a part-day of bereavement leave, the employee is entitled to be paid the earnings for the time that was actually worked that day. As well, the hours that were worked will be counted for the purposes of, among other things, determining whether the relevant overtime threshold has been reached, whether the limits on, for example, the daily and weekly hours of work have been reached, and whether the daily, weekly/bi-weekly and in-between shifts rest requirements have been met.

For clarity, this provision does not require employees to take bereavement leave in full day periods. It simply allows an employer to reduce the employee's two-day entitlement by a day if an employee is on bereavement leave for only part of a day.

Note that this provision allows the employer to attribute one day's leave to a part day of absence. It does not require the employer to do so.

For example, the employee may find out in the afternoon that their sister has died and consequently leave work early that day. If the employee worked a four-hour day rather than their usual eight hours and takes bereavement leave, their employer may consider the employee to have used up one of the employee's

two days of bereavement leave and the employee would be paid their earnings for the four hours they actually worked.

In addition, employers cannot prohibit employees who took a part day of leave from returning to work for the remainder of their shift. This is because, among other reasons, the employer's obligation to reinstate the employee at the end of the leave under ESA Part XIV, s. 53 and the prohibition against penalizing employees for having taken a leave under ESA Part XVIII, s. 74.

Evidence – s. 50.0.2(7)

50.0.2(7) An employer may require an employee who takes leave under this section to provide evidence reasonable in the circumstances that the employee is entitled to the leave.

Subsection 50.0.2(7) gives an employer an ability to require an employee to provide proof that they are or were entitled to take bereavement leave. The employer can require an employee to provide evidence that is reasonable in the circumstances that they are or were entitled to take the leave.

Evidence of entitlement to bereavement leave may take different forms, including a copy of a death certificate or statement from a funeral home, a published obituary, printed program from a memorial service or proof of an appointment with a funeral director or lawyer.

Evidence Reasonable in the Circumstances

Evidence that is reasonable in the circumstances will be fact-specific. The factors and principles that may be relevant when assessing reasonableness are:

- Whether any evidence is available.
- Where evidence is available, but only with some difficulty, whether it is reasonable to expect the employee to obtain the evidence – see the *Re Tilbury Assembly Ltd. and United Auto Workers, Local 251*, although note that this decision was made under the previous personal emergency leave provisions.
- The cost of the evidence. For example, it may not be reasonable, depending on all of the circumstances, for an employer to require an employee who earns minimum wage to obtain a note supporting attendance at a meeting with a lawyer on estate matters if the lawyer charges $25 for it.
- The employee had earlier asked for the time off for non-bereavement leave reasons for the time at which the absence occurred but was denied.
- The employee had announced plans in advance to miss work.

Bereavement Leave Taken Under Employment Contract – s. 50.0.2(8)

Same, Application of Act to Deemed Leave – s. 50.0.2(9)

Same, Application of Subs. (6) to Deemed Leave – s. 50.0.2(10)

50.0.2(8) If an employee takes a paid or unpaid leave of absence under an employment contract in circumstances for which he or she would also be entitled to take a leave under this section, the employee is deemed to have taken the leave under this section.

50.0.2(9) All applicable requirements and prohibitions under this Act apply to a leave deemed to have been taken under subsection (8).

50.0.2(10) Subsection (6) applies with necessary modifications to a leave deemed to have been taken under subsection (8).

These provisions, when read together, establish what happens when an employee takes a leave of absence under an employment contract (which includes a collective agreement) in circumstances that would also entitle the employee to a leave under s. 50.0.2.

"Circumstances" refers only to the triggering event that would entitle the employee to statutory bereavement leave, i.e., the employee is absent because of the death of an individual listed in s. 50.0.2(3).

It is Program policy that "circumstances" does not include the two-week employment eligibility criterion. Accordingly, these provisions will be triggered when an employee takes a leave of absence under an employment contract because of the death of an individual listed in s. 50.0.2(3), even during the first two weeks of employment; this is the case regardless of the fact that the employee does not have the right to take statutory bereavement leave during this time.

Subsections (8) to (10) codify the long-standing Program policy on the interplay between contractual leave entitlements and statutory leave entitlements where the contractual leave does *not* amount to a greater right or benefit than statutory bereavement leave under ESA Part III, s. 5(2).

Note that if a contract *does* provide a greater right or benefit than the bereavement leave entitlement – the determination of which includes consideration of reprisal protections and the entitlements under general provisions concerning leaves such as the right to reinstatement – the contractual leave provision applies and s. 50.0.2, including these subsections, does not apply. See the discussion of ESA Part III, s. 5(2) for details.

In general terms, subsections (8) to (10) provide that an employee who claims a contractual benefit for an absence – in circumstances in which the employee would also be entitled to take bereavement leave – does not give the employee an entitlement to those contractual absences *plus* an additional two days of bereavement leave.

Bereavement Leave Taken Under Employment Contract

50.0.2(8) If an employee takes a paid or unpaid leave of absence under an employment contract in circumstances for which he or she would also be entitled to take a leave under this section, the employee is deemed to have taken the leave under this section.

If an employee takes a paid or unpaid leave of absence under an employment contract in circumstances for which the employee would also be entitled to take a leave under s. 50.0.2, the employee is deemed to have taken a day of bereavement leave and the absence will reduce the employee's two-day per calendar year bereavement leave allotment accordingly. Note that this provision must be read in conjunction with subsections (9) and (10), discussed below.

For this provision to apply, the reason for the absence (i.e., the "triggering event") and the person in respect of whom the absence is related, must qualify for both the contractual leave and the statutory leave.

Some examples:

- An employer offers two flex days that employees can use at their discretion. The employee is absent for two days because of the death of their sister and claims benefits under the employer's plan. Subsection (8) deems the employee to have used two ESA bereavement days. As a result, the employee will have no further entitlement to bereavement leave under the ESA 2000.
- If, however, the contract of employment offers a flex day that can be used for any reason, and the employee uses that day to attend the memorial service of their great-aunt (who had not been dependent on the employee for care or assistance) the employee would **not** be deemed to have taken a day of bereavement leave pursuant to this provision. This is because a great-aunt is not a listed relative for whom a leave can be taken in s. 50.0.2 and, therefore, the contractual leave was not taken in circumstances for which the employee would also be entitled to take a bereavement leave.

This provision only has the potential to deem a statutory leave to be taken when a contractual leave is taken. It does not do the converse: it does not deem a contractual leave to be taken if a statutory leave is taken in circumstances for which the employee would also be entitled to take a contractual leave. The question as to whether statutory absences will also draw down against the contractual right is not a matter for the employment standards program.

Application of Act to Deemed Leaves

50.0.2(9) All applicable requirements and prohibitions under this Act apply to a leave deemed to have been taken under subsection (8).

If an absence has been deemed to be a statutory leave under ss. 50.0.2(8), this provision establishes that all requirements and prohibitions under the ESA 2000 apply to the absence.

This includes all requirements and prohibitions in s. 50.0.2 as well as general rights and obligations found in other sections and parts of the ESA 2000.

Examples include: the right to reinstatement, maintenance of benefits (if relevant), protection from reprisal, obligations on the employee with respect to advising the employer of the leave and providing evidence reasonable in the circumstances to demonstrate an entitlement to the leave (where required by the employer).

Application of s. 50.0.2(6) to Deemed Leaves

50.0.2(10) Subsection (6) applies with necessary modifications to a leave deemed to have been taken under subsection (8).

This provision states that subsection (6) applies, with necessary modifications, to a leave that is deemed to be a bereavement leave pursuant to subsection (8).

This means that if an employee takes a partial-day leave pursuant to their contract of employment, and that leave is deemed to be a day of bereavement leave under subsection (8), the employer may deem the absence to be a *full day* of bereavement leave and reduce the employee's two-day per calendar year allotment of bereavement leave days accordingly.

Section 50.1 was amended effective March 19, 2020 by the *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020* to expand emergency leave to cover infectious disease emergencies. Prior to the amendment, this section only addressed declared emergencies.

Although the amendment was effective on March 19, 2020, employees' entitlements to infectious disease emergency leave for Coronavirus (COVID-19) for reasons set out in subclauses (i)-(vi) of s. 50.1(1.1) are, by virtue of O. Reg. 228/20 (and initially by virtue of O. Reg. 66/20, which was later revoked and replaced by O. Reg. 228/20), retroactive to January 25, 2020.

Entitlement to infectious disease emergency leave where an employer temporarily reduces or eliminates a non-unionized employee's hours of work for COVID-19 related reasons as prescribed pursuant to subclause (vii) of s. 50.1(1.1)(b) is retroactive to March 1, 2020 and applies during the defined COVID-19 period – see below for details.

Note: During the declared emergency for COVID-19 (which commenced March 17, 2020 and terminated July 24, 2020), orders were issued under the *Emergency Management and Civil Protection Act* (EMCPA) that may have limited some employees' rights to take declared emergency leave, infectious disease emergency leave or any other statutory leave. Upon the termination of the declared emergency for COVID-19 on July 24, 2020, those emergency orders ceased to be orders under the EMCPA and instead continued as time-limited orders under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*. These orders, including the period of time to which they relate, can be found by visiting the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* on the Ontario government's e-laws website and then selecting the "Regulations under this Act" tab.

ESA Part XIV Section 50.1 – Emergency Leave: Declared Emergencies and Infectious Disease Emergencies

Section 50.1 was amended effective March 19, 2020 by the Employment Standards Amendment Act (Infectious Disease Emergencies), 2020 to expand emergency leave to cover infectious disease emergencies. Prior to the amendment, this section only addressed declared emergencies.

Although the amendment was effective on March 19, 2020, employees' entitlements to unpaid infectious disease emergency leave for Coronavirus (COVID-19) for reasons set out in subclauses (i)-(vi) of s. 50.1(1.1) are, by virtue of O. Reg. 228/20 (and initially by virtue of O. Reg. 66/20, which was later revoked and replaced by O. Reg. 228/20), retroactive to January 25, 2020.

Entitlement to infectious disease emergency leave where an employer temporarily reduces or eliminates a non-unionized employee's hours of work for COVID-19 related reasons as prescribed in section 4 of O.Reg. 228/20 is retroactive to March 1, 2020 and applies during the defined COVID-19 period – see below for details.

Entitlement to infectious disease emergency leave pursuant to the prescribed reason in ss. 3.1(1) of O. Reg. 228/20 (i.e. an order made under s. 7.0.2 of the Emergency Management and Civil Protection Act (EMCPA) that is continued under the Reopening Ontario (A Flexible Response to COVID-19) Act, 2020 (ROA), or any amendment to such an order, that relates to the designated infectious disease applies to the employee) is retroactive to July 24, 2020. See the discussion later in this chapter for details.

Section 50.1 was amended on April 29, 2021 by the *COVID-19 Putting Workers First Act, 2021* to provide employees with an additional entitlement of up to three **paid** days of infectious disease emergency leave

in certain circumstances related to a designated infectious disease. Although the amendment came into force on April 29, 2021, employees' entitlements to paid infectious disease emergency leave are retroactive to April 19, 2021. Entitlements to paid infectious disease emergency leave were originally set to end on September 25, 2021 but were subsequently extended to December 31, 2021. The ESA was also amended on April 29, 2021 to provide that an eligible employer is entitled to be reimbursed the amount of infectious disease emergency leave pay that they paid to their employees, up to $200 per employee per day taken. Eligible employers make their application for reimbursement to the Workplace Safety and Insurance Board – see the discussion of s. 50.1.1 for details.

Note: During the declared emergencies for COVID-19, orders were issued under the *Emergency Management and Civil Protection Act* (EMCPA) that may have **limited** some employees' rights to take declared emergency leave, infectious disease emergency leave or any other statutory leave. Some of those emergency orders continued as time-limited orders under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* (ROA). These orders, including the period of time to which they relate, were published as regulations and can be found by visiting the Ontario government's e-laws website.

Emergency Leave: Declared Emergencies and Infectious Disease Emergencies – s. 50.1(1)

50.1 (1) In this section,

"board of health" has the same meaning as in the *Health Protection and Promotion Act*;

"designated infectious disease" means an infectious disease designated by the regulations for the purposes of this section;

"public health official" means,

(a) within the meaning of the *Health Protection and Promotion Act*,

(i) the Chief Medical Officer of Health or Associate Chief Medical Officer of Health,

(ii) a medical officer of health or an associate medical officer of health, or

(iii) an employee of a board of health, or

(b) a public health official of the Government of Canada;

"qualified health practitioner" means,

(a) a person who is qualified to practise as a physician or nurse under the laws of the jurisdiction in which care or treatment is provided to the employee or an individual described in subsection (8), or

(b) in the prescribed circumstances, a member of a prescribed class of health practitioners.

Subsection 50.1(1) contains definitions of some of the terms that are used in s. 50.1.

These terms are used only in the infectious disease emergency leave context. See the discussion of the infectious disease emergency leave provisions for information on the meaning of these terms.

Interpretation, treatment – s. 50.1 (1.0.1)

50.1(1.0.1) For greater certainty, in this section, a reference to treatment related to a designated infectious disease includes receiving a vaccine for the designated infectious disease and recovery from associated side-effects.

This subsection clarifies that references to "treatment related to a designated infectious disease" in s. 50.1 includes receiving a vaccine for the disease and recovery from side-effects of the vaccine.

This is relevant for the eligibility criteria for both unpaid and paid infectious disease emergency leave. (See ss. 50.1(1.1)(a)(i) in respect of unpaid infectious disease emergency leave and ss. 50.1(1.2), para. 1 in respect of paid infectious disease emergency leave). These eligibility criteria state that an employee is eligible for the leave if the employee will not be performing the duties of his or her position because, among other reasons, "the employee is under individual medical investigation, supervision or treatment related to the designated infectious disease".

This subsection means that employees are eligible for unpaid and paid infectious disease emergency leave if they are not performing the duties of their position because they are receiving a vaccine and/or because they are experiencing side effects of the vaccine.

Leave of Absence Without Pay – s. 50.1(1.1)

50.1(1.1) An employee is entitled to a leave of absence without pay if the employee will not be performing the duties of his or her position,

(a) because of an emergency declared under section 7.0.1 of the *Emergency Management and Civil Protection Act* and,

- **i. because of an order that applies to him or her made under section 7.0.2 of the Emergency Management and Civil Protection Act;**
- **ii. because of an order that applies to him or her made under the *Health Protection and Promotion Act*;**
- **iii. because he or she is needed to provide care or assistance to an individual referred to in subsection (8); or**
- **iv. because of such other reasons as may be prescribed; or**

(b) because of one or more of the following reasons related to a designated infectious disease:

(i) The employee is under individual medical investigation, supervision or treatment related to the designated infectious disease.

(ii) The employee is acting in accordance with an order under section 22 or 35 of the *Health Protection and Promotion Act* that relates to the designated infectious disease.

(iii) The employee is in quarantine or isolation or is subject to a control measure (which may include, but is not limited to, self-isolation), and the quarantine, isolation or control measure was implemented as a result of information or directions related to the designated infectious disease issued to the public, in whole or in part, or to one or more individuals, by a public health official, a qualified health practitioner, Telehealth Ontario,

the Government of Ontario, the Government of Canada, a municipal council or a board of health, whether through print, electronic, broadcast or other means.

(iv) The employee is under a direction given by his or her employer in response to a concern of the employer that the employee may expose other individuals in the workplace to the designated infectious disease.

(v) The employee is providing care or support to an individual referred to in subsection (8) because of a matter related to the designated infectious disease that concerns that individual, including, but not limited to, school or day care closures.

(vi) The employee is directly affected by travel restrictions related to the designated infectious disease and, under the circumstances, cannot reasonably be expected to travel back to Ontario.

(vii) Such other reasons as may be prescribed.

Subsection (1.1) establishes the eligibility criteria for both declared emergency leave and **unpaid** infectious disease emergency leave, in clauses (a) and (b) respectively. (The eligibility criteria for paid infectious disease emergency leave are set out in subsection 50.1(1.2).)

These are dealt with separately below.

DECLARED EMERGENCY LEAVE ELIGIBILITY CRITERIA – ss. 50.1(1.1)(a)

On June 30, 2006, the *Employment Standards Act, 2000* was amended by the *Emergency Management Statute Law Amendment Act, 2006,* SO 2006, c 13, to create a new unpaid leave called, "emergency leave, declared emergencies", which the Program refers to as "declared emergency leave".

Declared emergency leave is available only if the Premier or Lieutenant Governor in Council declares an emergency under section 7.0.1 of the *Emergency Management and Civil Protection Act* (and only if the eligibility criteria set out in clause 50.1(1.1)(a) are then met).

The Lieutenant Governor in Council declared an emergency because of COVID-19 on March 17, 2020. That emergency declaration was terminated on July 24, 2020. A second emergency was declared because of COVID-19 on January 12, 2021 and terminated on February 9, 2021. A third emergency was declared because of COVID-19 on April 7, 2021 and terminated on June 2, 2021.

Employees who will not be performing the duties of their position because of the declared emergency and because of certain specified circumstances related to the declared emergency are entitled to an unpaid, job-protected declared emergency leave.

Clause (a) of ss. 50.1(1.1) establishes the qualifying criteria that must be met in order for an employee to be entitled to an unpaid declared emergency leave of absence. To qualify, both of the following conditions must be met:

Condition 1: The employee will not be performing the duties of the employee's position because of the emergency that was declared under s. 7.0.1 of the *Emergency Management and Civil Protection Act,* RSO 1990 c E.9 ("EMCPA"); and

Condition 2: The employee will not be performing the duties of the employee's position because of one of the following reasons:

1. an order that applies to the employee made under s. 7.0.2 of the EMCPA;
2. an order that applies to the employee made under the *Health Protection and Promotion Act,* RSO 1990, c H.7 ("HPPA");
3. the employee is needed to provide care or assistance to an individual referred to in s. 50.1(8); or
4. such other reasons as may be prescribed. (At the time of writing, no other reasons have been prescribed.)

As noted, both conditions 1 and 2 above must be met before the entitlement to declared emergency leave arises: an employee will not be performing the duties of the employee's position because of a declared emergency AND because of one of the reasons listed in (i), (ii), (iii), or (iv) above. These conditions are discussed below.

Condition 1: Employee will not be performing the duties of the employee's position because of the emergency that was declared under section 7.0.1 of the *Emergency Management and Civil Protection Act* (EMCPA):

Section 7.0.1 of the EMCPA gives the Lieutenant Governor in Council or, in certain circumstances, the Premier, the ability to declare that an emergency exists throughout Ontario or in any part of Ontario.

The first qualifying criterion for declared emergency leave is that there is a causal connection between the reason that the employee will not be performing the duties of the employee's position and the emergency that has been declared under s. 7.0.1 of the EMPCA.

Condition 2: Employee will not be performing the duties of the employee's position because of one of the following reasons:

i. An order that applies to the employee made under s. 7.0.2 of the *Emergency Management and Civil Protection Act* (subclause (i))

During a declared emergency, the Lieutenant Governor in Council, in certain circumstances and with certain limitations, may make orders under s. 7.0.2 of the EMCPA that it believes are necessary and essential in the circumstances to prevent, reduce or mitigate serious harm to persons or substantial damage to property.

The condition in subclause (i) of s. 50.1(1.1)(a) will be met if an order made under s. 7.0.2 of the EMCPA applies to the employee and there is a causal connection between the order and the employee not performing the duties of the employee's position.

The Program considers an order to "appl[y] to" an employee only if the order is directed at the employee, i.e., where the employee, either individually or as part of a group, is the subject of the requirement, prohibition or other direction made in the order.

In other words, this condition is not satisfied if an employee is only indirectly affected by the order or by the consequences of someone else complying with the order.

For example, an order that requires restaurants to close "applies to" the owners of restaurants. It does not apply to the employees of restaurants, even though they are affected by the closure.

ii. An order that applies to the employee made under the *Health Protection and Promotion Act* (HPPA) (subclause (ii))

Under the HPPA, orders can be issued by a medical officer of health or the courts requiring individuals or classes of persons to take or refrain from taking any action specified in the order. For example, under the communicable disease order provisions in s. 22 of the HPPA, an order can be issued requiring individuals to isolate themselves.

The condition in subclause (ii) of s. 50.1(1.1)(a) will be met if an order made under the HPPA applies to the employee (see the discussion of subclause (i) for the meaning of "applies to" the employee) and there is a causal connection between the order and the employee not performing the duties of the employee's position.

This subclause is engaged only if the instrument that was made under the HPPA was an "order". For example, "directives" may also be issued under the HPPA but "directives" do not satisfy this condition. (Note that an employee who is affected by a "directive" under the HPPA may, depending on all the circumstances, be entitled to an infectious disease emergency leave pursuant to s. 50.1(1.1)(b)(iii) or s.50.1(1.2), para. 3. See the discussion of that provision for more information.)

iii. The employee is needed to provide care or assistance to an individual referred to in s. 50.1(8) (subclause (iii))

An employee is entitled to declared emergency leave under subclause (iii) of s. 50.1(1.1)(a) if there is a causal connection between the need to provide care or assistance to an individual listed in s. 50.1(8) and the declared emergency.

The employee can be providing the care or assistance in Ontario or in another province, territory, or country and be eligible for declared emergency leave.

Section 50.1(8) was amended effective March 19, 2020 to include more individuals. However, because the first declared emergency relating to COVID-19 was made on March 17, 2020, the list of individuals to whom an employee is needed to provide care or assistance in order to be eligible for declared emergency leave is different on March 17 and 18 than it is from March 19 onwards, as follows:

For absences on March 17 or 18, 2020, the employee will meet the condition under subclause (iii) if, because of the declared emergency, the employee is needed to provide care or assistance to any of these individuals:

- The employee's spouse (which includes a same-sex spouse).
- A parent, step-parent or foster parent of the employee or the employee's spouse.
- A child, step-child or foster child of the employee or the employee's spouse.
- A grandparent, step-grandparent, grandchild or step-grandchild of the employee or of the employee's spouse.
- The spouse (which includes a same-sex spouse) of a child of the employee.
- The employee's brother or sister.
- A relative of the employee who is dependent on the employee for care or assistance.

For absences on or after March 19, 2020, the employee will meet the condition under subclause (iii) if, because of the declared emergency, the employee is needed to provide care or assistance to any of these individuals:

1. The employee's spouse (which includes a same-sex spouse).
2. A parent, step-parent or foster parent of the employee or the employee's spouse.
3. A child, step-child or foster child of the employee or the employee's spouse.
4. A child who is under legal guardianship of the employee or the employee's spouse.
5. A brother, step-brother, sister or step-sister of the employee.
6. A grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse.
7. A brother-in-law, step-brother-in-law, sister-in-law or step-sister-in-law of the employee.
8. A son-in-law or daughter-in-law of the employee or the employee's spouse.
9. An uncle or aunt of the employee or the employee's spouse.
10. A nephew or niece of the employee or the employee's spouse.
11. The spouse of the employee's grandchild, uncle, aunt, nephew or niece.
12. A person who considers the employee to be like a family member, provided the prescribed conditions, if any, are met.
13. Any individual prescribed as a family member for the purposes of this section. (At the time of writing, no individuals were prescribed.)

"Spouse" includes married same-sex couples, married opposite-sex couples, and couples of the same or opposite sex who live together in a conjugal relationship outside of marriage – see the definition of spouse and the discussion at ESA Part XIV, s. 45

With respect to "a person who considers the employee to be like a family member, provided the prescribed conditions, if any, are met" in paragraph 13: at the time of writing there were no prescribed conditions that had to be met.

The declared emergency entitlement is for providing care or assistance. This includes, for example, looking after minor children, providing psychological or emotional support to the family member, assisting the family member with regular household chores (e.g., housekeeping, laundry, shopping) as well as arranging for care by a third party provider, and directly providing or participating in the personal care of

the family member. Care or assistance also includes assisting the family member to get their affairs in order, where, for example, the family member is at risk of death.

Note that other leaves of absence in the ESA (infectious disease emergency leave, family medical leave, family caregiver leave, critical illness leave) have eligibility criteria relating to an employee "providing care or **support"** to specified individuals, while declared emergency leave uses the language "providing care or **assistance**". It is Program policy that the same interpretation applies to both phrases. In the context of leave entitlements, where the legislative language is given a broad and liberal interpretation, the types of activities that would fall under a broad view of "support" and a broad view of "assistance" are the same.

Examples of situations where, in the Program's view, this condition would be met during the COVID-19 declared emergency include:

- An employee will not be performing the duties of the employee's position because the employee is needed to provide care or assistance to his elderly mother who lives in another city and is in self-isolation due to the COVID-19 declared emergency.
- An employee will not be performing the duties of the employee's position because the employee needs to stay at home with his 5-year old child because the child's school has been temporarily closed as a result of the COVID-19 declared emergency.
- An employee has been buying groceries and picking up medication for her elderly aunt for several years. The employee works six days a week and would normally do the shopping on her day off on Monday. Because of the COVID-19 declared emergency, grocery stores have reduced their hours and are now closed on Mondays and during the employee's off-hours on working days. If the employee takes time from work to do the shopping, she would be eligible for declared emergency leave during that time.

Situations where, in the Program's view, this condition would not be met during the COVID-19 declared emergency include:

- An employee lives with her brother who has a compromised immune system. The brother has been advised by his doctor to remain at home. The brother is self-sufficient and does not need his sister for care or assistance. The employee wants to self-isolate to reduce the risk of exposing her brother to COVID-19.

  The employee is not eligible for declared emergency leave under this subclause.

  The employee satisfies the first condition for declared emergency leave: she is not performing the duties of her position because of the COVID-19 declared emergency (i.e., to avoid making her brother sick). However, she does not satisfy the second condition under this clause: while self-isolating may be a caring action in this situation, it does not constitute "providing care or assistance".

iv. Because of such other reasons as may be prescribed

At the time of writing, there are no prescribed reasons.

UNPAID INFECTIOUS DISEASE EMERGENCY LEAVE ELIGIBILITY CRITERIA – ss. 50.1(1.1)(b)

Start Dates of Eligibility

On March 19, 2020, the *Employment Standards Act, 2000* was amended by the *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020* to expand unpaid emergency leave to cover infectious disease emergencies, which the Program refers to as Infectious Disease Emergency Leave. (That Act also repealed the *SARS Assistance and Recovery Strategy Act, 2003*, which provided leave entitlements relating to SARS.)

Although the amendment that expanded emergency leave to include infectious disease emergencies was effective on March 19, 2020, employees' entitlements to unpaid infectious disease emergency leave for COVID-19 for reasons set out in clauses (i)-(vi) of s. 50.1(1.1)(b) are, by virtue of O. Reg. 228/20 (and initially by virtue of O. Reg. 66/20, which was later revoked and replaced by O. Reg. 228/20) retroactive to January 25, 2020.

Entitlement to unpaid infectious disease emergency leave where an employer temporarily reduces or eliminates a non-unionized employee's hours of work for COVID-19 related reasons as prescribed in ss. 4(1), para. 1 of O. Reg. 228/20 pursuant to clause (vii) of s. 50.1(1.1)(b) is retroactive to March 1, 2020 and applies during the defined COVID-19 period in ss. 1(1) of O. Reg. 228/20. When the conditions set out in ss. 4(1), para. 1 of O. Reg. 228/20 are met, the employee is **automatically deemed** to be on unpaid infectious disease emergency leave.

Entitlement to unpaid infectious disease emergency leave where an order made under section 7.0.2 of the *Emergency Management and Civil Protection Act* that is continued under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* (or any amendment to such an order) that relates to COVID-19 applies to the employee arose effective July 24, 2020 – see s. 3.1(1), para. 1 of O. Reg. 228/20.

See the end of this chapter for information on the implications of the retroactive application of this unpaid leave.

Which Diseases Create Eligibility

Employees have the right to take unpaid job-protected infectious disease emergency leave if they will not be performing the duties of their position because of certain specified reasons related to a designated infectious disease.

The diseases that have been designated as infectious diseases are set out in section 2 of O. Reg. 228/20.

At the time of writing, diseases caused by a novel coronavirus, including Severe Acute Respiratory Syndrome (SARS), Middle East Respiratory Syndrome (MERS) and coronavirus (COVID-19) have been designated as infectious diseases.

O. Reg. 228/20 establishes the start dates for the entitlement to unpaid infectious disease emergency leave for the different reasons for which the leave may be taken. At the time of writing, COVID-19 was the only infectious disease for which there were start dates. **Accordingly, the only disease for which unpaid infectious disease emergency leave may be taken at this time is COVID-19.**

End Dates of Eligibility

Regarding end dates for the entitlement to unpaid infectious disease emergency leave, note that:

- an employee's entitlement to unpaid infectious disease emergency leave because of a reason set out in subclauses 50.1(1.1(b)(i) to (vi) is not time-limited. An amendment would be required to O.

Reg. 228/20 in order to extinguish the entitlement to take infectious disease emergency leave for COVID-19 under those subclauses.

- an employee's entitlement where an employer temporarily reduces or eliminates a non-unionized employee's hours of work for COVID-19 related reasons as prescribed in ss. 4(1), para. 1 of O. Reg. 228/20 pursuant to clause (vii) of s. 50.1(1.1)(b) applies only during the defined COVID-19 period in ss. 1(1) of O. Reg. 228/20, which ends January 1, 2022.
- an employee's entitlement where an order made under section 7.0.2 of the *Emergency Management and Civil Protection Act* is continued under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* (ROA) (or any amendment to such an order) that relates to COVID-19 applies to the employee as prescribed in ss. 3.1(1), para. 1 of O. Reg. 228/20 pursuant to clause (vii) of s. 50.1(1.1)(b) is also not time limited. However, there is only an entitlement for as long as the relevant ROA order is in force.

Clause (b) of ss. 50.1(1.1) establishes the qualifying criteria that must be met in order for an employee to be entitled to an unpaid infectious disease emergency leave of absence. (See ss. 50.1(1.2) for the qualifying criteria for **paid** infectious disease emergency leave.)

Employees who will not be performing the duties of their position because of one or more of the following reasons related to a designated infectious disease are entitled to an unpaid infectious disease emergency leave:

(i) The employee is under individual medical investigation, supervision or treatment related to the designated infectious disease.

(ii) The employee is acting in accordance with an order under section 22 or 35 of the *Health Protection and Promotion Act* that relates to the designated infectious disease.

(iii) The employee is in quarantine or isolation or is subject to a control measure (which may include, but is not limited to, self-isolation), and the quarantine, isolation or control measure was implemented as a result of information or directions related to the designated infectious disease issued to the public, in whole or in part, or to one or more individuals, by a public health official, a qualified health practitioner, Telehealth Ontario, the Government of Ontario, the Government of Canada, a municipal council or a board of health, whether through print, electronic, broadcast or other means.

(iv) The employee is under a direction given by his or her employer in response to a concern of the employer that the employee may expose other individuals in the workplace to the designated infectious disease.

(v) The employee is providing care or support to an individual referred to in subsection (8) because of a matter related to the designated infectious disease that concerns that individual, including, but not limited to, school or day care closures.

(vi) The employee is directly affected by travel restrictions related to the designated infectious disease and, under the circumstances, cannot reasonably be expected to travel back to Ontario.

(vii) Such other reasons as may be prescribed.

These eligibility criteria are discussed individually below.

Employees have the right to be on unpaid infectious disease emergency leave only for as long as the event that triggered the entitlement to the leaves lasts. After the triggering event is over, the employee's normal obligations to be at work are resumed.

ELIGIBILITY CRITERIA FOR UNPAID INFECTIOUS DISEASE EMERGENCY LEAVE – Clauses (i) – (vii)

(i) The employee is under individual medical investigation, supervision or treatment related to the designated infectious disease (subclause (i))

Employees who will not be performing the duties of their position because they are under individual medical investigation, supervision or treatment (including for mental health) related to the designated infectious disease are eligible for unpaid infectious disease emergency leave.

The Act does not impose any restrictions with respect to where the medical investigation, supervision or treatment has to be undertaken in order for this eligibility criterion to be met. The investigation, supervision or treatment can be in Ontario, another province or territory, or another country.

Subsection 50.1(1.0.1), which was introduced into the Act on April 29, 2021, codifies previous Program policy that "treatment related to the designated infectious disease" in subclause "i" includes receiving a vaccine for the designated infectious disease and recovery from side effects of that vaccine. (The Program policy was based on the term "treatment" including preventative treatment, and was consistent with the definition of "treatment" in the *Health Care Consent Act*.) As such, employees who are not performing the duties of their position because they are getting vaccinated against the designated infectious disease or are experiencing side effects from the vaccine - whether or not the employee is under the care of a medical practitioner with respect to those side effects - are eligible for unpaid infectious disease emergency leave.

(ii) The employee is acting in accordance with an order under section 22 or 35 of the *Health Protection and Promotion Act* that relates to the designated infectious disease (subclause (ii))

Employees who will not be performing the duties of their position because they are acting in accordance with an order under s. 22 or s. 35 of the *Health Protection and Promotion Act* (HPPA) that relates to the designated infectious disease are eligible for unpaid infectious disease emergency leave. This criterion is met only if the order is, in whole or in part, directed at the employee or a class of persons that the employee fits into.

Section 22 of the HPPA authorizes a medical officer of health to require individuals or classes of persons to take or refrain from taking any action specified in the order in relation to a communicable disease. Orders may include actions such as requiring the person to whom the order is directed to isolate himself or herself, to place himself or herself forthwith under the care and treatment of a physician, or to conduct himself or herself in such a manner as not to expose anyone else to infection.

Section 35 of the HPPA authorizes a judge of the Ontario Court of Justice to issue orders when someone has failed to comply with certain orders that were issued by a medical officer of health in respect of a communicable disease that is a virulent disease. (Note that not all designated infectious diseases are necessarily designated as virulent diseases). Orders issued under s. 35 may, for example, require that someone be taken into custody and admitted and detained in a hospital.

(iii) The employee is in quarantine or isolation or is subject to a control measure (which may include, but is not limited to, self-isolation), and the quarantine, isolation or control measure was implemented as a result of information or directions related to the designated infectious disease issued to the public, in whole or in part, or to one or more individuals, by a public health official, a qualified health practitioner, Telehealth Ontario, the Government of Ontario, the Government of Canada, a municipal council or a board of health, whether through print, electronic, broadcast or other means (subclause (iii))

Under this subclause, an employee is eligible for unpaid infectious disease emergency leave if the employee will not be performing the duties of the employee's position because:

1. The employee is in quarantine, isolation, or is subject to a control measure (whether voluntarily or involuntarily),

   To qualify for this leave under subclause (iii), the employee must not be performing the duties of his or her position because the employee is in quarantine, isolation, or is subject to a control measure (whether voluntarily or involuntarily).

   It is the Program's position that "in quarantine", "in isolation", or "is subject to a control measure" is a step or an action implemented as the result of information or directions related to the designated infectious disease issued to the public, to a part of the public, or to one or more individuals by an entity listed in the provision (see below for more information). Depending on the circumstances, quarantine, isolation or a control measure may be initiated by an employee, initiated by an employer and agreed to by an employee, or imposed on an employee in response to the information or direction.

   With respect to "subject to a control measure": take an example where, in the context of a designated infectious disease outbreak, the Chief Medical Officer of Health issues a public statement or directive providing that employees who come in close contact with an at-risk population while at work should avoid working at other jobs that involve significant contact with the general population, in order to decrease the chances of spreading the disease to the at-risk population. An employee has two jobs - one that requires close contact with an at-risk population and one that involves significant contact with the general population. If the employee stops performing the duties at one of her jobs as a result of the information or direction provided by the Chief Medical Officer of Health, the employee is considered to be subject to a control measure and therefore meets the eligibility criteria under subclause (iii). As such, she would be entitled to take an infectious disease emergency leave from the workplace where she is no longer performing her duties. (This is the case whether it was the employee who decided which workplace to stop performing duties at, or if it happened at the direction of one of the employers.)

AND

2. The quarantine, isolation or control measure was implemented as a result of information or directions related to a designated infectious disease that was issued to the public in whole or in part or to one or more people by:

   a) a **"public health official**". This term is defined in ss. 50.1(1) and means:

i. within the meaning of the *Health Protection and Promotion Act*:

- the Chief Medical Officer of Health or Associate Chief Medical Officer of Health,
- a medical officer of health or an associate medical officer of health, or
- an employee of a board of health,

ii. a public health official of the Government of Canada

b) a **"qualified health practitioner".** This term is defined in s. 50.1(1) and means, "a person who is qualified to practice as a physician or nurse under the laws of the jurisdiction in which care or treatment is provided to the employee or an individual described in subsection (8)".

The qualified health practitioner can be in Ontario, or in another province, territory or another country.

So long as the information or direction provided by the qualified health practitioner is related to the designated infectious disease, **this condition will be satisfied if the physician or nurse has provided care or treatment to the employee, whether or not the care or treatment was related to the designated infectious disease**. For example, an employee who has an immune deficiency and who was told by his physician to self-isolate and not go to work during the COVID-19 outbreak is eligible for infectious disease emergency leave.

c) Telehealth Ontario

d) The Government of Ontario or of Canada.

It is the Program's position that where information is provided or directions are issued by the Premier of Ontario or the Prime Minister of Canada, this is done in their capacity as representatives of the Government of Ontario and the Government of Canada, respectively.

One question that has arisen is whether direction obtained through the Ontario.ca website COVID-19 self-assessment tool amounts to directions related to COVID-19 issued to an individual "by the Government of Ontario". It is the Program's position that it does. As such, if an employee completes the assessment questionnaire on the Ontario.ca website with the relevant information specific to the employee's symptoms and/or risk factors and receives direction that she or he is to self-isolate for a set number of days, then the employee is entitled to take infectious disease emergency leave for the duration of the self-isolation.

Another question that has arisen is whether orders issued under the federal *Quarantine Act* amount to direction related to COVID-19 issued to an individual "by the Government of Canada". It is the Program's position that it does.

Similarly, it is the Program's position that orders under the *Emergency Management and Civil Protection Act* (EMCPA) or the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* (ROA) amount to a "direction" issued "by the Government of Ontario".

For example, an order was issued under the EMCPA (and continued under the ROA when it ceased to be an order under the EMCPA on July 24, 2020) prohibiting employees who perform work in a long-term care home from performing work at more than one long-term care home location, and from performing work both at a long-term care home and in a retirement home or at a long-term care home and for any other health service provider. (A similar order applies to employees who perform work at a retirement home.) An employee who, for example, has two jobs – one at a long-term care home and one at a retirement home – and stops performing the duties at one of the homes as a result of the order is considered to be subject to a control measure implemented as a result of directions related to a designated infectious disease that was issued to the public in whole or in part or to one or more people by the Government of Ontario and therefore meets the eligibility criteria under subclause (iii). As such, she would be entitled to take an infectious disease emergency leave from the job where she is no longer performing her duties.

(Note that O. Reg. 228/20 was amended on August 24, 2020 to explicitly state that, retroactive to July 24, 2020, an employee is entitled to take infectious disease emergency leave where the employee is not performing the duties of his or her position because the employee is subject to an order that relates to COVID-19 under the ROA - see s. 3.1 of O. Reg. 228/20. From the Program's perspective, this amendment provides greater certainty that employees in this situation are entitled to infectious disease emergency leave.)

e) A municipal council in Ontario

It is the Program's position that where information is provided or directions are issued by the Mayor of a particular municipality in Ontario, this is done in the Mayor's capacity as a representative of that municipality's municipal council.

f) A board of health.

Subclause (iii) provides that the information or direction may be communicated "whether through print, electronic, broadcast or other means". All methods of communication are captured, including, for example, in-person, telephone, e-mail, the internet, radio, television, newspapers, text message alerts, terminal screens (e.g., at airports, train stations, in subway stations), billboards and signs.

(iv) The employee is under a direction given by his or her employer in response to a concern of the employer that the employee may expose other individuals in the workplace to the designated infectious disease (subclause (iv))

Under this subclause, an employee is eligible for unpaid infectious disease emergency leave if the employee will not be performing the duties of the employee's position in response to the employer's

concern that the employee may expose others in the workplace to the designated infectious disease. Some examples include:

- An employer is concerned that an employee who recently travelled or attended a public gathering may expose others in the workplace to a designated infectious disease. In response, the employer orders the employee to stay away from the workplace for a certain period of time.
- An employer is concerned that an employee whose wife is in self-isolation for the designated infectious disease directs the employee to stay away from the workplace out of a concern that the employee may have the disease and expose others in the workplace to it.
- An employer is concerned that an employee who is displaying symptoms of the designated infectious disease has the disease and directs the employee to stay away from the workplace until the employee provides a doctor's note stating that the employee does not have the disease. This example would apply even if the employee stated the symptoms were caused by something unrelated to the infectious disease, such as severe allergies.
- An employer provides a general direction to all employees in the context of the designated infectious disease outbreak that if they feel ill they should not come to work. An employee who then stays home because the employee is experiencing symptoms that have been associated with the designed infectious disease is eligible for leave under subclause (iv).
- An employer chooses to make a policy about COVID-19 vaccination and tells an employee not to come to work until the employee has been vaccinated against the designated infectious disease, out of a concern that unvaccinated employees may have the disease and expose others in the workplace to it. An employee who stays home until vaccinated is eligible for leave under subclause (iv).

This subclause does not create authority for employers to direct employees to stay away from the workplace and not perform the duties of their position in response to a concern about exposing others to a designated infectious disease. This subclause is simply providing that if the employer does that, the employee is eligible for an infectious disease emergency leave. The ESA does not address issues about health and safety in the workplace or employers' authority to exclude employees from the workplace. As such, the question of whether the employers' actions described in the examples above are appropriate or lawful under other laws is not a matter for the ES Program.

Note also there is no requirement that the employer's concern that the employee may expose other individuals in the workplace to the designated infectious disease be well-founded in order for an entitlement to arise under this subclause. For example, an employee has an allergy that makes the employee's skin blotchy. Although blotchy skin is not a symptom of a designated infectious disease, the employer is misinformed and is genuinely concerned that the employee may expose others to a designated infectious disease. If the employer therefore directs the employee to stay away from the workplace and not perform the duties of the employee's position, the employee will be eligible for infectious disease emergency leave.

Note as well that s. 4(1) of O. Reg. 228/20 prescribes an additional reason for which employees are entitled to infectious disease emergency leave: the employee's hours of work are temporarily reduced or temporarily eliminated by the employer for reasons related to COVID-19 during the defined COVID-19 period. O. Reg. 228/20 then deems employees to be on unpaid infectious disease emergency leave any time the employee is not performing the duties of his or her position for that reason. Although it may be argued that s. 4(1) of O. Reg. 228/20 should apply during the COVID-19 period to the situation where the employer temporarily reduced or eliminated an employee's hours of work out of a concern that the

employee may expose others in the workplace to COVID-19 rather than this subclause, it is Program policy that where employees are not performing the duties of their position because they are under a direction given by their employer in response to a concern of the employer that they may expose other individuals in the workplace to the designated infectious disease, the employee is eligible for unpaid infectious disease emergency leave under clause (iv) of s. 51.1(1.1)(b) or may, depending on the circumstances, have an entitlement to paid infectious disease emergency leave under paragraph 4 of s. 50.1(1.2). (It may matter to an employee which provision the entitlement arises under because s. 4 of O. Reg. 228/01 establishes exemptions to the rules regarding continued participation in certain benefit plans during a **deemed** leave.)

(v) The employee is providing care or support to an individual referred to in subsection (8) because of a matter related to the designated infectious disease that concerns that individual, including, but not limited to, school or day care closures (subclause (v))

Under this subclause, an employee is eligible for unpaid infectious disease emergency leave if the employee will not be performing the duties of the employee's position because the employee is providing care or support to an individual contained in the list in subsection (8) because of a matter related to the designated infectious disease that concerns that individual.

The employee can be providing the care or support in Ontario or in another province, territory country and be eligible for infectious disease emergency leave.

The individuals with respect to whom an employee can take this leave are listed in subsection (8) as follows:

1. The employee's spouse.
2. A parent, step-parent or foster parent of the employee or the employee's spouse.
3. A child, step-child or foster child of the employee or the employee's spouse.
4. A child who is under legal guardianship of the employee or the employee's spouse.
5. A brother, step-brother, sister or step-sister of the employee.
6. A grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse.
7. A brother-in-law, step-brother-in-law, sister-in-law or step-sister-in-law of the employee.
8. A son-in-law or daughter-in-law of the employee or the employee's spouse.
9. An uncle or aunt of the employee or the employee's spouse.
10. A nephew or niece of the employee or the employee's spouse.
11. The spouse of the employee's grandchild, uncle, aunt, nephew or niece.
12. A person who considers the employee to be like a family member, provided the prescribed conditions, if any, are met.
13. Any individual prescribed as a family member for the purposes of this section. (At the time of writing, no individuals were prescribed.)

"Spouse" includes married same-sex couples, married opposite-sex couples, and couples of the same or opposite sex who live together in a conjugal relationship outside of marriage – see the definition of spouse and the discussion at ESA Part XIV, s. 45.

With respect to "a person who considers the employee to be like a family member, provided the prescribed conditions, if any, are met" in paragraph 13: at the time of writing there were no prescribed conditions that had to be met.

“Providing Care or Support”

The designated infectious disease entitlement is for providing care or support. This includes, for example, looking after minor children, providing psychological or emotional support to the family member, assisting the family member with regular household chores (e.g., housekeeping, laundry, shopping) as well as arranging for care by a third party provider, and directly providing or participating in the personal care of the family member. Care or support also includes assisting the family member to get their affairs in order, where, for example, the family member is at risk of death.

Example of situations where, in the Program’s view, an employee would not be eligible for an infectious disease emergency leave under subclause (v) include:

- An employee lives with her brother who has a compromised immune system. The brother has been advised by his doctor to remain at home during an outbreak of a designated infectious disease. The brother is self-sufficient and does not need his sister for care or support. The employee wants to self-isolate to reduce the risk of exposing her brother to the designated infectious disease.

The employee is not eligible for infectious disease emergency leave under this subclause.

Although the employee would not be performing the duties of her position because of the designated infectious disease (i.e. to avoid making her brother sick), she would not be “providing care or support”. While self-isolating may be a caring action in this situation, it does not constitute “providing care or support”.

“Matter related to the designated infectious disease”

For a matter to be related to the designated infectious disease, there must be a causal connection between the “matter” in question and the designated infectious disease.

Closures of schools and day cares that are related to the designated infectious disease are specifically stated in subclause (v) as matters that are related to the designated infectious disease. So for example, an employee who will not be performing the duties of the employee’s position because the employee is providing care to his 5-year old child whose school has been temporarily closed because of the designated infectious disease is eligible for infectious disease emergency leave.

Where daycares or schools have reopened, it is Program policy that an employee who is concerned that the child will come into contact with COVID-19 at the daycare or school and as a result does not send the child to daycare or school is entitled to infectious disease emergency leave in order to provide care to the child. (This is because the situation falls squarely within the wording of subclause (v): the employee will be providing care to the child, and the reason the care is being provided is because of a matter related to COVID-19 that concerns the child, i.e. the matter is that the child is not going to daycare or school because of fears of coronavirus exposure.)

Similarly, an employee who is providing care or support to an elderly parent who had been living in a long-term care home but who left the home due to fears of catching COVID-19 is entitled to infectious disease emergency leave.

It is also Program policy that the cancellation of summer day camps because of COVID-19 also constitutes a matter related to the designated infectious disease. For example, an employee who will not be performing the duties of his position because he is providing care to his child who otherwise would have been at a day camp for five weeks in the summer that was cancelled because of COVID-19 is eligible for infectious disease emergency leave for those five weeks.

Other examples of situations where, in the Program's view, an employee is eligible for infectious disease emergency leave under subclause (v) include:

- An employee will not be performing the duties of the employee's position because the employee is providing care or support to his elderly mother who lives in another city and is in self-isolation due to the designated infectious disease.
- An employee has been buying groceries and picking up medication for her elderly aunt for several years. The employee works six days a week and would normally do the shopping on her day off on Monday. Because of a pandemic of the designated infectious disease, grocery stores have reduced their hours and are now closed on Mondays and during the employee's off-hours on working days. If the employee takes time from work to do the shopping, she would be eligible for infectious disease emergency leave during that time.

(vi) The employee is directly affected by travel restrictions related to the designated infectious disease and, under the circumstances, cannot reasonably be expected to travel back to Ontario (subclause (vi))

Under this subclause, an employee is eligible for unpaid infectious disease emergency leave if the employee will not be performing the duties of the employee's position because the employee is directly affected by travel restrictions that are related to the designated infectious disease and the employee cannot, under the circumstances, reasonably be expected to travel back to Ontario.

For example, this would include an employee who is on a cruise ship that is not permitted to dock in any country because of the concern that passengers are infected by a designated infectious disease.

There may be some situations where an employee is affected by travel restrictions (for example where there are no international commercial airline flights available) but the employee has other options available to travel back to Ontario. This condition will be met if it would not be reasonable to expect the employee to use alternative options.

What is reasonable will depend on the circumstances. For example, an employee was vacationing in Mexico City when Canada banned all flights from Mexico for two weeks. The employee could rent a car or take a series of buses and trains to return to Ontario but that would not be a reasonable expectation in the circumstances.

This provision applies only where the employee is directly affected by the travel restrictions. In other words, it applies only where the employee's travel back to Ontario is affected.

This provision applies only when the employee is caught by travel restrictions while outside of Ontario.

(vii) Such other reasons as may be prescribed (subclause vii)

O. Reg. 228/20, which was filed on May 29, 2020 and amended August 24, 2020, prescribes two additional reasons.

1. Subsection 4(1) of O. Reg. 228/20 prescribes an additional reason for which non-unionized employees are eligible for infectious disease emergency leave during the "defined COVID-19 period": the employee's hours of work are temporarily reduced or temporarily eliminated by the employer for reasons related in whole or in part to the designated infectious disease.

   Subsection 4(2) of O. Reg. 228/20 deems employees who are not performing the duties of their position because of the prescribed reason to be on the leave in respect of any time they are not performing their duties for this reason during the "COVID-19 period", which is defined in O. Reg. 228/20 to be the period beginning on March 1, 2020 and ending January 1, 2022.

2. Subsection 3.1(1) of O. Reg. 228/20 prescribes an additional reason, retroactive to July 24, 2020: an order made under s. 7.0.2 of the *Emergency Management and Civil Protection Act* (EMCPA) that is continued under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* (ROA), or any amendment to such an order, that relates to the designated infectious disease applies to the employee.

   Note that prior to this reason being prescribed, it was Program policy that employees who were not performing the duties of their position because an EMCPA order that was continued under the ROA applied to them were eligible for infectious disease emergency leave based on subclause (iii) of s. 50.1(1.1)(b): these employees were considered to be subject to a control measure on the basis of a direction issued by the Government of Ontario. From the Program's perspective, the addition of s. 3(1) to O. Reg. 228/20 provides greater certainty that employees in this situation are entitled to infectious disease emergency leave.

   See the discussion of the prescribed reasons in the discussion of O. Reg. 228/20.

Leave of Absence With Pay - ss. 50.1(1.2)

(1.2) In addition to any entitlement under subsection (1.1), an employee is entitled to a paid leave of absence if the employee will not be performing the duties of the employee's position because of one or more of the following reasons related to a designated infectious disease:

1. The employee is under individual medical investigation, supervision or treatment related to the designated infectious disease.

2. The employee is acting in accordance with an order under section 22 or 35 of the *Health Protection and Promotion Act* that relates to the designated infectious disease.

3. The employee is in quarantine or isolation or is subject to a control measure (which may include, but is not limited to, self-isolation), and the quarantine, isolation or control measure was implemented as a result of information or directions related to the designated infectious disease issued to the public, in whole or in part, or to one or more individuals, by a public health official, a qualified health practitioner, Telehealth Ontario, the Government of Ontario, the

Government of Canada, a municipal council or a board of health, whether through print, electronic, broadcast or other means.

4. **The employee is under a direction given by his or her employer in response to a concern of the employer that the employee may expose other individuals in the workplace to the designated infectious disease.**

5. **The employee is providing care or support to an individual referred to in subsection (8) because,**

   i. **the individual is under individual medical investigation, supervision or treatment related to the designated infectious disease, or**

   ii. **the individual is in quarantine or isolation or is subject to a control measure (which may include, but is not limited to, self-isolation), and the quarantine, isolation or control measure was implemented as a result of information or directions related to the designated infectious disease issued to the public, in whole or in part, or to one or more individuals, by a public health official, a qualified health practitioner, Telehealth Ontario, the Government of Ontario, the Government of Canada, a municipal council or a board of health, whether through print, electronic, broadcast or other means.**

Subsection 50.1(1.2) was introduced into the ESA by the *COVID-19 Putting Workers First Act, 2021* (CPWFA) on April 29, 2021.

The amendments made by the CPWFA provide employees with an entitlement of up to three **paid** days of infectious disease emergency leave in certain circumstances related to a designated infectious disease. These entitlements are **in addition** to the entitlement to unpaid infectious disease emergency leave.

Although the amendments came into force on April 29, 2021, employees' entitlements to paid infectious disease emergency leave are retroactive to April 19, 2021. Entitlements to paid infectious disease emergency leave end on September 25, 2021 or such later date as may be prescribed. At the time of writing, December 31, 2021 was the prescribed end date (see O. Reg. 228/20, s. 11.) .

The CPWFA also amended the ESA to provide that eligible employers are entitled to be reimbursed the amount of infectious disease emergency leave pay that they paid to their employees, up to $200 per employee per day taken. Eligible employers make their application for reimbursement to the Workplace Safety and Insurance Board – see the discussion of s. 50.1.1 for details.

Subsection 50.1(1.2) establishes qualifying criteria that must be met in order for an employee to be entitled to **paid** infectious disease emergency leave of absence. These criteria are a narrower subset of the reasons that entitle employees to unpaid infectious disease emergency leave. (See ss. 50.1(1.1)(b) for the qualifying criteria for **unpaid** infectious disease emergency leave.)

Subsection 50.1(1.2) must be read in conjunction with the rest of the section, including new subsections 50.1(1.3) – (1.13). Briefly, those subsections provide:

- ss. (1.3): the entitlement to paid infectious disease emergency leave is limited to three days.
- ss. (1.4) - (1.5): the three day entitlement is reduced by the number of days – if any – an employee was entitled to paid leave under an employment contract on April 19, 2021 in any of the circumstances for which an employee would also be entitled to paid infectious disease

emergency leave, but only where the contract required the employer to pay the employee at least as much as the employee would be entitled to be paid under ss. 50.1(1.11) of the ESA.

- ss. (1.6): the employer may deem an employee who takes any part of a day as paid infectious disease emergency leave to have used up one full day of the employee's ESA allotment.
- ss. (1.7) - (1.10): An employee is entitled to take their paid leave before the unpaid leave. An employee who is entitled to paid infectious disease emergency leave may elect to take the leave as unpaid infectious disease emergency leave, but only if the employee provides the employer written notice of that election by a specified deadline. (Employees who took unpaid infectious disease emergency leave between April 19, 2021 and April 28, 2021 inclusive were able to elect to be paid for that leave if they met the eligibility criteria and advised the employer in writing by May 12, 2021.)
- ss. (1.11) - (1.13): these subsections establish the manner of calculating the amount of infectious disease emergency leave pay an employee on paid infectious disease emergency leave is entitled to, with a cap of $200 per day.

Employees have the right to be on paid infectious disease emergency leave only for as long as the event that triggered the entitlement to the leave lasts. After the triggering event is over, the employee's normal obligations to be at work are resumed.

Employees who will not be performing the duties of their position because of one or more of the reasons set out in ss. 50.1(1.2) related to a designated infectious disease are entitled to a paid infectious disease emergency leave. Each reason is dealt with separately below.

1. The employee is under individual medical investigation, supervision or treatment related to the designated infectious disease.

This eligibility criterion for paid infectious disease emergency leave is the same as the eligibility criterion for unpaid infectious disease emergency leave in subclause (i) of s. 50.1(1.1)(b). As such, an employee who meets this eligibility criterion but has no remaining ESA paid infectious disease emergency leave days, or who elects to opt-out of the paid leave in accordance with ss. (1.8), will be entitled to unpaid infectious disease emergency leave.

Employees who will not be performing the duties of their position because they are under individual medical investigation, supervision or treatment (including for mental health) related to the designated infectious disease are eligible for paid infectious disease emergency leave.

The Act does not impose any restrictions with respect to where the medical investigation, supervision or treatment has to be undertaken in order for this eligibility criterion to be met. The investigation, supervision or treatment can be in Ontario, another province or territory, or another country.

Subsection 50.1(1.0.1), which was introduced into the Act on April 29, 2021 at the same time that paid infectious disease emergency leave was introduced, codified previous Program policy in the unpaid infectious disease emergency leave context that "treatment related to the designated infectious disease" in subclause "i" of ss. 50.1(1.1)(b) includes receiving a vaccine for the designated infectious disease and recovery from side effects of that vaccine. (The pre-April 29, 2021 Program policy was based on the term "treatment" including preventative actions, and was consistent with the definition of "treatment" in the *Health Care Consent Act*.) As such, employees who are not performing the duties of their position because they are getting vaccinated against the designated infectious disease or are experiencing side

effects from the vaccine - whether or not the employee is under the care of a medical practitioner with respect to those side effects - are eligible for paid infectious disease emergency leave.

2. The employee is acting in accordance with an order under section 22 or 35 of the *Health Protection and Promotion Act* that relates to the designated infectious disease

This eligibility criterion for paid infectious disease emergency leave is the same as the eligibility criterion for unpaid infectious disease emergency leave in subclause (ii) of s. 50.1(1.1)(b). As such, an employee who meets this eligibility criterion but has no remaining ESA paid infectious disease emergency leave days, or who elects to opt-out of the paid leave in accordance with ss. (1.8), will be entitled to unpaid infectious disease emergency leave.

Employees who will not be performing the duties of their position because they are acting in accordance with an order under s. 22 or s. 35 of the *Health Protection and Promotion Act* (HPPA) that relates to the designated infectious disease are eligible for paid infectious disease emergency leave. This criterion is met only if the order is, in whole or in part, directed at the employee or a class of persons that the employee fits into.

Section 22 of the HPPA authorizes a medical officer of health to require individuals or classes of persons to take or refrain from taking any action specified in the order in relation to a communicable disease. Orders may include actions such as requiring the person to whom the order is directed to isolate himself or herself, to place himself or herself forthwith under the care and treatment of a physician, or to conduct himself or herself in such a manner as not to expose anyone else to infection.

Section 35 of the HPPA authorizes a judge of the Ontario Court of Justice to issue orders when someone has failed to comply with certain orders that were issued by a medical officer of health in respect of a communicable disease that is a virulent disease. (Note that not all designated infectious diseases are necessarily designated as virulent diseases). Orders issued under s. 35 may, for example, require that someone be taken into custody and admitted and detained in a hospital.

3. The employee is in quarantine or isolation or is subject to a control measure (which may include, but is not limited to, self-isolation), and the quarantine, isolation or control measure was implemented as a result of information or directions related to the designated infectious disease issued to the public, in whole or in part, or to one or more individuals, by a public health official, a qualified health practitioner, Telehealth Ontario, the Government of Ontario, the Government of Canada, a municipal council or a board of health, whether through print, electronic, broadcast or other means

This eligibility criterion for paid infectious disease emergency leave is the same as the eligibility criterion for unpaid infectious disease emergency leave in subclause (iii) of s. 50.1(1.1)(b). As such, an employee who meets this eligibility criterion but has no remaining ESA paid infectious disease emergency leave days, or who elects to opt-out of the paid leave in accordance with ss. (1.8), will be entitled to unpaid infectious disease emergency leave.

Under this paragraph, an employee is eligible for paid infectious disease emergency leave if the employee will not be performing the duties of the employee's position because:

A. The employee is in quarantine, isolation, or is subject to a control measure (whether voluntarily or involuntarily),

To qualify for this leave under paragraph 3, the employee must not be performing the duties of his or her position because the employee is in quarantine, isolation, or is subject to a control measure (whether voluntarily or involuntarily).

It is the Program's position that "in quarantine", "in isolation", or "is subject to a control measure" is a step or an action implemented as the result of information or directions related to the designated infectious disease issued to the public, to a part of the public, or to one or more individuals by an entity listed in the provision (see below for more information). Depending on the circumstances, quarantine, isolation or a control measure may be initiated by an employee, initiated by an employer and agreed to by an employee, or imposed on an employee in response to the information or direction.

With respect to "subject to a control measure": take an example where, in the context of a designated infectious disease outbreak, the Chief Medical Officer of Health issues a public statement or directive providing that employees who come in close contact with an at-risk population while at work should avoid working at other jobs that involve significant contact with the general population, in order to decrease the chances of spreading the disease to the at-risk population. An employee has two jobs - one that requires close contact with an at-risk population and one that involves significant contact with the general population. If the employee stops performing the duties at one of her jobs as a result of the information or direction provided by the Chief Medical Officer of Health, the employee is considered to be subject to a control measure and therefore meets the eligibility criteria under paragraph 3. As such, she would be entitled to take a paid infectious disease emergency leave from the workplace where she is no longer performing her duties. (This is the case whether it was the employee who decided which workplace to stop performing duties at, or if it happened at the direction of one of the employers.)

AND

B. The quarantine, isolation or control measure was implemented as a result of information or directions related to a designated infectious disease that was issued to the public in whole or in part or to one or more people by:

a. a **"public health official**". This term is defined in ss. 50.1(1) and means:

   i. within the meaning of the *Health Protection and Promotion Act*:

      1. the Chief Medical Officer of Health or Associate Chief Medical Officer of Health,

      2. a medical officer of health or an associate medical officer of health, or

      3. an employee of a board of health,

   ii. a public health official of the Government of Canada

b. a **"qualified health practitioner".** This term is defined in s. 50.1(1) and means, "a person who is qualified to practice as a physician or nurse under the laws of the jurisdiction in which care or treatment is provided to the employee or an individual described in subsection (8)".

The qualified health practitioner can be in Ontario, or in another province, territory or another country.

So long as the information or direction provided by the qualified health practitioner is related to the designated infectious disease, **this condition will be satisfied if the physician or nurse has provided care or treatment to the employee, whether or not the care or treatment was related to the designated infectious disease**. For example, an employee who has an immune deficiency and who was told by his physician to self-isolate and not go to work during the COVID-19 outbreak is eligible for paid infectious disease emergency leave.

c. Telehealth Ontario

d. The Government of Ontario or of Canada.

It is the Program's position that where information is provided or directions are issued by the Premier of Ontario or the Prime Minister of Canada, this is done in their capacity as representatives of the Government of Ontario and the Government of Canada, respectively.

One question that has arisen is whether direction obtained through the Ontario.ca website COVID-19 self-assessment tool amounts to directions related to COVID-19 issued to an individual "by the Government of Ontario". It is the Program's position that it does. As such, if an employee completes the assessment questionnaire on the Ontario.ca website with the relevant information specific to the employee's symptoms and/or risk factors and receives direction that she or he is to self-isolate for a set number of days, then the employee is entitled to paid infectious disease emergency leave (and to unpaid infectious disease emergency leave if the employee runs out of ESA paid infectious disease emergency leave entitlements or has those entitlements but elects to take unpaid leave in accordance with ss. 50.1(1.8)).

Another question that has arisen is whether orders issued under the federal *Quarantine Act* amount to direction related to COVID-19 issued to an individual "by the Government of Canada". It is the Program's position that it does.

Similarly, it is the Program's position that orders under the *Emergency Management and Civil Protection Act* (EMCPA) or the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* (ROA) amount to a "direction" issued "by the Government of Ontario".

For example, a ROA order prohibits employees who perform work in a long-term care home from performing work at more than one long-term care home location, and from performing work both at a long-term care home and in a retirement home or at a long-term care home and for any other health service provider. (A similar order applies to employees who perform work at a retirement home.) An employee who, for example, has two jobs – one at a long-term care home and one at a retirement home – and stops performing the duties at one of the homes as a result of the order is considered to be subject to a control measure implemented as a result of directions related to a designated infectious disease that was issued to the public in whole or in part or to one or more people by the Government of Ontario and therefore meets the eligibility criteria under

subclause (iii). As such, she would be entitled to paid infectious disease emergency leave from the job where she is no longer performing her duties (and to unpaid infectious disease emergency leave if she runs out of ESA paid infectious disease emergency leave entitlements or has those entitlements but elects to take unpaid leave in accordance with ss. (1.8)).

(Note that O. Reg. 228/20 was amended on August 24, 2020 to explicitly state that, retroactive to July 24, 2020, an employee is entitled to take **unpaid** infectious disease emergency leave where the employee is not performing the duties of his or her position because the employee is subject to an order that relates to COVID-19 under the ROA - see s. 3.1 of O. Reg. 228/20. From the Program's perspective, this amendment provided greater certainty that employees in this situation are entitled to unpaid infectious disease emergency leave, and that even though there is no corresponding provision that applies with respect to paid infectious disease emergency leave, it is the Program's position that this eligibility criterion for paid infectious disease emergency leave is met where the employee is not performing the duties of his or her position because the employee is subject to an order that relates to COVID-19 under the ROA .)

e. A municipal council in Ontario

It is the Program's position that where information is provided or directions are issued by the Mayor of a particular municipality in Ontario, this is done in the Mayor's capacity as a representative of that municipality's municipal council.

f. A board of health.

Subclause (iii) provides that the information or direction may be communicated "whether through print, electronic, broadcast or other means". All methods of communication are captured, including, for example, in-person, telephone, e-mail, the internet, radio, television, newspapers, text message alerts, terminal screens (e.g., at airports, train stations, in subway stations), billboards and signs.

4. The employee is under a direction given by his or her employer in response to a concern of the employer that the employee may expose other individuals in the workplace to the designated infectious disease

This eligibility criterion for paid infectious disease emergency leave is the same as the eligibility criterion for unpaid infectious disease emergency leave in subclause (iv) of s. 50.1(1.1)(b). As such, an employee who meets this eligibility criterion but has no remaining ESA paid infectious disease emergency leave days, or who elects to opt-out of the paid leave in accordance with ss. (1.8), will be entitled to unpaid infectious disease emergency leave.

Under this paragraph, an employee is eligible for paid infectious disease emergency leave if the employee will not be performing the duties of the employee's position in response to the employer's concern that the employee may expose others in the workplace to the designated infectious disease. Some examples include:

- An employer is concerned that an employee who recently travelled or attended a public gathering may expose others in the workplace to a designated infectious disease. In response, the employer orders the employee to stay away from the workplace for a certain period of time.
- An employer is concerned that an employee whose wife is in self-isolation for the designated infectious disease directs the employee to stay away from the workplace out of a concern that the employee may have the disease and expose others in the workplace to it.
- An employer is concerned that an employee who is displaying symptoms of the designated infectious disease has the disease and directs the employee to stay away from the workplace until the employee provides a doctor's note stating that the employee does not have the disease. This example would apply even if the employee stated the symptoms were caused by something unrelated to the infectious disease, such as severe allergies.
- An employer provides a general direction to all employees in the context of the designated infectious disease outbreak that if they feel ill they should not come to work. An employee who then stays home because the employee is experiencing symptoms that have been associated with the designed infectious disease is eligible for leave under paragraph 4.
- An employer chooses to make a policy about COVID-19 vaccination and tells an employee not to come to work until the employee has been vaccinated against the designated infectious disease, out of a concern that unvaccinated employees may have the disease and expose others in the workplace to it. An employee who stays home until vaccinated is eligible for leave under paragraph 4.

This paragraph does not create authority for employers to direct employees to stay away from the workplace and not perform the duties of their position in response to a concern about exposing others to a designated infectious disease. This paragraph is simply providing that **if** the employer does that, the employee is eligible for a paid infectious disease emergency leave. The ESA does not address issues about health and safety in the workplace or employers' authority to exclude employees from the workplace. As such, the question of whether the employers' actions described in the examples above are appropriate or lawful under other laws is not a matter for the ES Program.

Note also there is no requirement that the employer's concern that the employee may expose other individuals in the workplace to the designated infectious disease be well-founded in order for an entitlement to arise under this paragraph. For example, an employee has an allergy that makes the employee's skin blotchy. Although blotchy skin is not a symptom of a designated infectious disease, the employer is misinformed and is genuinely concerned that the employee may expose others to a designated infectious disease. If the employer therefore directs the employee to stay away from the workplace and not perform the duties of the employee's position, the employee will be eligible for infectious disease emergency leave.

5. The employee is providing care or support to an individual referred to in subsection (8) because,

i. the individual is under individual medical investigation, supervision or treatment related to the designated infectious disease, or

ii. the individual is in quarantine or isolation or is subject to a control measure (which may include, but is not limited to, self-isolation), and the quarantine, isolation or control measure

was implemented as a result of information or directions related to the designated infectious disease issued to the public, in whole or in part, or to one or more individuals, by a public health official, a qualified health practitioner, Telehealth Ontario, the Government of Ontario, the Government of Canada, a municipal council or a board of health, whether through print, electronic, broadcast or other means.

This eligibility criterion for paid infectious disease emergency leave is a narrower subset of the eligibility criterion regarding providing care or support to certain relatives for unpaid infectious disease emergency leave in subclause (v) of s. 50.1(1.1)(b). As such, an employee who meets this eligibility criterion but has no remaining ESA paid infectious disease emergency leave days, or who elects to opt-out of the paid leave in accordance with ss. (1.8), will be entitled to unpaid infectious disease emergency leave.

Under this paragraph, an employee is eligible for paid infectious disease emergency leave if the employee will not be performing the duties of the employee's position because the employee is providing care or support to an individual contained in the list in subsection (8) because of the reasons set out in subclause (i) or (ii).

The employee can be providing the care or support in Ontario or in another province, territory country and be eligible for paid infectious disease emergency leave.

The individuals with respect to whom an employee can take this leave are listed in subsection (8) as follows:

- The employee's spouse.
- A parent, step-parent or foster parent of the employee or the employee's spouse.
- A child, step-child or foster child of the employee or the employee's spouse.
- A child who is under legal guardianship of the employee or the employee's spouse.
- A brother, step-brother, sister or step-sister of the employee.
- A grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse.
- A brother-in-law, step-brother-in-law, sister-in-law or step-sister-in-law of the employee.
- A son-in-law or daughter-in-law of the employee or the employee's spouse.
- An uncle or aunt of the employee or the employee's spouse.
- A nephew or niece of the employee or the employee's spouse.
- The spouse of the employee's grandchild, uncle, aunt, nephew or niece.
- A person who considers the employee to be like a family member, provided the prescribed conditions, if any, are met.
- Any individual prescribed as a family member for the purposes of this section. (At the time of writing, no individuals were prescribed.)

"Spouse" includes married same-sex couples, married opposite-sex couples, and couples of the same or opposite sex who live together in a conjugal relationship outside of marriage – see the definition of spouse and the discussion at ESA Part XIV, s. 45.

With respect to "a person who considers the employee to be like a family member, provided the prescribed conditions, if any, are met" in paragraph 13: at the time of writing there were no prescribed conditions that had to be met.

“Providing Care or Support”

The designated infectious disease entitlement is for providing care or support. This includes, for example, looking after minor children, providing psychological or emotional support to the family member, assisting the family member with regular household chores (e.g., housekeeping, laundry, shopping) as well as arranging for care by a third party provider, and directly providing or participating in the personal care of the family member. Care or support also includes assisting the family member to get their affairs in order, where, for example, the family member is at risk of death.

An employee is entitled to paid infectious disease emergency leave if the employee is providing care or support to an individual listed in subsection (8) if:

i. the individual is under individual medical investigation, supervision or treatment related to the designated infectious disease, or

ii. the individual is in quarantine or isolation or is subject to a control measure (which may include, but is not limited to, self-isolation), and the quarantine, isolation or control measure was implemented as a result of information or directions related to the designated infectious disease issued to the public, in whole or in part, or to one or more individuals, by a public health official, a qualified health practitioner, Telehealth Ontario, the Government of Ontario, the Government of Canada, a municipal council or a board of health, whether through print, electronic, broadcast or other means.

With respect to subclause (i):

Employees who will not be performing the duties of their position because an individual listed in subsection 51.1(8) is under individual medical investigation, supervision or treatment (including for mental health) related to the designated infectious disease are eligible for paid infectious disease emergency leave.

The Act does not impose any restrictions with respect to where the medical investigation, supervision or treatment has to be undertaken in order for this eligibility criterion to be met. The investigation, supervision or treatment can be in Ontario, another province or territory, or another country.

Subsection 50.1(1.0.1), which was introduced into the Act on April 29, 2021 at the same time that paid infectious disease emergency leave was introduced, codified previous Program policy in the unpaid infectious disease emergency leave context that “treatment related to the designated infectious disease” in subclause “i” includes receiving a vaccine for the designated infectious disease and recovery from side effects of that vaccine. (The Program policy was based on the term “treatment” including preventative actions, and was consistent with the definition of “treatment” in the *Health Care Consent Act*.) As such, employees who are not performing the duties of their position because they are providing care or support to an individual listed in subsection (8) is getting vaccinated for the designated infectious disease or is experiencing side effects from the vaccine - whether or not the individual is under the care of a medical practitioner with respect to those side effects - are eligible for paid infectious disease emergency leave.

With respect to subclause (ii): this is same as the eligibility criterion under paragraph 3 of this subsection (except under paragraph 3 it is the employee him or herself who is in quarantine, isolation or

subject to a control measure and here the employee is providing care or support to an individual listed in subsection (8) who is in quarantine, isolation or is subject to a control measure). See the discussion under paragraph 3 above for information on this eligibility criterion.

Limit, number of days – ss. 50.1(1.3)

(1.3) Subject to subsection (1.4), an employee is entitled to take a total of three paid days of leave under subsection (1.2).

This subsection provides that an employee is entitled to take up to three days of paid infectious disease emergency leave.

The Act does not place any restrictions on whether the three days have to be taken consecutively or individually.

Employees can take paid infectious disease emergency leave in entire days or part days (although see ss. 50.1(1.6), which allows employers to deem one day's leave to be taken when an employee takes part of a day off work for paid infectious disease emergency leave).,

The entitlement to three days of paid leave is subject to ss. 50.1(1.4) and (1.5), which provide that an employee's entitlement to three days of paid infectious disease emergency leave may be reduced or eliminated in certain circumstances where the employee had an entitlement to paid leave under their employment contract on April 19, 2021. See below for details.

Paid leave taken under employment contract – ss. 50.1(1.4), (1.5)

(1.4) If, on April 19, 2021, an employee is entitled to take paid leave under an employment contract in any of the circumstances for which the employee would also be entitled to take a leave under subsection (1.2), the employee's entitlement under subsection (1.3) is reduced by the employee's entitlement under the contract.

(1.5) Subsection (1.4) applies only if the employer is required under the employment contract to pay the employee for the paid leave an amount that is equal to or greater than what the employee would be entitled to under subsection (1.11).

These subsections provide that an employee's entitlement to three days of paid infectious disease emergency leave as set out in ss. 50.1(1.3) is reduced or eliminated in circumstances where the employee had certain entitlements to paid leave under an employment contract on April 19, 2021.

An employee's entitlement to three days of paid infectious disease emergency leave is reduced only where all of these criteria are met on April 19, 2021:

1. an employee's employment contract provides entitlements to a paid leave for one or more of the same reasons that paid infectious disease emergency leave can be taken under the ESA,

2. the employee had paid leave entitlements under their employment contract remaining on April 19, 2021 (i.e. the employee had not used up all of the contractual leave that meet criterion 1 before April 19, 2021),

3. the amount the employer is required to pay the employee for paid leave under the employment contract on April 19, 2021 is at least as much as the employee would be entitled to under the formula set out in ss. 50.1(1.11), and
4. the contract does not impose conditions on taking the contractual leave that are more onerous than what is set out in the ESA to take paid infectious disease emergency leave.

Each of these criteria is discussed below.

Criterion 1: an employee's employment contract provides entitlements to a paid leave for one or more of the same reasons that paid infectious disease emergency leave can be taken under the ESA

An employee's entitlement to three days of paid infectious disease emergency leave can be reduced only if the employee's contract of employment provides the employee with paid leave for one or more reasons that paid infectious disease emergency leave can be taken. The reasons for which leave can be taken under the contract do not have to exactly match the reasons that paid infectious disease emergency leave can be taken under the ESA for the reduction to apply.

Some examples:

- a contract provides three days of paid leave for the employee's personal illness and can be taken by the employee if the employee is sick from COVID-19. Because being sick from COVID-19 is one the reasons for which an employee can take paid infectious disease emergency leave, this criterion is met. If criteria 2 - 4 are also met with respect to the contractual sick days, and the employee has all three days of contractual leave available to her on April 19, 2021, the three days of contractual leave reduce the employee's three-day entitlement to paid infectious disease emergency leave to zero days.
- a contract provides an employee with two paid "floater days" that can be taken for any reason. Because this would be available for the same reasons for which an employee can take paid infectious disease emergency leave, this criterion is met. If criteria 2 - 4 are also met with respect to the floater days, and the employee has not taken either floater day by April 19, 2021, the two days of contractual leave reduce the employee's three-day entitlement to paid infectious disease emergency leave to one day.
- A contract provides an employee with three paid "family responsibility days" that could be used to provide care or support to immediate family members who are sick with COVID-19. Because this would be available for some of the reasons for which the employee can take paid infectious disease emergency leave, this criterion is met. If criteria 2 - 4 are also met with respect to the family responsibility days, and the employee has all three days of contractual leave available to her on April 19, 2021, the three days of contractual leave reduce the employee's three-day entitlement to paid infectious disease emergency leave to zero days.

Criterion 2: the employee had paid leave entitlements under their employment contract remaining on April 19, 2021

Criterion 1 dealt with the question of the **reasons** for which an employee has an entitlement to paid leave under their contract and **how many days of leave the contract provides**.

Criterion 2 deals with the question of the **amount of leave entitlements the employee had remaining on April 19, 2021**.

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An employee's three-day paid infectious disease emergency leave entitlement is reduced only if the employee had not used up all of the contractual leave entitlements that met Criterion 1 on April 19, 2021 (and only if criteria 3 and 4 are also met).

For example:

- a contract provides an employee with two paid sick days and one "floater day" that meet the criteria in criteria 1.
- the employee took the two contractual paid sick days in January 2021, so had zero contractual paid sick days available on April 19, 2021.
- the employee had not used the "floater" day before April 19, 2021, so that day remained available to the employee.
- in this example, the employee has one day of paid leave that meets the conditions in criterion 1 available on April 19, 2021. That one day reduces the employee's three-day entitlement by one day (assuming criteria 3 and 4 are also met).
- This employee is therefore entitled to two paid days of infectious disease emergency leave under the ESA.

Criterion 3: the amount the employer is required to pay the employee for paid leave under the employment contract on April 19, 2021 is at least as much as the employee would be entitled to under the formula set out in ss. 50.1(1.11)

Contractual leave entitlements that meet criteria 1 and 2 will only reduce an employee's three-day paid infectious disease leave entitlement if the employer is required under the contract to pay the employee for the paid contractual leave an amount that is equal to or greater than what the employee would be entitled to under the infectious disease emergency leave pay formula set out in ss. 50.1(1.11) of the ESA. (In very general terms, the formula provides that employees are entitled to the lesser of $200 and the wages the employee would have earned had the employee not taken the leave, excluding overtime pay, a shift

premium and premium pay on a public holiday, and with a special rule for employees who receive performance-related wages. See the discussion of ss. 50.1(1.11) for details.)

For example: an employee is entitled under the contract to salary continuance when the employee is away for personal illness. Because this provides an amount that is equal to or greater than what the formula for infectious disease emergency leave pay would provide, this criterion is met.

Because the analysis as to whether this criterion is met is performed with respect to the contractual entitlement on April 19, 2021, any changes to the employees' contractual entitlements after April 19, 2021 do not factor into the analysis. For example, an employee who earns $200 a day has a contract that provides three days of leave for personal illness with pay of $150 per day. This contractual entitlement does not meet Criterion 3 (it would have to provide $200 per day to satisfy this criterion) so will not reduce the three-day paid infectious disease emergency leave entitlement. This is the case even if the employer makes changes to increase the employee's contractual pay for leave for personal illness to $200 per day **after** April 19, 2021. However, see the heading at the end of the discussion of this subsection titled "Whether taking a paid infectious disease emergency leave day draws down the employee's contractual entitlement".

In some situations it may not be possible to make a determination in advance of the leave being taken as to whether, on April 19, 2021, the contractual entitlement meets this criterion. For example, the contract provides that an employee who takes a family leave is entitled to 75% of the wages the employee would have earned while on the leave. Whether or not this criterion is met depends on future events that happen after April 19, 2021 – i.e. the length of any leave the employee takes and the employee's wage rate at the time. In this situation – where there is uncertainty as to whether this criterion is met on April 19, 2021 because it depends on future events - the employer may engage in a two-step analysis: one on April 19, 2021 (this would be the point at which the employer would realize that, in the case of the specific contractual language and the specific employee's wage rate, that the results of the analysis will vary depending on the length of the employee's leave) and then a second review **after** the leave occurs (it would only be at this point at which the employer would be able to assess whether criterion 3 applies). After the second review, any necessary adjustments against the ESA's 3-day allotment of paid infectious disease emergency leave could be made when it is known whether the contractual pay entitlement is at least as much as the employee would be entitled to receive under the ESA.

For example:

- an employee is entitled under the contract to 75% of the employee's hourly rate while the employee is on contractual family leave.
- The employee earns $50 per hour and works eight hour shifts.

- If the employee takes a contractual family leave for a full day, the employee would be entitled to $300 under the contract (8 x $50 x 75%). The formula in the ESA for infectious disease emergency leave pay would entitle the employee to $200. Criterion 3 would be met in this case.
- However, if this employee takes a contractual family leave for only 5 hours in a day, criterion 3 would not be met. This is because the formula in the ESA for infectious disease emergency leave pay results in an entitlement of $200 (the lesser of $200 and 5 x $50) while the entitlement under the contract is for $187.50 (5 x $50 x 75%). Since the contractual pay is less than what the employee would be entitled to receive as infectious disease emergency leave pay under the ESA, criterion 3 would not be met in this case.
- Under this example, the employer in this case will only be able to reduce the ESA allotment of three paid infectious disease emergency leave *after* the employee has taken the leave of absence and would only be able to do so in the first scenario where the employee took the full day of contractual leave. The employer would not be able to reduce the ESA allotment if the employee took the contractual leave for only 5 hours.

Criterion 4: the contract does not impose conditions on taking the contractual leave that are more restrictive than what is set out in the ESA to take paid infectious disease emergency leave

Because ss. 50.1(1.4) says that the reduction can happen only if an employee is "entitled to take paid leave under an employment contract in any of the circumstances for which employees would also be entitled to take a leave under subsection (1.2)", contractual leave entitlements that meet criteria 1, 2, and 3 will only reduce an employee's three-day paid infectious disease leave entitlement if the conditions for taking paid contractual leave are no more restrictive than what is set out in the ESA for taking paid infectious disease emergency leave, including that the employee's employment contract incorporates all of the ESA's general provisions concerning leaves (as set out in ss. 51-53.1) and the ESA's anti-reprisal provisions.

Some examples of when there are more restrictive conditions for taking paid leave under the employment contract are:

- under the ESA, an employer cannot require an employee to provide a note from a doctor as evidence of the employee's entitlement to paid infectious disease emergency leave. If the contract requires the production of note from a doctor in order for the employee to take the paid leave under the contract, this criterion would not be met.

- although the ESA requires an employee to advise their employer ahead of time that the employee will be taking a leave (or as soon as possible after starting it if advance notice is not possible), the employee does not lose the right to paid infectious disease emergency leave if the employee fails

to provide the notice. But, if getting paid leave under the contract is conditional on the employee providing advance notice to the employer, this criterion would not be met.

As with Criterion 3, in some situations it may not be possible to make a determination as to whether, on April 19, 2021, the contractual entitlement meets Criterion 4. For example, a contract provides an employee with ten fully paid days of leave for personal illness per calendar year and the employee had not used any of them as of April 19, 2021. These contractual entitlements meet Criteria 1, 2 and 3. However, the contract requires employees to provide a medical note - which is not permitted in the ESA for paid infectious disease emergency leave - when the employee has three or more consecutive days of absence for personal illness. Whether or not Criterion 4 is met depends on events that happen after April 19, 2021 (the date the determination is made) – i.e. whether the employee takes a contractual leave for personal illness in single days, two consecutive days, or 3 or more consecutive days. In this situation – where there is uncertainty as to whether this criterion is met on April 19, 2021 because it depends on future events- the employer may engage in a two-step analysis: one on April 19, 2021 and the second when the future event happens and make the necessary adjustments to the results of the analysis.

Where All Four Criteria Are Met

If, on April 19, 2021, the employee's contractual leave entitlements meet all four criteria (or, where a two-step analysis is done as described under Criteria 3 and 4 that results in the contractual leave entitlements meeting all four criteria), the employee's three-day entitlement to paid infectious disease emergency leave under the ESA is reduced by the amount of leave available to the employee under the employee's employment contract that meets **all** four of these criteria.

Differences from how contractual entitlements are treated under other leaves

Note that the provision establishing the approach to "drawing down" is very different in the context of paid infectious disease emergency leave as compared to the sick leave, family responsibility leave and bereavement leave provisions of the ESA.

In the paid infectious disease emergency leave context, **the analysis about contractual entitlements happens on April 19, 2021 – not when the employee is absent**. The analysis involves a comparison of the reasons for the leave entitlements that are available to the employee under the contract with the reasons for paid infectious disease emergency leave available under the ESA.

It is important to note that the reasons for leave under the contract and the reasons for leave under the Act do not have to match perfectly in order for the contract to reduce the employee's three-day ESA entitlement. If a reason for leave under the contract is also one of the reasons the paid leave is available

under the Act, the three-day entitlement under the Act is reduced (assuming the contractual leave meets all the other conditions described above). This means that there can be situations where an employee will not have the right to paid leave under either the contract or the ESA when the employee is, after April 19, 2021, away for a reason that the ESA sets out as a qualifying reason for a paid infectious disease leave entitlement. (Although note that in this situation, the employee would have a right to **unpaid** infectious disease emergency leave under the Act.)

For example, the only paid leave an employee has a contractual entitlement to is to three fully paid "family days". These days could be used to care for a specified individual who contracted COVID-19. These are therefore contractual days that could be used for one or more of the reasons for which paid infectious disease emergency leave can be taken. As such, if the employee has three of these days available under his contract on April 19, 2021 and all of the other conditions described above are met, the employee would not be entitled to any days of paid infectious disease emergency leave under the ESA. If the employee wanted paid time off to get tested for COVID-19 or to get vaccinated against COVID-19, the employee would not have a right to that paid leave under the contract or under the ESA (though the employee would have an entitlement to take that time as unpaid infectious disease emergency leave).

Here are some additional examples of how the rule about contractual entitlements work in the paid infectious disease emergency leave context:

Scenario 1: An employee has paid sick days under the employment contract, and used all of them prior to April 19, 2021.

Example: Denise has a contractual entitlement to ten fully paid sick days each calendar year. These are the only days of paid leave available to her under her contract of employment. There are no conditions attached to the contractual entitlements that are more onerous than those required in the ESA. Denise had a back injury in February and used all ten of her paid sick days.

Denise had no paid leave available to her under her employment contract on April 19, 2021. She is therefore entitled to three days of paid infectious disease emergency leave.

Scenario 2: An employee has paid leave under the employment contract, and has some of it left on April 19, 2021.

Example 1: Anthony has a contractual entitlement to five fully paid sick days each calendar year. This is the only paid leave available under his contract of employment. There are no conditions attached to the contractual entitlements that are more onerous than those required in the ESA. He took three of the five paid sick days in January 2021. On April 19, 2021, Anthony had two paid days remaining under his contract.

Anthony is therefore entitled to one (3 ESA days minus 2 contractual days remaining) paid infectious disease emergency leave day under the ESA. This is because on April 19, 2021, Anthony had two employer-paid days of leave available under his contract that could be taken for one or more of the

reasons for which paid infectious disease emergency leave can be taken and which meet the minimum pay requirements.

Example 2: Quim has a contractual entitlement to five fully paid sick days each calendar year. This is the only paid leave available under his contract of employment. There are no conditions attached to the contractual entitlements that are more onerous than those required in the ESA. Quim took two of the five days in February 2021. On April 19, 2021, Quim had three paid days remaining under the contract.

Quim is therefore entitled to zero (3 ESA days minus 3 contractual days remaining) paid infectious disease emergency leave days under the ESA. This is because on April 19, 2021, Quim had three employer-paid days of leave available under his contract that could be taken for one or more of the reasons for which paid infectious disease emergency leave can be taken and which meet the minimum pay requirements.

Example 3: There is no requirement that the paid leave under the employment contract be for a **full workday** in order to meet the four criteria. For example, Alexander has a contractual entitlement to four hours of paid leave to receive a COVID-19 vaccine. This is the only paid leave available under his employment contract. There are no conditions attached to the contractual entitlement that are more onerous than those required in the ESA. Alexander did not use the leave before April 19, 2021. On April 19, 2021, Alexander had four hours of leave remaining under the contract.

Alexander is therefore entitled to three days less four hours of paid infectious disease emergency leave under the ESA. This is because on April 19, 2021, he had four hours of employer-paid leave available under his contract that could be taken for one or more of the reasons for which paid infectious disease emergency leave can be taken and which meet the minimum pay requirements.

Scenario 3 : An employee is hired after April 19, 2021

Example: Kristy is hired on May 1, 2021 and has five paid family days under her employment contract. This is the only paid leave available under her contract of employment. There are no conditions attached to the contractual entitlements that are more onerous than those required in the ESA. Given that she did not have any contractual entitlement to paid leave on April 19, 2021 - since she was not employed by the employer at that time - she is entitled to three days of paid infectious disease emergency leave.

Scenario 4 : An employee's contractual paid leave bank "refreshes" after April 19, 2021

Example: Nicholos has a contractual entitlement to five fully paid sick days each year. This is the only paid leave available under his contract of employment. There are no conditions attached to the contractual entitlements that are more onerous than those required in the ESA. These paid sick days are renewed every year on Nicholos's employment anniversary date, which is May 1st. On April 19, 2021 Nicholos had used up all his paid sick days under his contract of employment. As such, he is entitled to three paid infectious disease emergency leave. This is the case even though his paid contractual sick day bank will be renewed on May 1, 2021.

* * *

It is the employee's decision as to whether to claim paid infectious disease emergency leave

A question may arise in the situation where an employee has entitlements to both contractual leave and paid infectious disease emergency leave and the employee is absent for a reason that entitles the

employee to the leave under both the contract and the ESA. The question is which entitlement - the contractual leave entitlement or the statutory leave entitlement – must be taken first. (This may be relevant for several reasons, including for purposes of tracking the employee's remaining contractual and statutory entitlements and because employers are eligible to be reimbursed only for payments made for statutory paid infectious disease emergency leave).

The ESA does not dictate which entitlement must be taken first in this situation. As is the case with other statutory leaves, it is the policy of the Employment Standards program that employees decide whether or not to claim a statutory paid infectious disease emergency leave when the employee is absent for a reason that qualifies for that leave.

* * *

Whether taking a paid infectious disease emergency leave day draws down the employee's contractual entitlement

Another question that may arise is whether an employee taking a paid infectious disease emergency leave under the ESA affects the employee's contractual entitlements. In general, whether or not a contractual entitlement is also simultaneously reduced when an employee takes paid infectious disease emergency leave under the ESA is not a matter for the ES Program; it is a contractual matter and will depend on the contractual arrangement. There is, however, one exception that applies in the situation where an employee has entitlements to both contractual leave and statutory paid infectious disease emergency leave and the employee is absent for a reason that entitles the employee to take a leave under both. In that situation, where the employee claims the absence as statutory paid infectious disease emergency leave, it is the policy of the Employment Standards program that the employer cannot simultaneously reduce a contractual leave that met the qualifying conditions in ss. 50.1(1.4) that was used to reduce any of the employee's three-day entitlement to statutory paid infectious disease emergency leave.

(The reason that the exception applies in this situation is that unlike other leaves of absence under the ESA, an employee's statutory entitlement to paid infectious disease emergency is dependent on whether the employee has certain contractual entitlements. Because contractual leaves that meet the qualifying conditions in ss. 50.1(1.4) are incorporated into the statutory scheme and are relevant for establishing the employee's statutory entitlement (i.e. how many days of statutory paid infectious disease emergency leave an employee is entitled to), how they are administered is considered a matter for the Employment Standards program to the extent that the employer cannot reduce the contractual leave when an employee takes a statutory paid infectious disease emergency leave. If a reduction of the contractual leave was permitted in this situation, it would result in an employee who chooses to take, for example, one day of their statutory entitlement before taking their contractual entitlement losing two days of leave entitlement for the absence (i.e. the statutory day *and* a contractual day).

An employee who chooses to take their statutory entitlement before their contractual entitlement will lose one of their 3 days of leave.

* * *

Leave deemed to be taken in entire days – ss. 50.1(1.6)

(1.6) If an employee takes any part of a day as paid leave under subsection (1.2), the employer may deem the employee to have taken one paid day of leave on that day for the purposes of subsection (1.3).

Employees may not need an entire work day to attend to the event that gave rise to the paid infectious disease emergency leave and might only take part of a day off work. Subsection (1.6) allows an employer in this situation to count a part-day off work as an entire day of paid infectious disease emergency leave for the purpose of counting the absence against the statutory allotment of days. This is the only purpose for which the employer can deem the part day off work as an entire day's leave. The employer cannot deem the employee not to have worked at all on the day. Where an employee worked a partial day and took a part-day of paid infectious disease emergency leave, the employee is entitled to be paid the earnings for the time that was actually worked that day (in addition to the infectious disease emergency leave pay). As well, the hours that were worked will be counted for the purposes of, among other things, determining whether the relevant overtime threshold has been reached, whether the limits on, for example, the daily and weekly hours of work have been reached, and whether the daily, weekly/bi-weekly and in-between shifts rest requirements have been met.

For clarity, this provision does not require employees to take paid infectious disease emergency leave in full day periods. It simply allows an employer to reduce the employee's statutory paid infectious disease emergency leave entitlement by a day if an employee is on paid infectious disease emergency leave for only part of a day. (Note that pursuant to subsection 50.1 (1.8), an employee may elect to "opt out" of paid infectious disease emergency leave for a particular absence and can instead take the leave as unpaid infectious disease emergency.)

Note that this provision ***allows*** the employer to attribute one day's leave to a part day of absence. It does not require the employer to do so.

For example, an employee left work early to get vaccinated against COVID-19. The employee worked a five-hour day rather than her usual eight hour shift and takes paid infectious disease emergency leave. In that case, the employer may consider the employee to have used up one of her statutory days of infectious disease emergency leave and the employee would be paid infectious disease emergency leave pay for the three hours of leave in accordance with the formula set out in ss. (1.11)-(1.13) plus her earnings for the five hours that she actually worked.

Just because an employer may consider an employee to have used one day of paid infectious disease emergency leave due to a part day of absence does not mean that the employee then has the right to take the entire day off if the triggering event did not last the entire day. For example, an employee's shift is from 9 a.m. to 5 p.m. The employee has an appointment to get a vaccine at 9 a.m. at a location one hour away from the workplace. The employee claims the absence as paid infectious disease emergency leave. The employer is entitled to reduce the employee's paid infectious disease emergency leave entitlement by one day, but if the employee does not experience any immediate side-effects from the vaccine, the employee must return to work after the appointment is over. Employees have the right to be away from work under the infectious disease emergency leave provisions of the ESA 2000 only for as long as the event that triggered the entitlement lasts. After the triggering event is over, the employee's normal obligations to attend at work are resumed.

In addition, employers cannot prohibit employees who took a part day of leave from returning to work for the remainder of their shift. This is because of, among other reasons, the employer's obligation to reinstate the employee at the end of the leave in ESA Part XIV and the prohibition against penalizing employees for having taken a leave in ESA Part XVIII, s. 74.

An issue has arisen as to whether an employer could exercise its discretion and deem a partial day absence as a full day for some employees, but not for others, or whether this might allow employers to selectively punish employees who have too many absences in violation of the reprisal provisions of the ESA 2000.

The answer will depend on the facts. In particular, why did the employer treat the employees differently? Where an employer deems a full day's absence for some employees, but not for others, it is a question of fact as to whether the employer would be in violation of the ESA 2000.

For instance, an employer counts a three-hour paid infectious disease emergency leave as a full day's leave for employee A but not for employee B, who also takes a three-hour leave because the employer considers employee B to be a better worker than employee A. Although this might be unfair as between employee A and B, it would not be a violation of the ESA 2000, as it would not be a reprisal for exercising a right under the ESA 2000.

If, on the other hand, the motivation for the differential treatment was that employee A frequently took ESA leaves such as sick leave, family responsibility leave or paid infectious disease emergency leave of only a few hours, and the employer assigned a full day's absence to these short leaves as a way to ensure employee A used up all of their statutory entitlement as soon as possible because the employer found it inconvenient for the employee to be away for many short periods of time, that would be an unlawful reprisal.

As another example, it would also be an unlawful reprisal if the motive for the differential treatment was because employee A made inquiries about ESA rights or refused to agree to average hours for overtime pay purposes.

Paid days first – ss. 50.1(1.7); Same, election re: unpaid days – ss. 50.1(1.8)

(1.7) Subject to subsections (1.8) and (1.9), an employee is entitled to take the three paid days of leave before any of the unpaid days of leave.

(1.8) If an employee is entitled to both paid leave and unpaid leave under this section, the employee may elect to take one or more days or parts of a day of leave as unpaid leave only if the employee advises the employer in writing, before the end of the pay period in which the leave occurs, that the employee has elected to take that time as unpaid leave.

Together, these two subsections provide that where an employee who is entitled to **paid** infectious disease emergency leave takes infectious disease emergency leave between April 29, 2021 and December 31, 2021, that leave is treated as **paid** infectious disease emergency leave rather than unpaid infectious disease emergency leave. (See ss. (1.9) and (1.10) below for the rule that applies to infectious disease emergency leaves taken between April 19, 2021 and April 28, 2021, inclusive.)

In effect, these provisions provide that the “default” is that the paid infectious disease emergency leave days are used (and the employer is required to pay the employee infectious disease emergency leave pay in accordance with ss. (1.11)-(1.13)) before unpaid infectious disease emergency leave is taken. There is no requirement for an employee to request payment for the first days’ leave; the entitlement to infectious disease emergency leave pay flows automatically from the ESA.

The only exception is where the employee provides the employer with written notice that the employee elects to take the leave as unpaid infectious disease emergency leave. The written notice has to be provided to the employer before the end of the pay period in which the leave was taken in order for the leave to be considered unpaid. (An employee may choose to take unpaid infectious disease emergency leave rather than a paid leave because, for example, receiving paid infectious disease emergency leave may affect an employee’s eligibility for, or amount of, benefits under federal programs.)

An employee does not lose their paid infectious disease emergency leave entitlements if they choose to treat the absence as unpaid infectious disease emergency leave; the entitlements are just deferred to the next infectious disease emergency leave absence.

Same – ss. 50.1(1.9), (1.10)

(1.9) If, between April 19, 2021 and the day the *COVID-19 Putting Workers First Act, 2021* receives Royal Assent, an employee takes unpaid leave under subsection (1.1) in circumstances for which the employee would also be entitled to take a leave under subsection (1.2), the employee may elect to be paid for that leave only if the employee advises the employer in writing before the day that is 14 days after the *COVID-19 Putting Workers First Act, 2021* receives Royal Assent, that the employee has elected to take the leave as paid leave, and the employee is deemed to have taken the leave under subsection (1.2).

(1.10) Despite subsection 11 (1), if an employee elects to take paid leave under subsection (1.9), the employer shall pay the employee the amount to which the employee is entitled no later than the pay day for the pay period in which the employee made the election.

The *COVID-19 Putting Workers First Act, 2021* received Royal Assent and amended the ESA to introduce paid infectious disease emergency leave on April 29, 2021. However, ss. 50.1(5.2) provides that an employee's entitlement to paid infectious disease emergency leave is deemed to have started on April 19, 2021.

Subsection 50.1(1.9) provides that employees who took an unpaid infectious disease emergency leave between April 19, 2021 and April 28, 2021, inclusive, for a reason for which paid leave can be taken as per ss. (1.2), can retroactively elect to take those unpaid days as paid infectious disease emergency leave instead (if they have an entitlement to paid infectious disease emergency leave entitlements as per ss. (1.3)).

To make this election, employees must have advised their employer in writing no later than the day before the day that is 14 days after April 29, 2021 – i.e. no later than May 12, 2021.

Subsection 50.1(1.10) provides that where an employee makes an election under ss. 50.1(1.9), the employer shall pay the employee the infectious disease emergency leave pay the employee is entitled to receive no later than the pay day for the pay period in which the employee made the election. This "deadline" for payment overrides the deadline for payment of wages in ss. 11(1) of the ESA, which may have been missed (through no fault of the employer) due to the retroactive nature of the employee's election.

Paid leave – ss. 50.1(1.11)

(1.11) Subject to subsections (1.12) and (1.13), if an employee takes paid leave under subsection (1.2), the employer shall pay the employee the lesser of $200 per day and,

(a) either,

(i) the wages the employee would have earned had they not taken the leave, or

(ii) if the employee receives performance-related wages, including commissions or a piece work rate, the greater of the employee's hourly rate, if any, and the minimum wage that would have applied to the employee for the number of hours the employee would have worked had they not taken the leave; or

(b) if some other manner of calculation is prescribed, the amount determined using that manner of calculation.

This subsection sets out the manner of calculating the amount of infectious disease emergency leave pay an employer must pay an employee who takes paid infectious disease emergency leave.

Subject to ss. 50.1(1.12) and (1.13), the employer must pay the employee the lesser of $200 and either:

- the wages the employee would have earned had the employee not taken paid infectious disease emergency leave, and
- if the employee receives performance-related wages, such as commissions or a piece work rate, the greater of the employee's hourly rate, if the employee has one, and the minimum wage that would have applied to the employee for the number of hours the employee would have worked had they not taken the leave

At the time of writing, no other manner of calculating infectious disease emergency leave pay has been prescribed.

If an employee takes any part of a day as paid infectious disease emergency leave and the employer deems the employee to have taken one day of leave in accordance with ss. 50.1(1.6), the employer is required to pay infectious disease emergency leave pay for the time taken as infectious disease emergency leave (i.e., when the employee is absent) plus any wages the employee earns while working during the day in question.

This provision is read subject to ss. 50.1(1.12) and (1.13). Per ss. 50.1(1.12), overtime pay and shift premium amounts are not to be included in infectious disease emergency leave pay even if the employee "would have earned" these if the employee worked. Subsection 50.1(1.13) provides that if a day of paid infectious disease emergency leave falls on a public holiday, the employee is not entitled to premium pay for any paid infectious disease emergency leave taken.

Depending on how much leave is taken during a work day, infectious disease emergency leave pay for a work day can be any amount from less than a single hour's pay to an entire day of wages. But in no case does it exceed $200.

Calculating Infectious Disease Emergency Leave Pay

In order to determine how much infectious disease emergency leave pay an employee is entitled to, two things need to be established:

1. How much paid infectious disease emergency leave was taken, or the number of hours in a "work day" minus the number of hours worked, if any, and
2. Whether the formula in subclause (i) or (ii) will be used:

    i. The wages the employee would have earned had they not taken the leave, or
    ii. If the employee receives performance-related wages in whole or in part, the employee's hourly rate – if there is one – or the applicable minimum wage if there isn't.

1. How much Paid Infectious Disease Emergency Leave Taken

Determining length of employee's work day on the day leave was taken:

If the employee:

- works a regular work day, with set hours, this is the length of the day for the purpose of calculating infectious disease emergency leave pay.
- Is scheduled to work a particular number of hours on the day on which infectious disease emergency leave is taken, the length of the work day will be what was scheduled, even if the employee regularly works a set number of hours that is different from the scheduled shift.

The situation may arise when an employee may be required to report to work at a particular time, but does not have a shift or work period of a specified length. In that case, when assessing the amount of wages an employee would have earned had they not taken paid infectious disease emergency leave in order to determine the amount of infectious disease emergency leave pay owing, the employer must make a reasonable estimate of how long the employee would have worked on that day. For example, it

could be reasonable for an employer to take an average of the number of hours worked by all the employees in the same position as the employee who took paid infectious disease emergency leave on the day, or if another employee was called in to replace the employee on the day, it could be reasonable to refer to the length of that employee's shift.

When an employment standards officer is investigating a claim from an employee who believes they received less infectious disease emergency leave pay than the ESA requires (perhaps because the employer took the position that the business was not busy on that particular day and the employer intended to send the employee home early) the officer makes a determination on whether the amount paid by the employer was reasonable. Evidence may include direct evidence from other employees, receipts, point of sale records, customer or production logs, or the staff schedule from the day in question. If the employer has a staff rotation policy and employees are sent home early in a particular order when the business is not busy, was the employee the next person on the list?

Determining how much paid infectious disease emergency leave was taken:

The length of infectious disease emergency leave taken on a single day is calculated by deducting the number of hours actually worked, if any, from the total number of hours in the work day. For example, if it is determined that the employee was scheduled to work nine hours on the day, and they took five hours of paid infectious disease emergency leave to get a COVID-19 vaccine, they would be entitled five hours of infectious disease emergency leave pay (plus the wages they earned during the four hours at work). If the same employee missed the entire day, they would be entitled to nine hours of infectious disease emergency leave pay.

2. Whether the formula in subclause (i) or (ii) will be used

A. Subclause (i) – "the wages the employee would have earned had they not taken the leave"

Employees who do not receive any wages that are performance-related are entitled to the "wages the employee would have earned had they not taken the leave", as set out in subclause (i), subject to the $200 limit.

Here are examples of how the formula in subclause (i) applies in different scenarios:

a. Hourly Wage (Non-Salaried Employees)

If the employee is paid by an hourly wage, the amount of infectious disease emergency leave pay is the lesser of $200 and the amount obtained by multiplying the number of hours of infectious disease emergency leave x the hourly rate.

Example 1: Employee with a single rate of pay

- Employee's wage rate is $17.25 per hour.
- Employee normally works 8.5 hours in a day. The employee left work to take paid infectious disease emergency leave after working 1.5 hours

Entitlement:

- Employee normally works 8.5 hours per day, but worked 1.5 hours and took paid infectious disease emergency leave for the rest of the day = 7 hours of paid infectious disease emergency leave
- **Infectious Disease Emergency Leave Pay:** 7 hours x $17.25 = $120.75

- Note that the employee is also entitled to wages they earned while working on the same day = 1.5 hours x $17.25)
- Note: if the employee's infectious disease emergency leave pay had resulted an amount greater than $200.00, the employee would be entitled to receive $200.00 and not the calculated amount. This $200.00 maximum applies only to the infectious disease emergency leave pay, not to the employee's total wages for the day.

Example 2: Employee with more than one rate of pay

- Employee is paid $16.00/hour for Job "A" and $17.50/hour for Job "B"
- Employee is scheduled to work 10 hours: first five hours on Job "A" and second five hours on Job "B"

Entitlement:

- The employee worked for the first three hours doing Job A, and took the rest of the day as paid infectious disease emergency leave: 10 hours – 3 hours = 7 hours
- Of the 7 hours of infectious disease emergency leave, 2 were Job A and 5 were Job B
- **Infectious Disease Emergency Leave Pay:** (2 hours x $16.00 = $32.00) + (5 hours x $17.50 = $87.50) = $119.50
- Note that the employee is also entitled to wages they earned while working: 3 hours x $16.00 = $48.00.
- Note: if the employee's infectious disease emergency leave pay had resulted an amount greater than $200.00, the employee would be entitled to receive $200.00 and not the calculated amount. This $200.00 maximum applies only to the infectious disease emergency leave pay, not to the employee's total wages for the day.

Example 3: $200 Limit Applies

- Employee's wage rate is $30/hour
- Employee is scheduled to work 10 hours. The employee took the entire day as paid infectious disease emergency leave

Entitlement:

- The employee is entitled to the lesser of $200 and the wages the employee would have earned had the employee not taken paid infectious disease emergency leave, which is $300 ($30/hour x 10 hours)
- **Infectious Disease Emergency Leave Pay**: $200

b. Salaried employees

If the employee is paid by salary and has a regular number of days within a pay period and regular hours, the amount of infectious disease emergency leave pay is:

- If the employee took a full day or shift as infectious disease emergency leave, the lesser of $200 and employee's daily rate (salary ÷ number of days in a pay period)

- If the employee took part of a day or shift as infectious disease emergency leave, the lesser of $200 and the employee's hourly rate (salary ÷ number of hours in a pay period) x number of hours of infectious disease emergency leave

This is, in effect, salary continuance. If an employer pays an employee with a fixed salary the normal amount of pay for a week with a day of full or partial infectious disease emergency leave in it, the infectious disease emergency leave pay provisions of the ESA 2000 will be satisfied.

Examples: Salaried employees with regular number of days and hours within pay period

Example 1:

An employee is paid $1500.00 per bi-weekly pay period and works a five-day week. One day of paid infectious disease emergency leave is taken. Infectious disease emergency leave pay = $1500.00 ÷ 10 = $150.00.

Note: if the employee's infectious disease emergency leave pay had resulted an amount greater than $200.00, the employee would be entitled to receive $200.00 and not the calculated amount.

Example 2:

An employee is paid $1500.00 per bi-weekly pay period and works a 40 hour week. The employee takes four hours of paid infectious disease emergency leave. Hourly rate: $1500.00 ÷ 80 = $18.75/hour. Infectious disease emergency leave pay: $18.75 x 4 = $75.00. Note that the employee is also entitled to wages earned for the part of the day that the employee worked.

Note: if the employee's infectious disease emergency leave pay had resulted an amount greater than $200.00, the employee would be entitled to receive $200.00 and not the calculated amount. This $200.00 maximum applies only to the infectious disease emergency leave pay, not to the employee's total wages for the day.

Impact of top-ups on the Infectious Disease Emergency Leave Pay calculations

A situation may arise where the employee receives a "top-up" or subsidy from a third party in addition to an hourly rate of pay or salary. For example, an employee who works in a daycare centre may be paid $16.00/hour plus $2.00/hour as part of a municipal or provincial government initiative to raise wages for workers in the sector. Depending on how the subsidy is structured, it may or may not be considered wages the employee would have earned for the purposes of infectious disease emergency leave pay. If the employee is paid the subsidy directly by an entity other than the employer, then the subsidy may not be considered wages that the employee would have earned because they are not wages being paid by the employer. If, however, the subsidy and the hourly rate are a term of the contract of employment with the employer (oral or written, express or implied), then the subsidy amount must be included in the calculation of infectious disease emergency leave pay.

B. Subclause (ii) – Where an employee earns performance-related wages

The amount of infectious disease emergency leave pay for an employee paid fully or partly by a system of wage calculation related to performance is the lesser of $200 and the greater of the employee's hourly rate, if any and the minimum wage that would have applied to the employee.

"Performance-related wages" can include, for example, commission only, commission plus an hourly wage, piece work, or compensation as a flat-rate mechanic.

An "hourly rate" refers to an hourly rate set by an employment contract.

Here are examples of how the formula in subclause (ii) applies in different scenarios:

Example 1: Employee earns an hourly rate plus commission

- Employee earns $16.00/hour plus 2% commission on sales,
- Employee takes 6.5 hours of paid infectious disease emergency leave
- **Infectious Disease Emergency Leave Pay**: $16.00 x 6.5 = $104.00
- Note that the employee is also entitled to his/her hourly wage for any hours worked + commission earned while working that day, if any
- Note: if the employee's infectious disease emergency leave pay had resulted an amount greater than $200.00, the employee would be entitled to receive $200.00 and not the calculated amount. This $200.00 maximum applies only to the infectious disease emergency leave pay, not to the employee's total wages for the day.

Example 2: Employee paid entirely by commission

- Employee earns 10% commission on all sales
- Employee is scheduled to work eight hours, works five hours and makes sales of $500.00 and then takes three hours of paid infectious disease emergency leave
- **Infectious Disease Emergency Leave Pay**: Applicable minimum wage rate x 3
- Note that the employee is also entitled to the 10% commission on the $500.00 sales that the employee made that day
- Note: if the employee's infectious disease emergency leave pay had resulted an amount greater than $200.00, the employee would be entitled to receive $200.00 and not the calculated amount. This $200.00 maximum applies only to the infectious disease emergency leave pay, not to the employee's total wages for the day.

Example 3: Employee is a homeworker paid by piece work

- Employee earns $3.50 per phone call answered
- Employee is scheduled to work 8.5 hours, works two hours, answers nine phone calls, and takes 6.5 hours of paid infectious disease emergency leave
- **Infectious Disease Emergency Leave Pay**: Applicable minimum wage x 6.5
- Note that the employee is also entitled to $3.50 x 9 for actual work performed on the day
- Note: if the employee's infectious disease emergency leave pay had resulted an amount greater than $200.00, the employee would be entitled to receive $200.00 and not the calculated amount. This $200.00 maximum applies only to the infectious disease emergency leave pay, not to the employee's total wages for the day.

Example 4: Employee is a Flat Rate Mechanic

- Employee is scheduled to work nine hours
- Employee is paid a flat book rate of $16.00/hour for tune ups (calculated to take two hours to complete). Employee completes two tune ups in three hours and takes the rest of the shift as paid infectious disease emergency leave.

- **Infectious Disease Emergency Leave Pay:** Applicable minimum wage x 6
- Note that the employee is also entitled to $16.00 x 4 = $64.00, for actual work performed on the day
- Note: if the employee's infectious disease emergency leave pay had resulted an amount greater than $200.00, the employee would be entitled to receive $200.00 and not the calculated amount. This $200.00 maximum applies only to the infectious disease emergency leave pay, not to the employee's total wages for the day

Paid leave where higher rate of wages – ss. 50.1(1.12)

50.1(1.2) If a paid day of leave under subsection (1.2) falls on a day or at a time of day when overtime pay, a shift premium or both would be payable by the employer,

(a) the employee is not entitled to more than the employee's regular rate for any leave taken under subsection (1.2); and

(b) the employee is not entitled to the shift premium for any leave taken under subsection (1.2).

This subsection excludes overtime pay and shift premiums (for example, an extra amount paid for working evenings or weekends) from inclusion when calculating infectious disease emergency leave pay. As such, an employee would be entitled to be paid for hours of paid infectious disease emergency leave using their regular rate of pay, and not, for example 1.5 times their regular rate per the overtime provisions of the ESA if the leave was taken during a time the employee would have earned overtime pay had the leave not been taken.

Here are some examples illustrating the application of this subsection:

Example 1: Employee was scheduled to work overtime hours on a day when paid infectious disease emergency leave was taken

- Employee is paid $16.00/hour, has already worked 40 hours in a work week and is scheduled to work an additional shift of eight hours on a Saturday.
- Employee does not work any of the scheduled shift and takes paid infectious disease emergency leave.
- Employee would have earned wages for eight hours of work had the leave not been taken (4 of which would have exceeded the overtime threshold of 44 in a week)
- **Infectious Disease Emergency Leave Pay**: 8 hours x $16.00/hour = $128.00
- Note: if the employee's infectious disease emergency leave pay had resulted an amount greater than $200.00, the employee would be entitled to receive $200.00 and not the calculated amount.

Similarly, if an employee is scheduled to work hours that would normally attract a shift premium, if the employee misses all or some of the shift to take paid infectious disease emergency leave, then infectious disease emergency leave pay will be calculated on the employee's base rate and would not include the shift premium.

Example 2: Employee entitled to shift premium pay on a day where paid infectious disease emergency leave was taken

- Employee is paid $15.50/hour, plus an additional $2.50/hour for night shifts.
- Employee is scheduled to work a midnight to 8:00am shift, but takes a paid infectious disease emergency leave for the entire day.
- Employee would have earned wages for eight hours of work had the leave not been taken.
- **Infectious Disease Emergency Leave Pay:** 8 hours x $15.50 = $124.00
- Note: if the employee's infectious disease emergency leave pay had resulted an amount greater than $200.00, the employee would be entitled to receive $200.00 and not the calculated amount.

Paid leave on public holiday – ss. 50.1(1.13)

50.1(1.13) If a paid day of leave under subsection (1.2) falls on a public holiday, the employee is not entitled to premium pay for any leave taken under subsection (1.2).

Under ESA Part X, Public Holidays, employees who agree to, or are required to, work on a public holiday may be entitled to receive premium pay of at least one and one half times their regular rate for hours worked on that day. The effect of this subsection is that – despite the entitlement in s. 50(1.11) to be paid "the wages the employee would have earned had they not taken the leave" – the employee is not entitled to any premium pay that the employee would have earned by working on the public holiday had the leave not been taken.

Note that in certain situations, per ESA Part X, Public Holidays, the onus is on the employee to prove that the employee had "reasonable cause" for not working all or part of a scheduled shift either on a public holiday, or the "first and last" shifts before or after a public holiday. Also note that it is Program policy that if an employee takes paid infectious disease emergency leave, this will constitute reasonable cause for the purposes of Part X. Note that s. 50.1(4.1) prohibits an employer from requiring that the employee provide a certificate from a qualified health practitioner as evidence of an entitlement to paid infectious disease emergency leave. Therefore, an employer can only require an employee to provide other evidence "reasonable in the circumstances at a time that is reasonable in the circumstances", per s. 50.1(4.1).

Example:

An employee was scheduled to work on a public holiday for ten hours and was going to be paid public holiday pay plus premium pay for the ten hours. The employee worked for six hours and took four hours as paid infectious disease emergency leave. The employee earns the liquor servers minimum wage.

Entitlements:

1. **Entitlements from the Public Holidays part of the ESA:**
   - Public holiday pay calculated in accordance with the public holiday rules of the ESA
   - Premium pay for the hours worked on the public holiday in accordance with the public holiday rules of the ESA (liquor server's minimum wage x 1.5 x 6 hours)

2. **Entitlements from the Paid Infectious Disease Emergency Leave part of the ESA:**
   - No additional amount as infectious disease emergency leave pay

   Note that per ss. 50.1(1.13) the employee is not entitled to premium pay for the four hours taken as paid infectious disease emergency leave.

Explanation:

Infectious disease emergency leave pay generally provides that employees do not lose wages for the time they are not working when on paid infectious disease emergency leave, up to a maximum of $200 per day.

In the case of this employee who takes paid infectious disease emergency leave on a public holiday where the employee was scheduled to work and to earn premium pay plus public holiday pay, the employee's entitlements under the public holiday rules in the Act already provide that the employee earns

the amount the employee would have earned (except for premium pay as provided for in ss. 50.1(1.13)) had the employee not taken the leave. As such, in this situation, the employee is not entitled to receive any amount in infectious disease emergency leave pay over and above the employee's public holiday entitlements.

Note: The public holiday pay and premium pay that the employee is entitled to under the Act's public holiday rules is not infectious disease emergency leave pay. This is important because it means that the amount the employee is entitled to receive for the public holiday is not subject to the $200 daily infectious disease emergency leave pay maximum. Similarly, an employer is not eligible to be reimbursed this amount through the employer reimbursement scheme (since the amount the employer paid is what the employer owed the employee under the Act's public holiday rules, regardless of the leave of absence).

Advising Employer – s. 50.1(2), (3)

50.1(2) An employee who takes leave under this section shall advise his or her employer that he or she will be doing so.

(3) If the employee begins the leave before advising the employer, the employee shall advise the employer of the leave as soon as possible after beginning it.

Section 50.1(2) requires employees to tell their employers in advance that they will be taking declared emergency leave or infectious disease emergency leave (unpaid and paid). In situations where this cannot be done, the employee is required, pursuant to s. 50.1(3), to inform the employer as soon as possible after beginning the leave. The notice need not be in writing; oral notice of the leave is sufficient.

An employee does not lose their right to declared emergency leave or infectious disease emergency leave if the employee fails to comply with ss. 50.1(2) or (3). An employee's entitlement to the leave arises where an employee meets the eligibility criteria of the leave. It is the Program's position that the failure to advise the employer before or as soon as possible after the leave begins does not negate that entitlement. This approach has been affirmed in a grievance arbitration decision by the Ontario Labour Relations Board in the context of the former personal emergency leave, which used identical language to subsections (2) and (4) and which had similarly-structured entitlement provisions to those found in these two leaves – see *International Brotherhood of Electrical Workers, Local 115 v The State Group Inc.,* 2019 CanLII 22129 (ON LRB). In that decision, the Vice-Chair found that notice to the employer is not a prerequisite to exercising the right to the leave. Note that this approach is also consistent with the Program's long-standing policy in the pregnancy and parental leave context, where the structure of the entitlement and notice provisions are also similar to these. See ESA Part XIV, s. 46(4) and s. 48(4).

An issue has arisen as to whether an employer can penalize an employee for failing to give advance notice that the employee will be absent from work (as may be required under an employer policy), where the time off is a declared emergency leave or infectious disease emergency leave under the ESA 2000. Section 50.1(1.1) and (1.2) describes the employee's eligibility for these leaves. Section 50.1(2) requires the employee taking one of these leaves to advise the employer that the employee is taking the leave, and s. 50.1(3) provides that "if the employee begins the leave before advising the employer, the employee shall advise the employer of the leave as soon as possible after beginning it." It is clear from s. 50.1(3) that the ESA 2000 contemplates situations where the employee would be unable to advise the employer in advance of commencing declared emergency leave or infectious disease emergency leave. Part of the leave entitlement under the ESA 2000 is the right to take the leave even if advance notice cannot be given, with the proviso that the employee must advise the employer of the leave as soon as possible after beginning it. The failure to give notice in advance of taking leave, when it would have been

possible for the employee to do so, can be the subject of disciplinary action by the employer without violating section 74. However, the following points should be considered:

- The employee's failure to give advance notice would not be a lawful basis on which to deprive the employee of the right to take the leave if the qualifying conditions in subsections 50.1(1.1) or (1.2) have been met. An employer could not, for example, take the position that failure to give advance notice when it would have been possible for the employee to do so will result in the time taken off not be considered as declared emergency leave or infectious disease emergency leave.
- Any discipline for failing to provide notice in situations where such notice is required under section 50.1(2) (i.e., where section 50.1(3) does not apply) would have to be appropriately linked to the failure to give advance notice and must not, in effect penalize the employee for exercising the right to leave. The motive for any discipline that the employer does impose must clearly be the employee's failure to give advance notice and not the taking of the leave itself.

  In addition, an employer would be able to impose discipline if an employee fails to provide any notice of the leave (before or after the leave), or if the employee provides notice of the leave so late that one wouldn't reasonably be able to say that it falls within s. 50.1(3). However, the employer's disciplinary action would have to be appropriate, and in no way a penalty or reprisal for the employee having taken the leave, but only for the failure to give notice.

Employees who are deemed to be on infectious disease emergency leave by virtue of ss. 4(2) of O. Reg. 228/20 are, pursuant to ss. 4(4) of that regulation, exempt from the requirement to provide notice of the leave. See the discussion in O. Reg. 228/20.

Note that where an employee qualifies for both paid and unpaid infectious disease emergency leave, the employee does not need to specify in the notice whether they are taking paid or unpaid infectious disease emergency leave. Per ss. (1.7), where an employee who is entitled to paid infectious disease emergency leave takes infectious disease emergency leave between April 29, 2021 and December 31, 2021, that leave is treated as paid infectious disease emergency leave rather than unpaid infectious disease emergency leave. This is subject to ss. 50.1(1.8) that allows the employee to "opt out" of paid infectious disease emergency leave for a particular absence by providing the required written notice to the employer before the end of the pay period in which the leave was taken. Subsection 50.1(1.9) provides that employees who took an unpaid infectious disease emergency leave between April 19, 2021 and April 28, 2021, inclusive, for a reason for which paid leave can be taken as per ss. (1.2), can retroactively elect to take those unpaid days as paid infectious disease emergency leave instead (if they have an entitlement to paid infectious disease emergency leave entitlements as per ss. (1.3)). To make this retroactive election, employees must have advised their employer in writing by May 12, 2021.

Evidence of Entitlement, Declared Emergency – s. 50.1(4)

50.1(4) An employer may require an employee who takes leave under clause (1.1)(a) to provide evidence reasonable in the circumstances, at a time that is reasonable in the circumstances, that the employee is entitled to the leave.

Employers can require an employee who takes declared emergency leave to provide proof that the employee is or was entitled to take declared emergency leave. The employer can require an employee to provide evidence that is "reasonable in the circumstances" that the employee is or was entitled to take the leave at a time that is "reasonable in the circumstances."

Depending on the circumstances, such evidence could include:

- A note from an employee's daycare provider indicating that the childcare centre was closed because of a declared emergency,
- A copy of an order that applies to the employee made under the HPPA,
- A copy of an order that applies to the employee made under section 7.0.2 of the EMCPA.

Evidence of Entitlement, Infectious Disease Emergency – s. 50.1(4.1)

50.1(4.1) An employer may require an employee who takes leave under clause (1.1)(b) or subsection (1.2) to provide evidence reasonable in the circumstances, at a time that is reasonable in the circumstances, that the employee is entitled to the leave, but shall not require an employee to provide a certificate from a qualified health practitioner as evidence.

Employers can require an employee who takes unpaid or paid infectious disease emergency leave to provide proof that the employee is or was entitled to take the leave. The employer can require an employee to provide evidence that is "reasonable in the circumstances" that the employee is or was entitled to take the leave at a time that is "reasonable in the circumstances."

The employer cannot require an employee to provide a certificate from a qualified health practitioner [which is defined in ss. 50.1(1) as a person who is qualified to practise as a physician or nurse under the laws of the jurisdiction in which care or treatment is provided to the employee or an individual described in subsection (8)].

Depending on the circumstances, evidence reasonable in the circumstances could include:

- a copy of the information issued to the public by a public health official advising of quarantine or isolation (for example, a print out, screen shot or recording of the information)
- a copy of an order to isolate that was issued to the employee under s. 22 or s. 35 of the *Health Protection and Promotion Act*
- an email from a pharmacy or from a public health department indicating the employee's appointment date and time to receive a COVID-19 vaccination.

Subsection (4.1) provides that employers can only require the evidence at a time that is reasonable in the circumstances. What is considered reasonable in the circumstances will depend on all of the facts of the situation.

For example, if an employee is in isolation or in quarantine due to the designated infectious disease, it will not be reasonable to require the employee to provide the evidence during the quarantine or isolation period if the employee would have to leave home to obtain the evidence.

However, if the employee has electronic evidence that can be sent from home, it may be reasonable to require the employee to send it during the isolation or quarantine period.

Where an employee takes unpaid and/or paid infectious disease emergency leave to provide care or assistance to an individual listed in subsection (8), the employer cannot require the employee to give details of the relative's medical condition. The employer is prohibited from requiring the employee to provide a medical note with respect to the relative's illness. The employer may only require the employee to disclose the name of the relative, the relative's relationship to the employee, and a statement that the

absence was required because of the relative's illness and that there is a connection between the illness and the designated infectious disease.

Note that the evidence provisions in other ESA leaves do not explicitly state that the "reasonable in the circumstances" standard applies to the timeframe in which evidence may be required (i.e. the provisions in those other leaves only state that employers can require employees to "provide evidence reasonable in the circumstances" – see for example, ss. 50(6), 50.0.1(7) and 50.0.2(7).) Nonetheless, the Program has always considered - and continues to consider - the phrase "reasonable in the circumstances" in those other leaves to apply both to the evidence itself as well as to the timeframe within which it is being required. The explicit inclusion of the phrase "reasonable in the circumstances" with respect to the timeframe in infectious disease emergency leave is to clearly signal to employers that what is reasonable in the context of an infectious disease emergency might differ significantly from what would be a reasonable timeframe within which to require the production of evidence from an employee in other contexts and does not change the interpretation of the evidence provisions in other leaves.

Limit, Declared Emergency – ss. 50.1(5), (6)

50.1(5) An employee is entitled to take a leave under clause (1.1)(a) for as long as he or she is not performing the duties of his or her position because of an emergency declared under section 7.0.1 of the *Emergency Management and Civil Protection Act* and a reason referred to in subclauses (1.1) (a)(i) to (iv), but, subject to subsection (6), the entitlement ends on the day the emergency is terminated or disallowed.

(6) If an employee took leave because he or she was not performing the duties of his or her position because of an emergency that has been terminated or disallowed and because of an order made under subsection 7.0.2(4) of the *Emergency Management and Civil Protection Act* and the order is extended under subsection 7.0.8 (4) of that Act, the employee's entitlement to leave continues during the period of the extension if he or she is not performing the duties of his or her position because of the order.

Section 50.1(5) means that, subject to ss. (6), an employee is entitled to declared emergency leave only for as long as the employee meets the eligibility conditions (i.e., the employee is not performing the duties of his or her position because of the declared emergency and because of one of the reasons set out in s. 50.1(a)). This means, among other things, that once a declared emergency has been terminated or disallowed, subject to s. 50.1(6), the entitlement to declared emergency leave will also end.

Pursuant to ss. (6), the right to take declared emergency leave continues past the end date of the declared emergency if an employee was on declared emergency leave because of an order under s. 7.0.2(4) of the EMCPA and the EMCPA order is extended beyond the date the emergency is terminated or disallowed and the employee is not performing the duties of the employee's position because of that order.

The **first declared emergency for COVID-19**, which began March 17, 2020, was terminated on July 24, 2020. Orders under s. 7.0.2(4) of the EMCPA related to COVID-19 that were made during the first declared emergency for COVID-19 ceased to be orders under the EMCPA on July 24, 2020. As such, entitlement to declared emergency leave because of the first COVID-19 declared emergency ended on July 24, 2020. Note, however, that employees may have had entitlements to other leaves for COVID-19 related reasons beyond July 24, 2020, unpaid infectious disease emergency leave in particular.

The **second declared emergency for COVID-19** began January 12, 2021 and ended on February 9, 2021. Note, however, that employees may have had entitlements to other leaves for COVID-19 related reasons beyond January 12, 2021, unpaid infectious disease emergency leave in particular.

The **third declared emergency for COVID-19** began on April 7, 2021 and ended on June 2, 2021.

The Act does not specify an upper limit on the number of days an employee may take declared emergency leave. Employees may take the leave in part days, single days, and/or consecutive days or weeks. The Act does not place any restrictions in this regard. Employees may take a leave whenever they meet the eligibility criteria.

Background information re: EMCPA

According to s. 7.0.7 of the EMPCA, a declared emergency is terminated at the end of the 14th day following its declaration unless it is terminated on an earlier date. The declared emergency may be extended for one period of no more than 14 days by the Lieutenant Governor in Council. Then, it is the Legislative Assembly, on the recommendation of the Premier, which may extend the emergency for additional periods of up to 28 days.

The Legislative Assembly also has the power to disallow the declaration of emergency under s. 7.0.9 of the EMCPA. If the Assembly passes a resolution disallowing the declaration of emergency or the extension of one, any order made under s. 7.0.2(4) is revoked as of the day the resolution passes. Should this occur, an employee's entitlement, subject to s. 50.1(6), to declared emergency leave would also come to an end.

Generally, and unless an employee is exercising the right to declared emergency leave under s. 50.1(1.1)(iii) (i.e. in order to provide care or assistance to an individual referred to in subsection 50.1(8)), an employee's entitlement to declared emergency will also end where the order under the EMCPA is revoked or the order under the HPPA is no longer in effect, even though an emergency may still be declared.

In other words, unless the employee is needed to provide care or assistance to an individual referred to in subsection 50.1(8), the employee's right to leave turns on not being able to perform their duties both because there is a declared emergency under s. 7.01 of the EMCPA and because there is an order under the EMCPA or HPPA that applies to the employee. However, section 50.1(6) deals with the situation where despite the termination or disallowance of the declared emergency, the effective period of an order that had been made under s. 7.0.2 of the EMCPA may be extended. In this situation, an employee's leave entitlement continues during the period of extension if the employee is not performing the duties of their position because of the order.

Further, s. 141(2.3) of the ESA 2000 allows the Lieutenant Governor in Council to make a regulation to extend the entitlement of an employee to declared emergency leave beyond the day on which the entitlement would otherwise have ended if the employee is still not performing the duties of the employee's position because of the effects of the emergency and because of a reason referred to in s. 50.1(1.1)(a). This means that the government is able to extend the declared emergency leave entitlement for employees who are, for one of the reasons specified in s. 50.1(1.1)(a), not returning to work because of the prolonged effects of the declared emergency.

Limit, Infectious Disease Emergency – ss. 50.1(5.1)

(5.1) An employee is entitled to take a leave under clause (1.1) (b) starting on the prescribed date and for as long as,

(a) he or she is not performing the duties of his or her position because of a reason referred to in subclauses (1.1) (b) (i) to (vii); and

(b) the infectious disease is designated by the regulations for the purposes of this section. 2020, c. 3, s. 4 (2).

Subsection 50.1(5.1) means that employees are entitled to unpaid infectious disease emergency leave as long as they meet the eligibility criteria (i.e., they are not performing the duties of their positions because of one of the reasons set out in s. 50.1(1.1)(b) (i) to (vii), the reason is related to a designated infectious disease per O. Reg. 228/20 (initially O. Reg. 66/20 before that regulation was revoked and replaced on May 29, 2020 by O. Reg. 228/20), and there is a prescribed start date for that designated infectious disease in O. Reg. 228/20 (also initially set out in O. Reg. 66/20).

In other words, the Act does not specify an upper limit on the number of days an employee may take unpaid infectious disease emergency leave.

Employees may take the leave in part days, single days, and/or consecutive days or weeks. The Act does not place any restrictions in this regard. Employees may take a leave whenever they meet the eligibility criteria.

Note: entitlement to the leave for the reason prescribed in s. 4 of O. Reg. 228/20 applies only during the "COVID-19 period", which is defined to be the period beginning on March 1, 2020 and ending on January 1, 2022. See the discussion in O. Reg. 228/20.

Same, Paid Leave – ss. 50.1(5.2); Same (5.3)

(**5.2) An employee's entitlement to paid leave under subsection (1.2) is deemed to have started on April 19, 2021 and ends on September 25, 2021 or such later date as may be prescribed.**

(5.3) If the regulations so provide, an employee is entitled to paid leave under subsection (1.2) for such additional periods as may be prescribed.

These subsections provide the start and end date to paid infectious disease emergency leave entitlements.

Per these subsections, the entitlement to paid infectious disease emergency leave – which was introduced into the Act on April 29, 2021 - is retroactive and deemed to have started on April 19, 2021. The entitlement ends on September 25, 2021 or such later date as may be prescribed. At the time of writing, December 31, 2021 was the prescribed end date (see O. Reg. 228/212, s. 11.)

Additionally, if a different period is prescribed, paid infectious disease emergency leave would also be available during the prescribed period. At the time of writing no additional periods had been prescribed.

Protecting a Sustainable Public Sector for Future Generations Act, 2019 – ss. 50.1(7)

50.1(7) This section applies despite the *Protecting a Sustainable Public Sector for Future Generations Act, 2019,* and payments made in accordance with subsection (1.11) are not an increase to existing compensation entitlements or new compensation entitlements for the purposes of that Act.

This subsection was introduced into the ESA by the *COVID-19 Putting Workers First Act, 2021* (CPWFA) effective April 29, 2021, at the same time the CPWFA introduced the entitlement to paid infectious disease emergency leave into the ESA.

This subsection provides that the paid infectious disease emergency leave provisions apply despite the *Protecting a Sustainable Public Sector for Future Generations Act, 2019* (PSPSFGA) and that payments of infectious disease emergency leave pay are neither an increase to existing compensation entitlements nor new compensation entitlements for purposes of the PSPSFGA.

The PSPSFGA caps public sector compensation increases. The effect of this subsection is that infectious disease emergency leave pay payments are not counted towards the PSPSFGA's limit on compensation increases.

Care, Assistance, Support - Specified Individuals– s. 50.1(8)

(8) Subclauses (1.1) (a) (iii) and (1.1) (b) (v) apply with respect to the following individuals:

1. The employee's spouse.

2. A parent, step-parent or foster parent of the employee or the employee's spouse.

3. A child, step-child or foster child of the employee or the employee's spouse.

4. A child who is under legal guardianship of the employee or the employee's spouse.

5. A brother, step-brother, sister or step-sister of the employee.

6. A grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse.

7. A brother-in-law, step-brother-in-law, sister-in-law or step-sister-in-law of the employee.

8. A son-in-law or daughter-in-law of the employee or the employee's spouse.

9. An uncle or aunt of the employee or the employee's spouse.

10. A nephew or niece of the employee or the employee's spouse.

11. The spouse of the employee's grandchild, uncle, aunt, nephew or niece.

12. A person who considers the employee to be like a family member, provided the prescribed conditions, if any, are met.

13. Any individual prescribed as a family member for the purposes of this section.

Section 50.1(8) lists the individuals with respect to whom an employee may take declared emergency leave or infectious disease emergency leave as referred to in subclauses (1.1) (a) (iii),(1.1) (b) (v) and paragraph 5 of (1.2), respectively. See the discussions above for an explanation of the individuals listed in subsection (8).

s. 50.1(9) – REPEALED

Retroactive Order – s. 50.1(10)

50.1(10) If an order made under section 7.0.2 of the *Emergency Management and Civil Protection Act* is made retroactive pursuant to subsection 7.2(1) of that Act,

(a) an employee who does not perform the duties of his or her position because of the declared emergency and the order is deemed to have been on leave beginning on the first day the employee did not perform the duties of his or her position on or after the date to which the order was made retroactive; and

(b) clause 74 (1) (a) applies with necessary modifications in relation to the deemed leave described in clause (a).

Section 7.2(1) of the EMCPA allows for orders made under s. 7.0.2 of the EMCPA to be made retroactive to a certain date. Section 50.1(10) of the ESA provides that on or after the date to which the order was made retroactive, those employees who were not performing the duties of their position because of the declared emergency and because of the EMCPA order, are deemed to have been on leave, and they have anti-reprisal protections from discipline or other penalties.

For example, the Lieutenant Governor in Council declares an emergency under s. 7.0.1 of the EMCPA on May 1, 2016. On June 1, 2016 the Lieutenant Governor in Council makes an order under s. 7.0.2 of the EMCPA that applies to an employee and pursuant to s. 7.2(1) of the EMCPA it was made retroactive to May 15, 2016. The employee had not been performing the duties of his position since May 16, 2016. Because the order was made retroactive to May 15, 2016 and an emergency had been declared on May 1, 2016, s. 50.1(10) would apply and the employee would be deemed to have been on a declared emergency leave as of May 16, 2016.

UNPAID INFECTIOUS DISEASE EMERGENCY LEAVE - ISSUES SPECIFIC TO PRE-MARCH 19, 2020 ABSENCES

Although Infectious Disease Emergency Leave was introduced into the ESA on March 19, 2020, employees' entitlements to unpaid infectious disease emergency leave for COVID-19 for reasons set out in clauses (i)-(vi) of s. 50.1(1.1)(b) are, by virtue of O. Reg. 228/20 (initially O. Reg. 66/20 before it was revoked and replaced by O. Reg. 228/20 on May 29, 2020), retroactive to January 25, 2020.

Entitlement to unpaid infectious disease emergency leave where an employer temporarily reduces or eliminates a non-unionized employee's hours of work for COVID-19 related reasons as prescribed pursuant to clause (vii) of s. 50.1(1.1)(b) is retroactive to March 1, 2020 and applies during the defined COVID-19 period. See O. Reg. 288/20 for a discussion of some issues that arise because of the retroactive application of that deemed leave.

This section addresses some issues that arise because of the retroactive application of this leave.

Scenario: An employee was absent from work on or after January 25, 2020 but before March 19, 2020. The employee was absent for a reason listed in subclauses (i)-(vi) of s. 50.1(1.1)(b). The employer terminated the employee's employment before March 19 because of the absences.

Q. Is the employee entitled to be reinstated?

A. Yes. The retroactive application of the infectious disease emergency leave provisions means that as of March 19, 2020, an employer who terminated the employment of an employee because the employee was absent for one of the reasons listed in subclauses (i)-(vi) of s. 50.1(1.1)(b) between January 25 and March 18, 2020 is required to re-establish the employment relationship on March 19, 2020 (the day that the ESA was amended to provide for infectious disease emergency leave) and is required to reinstate the employee to the employee's former position, or to a comparable position if the former position no longer exists upon conclusion of the employee's leave. The requirement to reinstate does not apply if the employment of the employee is ended solely for reasons unrelated to the absences.

Q. Is the employee entitled to be compensated?

A. As stated in the previous answer, the employer is required to re-establish the employment relationship on March 19, 2020 (the day that the ESA was amended to provide for infectious disease emergency leave) and reinstate the employee at the end of the employee's leave (unless the exception to reinstatement applies). If the employer did not do so, an employment standards officer could order the employer to reinstate the employee at the end of the employee's leave and to pay compensation to the employee for, among other things, lost wages. It is Program policy that damage assessments do not include damages that arose prior to March 19, 2020.

Scenario: An employee was absent from work on or after January 25, 2020 but before March 19, 2020. The employee was absent for a reason listed in subclauses (i)-(vi) of s. 50.1(1.1)(b). During those absences, the employee used up some of the employee's:

- **vacation days,**
- **statutory leaves days (for example, sick leave or family responsibility leave),**
- **contractual leave days (for example, paid sick days or personal leave days).**

Q. Are those days credited back to the employee?

A. The Act does not require the employer to reinstate any vacation, statutory leave or contractual leave credits the employee used for pre-March 19, 2020 absences.

ESA Part XIV Section 50.1.1 - REIMBURSEMENT OF CERTAIN PAYMENTS MADE UNDER SECTION 50.1 – SECTION 50.1.1

Section 50.1.1 was introduced into the ESA by the *COVID-19 Putting Workers First Act, 2021* (CPWFA), effective April 29, 2021, at the same time that the CPWFA introduced a time-limited entitlement to paid infectious disease emergency leave into the ESA (see s. 50.1).

Section 50.1.1 establishes that employers may be reimbursed for certain infectious disease emergency leave pay payments made to employees pursuant to s. 50.1 of the ESA.

Section 50.1.1 provides that an eligible employer is entitled to be reimbursed, through the Workplace Safety and Insurance Board, the amount of infectious disease emergency leave pay paid to their employees, up to $200 per employee per day of paid infectious disease emergency leave taken.

An employer is **not** entitled to be reimbursed for payments made to an employee for paid infectious disease emergency leave under the *Employment Standards Act* (ESA) if either:

- the employee received WSIB benefits for the same days of leave
- the employer cancelled or rescinded the paid leave offered to their employees as part of an employment contract on, or **after**, April 19, 2021

In other words, an employer cannot cancel their employee's contractual entitlement to paid leave in order to take advantage of the employer reimbursement.

Reimbursement is **only** for infectious disease emergency leave pay under the ESA. Employers are not entitled to be reimbursed for vacation pay although employees are entitled to vacation pay for the wages they earn while on the paid leave. Employers are also not entitled to be reimbursed for public holiday pay that may have been paid to employees (see section 50.1 for more information on this).

Eligible employers make their application for reimbursement to the Workplace Safety and Insurance Board (WSIB) within 120 days of the date the employer paid the employee, or by April 30, 2022, whichever is earlier. The reimbursement program is not a WSIB program and is not funded by the WSIB's insurance fund. Eligible employers do not need to be registered with the WSIB in order to receive this reimbursement. Funding to administer the reimbursement program is provided by the Ministry of Labour, Training and Skills Development (MLTSD)

The provisions that establish the system for reimbursement are set out below. Information about the application process, criteria for reimbursement, and other aspects of the reimbursement system are available at https://ontario-covid19-worker-income-protection-benefit.ca/en.

Subsection 50.1.1(18) of the Act provides that an overpayment made by the WSIB may be recovered from the employer by the WSIB or by the Ministry of Labour, Training and Skills Development in accordance with the prescribed process. O. Reg. 637/21, which was made on September 3, 2021, prescribes the process by which an overpayment may be recovered. The text of the Regulation is set out at the end of this section.

Definition

50.1.1 (1) In this section,

"Board" means the Workplace Safety and Insurance Board, continued under subsection 159 (1) of the *Workplace Safety and Insurance Act, 1997*, despite the definition of "Board" in subsection 1 (1) of this Act.

Reimbursement for paid leave

(2) An employer may apply to the Board, in accordance with this section, to be reimbursed for payments made to an employee for paid leave taken under subsection 50.1 (1.2).

Same, maximum

(3) An employer is entitled to be reimbursed for payments made to an employee for paid leave taken under subsection 50.1 (1.2) up to a maximum of $200 per day, per employee.

Same, exclusion

(4) Despite subsection 50.1 (1.9), an employer is not entitled to be reimbursed for payments made to an employee on or after the day the *COVID-19 Putting Workers First Act, 2021* receives Royal Assent for a paid leave of absence under an employment contract in circumstances for which the employee would also be entitled to take a leave under subsection 50.1 (1.2).

Same, exclusion re change to employment contract

(5) If, under an employment contract that was in effect on April 19, 2021, an employee was entitled to a paid leave of absence in circumstances for which the employee would also be entitled to take a leave under subsection 50.1 (1.2), but due to a change to the employment contract on or after April 19, 2021, the employee is no longer entitled to some or all of the paid leave of absence that the employee was entitled to before the change, the employer is not entitled to be reimbursed for payments made to that employee for a paid leave of absence, whether the leave is taken under subsection 50.1 (1.2) or under the employment contract, to the extent that the employee was entitled to the leave of absence under the employment contract before the change.

Same, exclusion re payments made under the *Workplace Safety and Insurance Act, 1997*

(6) An employer is not entitled to be reimbursed for payments made to an employee for paid leave taken under subsection 50.1 (1.2) if the employee received benefits under the *Workplace Safety and Insurance Act, 1997* for the days of leave.

Application for reimbursement

(7) An application under this section shall be made by filing the following with the Board:

1. A completed application in the form approved by the Board.

2. An attestation, to be completed by the employer in the form approved by the Board that,

i. confirms that the employer made a payment to the employee for paid leave taken under subsection 50.1 (1.2),

ii. specifies the dates on which the leave was taken by the employee,

iii. specifies the date on which the payment was made and the amount of the payment made, and

iv. confirms that, on or after April 19, 2021, the employer was not otherwise required under an employment contract to make the payment to the employee.

3. A record of the payment made to the employee in the form approved by the Board.

4. Information about claims filed with the Board under the *Workplace Safety and Insurance Act, 1997* in respect of the employee.

5. Any other information required by the Board.

Time limit

(8) An application under this section shall be made within 120 days of the payment in respect of which the application is made.

Same, final date for application

(9) Despite subsection (8), no application under this section shall be made by an employer or accepted by the Board,

(a) after January 25, 2022;

(b) if a later date is prescribed for the purposes of subsection 50.1 (5.2), 120 days after that later date; or

(c) if an additional period is prescribed for the purposes of subsection 50.1 (5.3), 120 days after the last day of that period.

No determination if application incomplete

(10) The Board shall not make a determination regarding an employer's entitlement to reimbursement under this section if the employer's application does not meet the requirements of subsection (7) or is not filed within the time limits set out in subsections (8) and (9).

Determination of entitlement

(11) The Board shall make a determination regarding an employer's entitlement to reimbursement under this section after receiving the employer's application and shall advise the employer of its determination in writing after making its determination.

Same, payment

(12) If the Board determines that an employer is entitled to be reimbursed under this section, the Board shall pay the employer the amount to which the employer is entitled.

No right of reconsideration or appeal

(13) A determination made by the Board regarding an employer's entitlement to reimbursement under this section is not a final decision of the Board for the purposes of the *Workplace Safety and Insurance Act, 1997* and an employer has no right of reconsideration by, or appeal to, the

Board or the Workplace Safety and Insurance Appeals Tribunal in respect of a determination made by the Board under this section.

Hearing not required

(14) The Board is not required to hold a hearing when making a determination or exercising a power under this section.

No complaint

(15) Section 96 does not apply to a determination made by the Board under this section.

Overpayments

(16) If the Board pays an employer an amount in excess of the amount to which the employer is entitled under this section, the amount of the excess is an overpayment and is an amount owing under this Act.

Same

(17) If the Board pays an employer an amount under this section and the employee in respect of whom the employer was paid subsequently receives benefits under the *Workplace Safety and Insurance Act, 1997* for the days of leave for which the employer was paid, the amount of the payment to the employer is an overpayment and is an amount owing under this Act.

Same

(18) An overpayment made by the Board under this section may be recovered from the employer by the Board or the Ministry in accordance with the prescribed process.

Ministry to make payments to Board

(19) The Ministry shall make payments to the Board to defray the costs of administering this section, including the cost of payments made to employers and the administration costs of the Board.

Same, appropriation

(20) Money required to defray the costs of administering this section shall be paid out of the money appropriated by the Ministry from the Consolidated Revenue Fund for that purpose by the Legislature.

Repayment by Board

(21) On or before the prescribed date, the Board shall pay the Ministry any amounts paid to the Board under subsection (19) that are no longer required for the purpose of administering this section.

Same, payments not part of insurance fund

(22) Payments made to the Board under subsection (19) shall not form a part of the insurance fund that is administered by the Board under the *Workplace Safety and Insurance Act, 1997* and the Board shall not make any payments from the insurance fund for any purpose under this section.

Contract for services

(23) The Board may enter into a contract or agreement with any person for the purpose of administering this section.

Recordkeeping

(24) The Board shall maintain such records relating to the administration of this section as are required by the Ministry, including records that are necessary to verify applications and payments made under this section, and shall provide those records to the Ministry.

Collection and use of information

(25) The Board may collect and use personal information within the meaning of the *Freedom of Information and Protection of Privacy Act* for the purpose of administering this section.

Same

(26) The Board may use information collected under the authority of this section for the purpose of administering and enforcing the *Workplace Safety and Insurance Act, 1997*.

Same

(27) The Board may use information collected under the authority of the *Workplace Safety and Insurance Act, 1997* for the purpose of administering this section.

Disclosure of information

(28) Except as otherwise provided for in this section, the Board shall not disclose any information collected under the authority of this section unless authorized or required by law to do so.

False or misleading information

(29) No person shall provide false or misleading information under this section.

Same, disclosure to Director

(30) If the Board is of the opinion that false or misleading information has been provided by an employer in an application under this section, the Board shall disclose that information to the Director.

Investigation

(31) An employment standards officer or other prescribed person may investigate a possible contravention of this section.

Immunity

(32) No action or other proceeding for damages may be commenced against a member of the board of directors, or an officer or employee of the Board, for an act or omission done or omitted by the person in good faith in the execution or intended execution of any power or duty under this section.

O. Reg. 637/21: SECTION 50.1.1 OVERPAYMENT RECOVERY

Overpayment recovery process

1. (1) For the purposes of subsection 50.1.1 (18) of the Act, the process set out in sections 2 to 5 of this Regulation is prescribed as the process by which an overpayment made by the Workplace Safety and Insurance Board under section 50.1.1 of the Act may be recovered from an employer.

(2) Subsections 91 (1) to (10) and (11) to (13) of the Act apply with respect to inspections to

determine whether an overpayment was made by the Workplace Safety and Insurance Board to an employer.

Order to repay overpayment

2. (1) If an employment standards officer finds that an overpayment was made by the Workplace Safety and Insurance Board to an employer, the officer may order the employer to pay the amount of the overpayment to the Minister of Finance.

(2) An order issued under subsection (1) shall also require the employer to pay to the Director in trust an amount for administrative costs equal to the greater of $100 and 10 per cent of the overpayment.

(3) The order shall contain information setting out the nature of the overpayment or be accompanied by that information.

(4) The order shall be served on the employer in accordance with section 95 of the Act.

(5) Every employer against whom an order is issued under this section shall comply with it according to its terms.

Limitation period

3. (1) An employment standards officer shall not issue an order under section 2 more than four years after the date on which the overpayment was made by the Workplace Safety and Insurance Board to the employer.

(2) An employment standards officer shall not amend or rescind an order under section 2 after the last day on which the officer could have issued the order under subsection (1) of this section unless the employer against whom the order was issued consents to the rescission or

amendment.

Review

4. (1) An employer against whom an order has been issued under section 2 is entitled to a review of the order by the Board if, within 30 days after the day on which the order is served, the employer,

(a) applies to the Board in writing for a review; and

(b) pays the amount owing under the order to the Director in trust or provides the Director with an irrevocable letter of credit acceptable to the Director in that amount.

(2) The Board may extend the time for applying for a review under this section if it considers it appropriate in the circumstances to do so.

(3) The Board shall hold a hearing for the purposes of the review.

(4) The parties to the review are the employer against whom the order was issued and the Director.

(5) Subsections 116 (8) and (9), 117 (1) and (2), section 118 and subsections 119 (3) to (14) of the Act apply, with necessary modifications, with respect to a proceeding under this section.

(6) If an employer fails to apply for a review of an order issued under section 2 in accordance with subsection (1) of this section, the order becomes final and binding against the employer.

Collections

5. (1) Sections 125 to 127 and subsections 128 (1), (2), (4), (5) and (6) of the Act apply with respect to the collection of amounts owing under an order issued under section 2.

(2) Subject to subsection (3), a collector,

(a) shall pay any amount collected with respect to administrative costs to the Director;

(b) shall pay any amount collected with respect to an order under section 2 to the Minister of Finance; and

(c) may retain any amount collected with respect to the fees and disbursements.

(3) Despite subsection (1), if an amount is owing by an employer under an order issued under section 2 and an amount is also owing by the employer under an order issued under the Act to pay wages, fees or compensation, and the money collected by the collector is less than the full amount owing to all persons, the money shall be apportioned among those to whom it is owing under the order issued under the Act to pay wages, fees or compensation in the proportion each is owed and paid to them in accordance with subsection 128 (4) of the Act before any amount is apportioned in respect of the order issued under section 2.

ESA Part XIV Section 50.2 – Reservist Leave

Reservist Leave – ss. 50.2(1), (2)

50.2(1) An employee is entitled to a leave of absence without pay if the employee is a reservist and will not be performing the duties of his or her position because,

(a) the employee is deployed to a Canadian Forces operation outside Canada;

(b) the employee is deployed to a Canadian Forces operation inside Canada that is or will be providing assistance in dealing with an emergency or with its aftermath; or

(c) the prescribed circumstances apply.

(2) Participation, whether inside or outside Canada, in pre-deployment or post-deployment activities that are required by the Canadian Forces in connection with an operation described in clause (1) (a) is considered deployment to the operation for the purposes of that clause.

On December 3, 2007, the ESA 2000 was amended by the *Fairness for Military Families Act (Employment Standards and Health Insurance), 2007*, SO 2007, c 16 to create a new leave entitlement called reservist leave. This new standard gives an employee, who is a reservist, the right to a leave of absence if the employee will not be performing the duties of his or her position because the employee is

deployed to specified Canadian Forces operations. A "reservist" is defined as a member of the reserve force of the Canadian Forces as referred to in s. 15(3) of the *National Defence Act,* RSC 1985, c N-5.

Sections 50.2(1) and (2) provide that an employee who is a reservist will be entitled to the leave if:

1. The employee cannot perform the duties of their position because:
    - Of a deployment to a Canadian Forces operation outside Canada;
    - Of a deployment to a Canadian Forces operation inside Canada that is or will be providing assistance in dealing with an emergency or with its aftermath; or
    - Prescribed circumstances that may apply; or
2. The employee is participating in pre or post-deployment activities required by the Canadian Forces in connection with a Canadian Forces operation outside of Canada.

With respect to s. 50.2(1)(b), the term "emergency" is defined in s. 50.2(11) to mean:

- A situation or an impending situation that constitutes a danger of major proportions that could result in serious harm to persons or substantial damage to property and that is caused by the forces of nature, a disease or other health risk, an accident or an act whether intentional or otherwise; or
- A situation in which a search and rescue operation takes place.

At the time of writing, there are no prescribed circumstances that apply pursuant to s. 50.2(1)(c).

Section 50.2(2) states that the participation in pre-deployment or post-deployment activities that are required by the Canadian Forces in connection with an operation outside of Canada is considered deployment to the operation. This provision extends the period during which an employee is entitled to take reservist leave to include time engaged in any pre- or post-deployment activities required by the Canadian Forces in connection with an operation outside of Canada.

Restriction – s. 50.2(3)

50.2(3) An employee is not entitled to begin a leave under this section unless he or she has been employed by the employer for at least the prescribed period or, if no period is prescribed, for at least six consecutive months.

To be eligible for reservist leave, the employee has to have been employed by the employer for at least six consecutive months. As of the time of writing, no alternative period has been prescribed.

It is not necessary that the employee be actively working for all or any part of the qualifying period prior to commencing the leave. For example, the employee could be off receiving short-term disability benefits, on a Part XIV leave, on vacation, or on lay-off during the six month qualifying period. As long as there has been no break in the employment relationship within the preceding six month period, the employee is entitled to commence a leave.

Length of Leave – s. 50.2(4)

50.2(4) An employee is entitled to take leave under this section for the prescribed period or, if no period is prescribed, for as long as clause (1)(a) or (b) or the circumstances set out in a regulation made under clause(1) (c) apply to him or her.

Section 50.2(4) provides that an employee's entitlement to reservist leave lasts for the prescribed period or, if no period is prescribed, for as long clause (1)(a) or (b) or (c) apply to the employee. At the time of writing, there has been no period prescribed nor have circumstances been set out for the purposes of clause (1)(c) – therefore, the length of the leave will be as long as clause 50.2.1(a) or (b) applies to the employee (i.e., deployment to a Canadian Forces operation outside Canada or to one inside Canada that is dealing with an emergency or its aftermath. Note that s. 50.2(2) provides that participation in pre-deployment or post-deployment activities required by the Canadian Forces in connection with an operation outside of Canada is treated as deployment to such an operation for the purposes of s. 50.2(1)(a).

Advising Employer Re Start of Leave – ss. 50.2(5), (6)

50.2(5) An employee who intends to take a leave under this section shall give his or her employer the prescribed period of notice of the day on which he or she will begin the leave or, if no notice period is prescribed, reasonable notice.

(6) Despite subsection (5), if the employee must begin the leave before advising the employer, the employee shall advise the employer of the leave as soon as possible after beginning it.

Section 50.2(5) requires an employee who intends to take reservist leave to give their employer the prescribed period of notice of the day on which the employee will begin the leave or, if no notice period is prescribed, reasonable notice. At the time of writing, there has been no prescribed period of notice, therefore an employee is required to give their employer reasonable notice in advance that the employee intends to take reservist leave. In circumstances where that cannot be done, the employee is required pursuant to s. 50.2(6), to advise the employer as soon as possible after beginning the leave. The employee is required to advise the employer in writing pursuant to s. 50.2(10).

An employee does not lose their right to reservist leave if the employee fails to comply with ss. 50.2(5) or (6). An employee's entitlement to reservist leave arises where an employee meets the qualifying conditions in s. 50.2(1). It is the Program's position that the failure to advise the employer before or as soon as possible after the leave begins does not negate that entitlement. This approach is consistent in the context of the other statutory leaves, where the structure of the entitlement and notice provisions are similar to these. See for example ESA Part XIV, ss. 46(4) and 48(4).

Similarly, the question may arise as to whether an employer can penalize an employee for failing to give advance notice that the employee will be absent from work (as may be required under an employer policy), where the time off is a reservist leave under the ESA 2000. Section 50.2 sets out the conditions for an employee's eligibility for reservist leave. Section 50.2(5) requires the employee taking reservist leave to advise the employer that the employee is taking the leave, and s. 50.2(6) provides that "if the employee must begin the leave before advising the employer, the employee shall advise the employer of the leave as soon as possible after beginning it." It is clear from s. 50.2(6) that the Act contemplates situations where the employee would be unable to advise the employer in advance of commencing the reservist leave - however, it also clear from s. 50.2(5) that an employee who can give advance notice must do so. Consequently, the failure to give notice in advance of taking leave, when it would have been possible for the employee to do so, can be the subject of disciplinary action by the employer without violating s. 74. However, the following points should be borne in mind:

- The employee's failure to give advance written notice would not be a lawful basis on which to deprive the employee of the right to take the leave if the qualifying conditions in s. 50.2(1) have been met. An employer could not, for example, take the position that failure to give advance

notice when it would have been possible for the employee to do so will result in the time taken off not be considered as reservist leave.

- Any discipline for failing to provide notice in situations where such notice is required under s. 50.2(5) (i.e., where s. 50.2(6) does not apply) would have to be appropriately linked to the failure to give advance written notice and must not, in effect penalize the employee for exercising the right to leave. The motive for any discipline that the employer does impose must clearly be the employee's failure to give advance written notice and not the taking of the leave itself.

In addition, where s. 50(2)(6) does apply, an employer would be able to impose discipline if an employee fails to provide written notice of the reservist leave after the leave commences, or if the employee provides notice of the leave so late that one would not reasonably be able to say that it falls within s. 50.2(6). However, the employer's disciplinary action would have to be appropriate, and in no way a penalty or reprisal for the employee having taken the leave, but only for the failure to give notice.

Evidence of Entitlement – ss. 50.2(7), (8)

50.2(7) An employer may require an employee who takes a leave under this section to provide evidence that the employee is entitled to the leave.

(8) When evidence is required under subsection (7), the employee shall,

(a) provide the prescribed evidence, or evidence reasonable in the circumstances if no evidence is prescribed; and

(b) provide the evidence at the prescribed time, or at a time reasonable in the circumstances if no time is prescribed.

Section 50.2(7) gives an employer the ability to require an employee to provide proof that the employee is or was entitled to take reservist leave. Where an employer does require evidence, section 50.2(8) states that the employee shall:

- Provide the prescribed evidence, or evidence reasonable in the circumstances if no evidence is prescribed; and
- Provide the evidence at the prescribed time, or at a time reasonable in the circumstances if no time is prescribed.

At the time of writing, there has been no prescribed evidence or prescribed time. Therefore, where evidence is required, it must be evidence that is reasonable in the circumstances. Evidence of entitlement to reservist leave may be a document, notice or other kind of confirmation from the Canadian Forces that one of the qualifying conditions set out in s. 50.2(1) applies to the employee. The evidence that would be considered "reasonable in the circumstances" will depend upon all of the circumstance in any given situation.

Further, the employee is obliged to provide the evidence at a time that is reasonable in the circumstances. The corollary of this is that timelines imposed by the employer for providing such evidence must be reasonable in the circumstances.

Advising Employer Re End of Leave – s. 50.2(9)

50.2(9) An employee who intends to end a leave taken under this section shall give his or her employer the prescribed period of notice of the day on which he or she intends to end the leave or, if no notice period is prescribed, reasonable notice.

Section 50.2(9) requires an employee who has taken reservist leave and intends to end the leave, to give their employer the prescribed period of notice of the day on which the employee intends to end the leave, or if no notice period is prescribed, reasonable notice. At the time of writing, no period of notice has been prescribed; therefore an employee shall give their employer reasonable notice in advance of the day on which the employee intends to end the leave. The employee is required to advise the employer in writing pursuant to s. 50.2(10).

Note however that pursuant to s. 53(1.1), an employer of an employee who has been on a reservist leave may postpone the employee's reinstatement until:

1. A prescribed day; or
2. If no day is prescribed, the later of,
    - The day that is two weeks after the day on which the leave ends; and
    - The first pay day that falls after the day on which the leave ends.

Consequently, even though an employee has provided notice of their intended return date from leave in accordance with s. 50.2(9), the employer may postpone the employee's reinstatement under s. 53(1.1). As no day has been prescribed under s. 53(1.1)(a), the employer may postpone the reinstatement to the later of the day that is two weeks after the day the leave was to end or, the first pay day that falls after the day on which the leave was to end as per the employee's notice.

Written Notice – s. 50.2(10)

50.2(10) Notice under subsection (5), (6) or (9) shall be given in writing.

Section 50.2(10) requires that notice under s. 50.2(5) and (6) (advising the employer regarding start of leave) and s. 50.2(9) (advising the employer re: end of leave) must be given in writing. This is in contrast to the requirement to advise the employer in the sick leave, family responsibility leave or bereavement leave contexts. In those contexts, the notice may be given in writing or orally.

Definition, Emergency – s. 50.2(11)

50.2(11) In clause (1) (b),

"emergency" means,

(a) a situation or an impending situation that constitutes a danger of major proportions that could result in serious harm to persons or substantial damage to property and that is caused by the forces of nature, a disease or other health risk, an accident or an act whether intentional or otherwise, or

(b) a situation in which a search and rescue operation takes place.

Section 50.2(11) defines what "emergency" means in s. 50.2(1)(b) with respect to Canadian Forces operations inside Canada. Example of emergencies that could meet the requirements under s. 50.2(1)(b)

are Canadian Forces search and rescue operations and operations to provide assistance in dealing with natural disasters or their aftermath.

Transition – s. 50.2(12)

50.2(12) This section applies only if,

(a) the deployment described in subsection (1) begins on or after the day the *Fairness for Military Families Act (Employment Standards and Health Insurance), 2007* receives Royal Assent; and

(b) notice under subsection (5) or (6) is given on or after the day described in clause (a).

Section 50.2(12) states that the reservist leave provisions only apply if the deployment described in s. 50.2(1) began on or after December 3, 2007, the day the *Fairness for Military Families Act (Employment Standards and Health Insurance), 2007* received Royal Assent and further requires that notice of the leave be given on or after that date, in accordance with ss. 50.2(5) or (6).

As a consequence of this provision, an employee is not entitled to reservist leave in respect of a deployment that commenced before December 3, 2007.

ESA Part XIV Section 51 - Rights During Leave

Rights During Leave - s. 51(1)

51(1) During any leave under this Part, an employee continues to participate in each type of benefit plan described in subsection (2) that is related to his or her employment unless he or she elects in writing not to do so.

This section allows an employee on a Part XIV leave to continue to participate in all the types of plans listed in s. 51(2), unless he or she elects in writing not to do so. In other words, unless the employee advises in writing to the contrary, the employer must assume that the employee will continue to participate in the benefit plans, and therefore both the employer and the employee will continue to make their respective contributions.

Special rules apply to reservist leave - see ss. 51(4) and (5) below.

The employee on leave continues to participate in the specified benefit plans, even if all the employees in the employee's department are laid off, go on strike, or are locked out while he or she is on leave, and the benefits of those other employees are cut off. He or she has the right to have the employer pay its share of the contributions during the entire leave - subject to the provisions of s. 51(3).

An employee may already be on lay-off, on strike or locked out when he or she commences the leave, and his or her benefits may have been suspended when the lay-off, strike or lock-out began. However, when the employee begins the leave, he or she has the right to begin participation again in the benefit plans and require the employer to pay its share of the contributions during the entire leave - subject to the provisions of s. 51(3).

Note: participation in certain benefit plans is fundamentally different from the right to continue to accrue credit for length of service (and seniority and length of employment) during a leave, as provided in s. 52. Typically, the right to ongoing participation in a benefit plan is not a function of length service, length of employment or seniority. It is simply an arrangement for the payment or sharing of the payment of a

premium. As a result, the rights to continue to participate in these plans are set out separately from the right to accrue service (and seniority and length of employment) while on leave.

However, the right to begin participating in a benefit plan may be tied to length of service or length of employment. It is not unusual, for example, for the terms of a benefit plan to require the employee to have been employed for three months or to have completed three months of service before he or she will be eligible for benefits under the plan. In that case, time spent on leave would count towards the length of service or length of employment required for participation in the plan.

Benefit Plans - s. 51(2)

51(2) Subsection (1) applies with respect to pension plans, life insurance plans, accidental death plans, extended health plans, dental plans and any prescribed type of benefit plan.

Under s. 51(1), an employee who is on a Part XIV leave (with some exceptions that apply to reservist leave - see s. 51(4) and (5)) has the right to continue to participate in certain benefit plans. This section lists the plans to which s. 51(1) applies:

- Pension plans;
- Life insurance plans;
- Accidental death plans;
- Extended health plans;
- Dental plans;
- Any other plans that are prescribed by regulation (as of the date of writing, no other plans have been prescribed).

There are no specific definitions of these plans for the purposes of Part XIV (Leaves of Absence). However, the terms "pension plan" and "life insurance plan" are defined in s. 1 of O Reg 286/01, and it may be helpful to refer to those definitions should an issue arise as to whether a plan is a pension plan or an insurance plan.

Subsection 51(2) itself gives an employee the right to continue to participate only in the types of plans listed in the subsection. If the employer provides other types of plans, it would not be a violation of the subsection for the employer to discontinue the employee's participation in those plans for the length of the leave. The most significant types of plans that are not listed in this section (and that are often provided by employers) are short-term and long-term disability plans. However, s. 51(1) should be read in conjunction with s. 10 of O Reg 286/01, which provides as follows:

10 (1) A benefit plan to which Part XIII of the Act applies shall not disentitle an employee who is on a leave of absence described in subsection (2) from continuing to participate in the benefit plan during the leave of absence, if the benefit plan entitles an employee who is on a leave of absence other than one described in subsection (2) to continue to participate.

(2) This subsection applies to,

(a) a leave of absence under Part XIV[1] of the Act; and

(b) any longer leave of absence that the employee has applied for under a provision in the contract of employment that prevails under subsection 5(2) of the Act.

The effect of s. 10 of O Reg 286/01 is to require short-term and long-term disability benefits to continue to be provided to employees on Part XIV leave (and any longer leave that constitutes a "greater right or benefit" under s. 5(2) of the Act) if the employer's plan provides such benefits to employees on leaves other than Part XIV leaves (e.g., education leave). (Note that all references to a Part XIV leave in this and the next paragraph include a leave that constitutes "a greater right or benefit".) Only if the plan denies access to disability benefits during non-Part XIV leaves can the employee be denied access to disability benefits while on a Part XIV leave.

Further, even in this latter case (where a plan denies access to disability benefits during non-Part XIV leaves and s. 10 of O Reg 286/01 therefore does not apply), a female employee on a pregnancy or parental leave can access short-term and long-term disability benefits that she would have had access to had she not been on a pregnancy or parental leave during that portion of the leave in which she is unable to work for health reasons related to pregnancy or childbirth. This is because of the Supreme Court of Canada decision in *Brooks v Canada Safeway Ltd.,* [1989] 1 SCR 1219, 1989 CanLII 96 (SCC), in which the Court held that because discrimination on the basis of pregnancy is discrimination on the basis of sex, it is discriminatory to deny women short-term or long-term disability benefits that they otherwise would have been entitled to had they not been on the leave during that portion of a leave in which they are unable to work for health-related reasons related to pregnancy or childbirth, as these constitute a valid-health related reason for an absence from work. As a result, it would constitute discrimination on the basis of sex to deny a female employee disability benefits for that period of the leave. For other court decisions respecting the right to disability benefits for female employees during the "health related" portion of a pregnancy leave, see *Alberta Hospital Association v Parcels*, 1992 CanLII 6106 (AB QB) and *O.S.S.T.F., District 34 v. Barton*.

Note that this requirement to permit a female employee on a pregnancy or parental leave access to short-term and long-term disability benefits during that portion of the leave that she is unable to work for health reasons related to pregnancy or childbirth applies only if the employee would otherwise have had access to the plan had she not been on leave. If the employee could not have had access even if she had not gone on leave, there would be no requirement to provide plan benefits. Consider the example of an employer who offers only a modest short-term disability plan (say, three days per year) and no long-term plan who closes its operations from November to March every year. The employer puts all of its employees on temporary lay-off during this time, and discontinues its provision of short-term disability benefits for all employees during the lay-off. If an employee began her pregnancy leave on December 1, it would not be a violation of the Act if she cannot access the disability benefits for the portion of her leave in which she is unable to work for health reasons related to pregnancy and childbirth, because she would not have had access to those benefits even if she had not taken leave.

[1] Although s. 10(2)(a) refers to all leaves of absences under Part XIV, it must be noted that s. 51(4) provides specifically that employees on reservist leave do not continue to participate in the plans listed in s. 51(1). It is the Programs position that s. 10 of O Reg 286/01 cannot be used to provide a right to such plans to those employees. However, where an employer provides other types of benefit plans (other than the plans enumerated in s. 51(2)), to employees on a leave other than a leave under Part XIV (*e.g.* education leave), then s. 10 would operate to entitle employees on a reservist leave to participate in those other plans.

Employer Contributions - s. 51(3)

51(3) During an employee's leave under this Part, the employer shall continue to make the employer's contributions for any plan described in subsection (2) unless the employee gives the employer a written notice that the employee does not intend to pay the employee's contributions, if any.

Pursuant to this provision, an employer will be relieved of the obligation to make the employer portion of contributions to the benefit plans listed in s. 51(2) only if the employer has obtained a written notice from the employee that he or she will not be paying his or her portion of the contributions. (This provision must be read in conjunction with s. 51(4) and (5), which establishes special rules for reservist leave.)

Although, generally, obtaining the written notice that the employee will not make contributions is an administrative problem for the employer rather than a matter of interpretation under the *Employment Standards Act, 2000*, an officer may have to determine whether such a notice might have been obtained under duress.

An employer may find it helpful to provide employees with sufficient information to enable the employee to make an informed decision to continue paying the contributions to reduce the possibility of a claim that the employee was "tricked" into giving the notice.

Example 1

Employee A gives the employer written notice that she does not intend to continue paying her share of the contributions, if any, during her pregnancy and parental leave. The employer will not continue its share during the leave and A's coverage will lapse during the leave. The group insurance plan may also require that A, after the end of her leave, undergo a waiting period before becoming re-enrolled in the plan.

Example 2

Employee B gives the employer written notice that he wishes to pay his share of the contributions to continue coverage during his parental leave (or does not give any notice at all), but B turns out to be unable to pay the contributions during the leave. The employer may pay both the employer and employee share during the leave and then, with B's written authorization, deduct B's share of the contributions from his wages after he returns to work. If the employer does not pay both the employer's and B's shares in this manner, the employer will, in the case of non-pension benefits, pay both the employer's and B's share, but for a pro-rated portion of the leave. For example, if the employer's share is 50 per cent, the employer would pay 100 per cent, but only for half of the leave. There would be no coverage during the second half of the leave and the employee may be required to undergo a waiting period after the end of the leave before becoming re-enrolled in the plan. With pension benefits, the employer would pay its share during the whole leave, and B, to the extent that the plan allowed, would have the right to make up his share after the leave.

Contribution Calculations

If the employer's benefit plan contributions are a percentage of the employee's wages, the employer is still obligated to make contributions during the leave, even though the employee is not receiving any wages from the employer during that time. The amount of the contributions would be determined with reference to the wage rate that the employee received prior to going on leave. If this prior wage rate

fluctuated and the employment contract did not stipulate how contributions are to be determined, a reasonable average should be calculated in order to determine the base on which the contributions are computed. Officers may consider it appropriate to calculate the average regular wage over the 12 weeks, a period used in the context of Part XV of the Act (Termination and Severance of Employment), preceding the commencement of the leave. Where a wage increase is given to other employees during the leave and the employee would have received such an increase if he or she had not gone on leave, the employer contributions during the leave in regards to the employee should be adjusted upwards to reflect the increase.

Some employers do not offer benefit plans. Rather, they pay directly to the employee some amount of money instead of making contributions to a plan. These are often known as "percentage in lieu of benefits" arrangements. As such payments are not contributions to a benefit plan, an employer is not required to continue making them during the course of a Part XIV leave.

Annual contributions to group Registered Retirement Savings Plans ("RRSP") are limited to an amount related to wages received. The continuation of contributions to a group RRSP while an employee is on leave and not receiving any wages may result in an over-contribution to the plan. This possible result does not absolve the employer of its obligation to continue contributions throughout the leave. If an over-contribution does result, the recovery rules of the plan or of the Canada Revenue Agency ("CRA") will apply. However, where employees are participating in deferred profit-sharing plans, CRA has the authority to revoke the plan when contributions exceed the maximum allowable. Therefore, Program policy is that employers may cease making contributions to these plans, but only once they reach the maximum amount allowable under CRA rules.

If the employer is a member of a Multi-Employer Benefit Plan, and contributions are not required to be made to the plan in order to continue the employee's coverage during the leave, the employer will still be required to make contributions during the leave, except in cases where the employee is not required to draw on his or her benefit credits, if any, during the leave.

Reservist Leave - ss. 51(4), (5)

51(4) Subsections (1), (2) and (3) do not apply in respect of an employee during a leave under section 50.2, unless otherwise prescribed.

(5) Despite subsection (4), subsections (1), (2) and (3) apply in respect of an employee during a period of postponement under subsection 53 (1.1), unless otherwise prescribed.

An employee who is on a statutory leave other than reservist leave continues to participate in all types of benefit plans listed in s. 51(2) (e.g., pension plans, life insurance plans, accidental death plans, extended health plans, and dental plans) unless he or she elects not to do so. Pursuant to s. 51(4), an employee on reservist leave does not have the right to continue to participate in such benefit plans and the employer is not required to make contributions to the specified plans during an employee's reservist leave. However, if an employer elects to postpone the employee's return date pursuant to s. 53(1.1) (see ESA Part XIV s. 53 for a discussion), s. 51(5) entitles an employee to resume participating in the plans during the postponement period, unless he or she elects not to do so, and correspondingly requires the employer to resume making its contributions to the plans.

The special rules regarding benefit plan participation during reservist leave and the postponement period set out in ss. 51(4) and (5) apply unless otherwise prescribed. At the time of writing, no other rules had been prescribed.

ESA Part XIV Section 51.1 – Leave and Vacation Conflict

Leave and Vacation Conflict – s. 51.1(1)

51.1(1) An employee who is on leave under this Part may defer taking vacation until the leave expires or, if the employer and employee agree to a later date, until that later date if,

(a) under the terms of the employee's employment contract, the employee may not defer taking vacation that would otherwise be forfeited or the employee's ability to do so is restricted; and

(b) as a result, in order to exercise his or her right to leave under this Part, the employee would have to,

- **i. forfeit vacation or vacation pay, or**
- **ii. take less than his or her full leave entitlement.**

This provision was introduced by the ESA 2000. It addresses the situation where an employment contract places restrictions on the ability to defer taking vacation entitlements, such that a conflict between the right to vacation and the right to take a Part XIV leave is created. Specifically, it applies where an employment contract restricts or forbids the deferral of taking vacation, and, as a result, an employee on a Part XIV leave would have to either take less than their full Part XIV leave entitlement or give up some or all of their vacation or vacation pay entitlement under an employment contract. In this case, the employee has the option of deferring taking the vacation until the leave is over, or to a later date agreed upon in writing by the employer and employee. See ESA Part I, s. 1(3) and s. 1(3.1) for more information on agreements in writing. Section 51.1(2) addresses conflicts between vacation and Part XIV leaves that arise because of the statutory deadline for taking vacation. See subsection (2) below.

For example, an employment contract provides an employee whose period of employment is less than five years with three paid weeks of vacation per year. With respect to the one week that is over and above the ESA 2000's minimum standards, the contract has a "use it or lose it" clause that stipulates the extra week of vacation must be used by December 31 of each year. A recently hired employee is on a combined pregnancy and parental leave from July 1, 2018, to July 1, 2019. She had not taken any of the extra week of vacation before going on leave. Section 51.1(1) provides that the employee has the option of taking that extra week when her leave ends on July 1, 2019, or to a later date if she and the employer agree.

This section should be read in conjunction with s. 51.1(3), which allows an employee to forego vacation time (but not vacation pay), if the employee's employer agrees (in writing) and the Director of Employment Standards approves the agreement. See subsection (3) further below.

Leave and Completion of Vacation Conflict – s. 51.1(2)

51.1(2) If an employee is on leave under this Part on the day by which his or her vacation must be completed under paragraph 1 of section 35 or paragraph 1 of subsection 35.1(2), the uncompleted part of the vacation shall be completed immediately after the leave expires or, if the employer and employee agree to a later date, beginning on that later date.

This provision addresses the situation where the s. 35 or s. 35.1 deadline for taking vacation entitlements under the ESA 2000 comes up while an employee is on a Part XIV leave. In this case, the vacation is to be taken immediately upon the expiry of the leave, or, if the employer and employee agree in writing on a

later date. See ESA Part I, s. 1(3) and s. 1(3.1) for more information on agreements in writing. Section 51.1(1) addresses conflicts between vacation and Part XIV leaves that arise because of contractual restrictions on deferring vacation entitlements - see subsection (1) above.

For example, an employee is entitled to two weeks of vacation provided for in s. 33 (1) of the ESA 2000. The employee started work on January 1, 2016. The deadline for completing the vacation earned from January 1, 2016, to December 31, 2016, is, pursuant to s. 35, October 31, 2017. The employee is on a combined pregnancy and parental leave from February 1, 2017, to January 31, 2018 (however, note that a combined pregnancy and parental leave may be longer than 52 weeks, up to a maximum entitlement of 78 weeks). She had not taken any vacation prior to her leave. Section 51.1(2) provides that the two weeks of vacation will be taken immediately after her leave expires, i.e., the two weeks' vacation must start on February 1, 2018. If the employee and employer agree in writing, the employee can take her vacation at a later date.

This section should be read in conjunction with s. 51.1(3), which allows an employee to forego vacation time (but not vacation pay), if the employee's employer agrees (in writing) and the Director of Employment Standards approves the agreement. See subsection (3) below.

Alternative Right, Vacation Pay – s. 51.1(3)

51.1(3) An employee to whom this section applies may forego vacation and receive vacation pay in accordance with section 41 rather than completing his or her vacation under this section.

This provision was introduced by the ESA 2000. It provides that an employee to whom s. 51.1 applies (i.e., an employee on a Part XIV leave whose leave creates a conflict with his or her vacation rights) can, instead of taking his or her vacation at the end of the leave (or at a later date agreed to with the employer) as provided for in s. 51.1(2) and (3), forego the vacation time and receive only the vacation pay. This alternative right can only be exercised in accordance with s. 41 of the ESA 2000, i.e., if the employer agrees in writing to the plan, and the Director of Employment Standards approves the agreement. See ESA Part I, s. 1(3) and s. 1(3.1) for more information on agreements in writing.

ESA Part XIV Section 52 – Length of Employment

Length of Employment – s. 52(1)

52(1) The period of an employee's leave under this Part shall be included in calculating any of the following for the purpose of determining his or her rights under an employment contract:

1. The length of his or her employment, whether or not it is active employment.

2. The length of the employee's service, whether or not that service is active.

3. The employee's seniority.

Section 52(1) requires employers to give employees on Part XIV leave credit toward length of employment, length of service and seniority for the purpose of determining the employee's rights under an employment contract. This provision should be read in conjunction with the exception contained in s. 52(2) of the ESA 2000 regarding completion of probationary periods.

In other words, if rights or other entitlements are earned by way of length of employment, length of service or seniority, these rights or entitlements will continue to accrue during periods of Part XIV leave.

An attempt to exclude periods of Part XIV leave from the calculation of length of service, seniority and length of employment and corresponding entitlements to rights or benefits will be considered null and void, as an attempt to contract out of the ESA 2000. A proration clause will be void if its effect is to remove the period (or portion thereof) of Part XIV leave from the calculation of length of service, seniority or length of employment and by extension, reduce an entitlement that normally accrues through length of service, seniority or length of employment. It may even be considered an attempt to penalize the employee for having exercised the right to leave and thereby constitute a violation of s. 74 of the ESA 2000.

Note, however, that in the context of the requirement that time spent on leave be included when determining the employee's length of service, it is the policy of the Program that employees will earn credit only for length of service, but not for service itself, i.e., the employee is not treated as if they had actually been at work during the leave. This reflects a change in past policy. For more details, see the discussion under the heading "Vacation Entitlements" further on in this section.

History

Section 42(4) of the former *Employment Standards Act*, which was the predecessor to s. 52(1) of the ESA 2000, was amended effective December 1, 1996, by the *Employment Standards Improvement Act, 1996*, SO 1996, c 23. The earlier version of s. 42(4) read as follows:

42(4) Seniority continues to accrue during pregnancy leave or parental leave.

The amendment codified the Program's original policy position (held between December 1990 and November 1995) regarding the interpretation of the word "seniority" in the pre-1996 version of s. 42(4). During that period, the Program took the view that seniority included the concept of service and, therefore, employees accrued not only seniority but also credit for service during periods of pregnancy and parental leave. However, that interpretation was not supported by adjudicators and referees, and the policy was changed on November 15, 1995. From November 15, 1995, until s. 42(4) was amended by the *Employment Standards Improvement Act, 1996* on December 1, 1996, the Program's position was that the word seniority could not be interpreted to include the concept of "service".

On December 1, 1996, the "new" s. 42(4) came into force, specifically requiring employers to credit employees not only for seniority but also for length of service (as well as "length of employment") during periods of pregnancy and parental leave (the only two leaves available under the ESA 2000 at that time).

Calculation of Service – Transitional Issues

All employees on leave as of December 1, 1996, began accruing credit for length of service as of that date, even though the leave commenced prior to that date. For example, an employee who was on a leave from August 1, 1996, to February 1, 1997, would not receive any credit for length of service for the period August 1 to November 30, 1996, but would accrue such credit for the period December 1, 1996, to February 1, 1997.

In this example, the employee also accrued credit for seniority and length of employment for the entire period of leave (August 1, 1996 to February 1, 1997).

The phrases in paragraphs 1 and 2 and s. 52(1), "whether or not it is active employment" and "whether or not that service is active" indicate that for purposes of contractual provisions that refer to, say, "length of active employment" or "length of active service", time spent on a Part XIV leave will be counted in determining the employees length of active employment or length of active service, even though the period of an employee's pregnancy or parental leave, for example, might not ordinarily be considered to be a period of active employment or active service. The effect is that the employer cannot prorate entitlements that are dependent upon length of employment or length of service because the employee was not working during the period of leave.

For example, a contract provides that employees who have provided "two years of active service" are eligible for a Christmas bonus. A two-year employee who was away on pregnancy and parental leave for one of those two years will be eligible for the bonus. (Note: it does not matter if the bonus falls within the definition of wages in s. 1 of the ESA 2000 or not. Any entitlement driven by length of service, length of employment or seniority continues to accrue under this section).

However, the contract further provides that the amount of the bonus is to be calculated as a percentage of wages earned during the last two years. Where the amount of the bonus is calculated as a percentage of wages earned, the bonus could be reduced proportionally to reflect the fact that the employee only worked for part of that period.

Length of Employment

The Program has always taken the position that statutory leaves had no impact on an employee's length of employment, because a leave did not sever the employment relationship. The employee remained "employed" during the leave, even though they were not actively at work. Entitlements or rights that were earned after the employee had been employed for a specified length of time were therefore unaffected by the fact that an employee had taken a leave. Section 52(1) confirms this policy position and also precludes prorating rights or entitlements by using language in the contract that attempts to distinguish between "active" and "inactive" periods of employment.

Length of Service

Section 52(1) also precludes employers from prorating rights or entitlements that are dependent on the length of an employee's service under a contract of employment. Whereas length of employment is generally understood to mean the length of time elapsed since the date of hire, "length of service" is more likely to mean the period that an employee is providing services to the employer. Where an entitlement under an employment contract is dependent upon length of service, s. 52(1) requires that the time an employee spent on a Part XIV leave be included, even though they were not actually working during the leave period. Contract language that attempts to exclude inactive service from the calculation of length of service will be ineffectual.

Seniority

Seniority is a term frequently used in collective agreements and will often determine such things as order of lay-off or recall, or confer entitlements to job promotions and increases in annual vacation entitlements.

Under s. 52(1), entitlements that accrue through "seniority" under a contract will continue to accrue during periods of Part XIV leave.

Vacation as per Part XI of ESA 2000

Under Part XI of the ESA 2000, vacation is composed of two separate elements – vacation time and vacation pay.

Vacation Time:

Vacation time accrues on the basis of completion of a vacation entitlement period. Under s. 33(1), employees whose period of employment on completion of a vacation entitlement year is less than five years are entitled to two weeks of vacation after each vacation entitlement year and employees whose period of employment on completion of a vacation entitlement year is more than five years are entitled to three weeks of vacation after each vacation entitlement year. Under s. 34(2) and (3), employees whose period of employment on completion of a stub period is less than five years are entitled to a pro-rated amount of two weeks of vacation time and employees whose period of employment on completion of a stub period is more than five years are entitled to a pro-rated amount of three weeks of vacation time in respect of the stub period.

Section 33(2) and s. 34(4) provide that inactive as well as active periods of employment be included in the 12-month vacation entitlement year for the purpose of determining an employee's entitlement to vacation time. Consequently, an employee who takes a Part XIV leave during a vacation entitlement year will still have completed 12 months of employment during a vacation entitlement year even if they were not at work for much of that time, as the case may be in the context of a combined pregnancy and parental leave. In addition, the period of time spent on leave will count towards the employee's period of employment for the purposes of determining the amount of vacation (two or three weeks) to which the employee is entitled.

Vacation Pay:

Vacation pay is calculated under s. 35.2 of the ESA 2000 as a percentage of gross wages excluding vacation pay earned in the period during which the vacation time was earned. Employees who are not earning wages (which will include employees on pregnancy and parental leave under Part XIV) will not have earned any vacation pay during their leave.

Example 1

An employee whose period of employment is more than five years is entitled to three weeks of vacation after each year of employment and vacation pay at 6% of gross wages earned in that year. If the employee was on pregnancy and parental leave for all 52 weeks of the year (), they would be entitled to three weeks' vacation time at the end of the year but her vacation pay, calculated as 6% of the wages earned in the year, would amount to zero.

Example 2

The contract of employment provides a greater right or benefit than the minimum standard for vacation by giving the employee four weeks of vacation after each year of employment and vacation pay at 8% of gross wages earned in that year. This greater right is enforced as per s. 5(2) of the ESA 2000. If the employee was on a Part XIV parental leave for 37 weeks of the year, he would be entitled to the full four weeks of vacation time at the end of the year; however, the vacation pay would be just 8% of the wages earned during the 15 weeks the employee was not on leave (because the employee was not earning wages during the 37 weeks of leave).

Vacation Time Earned Through Service and Vacation Pay Earned as a Percentage of Wages

As noted earlier, it is now the policy of the Program that employees who are on Part XIV leave will earn credit for length of service; they are not earning credit for the service itself. In other words, the employee is not treated for all purposes as if they had actually been at work providing service throughout the leave, but only for purposes of those rights that depend upon length of employment or length of service. The impact of this policy change may be seen where vacation time is earned through service during the year rather than "length of service" or length of employment (which would be measured from when service or employment first began).

Example

The contract of employment provides that employees whose period of employment is less than five years are entitled to three weeks of vacation for every year of service (i.e. it is driven by service, rather than "length of service") and accrue vacation pay at the rate of six per cent of gross wages. The employee was on parental leave for 37 weeks in a year.

Vacation Time

Because the employee is not providing service during the leave, the employment contract would result in vacation time off being calculated as follows: 3 weeks x (15 weeks worked divided by 52 weeks) = .87 weeks of vacation time accrued.

Although, on its face, the vacation time provisions of the contract of employment might appear at first to provide a greater right or benefit than the employment standard set out in s. 33(1)(a) of the ESA 2000, in our example, the contract does not in fact provide a greater right or benefit. Consequently, the employment standard in s. 33(1)(a) should be applied to provide the employee with two weeks of vacation time for the vacation entitlement year.

Previously, under the former *Employment Standards Act*, it was the policy of the Program that the employee would be entitled to the full three weeks of vacation time in this example, because the policy was that the employee was to be credited for service during the leave for all purposes, i.e., the employer could not pro-rate the employee's entitlement because they had to be treated as if the employee had actually worked through the leave. The Program's position now under the ESA 2000 is that the employee earns credit for length of service, but not for service per se, i.e., the employee is not treated for all purposes as if they had actually been at work during the leave.

Vacation Pay

In this example, the employee's vacation pay entitlement under the employment contract is 6% of the wages he earned during the 52 weeks. This would be a greater right or benefit than the employment standard set out in ESA Part XI, s. 35.2, and thus would prevail. As the employee only earned wages for 15 weeks of the year, his vacation pay would be a little less than one week's pay, i.e. 6% of the 15 weeks' wages.

Vacation Time and Vacation Pay Earned Through Service

Some contracts of employment provide for "paid vacations" earned through service. In these contracts, both vacation time and vacation pay are earned together as a function of service. Once again, the new policy of the Program is that employees who are on leave will earn credit for length of service but they are not earning credit for the service itself. In other words, the employee is not treated for all purposes as if they had been actually at work throughout the leave, but only for purposes of rights that depend upon length of employment or length of service. Where both vacation time and vacation pay are earned

through service, the determination must be made as to whether the contractual provisions provide the employee with a greater benefit than the employment standards in ESA Part XI, s. 33 (1)(a) or s. 33(1)(b), s. 34(2) or s. 34(3) and s. 35.2.

Example

An employee is on pregnancy and parental leave for 39 weeks during a vacation entitlement year. The employment contract states that employees are entitled to 1.5 paid vacation days for each month of active service during the year (18 days per year). Under the contract, the calculation of her vacation time for the year in which they took the leave would be as follows: 3 months (i.e. 52 weeks minus 39 weeks = 13 weeks = 3 months) x 1.5 vacation days = 4.5 paid vacation days.

Vacation Time:

Because the employee is not credited with actual service during the leave (only "length of service" as per s. 52(1)), the vacation entitlement under the contract is only 4.5 vacation days. Since this is less than what the ESA 2000 provides, the contract will not prevail over the ESA 2000. Consequently, the employment standard in s. 33(1) should be applied to provide the employee with two weeks or three weeks of vacation time for the vacation entitlement year as determined by her period of employment upon completion of the vacation entitlement year.

Vacation Pay:

The 4.5 days of vacation pay would likewise have to be compared to the minimum entitlement under the ESA 2000 to determine whether it was a greater right than the 4% or 6% of wages otherwise earned under s. 35.2. In all likelihood it would be, in which case the contractual entitlement would prevail.

In contrast to the above example, it should be noted that there may be situations where the terms of the employment contract provide a greater right or benefit in that they specifically allow the employee on leave to accrue entitlements during a period of leave, that otherwise accrue through service. For example, in Drake International Inc. v Fernandez, 2005 CanLII 25327 (ON LRB) the issue was whether the employee had accrued paid vacation days during a period of leave. The Ontario Labour Relations Board found that issue did not entail an interpretation of the provisions of the ESA 2000 since the arrangement between the employer and employee exceeded the ESA 2000’s entitlements. The Board noted that the employee's letter of hire provided that paid vacation days accrued through months "worked" and the Employee Guide provided that vacation credits accrued based on "service". However, the Employee Guide went on to say that vacation benefits would continue to accrue during maternity/parental leave. As a result, the Board found that the employee accrued both the vacation time off and the vacation pay during the leave. The employer argued that the Employee Guide was intended to refer only to a right to accrue vacation time and that the company's payroll clerk had credited the employee with vacation pay in error but the Board noted that the employer could not demonstrate an occasion where vacation was accrued "correctly". As a consequence, the Board concluded that the specific terms of the contract allowed the employee to accrue 1.25 paid vacation days for each month they were on leave.

Other Issues

Two issues that have arisen deal with the impact of leaves of absence on attendance management programs and perfect attendance bonuses. Although s. 52(1) does not impact on these matters, questions often arise about them in this context. The impact of leaves of absence on attendance

management programs and perfect attendance bonuses are complex issues where it is often difficult to determine what is required under the ESA 2000.

Perfect Attendance Bonuses

Many employers have programs whereby employees are awarded a bonus for perfect attendance during the year. How should absences due to a Part XIV leave be treated for the purposes of such programs? Where an employer awards a bonus to employees for perfect attendance, on the one hand, an employee taking a Part XIV leave should not be disqualified from the bonus. Such disqualification would likely be found to be a penalty for having taken the leave and, consequently, a violation of s. 74 of the ESA 2000. On the other hand, it would seem absurd to count the time off on the leave of absence as "perfect attendance". Two ways in which an employer could deal with perfect attendance bonuses in such a way as to avoid difficulty with s. 74 of the ESA 2000 are as follows - note that the examples below are based on the assumption that perfect attendance is determined on a calendar year basis:

Prorated amount for the part of the year the employee worked, both before and after the leave.

For instance, if Jane took a combined 52-week pregnancy and parental leave (note that the entitlement to a combined leave is generally longer – up to 78 weeks) from July 1, 2014, to June 30, 2015, and if she would have been eligible for the perfect attendance bonus prior to going on her pregnancy leave, then she would be awarded a bonus, prorated for 2014. Similarly, if her attendance from June 30, 2015 to the end of 2015 would entitle her to a bonus (had that been her record for the entire year), then she would be awarded a bonus, prorated, for the months she were in attendance during 2015.

All Part XIV leave absences could be treated in a similar fashion. For example, days taken off as sick leave would not disentitle the employee from the bonus, but the amount of the perfect attendance bonus could be a prorated amount to reflect the fewer number of days in attendance. Or, time taken off as family medical leave would not disentitle the employee from the bonus, but the amount of the bonus could be a prorated amount to reflect the fewer number of days in attendance. This approach was cited with approval by the arbitrator in *Fleetwood Canada Ltd. v. Union of Needletrades, Industrial and Textile Employees, Local 1381*. In that case, the employer provided a weekly attendance bonus only to those employees who maintained perfect attendance during the week. The union argued that employees who took the previous personal emergency leave (then called "emergency leave") should still be allowed to collect the attendance bonus, pro-rated to reflect the number of days they actually worked in a week if they had otherwise had perfect attendance in that week. The arbitrator agreed with the union's approach, taking the position that disqualifying the employees from the bonus because of personal emergency leave absences was a penalty and therefore, a violation of s. 74 of the ESA 2000.

Extend the period of time considered when determining whether an employee is eligible for a bonus.

If we take the same example as above, the employer could consider Jane's attendance during the six months in 2014 prior to her leave and extend the year for six months after her return. If during that combined 12-month period Jane met the criteria to receive the bonus, they would receive the full amount of the bonus. Note that where the eligibility period is extended in this way, the next eligibility period will have to commence on the date it would ordinarily have commenced, notwithstanding the extension. In other words, while Jane's bonus for the year 2015 will be based on the two periods July 1, 2015, to December 31, 2015, and January 1, 2016, to June 30, 2016, her bonus for the year 2016 will have to be based on the period January 1, 2016, to December 31, 2016, even though there is some overlap. This is because if the starting date of all subsequent eligibility periods is set back six months, Jane would, over

the course of her time with her employer, lose out on a possible six months of bonus eligibility; that would constitute a penalty and would thus be prohibited. Other Part XIV leaves would be treated in the same way. For example, if an employee with otherwise perfect attendance took three days of sick leave during the year, then the year during which his attendance would be considered for the perfect attendance bonus would be extended by three days. If an employee with otherwise perfect attendance took eight weeks of family medical leave during the year, then the year during which her attendance would be considered for the perfect attendance bonus would be extended by eight weeks.

It should be noted that although the approaches set out above do not treat the period of an employee's Part XIV leave as actual service, there is no conflict with the requirement in s. 52(1) that the period of leave be included in calculating the length of an employee's service for the purpose of determining the employee's rights under an employment contract. An attendance bonus program does not award a bonus based on length of service, but on actual attendance at work. In the examples considered here, the entitlement to the bonus of a 25-year employee would be the same as the entitlement of a two-year employee. Not including the period of leave as actual service for the purposes of the attendance bonus program would not affect the accrual or calculation of the length of the employee's service, nor of any rights the employee has which are dependent upon the length of service.

Attendance Management Programs

The second issue deals with "attendance management programs". Attendance management programs frequently set out a series of steps of escalating seriousness, up to and including dismissal, for employees who miss too many days of work. Each step in these programs is triggered by absenteeism.

For the reasons set out above in the context of perfect attendance bonuses, attendance management programs would not encounter difficulties with s. 52 of the ESA 2000, because s. 52 does not require that Part XIV leave days be considered days of actual service. The more difficult question is how attendance management programs should treat Part XIV leave days to avoid violating the anti-reprisal provisions in s. 74 of the ESA 2000.

The first, and less problematic, option is to not include any absences due to a Part XIV leave towards the threshold to reach the next step in an attendance management program.

Theoretically, an employer could take a different approach, e.g., the employer would count days absent due to a Part XIV leave toward the threshold to reach the next step in an attendance management program. However, extreme care would have to be taken to ensure that the steps in the program are set out in such a way that an employee is not penalized, intimidated, threatened, or disadvantaged for having taken Part XIV leave days under the ESA 2000. While in theory attendance management programs are non-disciplinary, counting time taken, say, for sick leave under the ESA 2000 in assessing whether an employee's absenteeism rate meets the threshold for entering the initial or a subsequent stage of an attendance management program may be found to be a reprisal for exercising the employee's Part XIV right, depending on the structure of the program. For example, an attendance management program may violate s. 74 if it was structured in such a way that a reasonable person in the shoes of the employee would hesitate to take sick leave days under the ESA 2000 for fear of triggering (or coming closer to triggering) the next stage of the program. In order to avoid difficulty with s. 74, the program would require at minimum that the interviews be conducted in a non-threatening, non-intimidating, non-disciplinary manner; and where sick leave is concerned, that the threshold number of absences be higher than the number of sick leave days permitted under the ESA 2000 and justifiable based on the overall average of absences in a particular workplace, the structure of the attendance management program and the particular circumstances of the individual; and that in the final stages of the program where an employee

could be dismissed for innocent absenteeism, the threshold should be much higher than the three sick leave days that an employee is entitled to take under the ESA 2000 – a threshold that could result in dismissal if an employee missed only one or two days beyond the sick leave days covered by s. 50 would very likely be seen as penalizing the employee for having taken the sick leave days. In this regard, the arbitrator's decision in Natrel Inc. v Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 674, 2004 CanLII 55036 (ON LA) is relevant, although it was decided in the context of personal emergency leave, which was in force prior to January 1, 2019. In that case, the employer had implemented an attendance management program with the threshold for participation in the program being triggered (at the employer's discretion) by a single absence in excess of a plant average. Personal emergency leave days (then known as "emergency leave" days) were counted as absences for the purposes of the program. One employee was in the program and had been continued in the program for a second three-month period because of a single day of personal emergency leave. The first step of the program was a non-disciplinary interview and a three-month monitoring period with a follow-up letter. Additional absences within the three months could result in a second interview where the employee would be informed of the consequences of additional absences and a requirement that the employee provide a doctor's note for any absences in the next 12 months. If attendance did not improve in the three months following the second interview there would be a third interview and the employee would be required to provide a medical assessment of their fitness to perform their duties. A poor prognosis for regular attendance or where there was continued unsatisfactory attendance could result in termination. The arbitrator concluded that continuing the affected employee in the attendance management program and requiring him to produce a medical certificate for every absence by reason of having exceeded the threshold because of taking a day of personal emergency leave would constitute a reprisal under section 74 of the ESA 2000.

Likewise, an attendance management program that counts pregnancy, parental, family caregiver, family medical, critical illness, crime-related child disappearance, child death, domestic or sexual violence, family responsibility, bereavement, organ donor, or reservist leave absences towards the threshold to enter into the next stage would be problematic in most cases. Employees who take such leave would presumably exceed the threshold number of days to move to the next step in any attendance management program. To bring such employees in for an interview to discuss their attendance, where most or all of their absence was due to being on leave, could very well be seen as a reprisal for having taken the leave.

The first, less problematic, option described earlier (that is, to not consider any absences due to a Part XIV leave as absences that count towards the threshold to the next stage of an attendance management program) would avoid the challenges of structuring attendance management programs in such a way as to avoid violating s. 74 of the ESA 2000, and would also give consistent treatment to all Part XIV leaves.

Exception – s. 52(2)

52(2) The period of an employee's leave shall not be included in determining whether he or she has completed a probationary period under an employment contract.

Section 52(2) provides that, despite s. 52(1) (which provides that time spent on Part XIV leave counts for purposes of length of employment, length of service and seniority), time spent on Part XIV leave will not count towards the completion of probationary periods.

A probationary period typically means a term at the front end of an employee's employment during which their suitability as a permanent staff member can be assessed. As well, a period during which an employee is being assessed in a "new" position, where satisfactory completion of the assessment period

will result in the "permanent" placement of the employee in that new position, is also considered to be a "probationary period" under s. 52(2). While the beginning of the probationary period in this case does not coincide with the start of employment, it does coincide with the start of a new contract, and for that reason can be considered to be a "probationary period under an employment contract".

It should be noted that periods of leave do not count towards the completion of "disciplinary probationary periods", as such periods do not coincide with the start of employment or an employment contract and so may be seen as being driven by actual service rather than "length of employment, length of service or seniority". Employees do not earn credit for actual "service", as opposed to length of employment, length of service or seniority while on leave.

ESA Part XIV Section 52.1 – Leave Taken in Entire Weeks

52.1(1) If a provision in this Part requires that an employee who takes a leave to provide care or support to a person take the leave in periods of entire weeks and, during a week of leave, an employee ceases to provide care or support,

(a) the employee's entitlement to leave continues until the end of the week; and

(b) the employee may return to work during the week only if the employer agrees, whether in writing or not.

(2) If an employee returns to work under clause (1)(b), the week counts as an entire week for the purposes of any provision in this Part that limits the employee's entitlement to leave to a certain number of weeks.

This provision came into force on October 29, 2014. It establishes a rule relating to leaves that are required to be taken in periods of entire weeks. At the time of writing, only Family Medical Leave must be taken in periods of entire weeks. Accordingly, s. 52.1 only applies to Family Medical Leave. See the discussion of the effect of s. 52.1 on the Family Medical Leave entitlement in ESA Part XIV, s. 49.1(7).

ESA Part XIV Section 53 - Reinstatement

Reinstatement - s . 53(1)

53(1) Upon the conclusion of an employee's leave under this Part, the employer shall reinstate the employee to the position the employee most recently held with the employer, if it still exists, or to a comparable position, if it does not.

To Position Most Recently Held

At the conclusion of an employee's leave under this Part, the employer must reinstate the employee to the position he or she held at the commencement of the leave. In contrast to some of the earlier pregnancy leave provisions, the employee must be reinstated to the position he or she held before the leave if it still exists. In *Car Park Management Services Limited v Sze (April 30, 1996), ESC 96-87 (Muir)*, a decision under the former *Employment Standards Act*, the employer argued that the employee's position no longer existed because some aspects of the work had been computerized while she was on leave and the employee did not have computer training. See also *Imapro Corporation v Fawcett* (September 14, 1995) ESC 97-43 (Randall) in which the employer reinstated the employee to a new position because he intended to terminate her with notice contrary to s. 44 of the former *Employment*

Standards Act (corresponding to s. 74 of the *Employment Standards Act, 2000*). Her previous position required long-term involvement on projects that would have run longer than the notice period. In both of the above decisions, the employer was found to be in violation of the obligation to reinstate under the former *Employment Standards Act*.

The option of reinstating the employee to a comparable position is available only if the employee's own position is no longer there. In *Gorrell, Grenkie, Leroy and Remillard v Vaughan* (November 22, 1993), ESC 3296 (Novick), a decision under the former *Employment Standards Act*, the referee stated that the employer was obliged to reinstate the employee to her own position and that the employee was entitled to refuse an offer of a comparable position (at another office) because her own position still existed. An employer may argue that an employee's position no longer exists because another person (either a reassigned employee or a replacement) is now performing his or her work. This is not a valid reason for not reinstating the employee to the position previously held. If the job is still there, if the same work is being done, the employee has a right to be reinstated to perform the same work, regardless of the fact that another person is now, and has been, performing it.

With respect to the question of "what is the position the employee most recently held", see the following decisions under the former *Employment Standards Act*: *Canadian Holidays Ltd. v Bartol* (July 31, 1995), ESC 95-147 (Novick); *Woodbridge Inoac Inc. v Frayne* (May 2, 1995), ESC 95-86 (Novick); and *Martel v 785364 Ontario Inc. o/a Sunny's Restaurant* (June 9, 1995), ESC 95-109 (Novick). Also see *O.P.S.E.U. Local 458 v Open Hands Inc.* (unreported) where the Divisional Court found that the employer violated the former *Employment Standards Act* when it reinstated an employee to the same job she held before her leave but at a different location.

It should be noted that in determining "what is the position most recently held" that the terms of the employment contract (whether or not it is in writing) are relevant and that the duties and functions being performed (or the location of their performance) prior to the commencement of the leave are not necessarily determinative of the issue.

For example, in a decision under the current Act, the question of "what is the position most recently held" was considered by the Court of Appeal in *Elementary Teachers Federation of Ontario v Toronto District School Board*, 2005 CanLII 36712 (ON CA). In that case, a board of arbitration had dismissed a grievance arising from the reinstatement of a teacher returning from pregnancy and parental leave. The employee had been teaching Senior French when she went on her leave and was informed that she would be teaching Senior Science when she returned. She declined the assignment. Her collective agreement provided that staffing was to be determined for each year by a process requiring the principal to consider the preferences, abilities, qualifications and experience of the teachers in assigning teaching duties. Her union argued that she should have been reinstated to the French teaching position she held prior to going on leave but the board of arbitration concluded that under the collective agreement the teacher had no right to a particular teaching assignment from year to year or a reasonable expectation to continue teaching the same subject every year. In other words, when the terms of the employment contract (collective agreement) were considered, the employee’s position was not that of "a Senior French teacher" but more broadly that of "a teacher". Despite the fact that she had been teaching French just prior to the commencement of her leave, she did not have a right to reinstatement as a Senior French teacher. The union sought judicial review but the application was dismissed by Divisional Court in *Elementary Teachers' Federation of Ontario v Toronto (District) School Board*, 2004 CanLII 1652 (ON SC). On appeal of that decision, the Court of Appeal affirmed the Board's decision as reasonable.

In some instances, a pregnant employee during the period prior to her leave is unable to perform her normal job due to the pregnancy. Therefore, the employee is given another job for several weeks before

she goes on leave. At the end of her leave, the employee must be reinstated to her original, normal job. The employer's offer of the other job on a temporary basis was due to the employer's duty to accommodate under the *Human Rights Code*, RSO 1990, c H.19.

Section 53 governs the rights of employees after a leave has been taken. There can therefore be no violation of s. 53 before an employee takes a leave. There can, however, be a violation of s. 74 before an employee takes a leave. See the discussion at ESA Part XVIII, s. 74.

Although not directly related to s. 53, (as it is not truly a "reinstatement" issue), one issue that arises frequently is whether an employer is obligated to provide an employee with a part-time position, rather than his or her earlier full-time position, at the employee's request. Clearly, there is no such obligation under the ESA 2000.

Where an employer and employee have reached a pre-leave agreement that the employee will return only on a part-time basis, and the employee changes his or her mind and wants his or her previous position back, Program policy requires that he or she must be given it back. See also *Goode v S&E Management Ltd.* (October 29, 1996), ES 96-227 (Novick) in which the claimant, before the expiry of her leave, requested that upon her return she be placed in a different position which allowed for better hours, or alternatively, a further four-month leave of absence. The employer was found to be in violation of the former *Employment Standards Act* by having refused and terminated the employee without allowing her the opportunity to exercise her right to be reinstated to her previous position. The s. 53 protection gives the employee the right to be reinstated to her previous position upon the conclusion of her leave. Any alternate arrangement that does not allow her to exercise that right or that excuses the employer from meeting its obligation to reinstate (such as agreement, prior to the leave, to reinstatement to part-time duties) is seen as a contracting out of the s. 53 employment standard, and hence, by virtue of s. 5(1) of the Act, is null and void.

One issue related to reinstatement to the "same" position concerns the application of the Ontario *Human Rights Code* provisions that prohibit discrimination on the basis of "family status" and impose a duty of accommodation on the grounds of family status. An employee who seeks such accommodation (for example, an employee may request a change in her shift schedule or a reduction in hours because of difficulties with child care arrangements etc.) and who believes he or she has experienced discrimination may be referred to Ontario's Human Rights Legal Support Centre for assistance.

To a Comparable Position

If the employee's position no longer exists, the employer must reinstate the employee to a position comparable to his or her former one. The employer can reinstate the employee to a comparable position only if the employee's former position no longer exists; if the former position still exists, the employer has no choice but to reinstate the employee to it. It should also be noted that there is no positive obligation on the employer to create a comparable position in circumstances where the employee would otherwise have been terminated for reasons completely unrelated to the leave. For example, an employer will be obliged to reinstate to a comparable position where the position most recently held by the employee has been modified to the extent that it could no longer be considered the same position, and the employee would have otherwise moved into the "comparable" position had he or she not been on leave. Another example is where an employee's position has been eliminated, and the employee would have been transferred to the same position at a different location had the employee not been on the leave. See discussion on s. 53(2) below.

In order to meet the obligation to reinstate an employee to a comparable position, it is clearly not sufficient merely to offer a position with the same wages and benefits - see *C.L.C. (Can Workers' Union, Local 354) v American Can Canada Inc.*, 1983 CanLII 935 (ON LRB) and *Hobbs and Jaciw Investments Limited v Reed* (July 11, 1978), ESC 533 (Egan), both cases under the former *Employment Standards Act*). Rather, one must look at a number of factors, including all the aspects of the new, allegedly comparable job that might make it more or less appealing than the claimant's original job, viewed objectively from the perspective of an employee in a similar position to that of the claimant.

The factors to consider, as originally enunciated by Referee Picher in *C.L.C. (Can Workers' Union, Local 354) v American Can Canada Inc.* and adopted by the Program are:

1. Location of Job: If the "comparable" work offered by the employer exists in another city or town, the work may or may not be comparable. For example, if commuting would be impossible or would involve a substantial increase in travel time, the work is unlikely to be comparable. In determining whether the work is comparable, the officer should consider the circumstances of the employee in question. The test to be applied is how a reasonable person in the employee's circumstances would view the change. For example, commuting may be possible for an employee with a driver's license, but impossible for an employee without one. It should also be noted that even if the employment contract permitted the employer to transfer the employee to another city and, assuming no negative changes in the terms and conditions of employment, such a transfer therefore constituted "reasonable alternative employment" for the purposes of paragraph 5 of s. 2(1) of O Reg 288/01, it does not necessarily mean that the obligation to reinstate the employee to a "comparable" position under this section has been satisfied.
2. Hours of Work: including time of the day and the length of the working day; any shift or weekend work.
3. Quality of Working Environment: office vs. warehouse vs. store vs. factory; degree of luxury; overall atmosphere; privacy vs. group surroundings; comfortable vs. spartan conditions.
4. Degree of Responsibility: including degree of independence and supervision; degree of initiative required; decision-making authority; ability to input own taste or influence; amount of clerical or secretarial functions; job satisfaction.
5. Job Security and Possibility of Advancement: what was/is the likelihood of the job continuing to exist, and the opportunity to progress from that job to a higher position; relationship of background, training and education of employee to position; and development of proper skills for advancement in each position.
6. Prestige and Perquisites: "atmosphere and trappings of an executive" if relevant - e.g., own office; name and title on organization chart; personal or position profile - e.g., opportunity for broader contact with other management and personnel; own business card, expense account, administrative assistant; signing authority; social privileges; immediate supervision or instruction of others.

The importance and weight to be given to each of the foregoing factors will vary from case to case, depending on the particular facts in each situation. The new position may not be quite as attractive as the old job in all respects, but it will be considered a comparable position if, when the various factors are considered in their totality, the position is qualitatively similar, if not superior, to the job the employee had before he or she went on leave. A test of what is comparable is an objective test, based on what a "reasonable employee" in the same circumstances would think.

For example, the employee in *C.L.C. (Can Workers' Union, Local 354) v American Can Canada Inc.* had previously held an executive position as Communication Co-ordinator. Upon her return at the end of her leave, she was given work consisting mainly of clerical tasks. Although she incurred no loss in wages, benefits or seniority, her new position involved a marked decrease in the degree of responsibility, prestige and perquisites as well as a loss in job security. In addition, her working environment, originally a private office with access to a personal administrative assistant, deteriorated to a secretarial corner. In light of the foregoing, it was found that the new position was not of a comparable nature and compensation/reinstatement was ordered.

A pre-existing job evaluation system may be relevant but is not determinative of the comparability of the two positions. As the referee stated in *Reed Inc. v Nidd* (December 23, 1986), ESC 2002 (Mitchnick), another decision under the former *Employment Standards Act,* the evaluation system may be relevant as an "objective" factor. However, "subjective" factors such as humiliation, embarrassment and loss of prestige must be taken into account as well, but from an objective viewpoint. In other words, for example, would a "reasonable employee" have been humiliated in the same circumstances?

Furthermore, it may not be sufficient merely to offer the same wage where the wage range of the new position is inferior. For example, a new position at $25,000 per year at a $20,000 to $25,000 range may not be considered comparable to the wage of $25,000 at the former position that had a range of $24,000 to $29,000.

To illustrate further, in *Bronson Bakery Ltd v Melo and Scott* (November 27, 1985), ESC 1992 (Fraser), a decision under the former *Employment Standards Act*, neither the somewhat lesser degree of responsibility nor the minor variance in hours of work were sufficient of themselves to render the two jobs incomparable. There were, however, significant reductions in prestige and quality of working environment. Having regard to all of these factors, in sum, the referee determined that the employer was in breach of the reinstatement obligations.

It should be noted that despite what appears to be an emphasis in the cases on the employee’s perspective with respect to these factors, the test is objective, that is, how would a reasonable employee in the same circumstances have viewed the situation?

For example, in *C.L.C. (Can Workers' Union, Local 354) v American Can Canada Inc.,* Referee Picher indicated that the employee found the change of geographical location (from Etobicoke to Brampton) significant, but he felt that there was no substantial difference, on that issue alone, and particularly so in light of the fact that the new position may have been even closer to her residence. However, he saw that her concerns on the issue of "location" were in fact more related to "Quality of Working Environment" and the positions were clearly not comparable on that issue. This matter is more directly dealt with in *Bronson Bakery Ltd v Melo and Scott* where the employee was reinstated to a retail position as opposed to her previous office position. The employer argued that most people would prefer the open environment of the store and dealing with the public and thus submitted that most people would have a different subjective preference from the claimant. However, the referee found that the employee’s viewpoint had a "reasonable objective basis", i.e., that office work was generally seen to have more prestige than retail sales and a higher quality working environment. Accordingly, there should be a "reasonable objective basis" for a subjective viewpoint on the factors considered.

Special Rule for Reservist Leave - ss. 53(1.1) and (1.2)

53(1.1) Despite subsection (1), the employer of an employee who has been on leave under section 50.2 may postpone the employee's reinstatement until,

(a) a prescribed day; or

(b) if no day is prescribed, the later of,

i. the day that is two weeks after the day on which the leave ends, and

ii. the first pay day that falls after the day on which the leave ends.

(1.2) During the period of postponement, the employee is deemed to continue to be on leave under section 50.2 for the purposes of sections 51.1 and 52.

Unlike other types of Part XIV leaves, section 53(1.1) allows the employer of an employee who has been on a reservist leave to postpone the employee's reinstatement until:

- A prescribed day; or
- If no day is prescribed, the later of,
    - The day that is two weeks after the day on which the leave ends, and
    - The first pay day that falls after the day on which the leave ends.

At the time of writing, there has been no prescribed day. As such, an employer may postpone an employee's reinstatement following a reservist leave until the later of two weeks after the day on which the leave ends or the first pay day after the day on which the leave ends.

Therefore, although s. 50.2(9) requires an employee who has taken reservist leave to provide written notice to the employer of the date when he or she intends to end the leave, s. 53(1.1) enables the employer to actually postpone the employee's reinstatement for two weeks following the date set out in the employee's notice or the first pay day that falls after that date, whichever is later.

Section 53(1.2) states that during a period of postponement, the employee is deemed to continue to be on a reservist leave for the purposes of s. 51.1 (leave and vacation conflict) and s. 52 (length of employment).

Note that pursuant to s. 51(4), an employer is not required to continue the employee's participation in the types of benefit plans listed in s. 51(2) (if applicable) during a period of reservist leave. However, should the employer decide to postpone an employee's reinstatement date as permitted by s. 53(1.1), s. 51(5) provides that the employee is entitled to continue to participate in benefit plans pursuant to ss. 51(1) and (2) and the employer is required to make contributions to such plans as required under s. 51(3), during the postponement period.

Exception to Reinstatement Obligation - s. 53(2)

53(2) Subsection (1) does not apply if the employment of the employee is ended solely for reasons unrelated to the leave.

The right of reinstatement under s. 53 is not absolute. The reinstatement provisions are meant to ensure that an employee who goes on Part XIV leave is in the same position she or he would have been in if she or he had not gone on leave. The provisions are not meant to give a greater right to employees on leave. Where the employer has reasons to terminate an employee's employment that are completely unrelated to the fact that the employee went on a Part XIV leave, reinstatement will not be required. The employer

has the onus of proving that the termination was totally unrelated to the fact that the employee took the leave.

The same principle applies with respect to economic downturns or other reasons that lead to layoffs. If at the end of a leave, the position the employee most recently held still exists but is inactive (for example, because the business is not operating or is operating at lower than usual capacity and does not currently have any work for that position), there is no violation of s. 53 where the employer reinstates the employee into his or her most recently held position and then immediately places the employee on a temporary layoff (so long as the layoff does not constitute a reprisal, e.g. if any part of the reason for the layoff was because the employee took the leave). For practical purposes, in the situation where the position is inactive at the time the employee's leave is over, the employer only notionally reinstates the employee; the employee does not need to physically return to the workplace for a shift nor does the employee need to complete any amount of work before being told that he or she is laid off.

While s. 53(2) was introduced in the ESA 2000, it was intended merely to codify Program policy that existed under the former *Employment Standards Act*. While the cases cited in this section were all decided under the former *Employment Standards Act*, the principles enunciated in these cases are equally applicable to the ESA 2000.

In determining whether the termination is in contravention of s. 53, the test is, "Would this employee have lost his or her job if he or she had never gone on Part XIV leave?"

This test was used in *C.L.C. (Can Workers' Union, Local 354) v American Can Canada Inc.* where the referee noted that absent her leave, the employee would still be in her former function. The referee referred to her pregnancy as a "catalyst" for the decision to change the employee's position. See also *Wyeth-Ayerst Canada Inc. v Dowd* (January 7, 1998), 2466-96-ES (ON LRB), where a bona fide restructuring was held not to prove the employer's case because the evidence disclosed the employee's leave had been a factor in the decision to terminate her. See also *Jackson v Elizabeth Arden Salons of Canada Limited* (October 20, 1995), ESC 95-175 (Bradbury).

An employer cannot refuse to reinstate an employee where it was discovered during the leave that the employee was in fact dispensable, as it would be the occasion of the leave that gave rise to the reason for the termination (reasoning used in *C.L.C. (Can Workers' Union, Local 354) v American Can Canada Inc.*). This situation is often encountered where the employer determines during an employee's leave that the operation runs more smoothly without him or her or the temporary replacement performs more satisfactorily. A termination under these circumstances will be a violation, since the purpose of Part XIV of the Act is to ensure that the employee does not "lose out" in the workplace by reason of a Part XIV leave.

The fact that reinstatement at the termination of the leave is at an inconvenient or difficult point in the employer's cycle of operations (e.g., in the final few weeks of a teaching term for a teacher) is not a legitimate basis for non-reinstatement. Clearly, had the employee not gone on a leave, under normal circumstances, he or she would have continued to have been employed.

Again, the exception in s. 53(2) applies only where the reasons for not reinstating were entirely unrelated to the leave.

However, if the reason for the failure to reinstate would have resulted in a termination even if the employee had not gone on leave, there is no violation under s. 53(1). For instance, where the employer undergoes a downsizing or restructuring of its business, there would be no obligation to reinstate if the employee would have lost his or her job regardless of whether he or she had gone on leave. See

Littlewood v Birchcliff Heights Child Care Centre (March 27, 1997), 2882-96-ES (Misra), *Rahman v York Condominium Corporation 506*, 1999 CanLII 19489 (ON LRB), and *Singh v George Kent Home Improvements Limited* (January 18, 1996), ESC 96-09 (Muir). See also *Nygard International Ltd. v* Thornton (October 12, 1994), ESC 93-154A (Muir), where an employee is guilty of misconduct that would justify her dismissal, she need not be reinstated.

It should be noted however that even where there is no obligation to reinstate, there may in some situations be an issue of reprisal under s. 74. For example, if it is demonstrated that but for being on the leave, the employee would have been given a choice between accepting termination or being offered another position with the same employer, albeit one that is not comparable with the original position, the employee may be found to have been "penalized" because she had exercised a right to leave - despite not having a right to be reinstated to her job or to a comparable position.

When an employee is hired on a fixed-term contract and the term expires during her leave, the employment relationship generally comes to its natural conclusion with the expiry of the term. In such cases, the reasons for not reinstating are entirely unrelated to the leave and so the employer has no obligation to reinstate under s. 53(1). The employee's employment simply ends when the contract expires. (However, if the evidence showed that the employer chose not to consider the employee for a contract renewal because she was on a leave, that decision not to renew could nevertheless constitute a reprisal under s. 74.)

Where legitimate grounds do exist, the employer may terminate an employee during his or her leave in compliance with Part XV of the Act; the employer need not reinstate and then dismiss the employee. Under the former *Employment Standards Act*, there were two conflicting lines of authority as to whether the employer is required to pay wages to employees who are entitled to notice of termination, if they are on leave of absence (or otherwise not available to work the notice period for reasons personal to themselves). One line of authority has interpreted the termination provisions in the former *Employment Standards Act* and regulations as in most instances requiring the employer to pay wages to employees who are entitled to notice of termination but who do not make themselves available to work the notice period for reasons personal to themselves. See *MacMillan Bathurst Inc. v Fox* (June 13, 1985), ESC 1893 (Egan), *Maple Leaf Foods Inc. v Alejandro*, 1999 CanLII 2908 (ON CA) and *Horizon Poultry Products Inc. v Roth* (February 2, 1995), ESC 95-53 (Randall). The second line of cases took the view that employees not making themselves available for work during the notice period ought not be entitled to wages during the notice period. See *St. Joseph's Health Centre of London v Vanderwerf* (February 10, 1992), ESC 2982 (Novick) and *Pioneer Youth Services (Toronto) Inc. v Fitzpatrick*, 2000 CanLII 4665 (ON LRB). Although both viewpoints have received some support from the courts on judicial review, it is the Program's position that the better interpretation of the termination provisions is found in the *MacMillan Bathurst Inc. v Fox* and *Maple Leaf Foods Inc. v Alejandro* line of cases.

Section 60(1)(b) of the Act provides that the employer shall pay to the employee the wages to which the employee is entitled to receive during the period of notice, "which in no case shall be less than his or her regular wages for a regular work week." Further, s. 61 of the Act provides that an employer may terminate the employment of an employee without notice, but only if it pays termination pay equal to the amount the employee would have been entitled to receive under s. 60 had notice been given, which, as summarized above, provides that the amount will in no case be less than the regular wages for a regular work week.

The purpose underlying the notice of termination provisions is to give employees some breathing room during the notice period (or with the pay in lieu of notice) to reorder their affairs. To interpret the termination provisions in a way that would place employees who are on a leave in a worse position than they would have been in had they not taken the leave would be contrary to the intention of the Act.

Consequently, it is Program policy that unless the employee is otherwise disentitled to termination pay (i.e., by virtue of s. 2(1) of O Reg 288/01), the employer must pay the required wages even if the employee is on leave. The above interpretation follows the reasoning upheld by the Court of Appeal in *Maple Leaf Foods Inc. v Alejandro* and by the Divisional Court in *MacMillan Bathurst Inc. v Fox*. Although those cases (which were decided under the former *Employment Standards Act*) dealt with workers' compensation and sick leave, respectively, the principles are relevant to Part XIV leave. See ESA Part XV ("Termination and Severance of Employment") for a discussion of this issue. See *Horizon Poultry Products Inc. v Roth* for a decision under the former *Employment Standards Act* concerning an employee dismissed while on pregnancy/parental leave. Note that *Pioneer Youth Services (Toronto) Inc. v Fitzpatrick*, also a decision under the former *Employment Standards Act*, followed the opposing line of cases to find that where an employee is terminated for reasons unrelated to her pregnancy or pregnancy leave and the period of notice that is given coincides with her pregnancy leave, she is not entitled to be paid during the notice period. This decision is contrary to Program policy.

Where legitimate grounds to terminate the employment relationship exist and severance pay is owing, it is Program policy that the "regular work week" that is used to determine the amount of severance pay owing is the employee's "regular work week" that he or she had before the leave began.

Sham Reinstatement

Although s. 53(1) requires reinstatement of the employee, it does not address firings post-reinstatement. Protection in this regard is offered by the Program's position that a "sham reinstatement" will be considered to be no reinstatement at all, and thus a violation of s. 53(1). The right to a Part XIV leave and reinstatement thereafter would be a farce if the employer could get away with firing the employee immediately following a token reinstatement. In *Cole v Coates* (June 30, 1982), ESC 1241 (Bigelow), although no clear reasons were given by the referee, an employee who was terminated one week after reinstatement was compensated for the violation of her rights under the reinstatement provisions. Clearly, the longer the employee is back at work, the more difficult it is to identify a "sham reinstatement".

Further protection against post-reinstatement firings is provided by s. 74 of the Act, which prohibits employers from dismissing or otherwise penalizing an employee because he or she, among other things, takes a Part XIV leave.

Wage Rate - s. 53(3)

53(3) The employer shall pay a reinstated employee at a rate that is equal to the greater of,

(a) the rate that the employee most recently earned with the employer; and

(b) the rate that the employee would be earning had he or she worked throughout the leave.

Section 53(3) sets out the wage rate that an employee reinstated under s. 53(1) is entitled to receive. This rate is the higher of the rate he or she earned before the leave began, and the wage rate the employee would be earning had he or she continued to work and not gone on leave. The latter provision would apply, for example, if the employee would have advanced to a higher grade in the pay scale for his or her position because he or she had been employed for the requisite amount of time. For example, if there is a grid that provides that an employee's wage rate increases by $0.50 per hour after each of the first five years of employment, and an employee who had been earning $25.00 commences a combined pregnancy and parental leave of one year at the point at which she had been employed for two and one-half years, she would be entitled to a rate of $25.50 when she resumed working at the conclusion of her

leave. It would also apply if a union negotiates a pay raise for employees in the bargaining unit it represents. (For example, if the employer grants an across-the-board increase of $1.20 an hour for all office employees that took effect while an employee who works in the office was on leave, that employee would be entitled to earn the increased rate when he or she returned from leave.)

The purpose behind this provision is to prevent an employer from denying a reinstated employee wage increases that, from an objective standpoint, would inevitably have been given to him or her during the time that he or she was on leave had he or she instead continued working. It was not intended to give an employee a right to a wage increase where it is entirely speculative as to whether he or she would have received the increase had he or she continued working.

For example, an employee's contract of employment might provide for a performance review every year in the month following the anniversary of his or her date of hire, with the result of that review determining whether he or she would receive a merit increase. If an employee was hired on June 15, 2010, received favourable performance reviews and, in consequence, merit increases in July of 2011 and 2012, and then went on leave from September 15, 2012, to September 14, 2013, subsection 53(3) does not entitle her to a merit increase immediately upon her return to work on September 15, 2013, even though in the ordinary course she would have had a performance review in July of 2013 that probably would have resulted in a merit increase (based on what happened after her performance reviews in earlier years). This is because the merit increases were not automatic; whether she would have received a merit increase had her performance been reviewed in July of 2013 is conjectural.

Although in the above example there is no entitlement to a merit increase upon the employee's return to work, the employer would be required to schedule a performance review (and provide a merit increase if the results of that review so indicated) in such a way that the employee was not penalized for having exercised her right to take leave; otherwise, there would be a violation of s. 74 of the Act. There are two ways in which the employer can do this and avoid such a violation. The first would be to provide the employee with a review once her post-leave service, when added to any pre-leave service that had not been the subject of a review, equalled the period that would entitle her to a review. Thus, using the example from the preceding paragraph, where the employee is entitled to a review after each 12 months of service and had accumulated three months of service credits towards the 12 months before going on leave, the employer would have to give her a performance review following the completion of a further nine months of service following her return. The further nine months would be completed on May 15, 2014, and so the review would take place in June of 2014; subsequent reviews would take place in June of each year, rather than in July. Alternatively, the employer could give the employee a performance review after the employee returned to work, using what would have been the usual review period of June 15, 2012, to June 14, 2013, but (assuming a favourable review) granting the employee a pro-rated, rather than full, merit increase, based on the fact that she had worked for only one-quarter of that period.

This provision was also not intended to insulate employees from the effects of negative economic downturns at their workplace such as cuts to wage rates that happened during their leave due to their employer’s economic circumstances. This means that while an employer is required to pay a reinstated employee the wage rate the employee most recently earned (or the rate the employee would have earned had the employee worked through the leave, if that is greater), this provision does not prohibit employers from reducing the employee’s wage rate immediately upon reinstating the employee, either permanently or temporarily (so long as reduction does not constitute a reprisal, e.g. if any part of the reason for the reduction was because the employee took the leave). A unilateral reduction of an employee’s wages may, depending on the circumstances, constitute a constructive dismissal and if the employee resigns in response to the reduction within a reasonable time, the employer will be considered to have terminated (and severed) the employee’s employment under the ESA. (Note, though, that temporary wage

reductions by the employer for reasons related to COVID-19 do not constitute constructive dismissal under the ESA if they occur during the defined “COVID-19 period” – see O. Reg. 228/20 for details.)

ESA Part XIV Section 53.1 – Leaves Apply Separately

Leaves apply separately – s. 53.1

53.1 For greater certainty, every entitlement to leave under this Part applies separately from, and in addition to, every other entitlement under this Part.

Section 53.1 provides that an employee's entitlement to any Part XIV leave is in addition to any entitlement they may have to any other Part XIV leave. This includes pregnancy leave, parental leave, family medical leave, family caregiver leave, child death leave, crime-related child disappearance leave, critical illness leave, domestic or sexual violence leave, sick leave, family responsibility leave, bereavement leave, organ donor leave, emergency leave and reservist leave.

This provision was added to the ESA 2000 effective January 1, 2019 by the *Making Ontario Open for Business Act, 2018*. Prior to January 1, 2019, certain individual leave provisions contained similar language to make clear that Part XIV leaves apply independently. With the inclusion of s. 53.1, those individual provisions were no longer necessary and were repealed. The wording “for greater certainty” is used because the Employment Standards Program has always taken the position that an employee’s entitlement to a Part XIV leave is independent from the employee’s entitlement to any other Part XIV leave; this new provision simply codifies that principle.

An employee’s eligibility for more than one leave will depend on the circumstances giving rise to the absence. Take, for example, an employee whose minor child is critically ill with a serious medical condition and has a significant risk of death within 26 weeks. The employee could be eligible for critical illness leave (because the minor child is critically ill), family caregiver leave (because the child has a serious medical condition), family medical leave (because the child has a serious medical condition with a significant risk of death within 26 weeks), and family responsibility leave (because the child has an illness, injury or medical emergency). Taking into account the statutory requirements for each leave, the employee is free to decide when to take each leave and the order in which they’re taken.

ESA Part XV - Termination and Severance of Employment

The notice provisions in Part XV of the *Employment Standards Act, 2000* ensure that employees are given some minimum amount of advance warning of termination of employment (or pay in lieu of notice or some combination thereof) so that the employee may make new arrangements for work.

The severance pay provisions Part XV of the Act provide some long-service employees with compensation for loss of seniority and job-related benefits and also for their investment of long service when the employment relationship is severed by the employer. The employer's obligations under the notice and severance provisions are entirely separate and distinct from each other and one cannot be used to offset the other.

ESA Part XV Section 54 - No Termination Without Notice

54 No employer shall terminate the employment of an employee who has been continuously employed for three months or more unless the employer,

(a) has given to the employee written notice of termination in accordance with section 57 or 58 and the notice has expired; or

(b) has complied with section 61.

Section 54 requires employers to provide advance written notice of termination, in accordance with s. 57 or s. 58, or to provide termination pay in accordance with s. 61 when terminating the employment of an employee. Under the former *Employment Standards Act*, pay in lieu of notice was characterized as a remedy if notice was not given, not an alternative to notice as it is now.

Eligibility for Notice of Termination or Termination Pay

An employee is eligible for notice of termination or termination pay if he or she has been continuously employed for three months or more by his or her employer. A similar eligibility requirement was contained in the former *Employment Standards Act*. However, the word "continuously" has been added to clarify that the employment relationship must continue for a full three months.

All time spent in an employer-employee relationship will count toward the three-month eligibility requirement. As long as there is no clear termination of the employment relationship, periods of inactive employment (such as lay-off, leave or sick time) must be included as periods of time during which an employee is continuously employed.

The term "period of employment", which is defined in s. 8(2) of O Reg 288/01 to allow separate periods of employment to be added together and treated as one, does not apply with respect to the three-month eligibility requirement for notice in s. 54. Rather, "period of employment" applies to determine the amount of notice the employee is entitled to under s. 57 once it has been established that the employee has met the three-month eligibility requirement.

In addition, when determining the "period of employment", reference must also be made to s. 59, which sets out what is included and excluded time. Although s. 59 generally provides that time spent on leave or other inactive employment is included in determining the period of employment, it excludes time spent on lay-off after a deemed termination date.

Therefore, the time spent on lay-off after the deemed termination date (i.e., the time spent on lay-off from the date the lay-off commenced) would not count in determining the "period of employment" and the amount of notice an employee is entitled to. That time would, however, count in determining whether the employee had completed three months of continuous employment in order to be eligible for notice.

For example: An employee was hired January 1. She was laid off February 1. Thirteen weeks after the layoff began (May 1), her employment is deemed to be terminated as of the date the layoff began (February 1) - see ESA Part XV s. 56(5).

Under s. 54, all employment (whether active or inactive) counts towards the three-month continuous employment eligibility requirement. This employee has met the three months' continuous employment eligibility requirement; she was employed for four months (January 1 to May 1) and so is eligible for notice of termination.

The amount of notice (or pay in lieu in this case) she is entitled to is determined by s. 57 and turns on her "period of employment".

Under s. 57 an employee whose "period of employment" is less than one year is entitled to one week's termination notice.

Under s. 59, "period of employment" does not include periods of layoff after the deemed termination date. This employee's "period of employment" is therefore 1 month (January 1 to February 1). As a result, because she was employed for at least three months and her period of employment is less than one year, she is entitled to one week's termination notice.

Note again that the eligibility requirement is three months of continuous employment and not three months of active service. If an employee started work on July 29 and was still employed for any part of the day on October 28, the employee will have been continuously employed for three months despite having been off sick or on layoff or leave for some time between July 29 and October 28. In this example, if the employer terminated the employee on the 28th of October (regardless of whether the employee had a scheduled shift on that day or had started or completed his or her shift) the employee would be eligible for notice of termination.

When determining whether an employee meets the three-month continuous employment eligibility requirement there is occasionally some debate as to when employment commenced. Generally, the first day of employment will be considered to be the first day of work. Although an offer of employment may be made and a contract of employment entered into some period of time before the employee starts work, the Program's view is that the employment relationship commences on the date the employee starts work unless there is clear evidence to indicate otherwise.

With respect to the three months of continuous employment requirement, regard should also be had to ss. 9(1), 10(1) and 10(2) of the *Employment Standards Act, 2000*, which provide as follows:

9(1) If an employer sells a business or a part of a business and the purchaser employs an employee of the seller, the employment of the employee shall be deemed not to have been terminated or severed for the purposes of this Act and his or her employment with the seller shall be deemed to have been employment with the purchaser for the purpose of any subsequent calculation of the employee's length or period of employment.

10(1) This section applies if the building services provider for a building is replaced by a new provider and an employee of the replaced provider is employed by the new provider.

10(2) The employment of the employee shall be deemed not to have been terminated or severed for the purposes of this Act and his or her employment with the replaced provider shall be deemed to have been employment with the new provider for the purpose of any subsequent calculation of the employee's length or period of employment.

Under these provisions, the employment with the seller or the original service provider and the employment with the purchaser or the new service provider is combined for the purposes of calculating the employee's length of employment, and, therefore, when determining eligibility for notice (as well as for the purpose of calculating "period of employment" when determining the amount of notice to which an employee is entitled.)

Example:

If an employee is employed by Company B for two months and Company B sells the business to Company C who employs the employee for a further period of one month, the employee will have met the three month requirement. Company C will then be required to provide the employee with notice of termination of employment or termination pay calculated on the basis of employment with Company B

and Company C. For a more detailed explanation of s. 9 and s. 10, please refer to ESA Part IV (Continuity of Employment).

It is important to note that employment is only counted if it is performed in Ontario, or elsewhere as a continuation of the work performed in Ontario. For example, if an employee works for ABC Inc. for two years in Quebec, then is transferred to Ontario, where he or she works for ABC Inc. for two more months, the employee is considered to have only two months of employment with ABC Inc. for purposes of s. 54.

Where the employee performs work outside Ontario that is a continuation of the work performed in Ontario, the time spent outside of the province will be included in calculating the whether the employee has been employed for three months or more.

Written Notice of Termination

Section 54 requires that the employer provide written notice of termination to an employee who is entitled to notice. Section 4(1) of O Reg 288/01 sets out the manner in which such written notice may be provided - see O Reg 288/01 s. 4(1) for a detailed discussion.

It is the policy of the Program that although s. 54 requires that notice of termination be in writing, if the notice given to the employee is oral, but such notice is greater in length than the required notice under s. 54 (and meets or exceeds the minimum requirements concerning continuation of wages and benefits), it will be considered a greater right or benefit under s. 5(2) of the Act. This policy is supported by the case of *Fanaken v Bell, Temple*, 1984 CanLII 1856 (ON SC).

Where the employer is alleging that it gave oral notice greater in length than the required minimum written notice, the onus will be on the employer to show that the employee received and understood the oral notice, and that the notice was specific as to the date of termination.

ESA Part XV Section 55 - Prescribed Employees Not Entitled

55 Prescribed employees are not entitled to notice of termination or termination pay under this Part.

This section provides that prescribed employees are not entitled to notice of termination or termination pay under Part XV of the *Employment Standards Act, 2000*. The prescribed employees are identified in s. 2 of O Reg 288/01. Refer to O Reg 288/01 for a complete discussion of the prescribed employees.

Note: For information on the application of the wilful disobedience exemption established in para. 3 of s. 2(1) of O Reg 288/01 where an employee is not vaccinated against, or tested for, COVID-19 in accordance with the employer's policy, also refer to "ESA Termination and Severance Liabilities Where an Employee is Not Vaccinated Against or Tested For COVID-19".

As with all exemptions from a minimum standard, the onus is on the employer to establish on a balance of probabilities that the exemption applies.

ESA Part XV Section 56 - What Constitutes Termination

What Constitutes Termination - s. 56(1)

56(1) An employer terminates the employment of an employee for purposes of section 54 if,

(a) the employer dismisses the employee or otherwise refuses or is unable to continue employing him or her;

(b) the employer constructively dismisses the employee and the employee resigns from his or her employment in response to that within a reasonable period; or

(c) the employer lays the employee off for a period longer than the period of a temporary lay-off.

This definition is relevant for Part XV, ss. 54 – 62 of the *Employment Standards Act, 2000* which refer to a termination of the employment relationship for the purposes of an entitlement to notice of termination or pay in lieu, as opposed to ESA Part XV, ss. 63 – 66 which refer to a severance of the employment relationship for the purposes of an entitlement to severance pay. Sections that deal with notice of termination or termination pay entitlement use "terminates" or "terminated". Sections that deal with severance pay entitlement use "severs" or "severed".

The definition of what constitutes a termination in this section is exhaustive. Only those situations specifically described in the definition will be considered to constitute a termination of the employment relationship. The definition has three parts:

1. The employer dismisses the employee or otherwise refuses or is unable to continue employing him or her - s. 56(1)(a)

The term "dismisses" in s. 56(1)(a) means a firing or similar ending of the employment relationship by the employer. It occurs on the initiative of the employer as opposed to the employee. An employer may dismiss an employee expressly, for example, by informing the employee that they are fired. An employer may also dismiss an employee implicitly, for example, by demanding the employee's pass card or by telling the employee to resign or they will be fired.

Clause (a) of the definition will also apply where the employer refuses or is unable to continue employing the employee, even if the situation does not involve an actual firing as such. The clause is very broad in its scope and captures the vast majority of situations in which an employee's employment ceases at the instance of the employer. A discussion of some of the issues that may arise in determining whether or not there has been a dismissal follows:

i. Quit v. Fired

One issue that arises is whether the employee resigned, as opposed to having their employment terminated by the employer. It has generally been held that two things must be established in order to conclude that an employee has quit:

1. A statement by the employee informing the employer of an intention to quit (or, in the absence of any statement, some act from which it may be inferred that the employee intended to quit); and
2. Some action on the part of the employee to carry out that intention.

In this regard see, for example: *Grimsby Packaging Ltd. v Prokopp* (July 23, 1991), ESC 2881 (Dissanyake); *Rock Glen Fruit Farms Limited v Nordstrom* (February 26, 1992), ESC 2988 (Roberts); and *Deluxe Taxi (Barrie) Ltd. v Employees* (April 18, 1973), ESC 125 (McNish).

In certain types of situations, the employee's conduct has been found to be inconsistent with quitting. For example:

- Where the employee says "I quit" in the heat of the moment and quickly withdraws the remark or returns to work shortly after saying it - see *Deluxe Taxi (Barrie) Ltd. v Lupo,* 2012 CanLII 1120 (ON LRB).

- Where the employee says "I quit" without saying when they will leave and continues to perform their duties - see *Nunes & Murphy Restaurants Inc. operating as Harvey's 2513 v Kelly,* 2016 CanLII 17266 (ON LRB).
- Where the employer advises the employee that unless they apologize, they will be fired, and the employee as a result, resigns (discussed under constructive dismissal below) – see *Brown v Canadian Tire Corp.,* 2000 CanLII 2305 (ON LRB) and *Canadian Debt Recovery Ltd v Landell,* 2010 CanLII 67932 (ON LRB).
- Where the employee tells their colleagues that they quit or will quit but does not inform the employer and remains at work and completes their regular duties – see *M. Oomen's Glass Ltd v Oomen,* 2013 CanLII 76435 (ON LRB).

Certain types of conduct have been found to indicate a resignation. For example:

1. Where the employee states their intention to quit and then requests their Employment Insurance record of employment form – see *Re J. Mac D. Thomson.*
2. Where an employee fails to return to work after giving notice of intention to quit, coupled with cleaning out their desk and leaving keys behind - see *Kingsway Lodge and Nursing Home v Cunningham et al* (June 26, 1985), ESC 1906 (Brown).
3. Where the employee emailed their employer to confirm that they were not resigning but did not return to work, despite the employer making it clear that they could return – see *Chapman v Martindale Animal Clinic,* 2016 CanLII 7070 (ON LRB).

ii. Withdrawing Notice of Termination or Resignation

Notice of termination or resignation of employment, once given, cannot be withdrawn. Whether it is the employer giving notice of termination to the employee or the employee giving notice of resignation to the employer, the cases indicate that the person who gave the notice may not withdraw it unless the other party gives their consent. See *Roberts v Creative Hair Design,* 2000 CanLII 12795 (ON LRB).The only exception to this is where the termination or resignation announcement is given in the heat of the moment and then withdrawn quickly.

This Program policy reflects the common law. The rationale behind the law and the policy is that the party receiving the notice may have taken certain actions in reliance on it. For example, the employee, after receiving a notice of termination from the employer, may accept a job offer in another city and sell their house. An employer, having received notice of resignation from the employee, may make arrangements to advertise the position or may have actually hired a replacement employee. The cases indicate that it is not necessary to show that the party actually relied on the notice in order to prevent its withdrawal without that party's consent. The possibility of reliance is sufficient. See for example *Westburne Central Supply v Green* (December 10, 1992), ES 221/92 (Randall).

iii. Employee Fired After Giving Notice of Resignation

Is an employee who gives notice of resignation but whose employer responds by terminating their employment entitled to termination pay? The answer is yes, since what the employer did was to terminate the employee's employment before the employee's notice of resignation could take effect. See for example *Leon's Furniture Limited/Meubles Leon Ltée v Aelick,* 2016 CanLII 77660 (ON LRB). Also see *Quebec (Commission des normes du travail) v. Asphalte Desjardins Inc.* (2014 SCC 51): although this decision of the Supreme Court of Canada involved Quebec legislation, it affirms the employment law principle that an employment contract is not automatically ended upon receipt of a notice of resignation,

that the relationship continues to exist until the date specified in the notice given by the employee, and that an employer that wishes to terminate the contract before the resignation takes effect is required to provide notice of termination/termination pay.

However, the amount of the employee's termination pay entitlement will be based on the shorter of:

1. The length of the applicable notice period under s. 57 or s. 58; and
2. The length of time between the date of termination by the employer and the effective date of the employee's notice of resignation (i.e., the point at which the employee would have left in any event had the employee's employment not been terminated by the employer).

For example, an employee with a period of employment of ten years gives notice of resignation on June 2, to be effective June 30. The employer immediately terminates the employee's employment. The employee will be entitled to termination pay based on the shorter of:

1. The required notice under s. 57 or s. 58, which for this employee is eight weeks; or
2. The length of time between the termination and the effective date of the employee's notice of resignation, which in this case is four weeks (June 2 to June 30).

Thus, the employee will be entitled to four weeks' termination pay. This is supported by a Divisional Court decision, *Re Redpath Industries Ltd. and Ison et al.*, 1985 CanLII 2192 (ON SC).

Another example is an employee with a period of employment of three years who gives notice of resignation on June 2, to be effective June 30. The employer terminates the employee's employment two weeks into the four-week notice of resignation period. The employee will be entitled to termination pay based on the shorter of:

1. The required notice under s. 57 or s. 58, which for this employee is three weeks; or
2. The length of time between the termination and the effective date of the employee's notice of resignation, which in this case is two weeks (June 16 to June 30).

Thus, the employee will be entitled to two weeks' termination pay.

However, see O Reg 288/01, s. 2(1) para. 3 for the discussion in regarding the applicability of the wilful misconduct exemption to employees who have resigned and accepted employment with a competitor but prior to commencing work for their new employer put themselves into a serious conflict of interest with their current employer by, for example, disclosing confidential information to the competitor.

iv. Otherwise refuses or is unable to continue employing

The phrase, "otherwise refuses or is unable to continue employing him or her" includes terminations of employment by operation of law such as those that result from bankruptcy (see the decision of the Supreme Court of Canada in *Rizzo & Rizzo Shoes Limited (Re)*, [1998] 1 SCR 27) or frustration of contract. An example of the latter situation would be where the employer is required to cease operations as a result of an order issued under the *Environmental Protection Act,* RSO 1990, c E.19 ("EPA"). At common law, this might arguably be considered to result in frustration of the employees' employment contracts, but the phrase "unable to continue employing" ensures that the situation is treated as involving a termination by the employer, with the result that the employees whose employment is terminated because the employer was required to cease operations under the EPA are entitled to notice of termination. This is so whether or not the cessation of operations is self-induced by the employer. In other words, it applies to situations where the environmental order issued was not the result of actions or

omissions of the employer, as well as to situations where the order was the result of the employer's actions or omissions. The broad language of s. 56(1)(a) of the *Employment Standards Act, 2000* eliminated the need for such a provision.

"Otherwise refuses. . . to continue employing" would also cover the situation of an employee employed on a term contract where the employer technically does not dismiss an employee but simply lets the contract expire without renewing it, although this does not necessarily mean that the employee would be entitled to notice or termination pay - see the discussion of the term or task exemption in O Reg 288, s. 2(1), para. 1.

2. The employer constructively dismisses the employee and the employee resigns from his or her employment in response to that within a reasonable period - s. 56(1)(b)

Section 56(1)(b) provides that a termination occurs where an employer constructively dismisses an employee and the employee resigns their employment within a reasonable period in response to the employer's action.

Note that O. Reg. 228/20 (“Infectious Disease Emergency Leave”) establishes that there is no constructive dismissal under the ESA where a non-unionized employee’s employer temporarily reduces or temporarily eliminates the employee’s wages or hours of work for reasons related to COVID-19 during the defined COVID-19 period, unless the termination resulting from the constructive dismissal occurred before May 29, 2020. See O. Reg. 228/20 for details

Note also that during the first declared emergency for COVID-19 (which commenced March 17, 2020 and terminated July 24, 2020), orders were issued under the *Emergency Management and Civil Protection Act* (EMCPA) that authorized employers to make some specific unilateral changes to specified terms and conditions of employment. Upon the termination of the first declared emergency for COVID-19 on July 24, 2020, those orders ceased to be orders under the EMCPA and instead continued as time-limited orders under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020.* The orders, including the period of time to which they relate, can be found by visiting the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* on the Ontario government’s e-Laws website and then selecting the “Regulations under this Act” tab.

In technical terms, a constructive dismissal exists where the employer repudiates the employment contract by committing an actual breach or an anticipatory breach of a fundamental term of the contract. If the breach (whether actual or anticipatory) is substantial and adverse to the employee, they can elect to end the contract by resigning but is treated in law as if they had been dismissed by the employer.

As distinguished from an actual breach that imposes an immediate change in the terms of the employment contract, an anticipatory breach is a change to the contract of employment that will come into effect at some future date. Key to a finding of anticipatory breach is that the employer has unequivocally stated that at some future point it will no longer abide by the terms of the contract as it presently exists. An employer will not have committed an anticipatory breach by simply proposing (even in extremely strong terms) the desirability, from its perspective, of making changes or inviting the employee to consider the proposal or to negotiate.

However, an anticipatory breach that would give rise to a constructive dismissal if the employee resigns within a reasonable period of time must be distinguished from a situation where the employer is

terminating the employment relationship by giving proper written notice of a change to the employment contract to occur on a future specified date.

In the latter case, if the employer provides notice in writing clearly indicating that the employer will be making a unilateral change to the employment contract at a future specified date and it is clear that the employee must either agree to the future change or the employment relationship will end on the specified date, the employer is considered by the Program to have effectively provided notice of termination in accordance with ESA Part XV, s. 54 with an offer of re-employment on new terms and conditions.

In other words, even though the notice of a change to the contract may not specifically state that it constitutes notice of termination with an offer of new employment on different terms effective on a future, specified date, if it is clear that a refusal to accept the change on that date will end the employment relationship, the written notice of the change may be treated as working notice of termination under the Act. In contrast to a constructive dismissal flowing from an anticipatory breach, which requires the employee to resign within a reasonable period in response to the employer's actions pursuant to s. 56(1)(b), if the employee were to resign in response to a notice of a future change as described above (i.e., one which is effectively considered a notice of termination), they would forfeit any additional rights to notice of termination under the Act. See the discussion on Notice of Termination & Termination Pay Obligations below for more information. **For information on the application of these principles where an employee is not vaccinated against, or tested for, COVID-19 in accordance with the employer's policy, see "ESA Termination and Severance Liabilities Where an Employee is Not Vaccinated Against or Tested For COVID-19".**

As noted above, a notice of a future change to a contract will only be considered a notice of termination where it is clear that the current contract of employment will end on a specified date and that the only option available to the employee as of that date is to accept re-employment on the new, amended contract terms. In this regard, see *Wronko v Western Inventory Service Ltd.*, 2008 ONCA 327 (CanLII), in which the Court of Appeal concluded that the employer's notice of a future change did not constitute effective notice of termination. In that case, the employer had provided notice in September 2002 that the employee's contract, which provided for two years termination pay, would be amended in September 2004 to provide a maximum of 30 weeks termination pay. The notice specifically provided that the employee's agreement to the change was "voluntary and is not a mandatory requirement for your continued employment". Over the course of the next two years, the employee on several occasions advised the employer that he would not accept the change. In September 2004, the date the change was to be implemented, the employer advised the employee that if he did not accept the new terms and conditions of his employment, they no longer had a job for him. Despite the employer's argument that the notice of the change which had been given in 2002 constituted notice of termination, the Court of Appeal found that not to be the case on the facts. The Court found that although the employee had made it clear that he would not accept the proposed change to his contract; the employer had failed to make it clear that the refusal to accept the new terms would result in his termination and re-employment would only be offered upon the new terms. The employer was found to have acquiesced to the employee's position and the terms of the existing contract remained in effect. The Court concluded that the case did not involve a constructive dismissal in that the employee did not treat the employment contract as having been repudiated but rather, the employee's employment was terminated in September 2004 and the employer was then liable for two years of termination pay in accordance with the employment contract.

i. Criteria for Constructive Dismissal

The following criteria must be met to establish a constructive dismissal as a result of a change to the employment contract:

1. The change is made unilaterally by the employer, i.e., without the employee's agreement;
2. The change is to a fundamental term or condition of the employee's employment; and
3. The change is substantial and to the employee's disadvantage.

1. The change is made unilaterally by the employer, i.e., without the employee's agreement.

The meaning of the first criterion is self-evident; the second and third criteria are discussed in more detail below.

2. The change is to a fundamental term or condition of the employee's employment.

In determining whether this criterion of the test is met, an officer must first decide whether the term in question is a fundamental term or condition of employment. Terms and conditions of employment may be implicit or explicit. Implicit terms may be established by past practice or custom or judicial ruling. Explicit terms and conditions of employment might be the subject of an oral or written employment contract or may be contained in oral or written workplace policies. Some examples of terms and conditions of employment that would usually be considered fundamental are as follows:

- The core duties and responsibilities of a position;
- The status, perquisites and remuneration associated with a position; and
- In some cases, the geographic location where the duties of a position are to be performed.

3. The change is substantial and to the employee's disadvantage.

Constructive dismissal will only be established if the change is substantial and adverse to the employee.

What constitutes a substantial change to the employee's disadvantage is a factual determination that will vary with the circumstances of each case. In each case, however, the change must be considered with regard to the particular employee's circumstances, but from the perspective of a reasonable person. The test to be applied is how a reasonable person in the employee's circumstances would view the change.

What follows are some examples of substantial changes to terms and conditions of employment that are generally considered fundamental.

- A pay cut of a substantial amount. Generally, pay cuts of up to 10 per cent will not be considered as substantial. However, 10 per cent is not a "magic number" but is just a rough guide. In determining the magnitude of a pay cut, the value of the benefits should be considered. See *Ontario Chemists Rx Inc. v Ibrahim,* 2007 CanLII 48597 (ON LRB).
- A substantial reduction in hours. See *Skelton v 1012311 Ontario Ltd.,* 2004 CanLII 29465 (ON LRB), in which the Board found a reduction of hours from 40 or more per week to 16 hours per week constituted a constructive dismissal.
- A breach of the requirement to pay wages on a regular basis. Where the employer has for example, failed to pay the employee's wages on time for several pay periods, the employee may be able to resign and claim constructive dismissal. See *Ma v VE Collective Inc*, 2014 CanLII 39566 (ON LRB) in which the Board found a constructive dismissal arising from the employer having repeatedly missed paying the employee on her pay day by two or three days and in the last of the two pay days before she resigned, having missed her pay day by seven days.–

- Where the delay in payment is lengthy, one such instance, as opposed to repeated ones, may be sufficient to amount to a constructive dismissal. See *Di Giuseppe v Hospice Richmond Hill,* 2015 CanLII 56255 (ON LRB) where the Board found that by paying the employee 2 weeks late combined with the uncertainty of whether the employer had the ability to pay the employee in the future constituted constructive dismissal.
- A clear demotion, whether or not accompanied by a pay cut, particularly where the employee is stripped of managerial responsibilities or suffers a significant loss of status. See *Beck v Hamilton (City)*, 2007 CanLII 22576 (ON LRB), where the OLRB found that as a result of a reorganization, the terms and conditions of the claimant's position were significantly diminished relative to his peers. He effectively suffered a substantial demotion and a significant diminution in his responsibilities resulting in a constructive dismissal. The Board also noted that the employer's motives were not determinative as a demotion can constitute a constructive dismissal even if there is a legitimate business justification for a reorganization that brings about the demotion and reduction in responsibilities. See also *Smith v CPI Corp.,* 2013 CanLII 14044 (ON LRB).
- There is no demotion, but there is a significant change in duties or responsibilities. For example, if a production manager is reassigned to the position of sales manager, a position that requires different skills and abilities even where there is no change in salary, status or perquisites, the substantial change in the nature of the duties may be a basis on which a constructive dismissal can be founded.
- A change of shift, particularly from a day shift to the night or graveyard shift, unless the change is pursuant to an express or implied provision in the contract of employment. In some cases, the employer may be able to establish the existence of an implied term on the basis of past practices in similar situations or evidence of the expectations of the parties.
- A job transfer to another city or town, where commuting would be impossible or would involve a substantial increase in travel time. For example, commuting may be possible for an employee with a driver's license, but impossible for an employee without one. There is court authority that says an employee's job may be transferred to another location if the right of the employer to make such a transfer is an implied term of the employment contract - see *Smith v Viking Helicopter Ltd. (CA),* 1989 CanLII 4368 (ON CA). The onus would be on the employer, however, to demonstrate that such an implied term existed. Implied terms to this effect are most likely to be found in cases where the employer is large organization with numerous offices or branches in different cities and the employee is in the managerial category.
- In some cases, a lay-off, even one that lasts no longer than the period of a temporary lay-off. This may be surprising to some, since a temporary lay-off is not in itself considered a termination under s. 56(1)(c). However, in *Stolze v Addario*, 1997 CanLII 764 (ON CA), the Ontario Court of Appeal held that if the terms of the employee's employment contract do not provide, either expressly or by implication, that they can be laid off, a lay-off, even a temporary one, can constitute a constructive dismissal and will be treated as a termination by the employer if the employee responds by quitting. It should be noted that the employee in *Stolze v Addario* was a key employee who was paid an annual salary and that the employer had never before laid off any salaried personnel in the 32 years that the employee had been working for the employer. Bearing in mind that a term providing for lay-offs need not be express and that in many cases it may be implied on the basis of past practice, common understandings or custom in the industry or trade concerned, it is likely that few employees could successfully claim constructive dismissal on the basis of a temporary lay-off.

ii. Other Breaches Giving Rise to Constructive Dismissal

Other breaches of the employment contract that may give rise to a constructive dismissal include forced resignations or sustained harassment or abuse.

A forced resignation occurs where the employer puts the employee to a choice between resigning and some even less palatable alternative, such as where the employer says to the employee, "If you don't resign, I'll fire you." If the employee in fact resigns in response to such a statement, the employee will be considered to have been constructively dismissed by the employer.

If the employer harasses or abuses the employee to an intolerable extent and as a consequence the employee resigns, the employee will be considered as having been constructively dismissed. It is not necessary to show intent on the part of the employer to get rid of the employee in order to find a constructive dismissal. Even in the absence of such intent, there will be a constructive dismissal if the employee resigns in response to the employer's behaviour and that behaviour would be unacceptable to a reasonable person in the employee's circumstances.

In *Tiny Town Daycare Inc. v Vlahos*, 2015 CanLII 67009 (ON LRB), the Board found that the employer's treatment of the employee constituted a constructive dismissal and awarded the employee termination pay. The employer subjected the employee to a sexual and gender-related harassment that created a poisoned work environment, which itself was a fundamental breach of the employment relationship. The employer also accused her of defamation, slander and neglect of duty, and threatened to make a complaint that would result in the employee losing her license. The Board held that the employer's conduct was so reprehensible that the employee felt she had no other alternative than to quit her employment.

Note, however, that unpleasantness, rudeness or misunderstanding of the facts on the part of the employer does not necessarily create the sort of poisoned work environment that can be treated as constructive dismissal by an employee who experiences it – see *Mortensen v Convergys CMG Canada Limited Partnership,* 2015 CanLII 2630 (ON LRB).

iii. Reasonable Period

As noted above, s. 56(1)(b) specifically provides that an employee who alleges constructive dismissal is required to resign from their employment within a "reasonable period". Although the employee must at some point resign to signal their rejection of the unilateral imposition of new terms by the employer, in order for s. 56(1)(b) to apply, the resignation does not have to be immediate. The reasonable period affords the employee time to consider whether to accept the change. It is an opportunity to try out the new arrangement or assess the future impact of an anticipatory breach before deciding whether or not to resign and claim constructive dismissal.

Where the breach has immediate consequences, the reasonable period will begin to run from the point the breach impacts upon the employee. In cases of anticipatory breach, the reasonable period will be considered to start running when the employer announces its intention.

It is Program policy that this reasonable period under s. 56(1)(b) is not necessarily the same length as the notice period under ss. 57 or 58. What constitutes a reasonable period may vary with the circumstances of each case. For example, if the employee is paid a salary of $1000 per week and the employer unilaterally reduces the salary to $700 per week effective immediately, what would constitute a reasonable period would be quite short, as very little time would be needed by the employee to determine whether the change was acceptable because the impact on them would be quite obvious. On the other

hand, if the employee was a sales employee paid on a salaried basis and the employer unilaterally changed the employee's remuneration to a commissioned basis and gave the employee a new sales territory at the same time, what constitutes a reasonable period in those circumstances may be quite lengthy, as the employee may need to try out the new arrangement for a considerable time before being in a position to gauge its impact on their earnings.

It should be noted that in order to preserve rights to a remedy under the common law, an employee may be expected to stay on under the changed terms beyond what would be considered a reasonable try out period. An employee who wishes to claim damages at common law for failure to give reasonable notice of termination has to show that they have made reasonable efforts to mitigate or lessen those damages, otherwise their damages will be offset by the amount that they could have reduced them by using reasonable efforts. The courts have said that this might require the employee to stay on under the new arrangement where it does not involve work that is substantially different or demeaning and where the work relationship is not acrimonious - see *Mifsud v MacMillan Bathurst Inc.*, 1989 CanLII 260 (ON CA).

However, in order to claim a remedy for constructive dismissal under the ESA 2000, the employee would have to resign within a reasonable period. That may mean that the employee has to choose between protecting their remedy under the common law and successfully claiming for termination pay on the basis of constructive dismissal under the ESA 2000.

iv. Notice of Termination & Termination Pay Obligations

An immediate or anticipatory unilateral breach of a fundamental term of the employment contract that has adverse consequences is a constructive dismissal and if it is followed by a resignation within a reasonable period of time it is a termination of employment under the Act. It follows therefore that the employer will have an obligation to provide notice of termination or termination pay in lieu of notice.

However, as discussed above under s. 56(1)(b), if an employer provides proper notice (see below) of a change to the contract that will be implemented on future date, and it is clear that a failure to accept the new terms and conditions of employment on the specified date will result in the existing employment contract being terminated with an offer of re-employment on the amended terms, there is no constructive dismissal. As a factual matter, it is the employer, not the employee who is terminating the employment contract, so the constructive dismissal analysis, which applies when the employee has resigned but is treated in law as if they had been dismissed, is not relevant.

Program policy is that proper notice must also be:

- In writing and specify a date for the contract change;
- Addressed to the employee; and
- Served either personally or in accordance with ESA Part XXI, s. 95.

Where all these conditions are met, the employer's notice of the contract change will be considered to be working notice of termination for the purposes of discharging the employer's liabilities for notice under the Act. If the working notice provided is something less than what is required under s. 57 or s. 58, the employer will be liable for the difference in termination pay in the event the employee does not accept the offer of the "new" contract. The employer's liability will be reduced according to the amount of notice that was given. Further, should the employee resign before the end of the notice period, they will have no further entitlements to payment for the balance of the notice period or to termination pay in lieu of notice.

3. The employer lays the employee off for a period longer than the period of temporary lay-off - s. 56(1)(c)

The provision states that a lay-off that exceeds the period of a "temporary lay-off" is a termination. Section 56(2) defines a temporary lay-off. Please see ss. 56(2), (3.1) and (3.3) - (3.6) for a detailed discussion of a temporary lay-off, and the point at which a lay-off will exceed a period of temporary lay-off thereby triggering a termination under s. 56(1)(c).

Note that O. Reg. 228/20 (“Infectious Disease Emergency Leave”) provides that during the defined COVID-19 period, non-unionized employees whose wages or hours of work are temporarily reduced or temporarily eliminated by their employer for reasons related to COVID-19 are not considered to be laid off under the ESA (except where the layoff is because of a permanent discontinuance of all of the employer’s business at an establishment). See O. Reg. 228/20 for details.

As this section provides that a lay-off is a termination only where the period of lay-off exceeds that of a temporary lay-off, it follows that a temporary lay-off is not a termination and that there is therefore no obligation under the Act to give an employee notice of a temporary lay-off. If an employer does provide notice of lay-off and the lay-off ultimately lasts longer than a temporary lay-off and is subsequently deemed to be a termination, the notice of lay-off cannot generally be set-off against the employer's notice of termination obligations.

Ontario Regulation 288/01, s. 4(2) permits notice of indefinite lay-off to fulfil the employer's notice of termination obligations. The ESA 2000 restricts the application of this provision to situations where an employer would be in breach of a collective agreement if it advised employees that their employment was being terminated. This allows an employer bound by such a collective agreement and who anticipates that a lay-off that it is about to implement will end up resulting in termination for the purposes of the Act, to satisfy the Act's notice requirements by giving notice of indefinite lay-off.

It should be noted that while a lay-off that lasts no longer than the period of a temporary lay-off will not be considered a termination under s. 56(1)(c), if the employee's employment contract does not provide, either expressly or by implication (which could be based on past practice, common understandings or custom in the industry or trade concerned) that they may be laid off, a lay-off, even one that would be considered temporary under s. 56(2), may constitute a constructive dismissal; in that case, if the employee responds to the lay-off by quitting within a reasonable period, the situation will be treated as involving a termination by the employer pursuant to s. 56(1)(b). In this regard, see the discussion of the Ontario Court of Appeal decision in *Stolze v Addario*.

Temporary Lay-off - s. 56(2)

56(2) For the purpose of clause (1)(c), a temporary lay-off is,

(a) a lay-off of not more than 13 weeks in any period of 20 consecutive weeks;

(b) a lay-off of more than 13 weeks in any period of 20 consecutive weeks, if the lay-off is less than 35 weeks in any period of 52 consecutive weeks and,

- **i. the employee continues to receive substantial payments from the employer,**
- **ii. the employer continues to make payments for the benefit of the employee under a legitimate retirement or pension plan or a legitimate group or employee insurance plan,**

iii. the employee receives supplementary unemployment benefits,

iv. the employee is employed elsewhere during the lay-off and would be entitled to receive supplementary unemployment benefits if that were not so,

v. the employer recalls the employee within the time approved by the Director, or

vi. in the case of an employee who is not represented by a trade union, the employer recalls the employee within the time set out in an agreement between the employer and the employee; or

(c) in the case of an employee represented by a trade union, a lay-off longer than a lay-off described in clause (b) where the employer recalls the employee within the time set out in an agreement between the employer and the trade union.

This section defines a "temporary lay-off" for the purpose of s. 56(1)(c), which provides that a termination occurs when an employee is laid off for a period longer than a temporary lay-off. This section must be read in conjunction with s. 56(3.1)-(3.6), which sets out what constitutes a week of lay-off for the purpose of this section.

This section must also be read in conjunction with s. 56(5), which provides that once a termination is triggered by a lay-off that exceeds the period of a temporary lay-off, the termination is deemed to have occurred on the very first day of the lay-off.

1. A lay-off of not more than 13 weeks in any period of 20 consecutive weeks - s. 56(2)(a)

Subject to s. 56(2)(b) and s. 56(2)(c), an employee is considered to be on a temporary lay-off if the employee is on lay-off for no more than 13 weeks within any period of 20 consecutive weeks.

For example, an employee who is laid off for ten weeks, recalled to work for eight weeks and then laid off again for another ten weeks will be temporarily laid off under s. 56(2)(a) because the longest the lay-off lasted in any period of 20 consecutive weeks was 12 weeks. As a result, the employee’s employment would not have been deemed to have been terminated and they would not be entitled to notice of termination or termination pay.

The period of 20 consecutive weeks is a rolling window so that if the employee is laid off for more than 13 weeks in any consecutive 20-week period, the lay-off ceases to be temporary. Neither the employer nor the employee can pick and choose which 20 weeks to use when determining whether the 13-week threshold has been reached. Rather, the threshold is reached and a termination occurs on the first occasion that the layoff exceeds 13 weeks of lay-off in any period of 20 consecutive weeks.

A week of lay-off is defined in s. 56(3.1) with respect to employees with a regular work week and in s. 56(3.3) and s. 56(3.5) with respect to employees who do not have a regular work week.

However, the fact that an employee has a regular work week (i.e., they usually work the same number of hours each week) does not necessarily mean that they usually work the same days each week. Because of this, the point at which the lay-off of an employee with a regular work week will be considered to have exceeded the period of a temporary lay-off so as to trigger a termination may differ according to whether the employee usually works the same days each week or whether the employee instead works different days from week to week.

Similarly, the fact that an employee does not have a regular work week (i.e., they do not work the same number of hours in each week) does not necessarily mean that the employee does not work the same days in each week. Again, the point at which the lay-off of an employee who does not have a regular work week will be considered to have exceeded a period of temporary lay-off so as to trigger a termination will depend on whether the employee usually works the same days each week or works different days each week.

Note that for the purposes of the under 35 weeks in 52 rule, termination is triggered at the point the employee has been on lay-off for a full 35 weeks; thus, the question of when the lay-off exceeds 35 weeks does not arise.

i. Termination Triggered by Lay-off Where Employee Usually Works the Same Days Each Week

For purposes of s. 56(2)(a), known as the 13 weeks in 20 rule, the Program's position is that where an employee usually works the same days each week, the lay-off will exceed 13 weeks at the first moment of the first day in the 14th week on which the employee would normally have been scheduled to work and on which they do not work. Under s. 56(2)(b), the under 35 weeks in 52 rule, termination is triggered at the point the employee has been on lay-off for a full 35 weeks; accordingly, the question of when the lay-off exceeds 35 weeks does not arise.

Consider an employee who usually works Monday through Friday and who is temporarily laid off as defined in s. 56(2)(a). The employee is initially laid off for ten weeks, goes back to work for four weeks (no longer on layoff) and is then laid off again for another three weeks. The employee has at that point been on a temporary lay-off for a full 13 weeks within a 17- week period. If the employee is subsequently on lay-off on any day that would normally be a work day (i.e., a Monday, Tuesday, Wednesday, Thursday or Friday) within the next three weeks, the lay-off will have exceeded a period of temporary lay-off and a termination will be triggered under s. 56(1)(c).

Note that there would not have to be a full week of lay-off in those next three weeks in order to trigger a termination; the employee has already been on lay-off for a full 13 weeks within the last 17 weeks and so even one second more of lay-off occurring in the next three weeks means that they will have been laid off for more than 13 weeks in a 20-week period.

Although a termination is triggered at this point, the termination is deemed to have occurred on the very first day of the lay-off. In the case of an employee who usually works the same days each week, the first day of layoff can be identified as the first day in the first week of lay-off on which the employee would normally work and on which they did not work. See the discussion of s. 56(5) below regarding deemed termination date.

ii. Termination Triggered by Lay-off Where Employee Does Not Usually Work the Same Days Each Week

For purposes of s. 56(2)(a), known as the 13 weeks in 20 rule, the Program's position is that where an employee does not usually work the same days each week, the lay-off cannot be considered to have exceeded 13 weeks until the end of the 14th week of lay-off. In contrast to the situation of an employee who usually works the same days each week, in the case of an employee who does not usually work the same days each week, no particular day within a week that is a week of lay-off can be identified as a day on which the employee continues to be on lay-off. If the employee sometimes works on Tuesdays but often does not work on Tuesdays, the fact that they do not work on a particular Tuesday does not necessarily mean that they are on lay-off that day. In the result, in order to determine that the lay-off has

in fact exceeded 13 weeks, we must wait until the end of the 14th week of lay-off before we can know that the employee has been on lay-off for more than 13 weeks. Under s. 56(2)(b), the under 35 weeks in 52 rule, termination is triggered at the point the employee has been on lay-off for a full 35 weeks; accordingly, the question of when the lay-off exceeds 35 weeks does not arise.

Although a termination is triggered at the end of the 14th week of layoff, the termination is deemed to have occurred on the very first day of the lay-off. In the case of an employee who does not usually work the same days each week, just as there is no particular day in the 14th week of lay-off that we can say is a day on which the employee continues to be on lay-off, likewise there is no particular day in the first week of lay-off that we can say was a day on which the employee was on lay-off. Given this, and given the need to be able to ascertain a deemed termination date, the position of the Program is that the first day of the lay-off (and hence the deemed termination date) for an employee who does not usually work the same days each week is the first day of the first week of lay-off. Since the week of lay-off corresponds to the work week, this means that if the employee's work week is Sunday to Saturday, the first day of the lay-off will be the Sunday. See the discussion in s. 56(5) regarding deemed termination date.

Note that where a termination is triggered because of a layoff that exceeds 13 weeks in a period of 20, the employee is entitled under the Act to their termination pay forthwith, even where the contract or collective agreement provides recall rights. In the case of termination pay, the provisions in the Act requiring an election between retention of recall rights (with the employee's entitlement paid into trust) and giving up recall rights (and receiving the entitlement forthwith) apply only if the termination pay entitlement arises because of a layoff of 35 weeks or more - see ESA Part XV, s. 67(1).

As a consequence, when a termination is triggered because of a lay-off that exceeds 13 weeks in a period of 20 consecutive weeks, an employee is entitled under the Act to be paid their termination pay in accordance with ESA Part V, s. 11(5). Nothing in the Act requires that such an employee choose between receiving termination pay forthwith and retaining their recall rights.

2. A lay-off of more than 13 weeks in any period of 20 consecutive weeks if the lay-off is less than 35 weeks in any period of 52 consecutive weeks – s. 56(2)(b)

Section 56(2)(b) sets out the six circumstances in which a lay-off of more than 13 weeks in any consecutive 20-week period but less than 35 weeks in any period of 52 consecutive weeks is still considered to be a temporary lay-off:

i. The employee continues to receive substantial payments from the employer,

ii. The employer continues to make payments for the benefit of the employee under a legitimate retirement or pension plan or a legitimate group or employee insurance plan,

iii. The employee receives supplementary unemployment benefits,

iv. The employee is employed elsewhere during the lay-off and would be entitled to receive supplementary unemployment benefits if that were not so,

v. The employer recalls the employee within the time approved by the Director, or

vi. In the case of an employee who is not represented by a trade union, the employer recalls the employee within the time set out in an agreement between the employer and the employee.

It should be noted that the period of 52 consecutive weeks is a rolling window. Neither the employer nor the employee can pick and choose which 52 weeks to use when determining whether the 35-week

threshold has been reached. Rather, the threshold is reached and a termination occurs on the first occasion of there being 35 weeks of lay-off in a period of 52 consecutive weeks. As the termination is triggered at the point the employee has been on lay-off for a full 35 weeks; the question of when the lay-off exceeds 35 weeks does not arise.

In addition, the word "any" in s. 56(2)(b) means, in the case of an employee who accepts a recall, that time spent on lay-off prior to the recall is taken into account in determining whether a post-recall lay-off has triggered a termination (or severance). In other words, both the time spent on lay-off prior to the recall and the time spent on lay-off where the employee is laid off again following the recall is counted in determining whether the employee has been laid off for at least 35 weeks in any 52-week period.

See the Court of Appeal decision in *United Steel v National Steel Car Limited*, 2013 ONCA 401 (CanLII) and ESA Part XV, 63(1) for a discussion of this case.

The six circumstances in which a lay-off of more than 13 weeks in any period of 20 consecutive weeks but less than 35 weeks in any period of 52 consecutive weeks is still considered to be a temporary lay-off are:

i. The employee continues to receive substantial payments from the employer.

Section 56(2)(b)(i) provides that a lay-off of more than 13 weeks in any 20 consecutive week period but less than 35 weeks in any period of 52 consecutive weeks is still considered to be a temporary lay-off if the employer continues to provide the employee with substantial payments during the period of lay-off.

It is Program policy that the term "continues" indicates that the employer must make ongoing payments to the employee during the entire period of temporary lay-off, including the first 13 weeks of lay-off, in order for this clause to apply. If the employer stops making the payments at any time, the lay-off will cease to be a temporary lay-off under this clause.

The use of the plural as opposed to the singular form of the word "payment" reinforces that the employer must make multiple and continuous payments to the employee during the entire period of temporary lay-off.

Section 56(2)(b)(i) has not been interpreted by a referee, adjudicator, OLRB or court, so employment standards officers may wish to contact the Employment Practices Branch for assistance in the event they are required to consider the application of this provision.

ii. The employer continues to make payments for the benefit of the employee under a legitimate retirement or pension plan or a legitimate group or employee insurance plan.

Section 56(2)(b)(ii) provides that a lay-off of more than 13 weeks in any 20 consecutive weeks but less than 35 weeks in any period of 52 consecutive weeks is still considered to be a temporary lay-off if the employer continues to make payments under a legitimate retirement or pension plan or a legitimate group or employee insurance plan during the period of lay-off.

Where the employer's pension or benefit plan contributions are based on a percentage of the employee's wages, the contributions would continue to be made on the basis of the wages the employee was earning prior to the lay-off.

It is Program policy that the words "continues" and "legitimate" indicate that the employer must make ongoing payments for the entire period of the temporary lay-off (including the first 13 weeks) and the employer's payments must be made pursuant to plan provisions that were in existence before the

commencement of the lay-off, unless the employee has specifically agreed to an amendment to the plan or the amendment was necessitated by a legitimate cause such as a legislative change.

If, for example, a plan provides that the coverage will end after 26 weeks of lay-off, the employer will not be able to continue to make payments to a legitimate plan after the 26th week and, therefore, the employee will cease to be on a temporary lay-off when the employer stops making the payments. Note however, that with respect to a group or employee insurance plan comprised of multiple plans (e.g., a package consisting of life insurance, extended health accidental death and a long-term disability plan) the discontinuance of one of those plans may, in certain circumstances, not trigger the end of a temporary lay-off. See the discussion of such package plans below.

If the employer, with employee agreement, renegotiated the terms of the plan after the commencement of the lay-off to extend the coverage from 26 weeks to 35 weeks, the employee would continue to be on a temporary layoff for up to 35 weeks after the lay-off began. However, if the terms of the plan were renegotiated without employee agreement, the employee would cease to be on a temporary lay-off at the point the employer began making payments pursuant to the new extended plan. This is because the employer is not continuing to make payments pursuant to the plan, so much as starting to make new payments not previously required. Also, it might be inferred that the employer has taken such action in an attempt to extend the temporary layoff past 13 weeks and therefore the requirement that the plan be legitimate is not met. In this regard see *Stanton Pipes Ltd. v Turk et al* (February 5, 1986), ESC 2035 (Egan).

Another point in regard to these payments is that they must relate to the period of employment after the lay-off began. If, for example, pension plan contributions made during the period of lay-off are in respect of service accrued prior to the commencement of the lay-off, those contributions will not be considered as payments within the meaning of this section.

It is Program policy that there is no requirement that an employer who offers both an insurance plan or plans and a pension plan must continue payments under both the insurance plan or plans AND the pension plan. The employer could continue payments under just the pension plan or just the insurance plan or plans. However, if the employer offers a pension plan and more than one type of insurance plan, and it does not continue payments under the pension plan, it is Program policy that s. 2(b)(ii) will generally not apply unless payments are continued under ALL the insurance plans. Likewise, if the employer does not offer a pension plan but does offer more than one type of insurance plan, s. 2(b)(ii) will generally not apply unless payments are continued under ALL the insurance plans. Thus, if the employer continues only part of the insurance coverage (e.g., just life insurance while dropping health insurance) this clause, generally speaking, will not apply.

However, where an employer continues to provide the insurance plan package but through no fault of the employer and for otherwise legitimate reasons part of that coverage (e.g., disability insurance) is subsequently discontinued, the temporary lay-off will continue despite the discontinuance of such coverage. For example, consider an employer who provides a group insurance plan package that includes disability benefits. It may be that an insurer will not provide coverage for disability after a certain point in the layoff and that the terms of the policy specifically state this. In that situation, if disability insurance payments are not continued beyond the point at which coverage under the plan ends, but the employer has other insurance plans under which payments continue to be made, it is the Program's view that the situation will still be covered by s. 2(b)(ii). This assumes that the length-of-coverage provision in the plan was not specifically negotiated by the employer in anticipation of or in response to the lay-off and that the employer could not, prior to the lay-off, have arranged for disability insurance with a different

insurer who was willing to offer lengthier coverage. Note, however, that if there are no other insurance plans, the cessation of coverage under the disability plan will mean that s. 2(b)(ii) no longer applies.

The issue has arisen as to what happens in a situation where the plan provides that both the employer and the employee make contributions to the plan, e.g., employer 50 per cent and employee 50 per cent, and the employee is requested to make their share of the contribution and refuses. In such situations, the insurer will not normally accept a partial premium (i.e., only the employer's payment) as sufficient to maintain the plan and may suspend or cancel the plan. In such a situation, should the employee be able to consider themselves as terminated after 13 weeks of lay-off even though that is the result of the employee's failure to pay half the insurance premium? The Program's policy is that if the employee does this and the employer is prevented as a result from continuing its payments under the plan because the insurer has suspended or cancelled the plan, this clause will apply and the lay-off will still be considered to be temporary past the 13-week point. In this situation however, it is Program policy that the employer should do everything reasonably possible to ensure continued coverage for the employee, such as taking advantage of any grace periods and contacting the employee to ensure the employee's failure to pay was not due to an oversight.

iii. The employee receives supplementary unemployment benefits.

Section 56(2)(b)(iii) provides that a lay-off of more than 13 weeks in any 20 consecutive week period but less than 35 weeks in any period of 52 consecutive weeks is still considered to be a temporary lay-off if the employee is in receipt of supplementary unemployment benefits.

Supplementary unemployment benefits ("SUBS") are amounts that the employer pays to the employee to top up the employee's unemployment benefits. For example, the employee is receiving $300 a week in benefits under the *Employment Insurance Act*, SC 1996, c 23, and the SUBS plan provided by the employer entitles the employee to a top up of a further $100 a week while they are on lay-off. The term supplementary unemployment benefit is not defined in the ESA 2000. However, it is defined in s. 145(1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) ("ITA") as follows:

Supplementary unemployment benefit plan **means an arrangement, other than an arrangement in the nature of a superannuation or pension fund or plan or an employees profit sharing plan, under which payments are made by an employer to a trustee in trust exclusively for the payment of periodic amounts to employees or former employees of the employer who are or may be laid off for any temporary or indefinite period.**

If the employer's SUBS plan does not meet the definition in the ITA, with the result that the payments would not be considered supplementary unemployment benefits under s. 56(2)(b)(iii), the payments the employer makes may instead satisfy the conditions in s. 56(2)(b)(i), if the plan is bona fide and the payments continue to be made through the period of lay-off.

iv. The employee is employed elsewhere during the lay-off and would be entitled to receive supplementary unemployment benefits if that were not so.

Section 56(2)(b)(iv) provides that a lay-off of more than 13 weeks in any 20 consecutive week period but less than 35 weeks in any period of 52 consecutive weeks is still considered to be a temporary lay-off if the employee is employed elsewhere during the lay-off and would have received SUBS had they not been so employed.

v. The employer recalls the employee within the time approved by the Director.

Section 56(2)(b)(v) provides that a lay-off of more than 13 weeks in any 20 consecutive week period but less than 35 weeks in any period of 52 consecutive weeks is still considered to be a temporary lay-off if the employer recalls the employee within the time approved by the Director of Employment Standards. There is no requirement that the employee be in receipt (or entitled to) any of the payments described in ss. 56(2)(b)(i)-(iv) during the lay-off.

Some of the factors the Director or their delegate (see Delegation of Powers) may consider in determining whether to provide approval are:

- The reason for the lay-off:
- The length of the lay-off;
- The financial situation of the employer;
- The view of the union (if there is one).

Note that this list is not intended to be exhaustive.

vi. In the case of an employee who is not represented by a trade union, the employer recalls the employee within the time set out in an agreement between the employer and the employee.

Section 56(2)(b)(vi) provides that a lay-off of more than 13 weeks in any 20 consecutive week period but less than 35 weeks in any period of 52 consecutive weeks is still considered to be a temporary lay-off if the employer recalls the employee within the time set out in an agreement between the employer and the employee. This provision only applies to an employee who is not represented by a trade union. The agreement must be in writing in accordance with ESA Part I, s. 1(3).

There is no requirement that the Director of Employment Standards approve the agreement. There is also no requirement that the employee be in receipt (or entitled to) any of the payments described in ss. 56(2)(b)(i)-(iv) during the lay-off.

3. In the case of an employee represented by a trade union, a lay-off longer than a lay-off described in clause (b) where the employer recalls the employee within the time set out in an agreement between the employer and the trade union - s. 56(2)(c)

Section 56(2)(c) provides that a temporary lay-off can last for a period that is longer than the period described in s. 56(2)(b) if the employee is represented by a union and the employer recalls the employee within the time set out in an agreement between the employer and the union. However, in *National Automobile, Aerospace Trans-portation and General Workers Union of Canada (C.A.W. - Canada) Local No. 27 v London Machinery Inc.*, 2006 CanLII 8711 (ON CA), the Ontario Court of Appeal held that in order for s. 56(2)(c) to apply, the employee must be recalled before the lay-off has reached a total of 35 weeks in a 52 week period.

There is no requirement that the Director of Employment Standards have approved the agreement in order for it to be effective. Further, there is no requirement that any of the conditions set out in ss. 56(2)(b)(i) to (iv) have been met.

Definition - s. 56(3)

56(3) In subsections (3.1) to (3.6),

"excluded week" means a week during which, for one or more days, the employee is not able to work, is not available for work, is subject to a disciplinary suspension or is not provided with work because of a strike or lock-out occurring at his or her place of employment or elsewhere.

Section 56(3) defines "excluded week" as a week during which the employee did not work for one or more days because the employee is not able or available to work, is subject to disciplinary suspension or is not provided with work because of a strike or lock-out occurring at their place of employment or elsewhere.

Lay-off, Regular Work Week - s. 56(3.1)

56(3.1) For the purpose of subsection (2), an employee who has a regular work week is laid off for a week if,

(a) in that week, the employee earns less than one-half the amount he or she would earn at his or her regular rate in a regular work week; and

(b) the week is not an excluded week.

Subsection 56(3.1) defines what constitutes a week of lay-off in the case of employees who work a regular work week for the purpose of determining whether a period of temporary lay-off as defined in s. 56(2) is exceeded, thereby triggering a termination as per s. 56(1)(c). The point at which a temporary lay-off ceases to be temporary and triggers a termination is discussed in detail in s. 56(2) above.

Subsection 56(3.1) refers to regular rate and regular work week, which are defined terms in s. 1 as follows:

"Regular rate" means, subject to any regulation made under paragraph 10 of subsection 141 (1),

(a) for an employee who is paid by the hour, the amount earned for an hour of work in the employee's usual work week, not counting overtime hours,

(b) otherwise, the amount earned in a given work week divided by the number of non-overtime hours actually worked in that week;

"Regular work week", with respect to an employee who usually works the same number of hours each week, means a week of that many hours but not including overtime hours;

Refer to ESA Part I, s. 1 for a detailed discussion of these terms.

For an employee who has a regular work week, a "week of lay-off" is a week, other than an excluded week, in which the employee receives less than 50 per cent of the wages they would earn at their regular rate for a regular work week. This means that an employee may be deemed to be on a lay-off for purposes of s. 56 even though they are still doing some work.

In determining what seven-day period should be looked at for the purpose of determining whether there has been a week of lay-off, reference should be made to the same seven-day period as would make up the employee's work week, i.e., a recurring period of seven consecutive days selected by the employer for the purpose of scheduling work, or, where the employer has not selected such a period, a recurring period of seven days beginning on Sunday and ending on Saturday.

It should be borne in mind that a week of lay-off does not include an excluded week, as defined in s. 56(3). In other words, where:

1. The employee is not able to work;
2. The employee is not available to work;
3. The employee is subject to disciplinary suspension; or
4. Because of a strike or lock-out.

These are discussed in detail below.

1. The employee is not able to work.

Any week in which an employee is not able to work because they are, for example, off on sick leave, workers' compensation, or is otherwise unable to work for medical reasons will not be a week of layoff.

2. The employee is not available to work.

Any week in which an employee is unavailable for work (for example, because they are in jail, or on a personal emergency leave, pregnancy or parental leave) will not be a week of lay-off.

Where an employee has found work with another employer during the lay-off, the employee may, depending on the facts, still be considered to be available for work with the employer that laid them off, regardless of whether the new employment is of a temporary or a permanent nature. Any week during which the employee is employed by another employer would be considered a week of lay-off as regards the employer who had laid them off provided that the employee would, if recalled by the employer during that week, be able to immediately return to work for that employer or at least be able to return to work on the same day as the recall.

3. The employee is subject to disciplinary suspension.

Any week in which an employee is on disciplinary suspension is not a week of lay-off. It is important to ensure, though, that the disciplinary suspension is bona fide and is within the employer's express or implied authority under the contract of employment.

4. Because of a strike or lock-out.

Any week in which an employee is not provided with work by the employer due to a strike or lock-out at the employee's place of employment, or elsewhere, is not a week of lay-off.

It is important to note that the strike or lock-out need not be at the employee's place of employment. For example, if there is a strike or lock-out at a supplier, and the employer is a manufacturer dependent upon the supplier for its parts, that employer may be forced to close down until the strike or lock-out is over or a new supplier can be found. In that case the employees of the manufacturer are not considered to be on a lay-off during the temporary closure that occurs as a result.

It is the Program's position that if an employee's employer is not providing work because it is the one doing the locking out, the lock-out must be a lock-out that is legal under the *Labour Relations Act, 1995,* SO 1995, c 1, Sch 1, in order for an affected week to be considered an excluded week. In those circumstances, the employer's failure to provide work flows from the right to lock out the employees under the *Labour Relations Act, 1995* and the employer should not suffer any adverse consequences for exercising that right.

On the other hand, if the lock-out is by the employee's employer and is illegal, the Program's position is that a week in which the employees are illegally locked out is a week of lay-off and not an excluded week. However, a week of strike, whether illegal or legal, will be considered by the Program to be an excluded week (i.e., not a week of layoff) because the employer does not in those circumstances have any control over whether work is provided.

In regard to termination and strike or lock-outs, note that O Reg 288/01, s. 2(1) para 8 establishes an exemption from the notice obligations under the Act where an employee has been terminated during or as a result of a strike or lock-out at their place of employment.

Effect of Excluded Week - s. 56(3.2)

56(3.2) For the purposes of clauses 2(a) and (b), an excluded week shall be counted as part of the periods of 20 and 52 weeks.

This subsection provides that an excluded week is included in counting the periods of 20 and 52 consecutive weeks used to determine whether a layoff is a temporary lay-off, as defined in s. 56(2).

Lay-off, No Regular Work Week - ss. 56(3.3)-56(3.6)

56(3.3) For the purposes of clauses (1)(c) and (2)(a), an employee who does not have a regular work week is laid off for a period longer than the period of a temporary lay-off if for more than 13 weeks in any period of 20 consecutive weeks he or she earns less than one-half the average amount he or she earned per week in the period of 12 consecutive weeks that preceded the 20-week period.

56(3.4) For the purposes of subsection (3.3),

(a) an excluded week shall not be counted as part of the 13 or more weeks but shall be counted as part of the 20-week period; and

(b) if the 12-week period contains an excluded week, the average amount earned shall be calculated based on the earnings in weeks that were not excluded weeks and the number of weeks that were not excluded.

56(3.5) For the purposes of clauses (1)(c) and 2(b), an employee who does not have a regular work week is laid off for a period longer than the period of a temporary lay-off if for 35 or more weeks in any period of 52 consecutive week she or she earns less than one-half the average amount he or she earned per week in the period of 12 consecutive weeks that preceded the 52-week period.

56(3.6) For the purposes of subsection (3.5),

(a) an excluded week shall not be counted as part of the 35 or more weeks but shall be counted as part of the 52-week period; and

(b) if the 12-week period contains an excluded week, the average amount earned shall be calculated based on the earnings in weeks that were not excluded weeks and the number of weeks that were not excluded.

Subsections 56(3.3) to (3.6) effectively define what constitutes a week of lay-off with respect to an employee who does not have a regular work week for the purposes of determining whether a period of

temporary lay-off, as defined in s. 56(2), is exceeded, thereby triggering a termination as per s. 56(1)(c). Note that the point at which a temporary lay-off ceases to be temporary and triggers a termination in accordance with s. 56(2) is discussed in detail in s. 56(2) above.

In applying these provisions, the Program takes the position that a week of lay-off is identified by reference to the seven-day period in which the employer schedules work (the work week) for employees who do not have a regular work week. Note that the definition of work week in ESA Part I, s. 1 states that if the employer has not selected a seven-day period for the purposes of scheduling work, the work week is considered to be Sunday to Saturday.

Subsection 56(3.3) provides that an employee who does not have regular work weeks will have been laid off for more than the period of a temporary lay-off (i.e., their employment will be terminated) if for more than 13 weeks in a period of 20 consecutive weeks the employee earns less than one-half the average amount they had been earning per week in the 12 consecutive weeks preceding the first week of lay-off in the 20-week period.

Likewise, s. 56(3.5) provides that an employee who does not have regular work weeks will have been laid off for more than the period of a temporary lay-off (i.e., their employment will be terminated) if for at least 35 weeks in a period of 52 consecutive weeks the employee earns less than one-half the average amount they had been earning in the 12 consecutive weeks preceding the first week of lay-off in the 52-week period.

In other words, for an employee who does not have a regular work week, the first week of a lay-off will be the first work week in which the employee earns less than 50 per cent of the average earned per week over the 12-week period preceding the 20- or 52-week period.

Note however that s. 56(3.4)(b) and s. 56(3.6)(b) provide that if the 12-week period referred to in either s. 56(3.3) or s. 56(3.5) contains an excluded week, the average amount earned is to be calculated based on the earnings in weeks that were not excluded weeks divided by the number of weeks that were not excluded weeks.

Subsections 56(3.4)(a) and 56(3.6)(a) provide that excluded weeks are not counted as weeks of lay-off for the purpose of determining whether the employee has been laid off for a period than a temporary lay-off (i.e., for more than 13 weeks in a period of 20 consecutive weeks or for at least 35 weeks in a period of 52 consecutive weeks) under s. 56(1)(c), s. 56(2)(a) and s. 56(2)(b). However, excluded weeks do count as part of the 20-week and 52-week period referred to in s. 56(2)(a) and s. 56(2)(b).

Temporary Lay-off Not Termination - s. 56(4)

56(4) An employer who lays an employee off without specifying a recall date shall not be considered to terminate the employment of the employee, unless the period of the lay-off exceeds that of a temporary lay-off.

Section 56(4) permits employers to place employees, unionized or otherwise, on a temporary lay-off without having to provide the employee with a date of recall.

This section clarifies that the employment of employees who are laid off without a recall date is not terminated, provided that the period of temporary lay-off does not exceed that of a temporary lay-off as defined in s. 56(2).

Section 56(4) reverses Program policy under the former *Employment Standards Act*, which was adopted in response to a decision of the Court of Appeal in *Stolze v Addario*. The Court had found that because a "notice of indefinite lay-off" was deemed to be a notice of termination under s. 8(3) of O Reg 327 under the former *Employment Standards Act*, a lay-off without a recall date was, in effect, an immediate termination. Under the ESA 2000, a notice of indefinite lay-off will be considered to be a notice of termination only where an employer who is bound by a collective agreement is precluded by that agreement from giving an employee notice of termination despite the employer's intention to lay the employee off for a period longer than a temporary lay-off. See the detailed discussion at O Reg 288/01, s. 4(2).

Deemed Termination Date - s. 56(5)

56(5) If an employer terminates the employment of an employee under clause (1)(c), the employment shall be deemed to be terminated on the first day of the lay-off.

Section 56(5) provides that where the lay-off ceases to be temporary, the employee's employment will be deemed to be terminated as of the first day of the lay-off, not the date on which the lay-of ceased to be temporary. In other words, once a lay-off exceeds a period of temporary lay-off as defined in s. 56(2) and a termination is triggered, it is necessary to identify the first day of the lay-off as this will be the deemed termination date in accordance with s. 56(5). See the discussion in s. 56(2), which defines a temporary lay-off and discusses at what point a temporary lay-off is exceeded and thus when a termination is triggered.

In the case of an employee who usually works the same days each week, the Program's position is that the first day of the lay-off is the first day in the first week of lay-off on which the employee would normally work and on which they did not work.

Consider for example an employee whose employer schedules work on a Monday through Sunday basis and who regularly works Monday through Friday.

- On Monday March 1 the employee works his regularly scheduled shift but is told that he is being laid off as of Tuesday, March 2. The first week of lay-off is the week of March 1 to March 7.
- The employee continues to be on a lay-off for a full 13 weeks to May 30 and continues to be on lay-off the next day, which is Monday, May 31.
- A termination is therefore triggered at the start of the employee's regular shift on Monday May 31.

Pursuant to s. 56(5), the employee is deemed to have been terminated back on Tuesday, March 2.

In the case of an employee who does not usually work the same days each week, no particular day in the first week of lay-off can be said to be the first day on which the employee was laid off as a factual matter. The position of the Program, however, is that where it is necessary to identify some day as the first day of the lay-off and hence the deemed termination date, the only sensible approach is to consider it to be the first day of the first week of layoff. Bearing in mind that a week of lay-off should correspond to the work week, if the work week is from Sunday to Saturday, the first day of the lay-off will be considered to be the Sunday of the first week of lay-off, and that day will be the deemed termination date. See the discussion at ss. 56(3.1), (3.3) to (3.6) on what constitutes a week of lay-off with respect to an employee who does not have a regular work week for the purposes of determining whether a period of temporary lay-off.

As a consequence of a combination of this deeming provision and s. 59(2), the amount of the entitlement to pay in lieu of notice for individual terminations (that is, where the mass notice entitlements are not

triggered) under ESA Part XV, s. 61 is based on the period of employment as it stood on the day the lay-off began.

Note that this is so even though the employee worked some days after the lay-off commenced. For example, consider an employee whose work week is from Sunday to Saturday and who normally works five days a week, Monday to Friday:

Example 1:

Week beginning Sunday, January 9:

- Employee commenced a lay-off on Monday and was laid off for four weeks;
- Returned to work for six weeks;
- Laid off for nine weeks;
- Returned to work for a week, then laid off again.

Example 2:

Week beginning Sunday, May 22:

Once the lay-off continues into this week (i.e., into the first instant of the first day of the week which would normally be a work day) the employee has been laid off for more than 13 weeks in a 20-week period. As a result, employment is deemed to have been terminated as of January 10, the first day of lay-off.

The period of employment for the purposes of calculating this employee's notice/pay in lieu entitlement will be considered to have ended on January 10 even though the employee did some work after that date.

Note, however, that the entire period of lay-off will be included in determining the employee's length of employment for the purposes of determining whether the employee has been continuously employed for three months or more in order to qualify for notice or termination pay under ESA Part XV, s. 54.

As s. 56(1)(c) provides that a termination only occurs where the period of lay-off exceeds that of a temporary lay-off, it follows that a temporary layoff is not a termination and that there is no obligation under the Act to give an employee notice of a temporary lay-off. If an employer does provide notice of lay-off and the lay-off is subsequently deemed to be a termination, the notice of lay-off cannot be set-off against the employer's notice of termination obligations, except where O Reg 288/01, s. 4(2) applies.

ESA Part XV Section 57 - Employer Notice Period

57 The notice of termination under section 54 shall be given,

(a) at least one week before the termination, if the employee's period of employment is less than one year;

(b) at least two weeks before the termination, if the employee's period of employment is one year or more and fewer than three years;

(c) at least three weeks before the termination, if the employee's period of employment is three years or more and fewer than four years;

(d) at least four weeks before the termination, if the employee's period of employment is four years or more and fewer than five years;

(e) at least five weeks before the termination, if the employee's period of employment is five years or more and fewer than six years;

(f) at least six weeks before the termination, if the employee's period of employment is six years or more and fewer than seven years;

(g) at least seven weeks before the termination, if the employee's period of employment is seven years or more and fewer than eight years;

(h) at least eight weeks before the termination, if the employee's period of employment is eight years or more.

This section is similar to part of the corresponding provision (s. 57(1)) of the former *Employment Standards Act*.

Section 57 establishes the length of notice of termination that an employee is entitled to under s. 54. This section also establishes the notice period for the purpose of s. 60 (requirements during notice) and s. 61 (calculation of termination pay in lieu of notice). This section must be read in conjunction with s. 59 of the *Employment Standards Act, 2000* and s. 8 of O Reg 288/01, which set out what time must be included in the period of employment, and the start and end date of the period of employment, respectively, for the purposes of calculating the employee's entitlement.

Section 59(1) of the Act provides that time on leave, lay-off and other inactive employment (e.g., vacation, sick time) is included in determining the period of employment for purposes of calculating the amount of the employee's notice entitlement. However, under s. 59(2) time spent on lay-off after the deemed termination date (i.e., from the day after the date the lay-off commenced is not included). For a detailed discussion refer to ESA Part XV, s. 59.

Period of employment is defined in s. 8(1) of O Reg 288/01 as the period beginning the day the employment most recently commenced and ending the day notice of termination was provided (if it was provided in accordance with Part XV) or the day the employee's employment is terminated (if notice was not given in accordance with Part XV). Two successive periods of employment that are not more than 13 weeks apart are to be added together and treated as a single period of employment under s. 8(2) of O Reg 288/01. For a detailed discussion refer to O Reg 288/01, s. 8.

Section 4(1) of O Reg 288/01 sets out the manner in which the notice must be given. Please see O Reg 288/01, s. 4.

ESA Part XV Section 58 - Notice, 50 or More Employees

Notice, 50 or More Employees - s. 58(1)

58 (1) Despite section 57, the employer shall give notice of termination in the prescribed manner and for the prescribed period if the employer terminates the employment of 50 or more employees at the employer's establishment in the same four-week period.

Section 58(1) provides for longer periods of notice in so-called "mass termination" situations than is provided in s. 57. The section must be read in conjunction with s. 3(4) of O Reg 288/01, which sets out an exception (i.e., the 10% rule) to the application of s. 58. See O Reg 288/01, s. 3(4) for a discussion.

The prescribed period of notice that must be given once s. 58 is triggered is set out in s. 3(1) of O Reg 288/01. The prescribed manner in which the notice must be given is set out in s. 4 of O Reg 288/01. Refer to O Reg 288/01 for a discussion of those provisions.

A mass termination under s. 58 is considered to have occurred when all of the following conditions are met:

1. The employment of 50 or more employees is terminated;
2. The terminations occur at the employer's establishment; and
3. The terminations occur within a four-week period.

Each condition is discussed below.

1. The employment of 50 or more employees is terminated.

This condition is met when 50 or more employees have their employment terminated. The "50 or more" threshold is based on the number of employees whose employment is terminated in the same four-week period and not on the number of employees who are given notice of termination in the same four-week period as was the case under the corresponding provision of the former *Employment Standards Act*.

Questions sometimes arise as to whether employees whose employment is terminated but who are not themselves entitled to notice (for example, because they have been employed for less than three months or because they are exempt under s. 2 of O Reg 288/01) are included in the count for purposes of determining whether the "50 or more" threshold has been met. It is Program policy that all employees to whom the *Employment Standards Act, 2000* applies (which does not include those individuals set out in ss. 3(2), (3) and (5) of the Act) and whose employment is terminated are included the count. Note, however, that employees of temporary agencies are employees of the agency, and would only be counted for the purpose of determining whether the agency has hit the 50-employee threshold - they would not be counted for the purpose of determining whether the agency client in whose workplace the agency employee was placed has hit the 50-employee threshold.

2. The terminations occur at the employer's establishment.

This condition requires that the terminations all occur at the same "establishment". "Establishment" is defined in s. 1 of the Act as a location where the employer carries on business. Separate locations are considered to be one establishment if they are located in the same municipality. Locations in different municipalities are considered to be one establishment if one or more employees at a location in one municipality have bumping rights to a location in a different municipality.

For example, if XYZ Company has four plants in Toronto, and a plant in Barrie to which the employees in Toronto may bump, then the establishment as defined in the Act will consist of the four Toronto plants as well as the Barrie plant. The "establishment" will include unionized as well as non-unionized employees at the locations in question, even if the latter group does not have bumping rights.

Please refer to ESA Part I, s. 1 for further discussion of the term "establishment".

3. The terminations occur within the same four-week period.

This condition requires that the terminations all occur within the same four-week period.

The four-week period is a "rolling window". The employer cannot, however, pick and choose which four-week period to use when determining whether the 50-termination threshold has been reached. Rather, the threshold is reached and a mass termination occurs on the first occasion of there being 50 or more employees terminated in any four-week period. Where terminations are triggered by a lay-off that exceeds a period of temporary lay-off, the deemed termination date (the first day of lay-off) is considered to be the termination date for the purposes of determining whether 50 or more employees have been terminated within the same four-week period. See the discussion at ESA Part XV, s. 56.

Information - s. 58(2)

58(2) An employer who is required to give notice under this section,

(a) shall provide to the Director the prescribed information in a form approved by the Director; and

(b) shall, on the first day of the notice period, post in the employer's establishment the prescribed information in a form approved by the Director.

This section provides that an employer who is required to give notice under s. 58(1) (i.e., where there is a mass termination) shall provide prescribed information to the Director of Employment Standards in a form approved by the Director. It further requires the employer to post in the employer's establishment on the first day of the notice period the prescribed information in the form approved by the Director. It should be noted that the posting of the form does not relieve the employer of the obligation to provide individual written notice to each employee where such individual notice is required (see s. 4 of O Reg 288/01); note also, however, that s. 5 of O Reg 288/01 provides that individual notice is not required in certain circumstances where employees have bumping rights. See the discussion of these provisions in O Reg 288/01.

Section 3(2) of O Reg 288/01 prescribes the information that is to be provided and posted (see O Reg 288/01). The form that has been approved by the Director for this purpose is the "Form 1". The Form 1 may be downloaded from the Ministry of Labour's website.

Section 58(5) of the Act sets out where and for how long the employer must post the Form 1 - see subsection (5) below for a discussion). Note that where an employer pays termination pay in lieu of providing mass notice that the employer will still be required to provide a Form 1 to the Director but will not be required to post it. See the discussion of s. 61(2) of the Act in ESA Part XV, s. 61.

As with individual notice of termination, nothing precludes an employer from providing a greater right or benefit with respect to mass notice (whether orally or in writing). However, the employer would not thereby be relieved of the obligation to file a Form 1 and post the information by the first day of the statutory portion of the notice period. In addition, that part of the notice period that would be the statutory notice period - i.e., that part equal to the notice required under Part XV and ending on the termination date (see definition of "statutory notice period" at ESA Part I, s. 1) would not start running until a Form 1 was received by the Director, pursuant to s. 58(4).

One question that arises is what level of detail must be provided in the Form 1 before it is considered to fulfil the s. 58(2) requirement. The employer need not complete Form 1 in exhaustive detail. However, the employer must provide an answer to all the questions. For example, it is sufficient to answer the question regarding the economic circumstances surrounding the terminations with "business slowdown".

Content - s. 58(3)

58 (3) The information required under subsection (2) may include,

(a) the economic circumstances surrounding the terminations;

(b) any consultations that have been or are proposed to take place with communities in which the terminations will take place or with the affected employees or their agent in connection with the terminations;

(c) any proposed adjustment measures and the number of employees expected to benefit from each; and

(d) a statistical profile of the affected employees.

This section is substantially the same as the corresponding provision (s. 57(5)) of the former *Employment Standards Act*.

This section sets out the types of information that may by regulation be required to be provided to the Director and posted in the employer's establishment pursuant to s. 58(2). Section 3(2) of O Reg 288/01 is the provision that prescribes the specific information that is to be provided and posted - see the discussion at O Reg 288/01.

When Notice Effective - s. 58(4)

58(4) The notice required under subsection (1) shall be deemed not to have been given until the Director receives the information required under clause (2)(a).

This section states that notice of mass termination shall not start running until the Director of Employment Standards receives the completed Form 1. Section 3(3) of O Reg 288/01 sets out how the form is to be delivered. Refer to O Reg 288/01 for a discussion of that section.

The financial consequences to an employer who does not deliver the Form 1 prior to or at the time of giving notice to employees under s. 58(1) may be significant. For example, an employer is required to give 16 weeks' mass notice to 550 employees. It does so, but does not deliver the Form 1 until 8 weeks later. The employer in this case will be liable for eight weeks' pay in lieu of notice to 550 employees. Assuming a 40-hour work week paid at minimum wage, this would amount to approximately $2 million dollars. Accordingly, employers should be advised to take care in ensuring that the Form 1 is properly delivered in accordance with s. 3(3) of O Reg 288/01.

Posting - s. 58(5)

58(5) The employer shall post the information required under clause (2)(b) in at least one conspicuous place in the employer's establishment where it is likely to come to the attention of the affected employees and the employer shall keep that information posted throughout the notice period required under this section.

Section 58(5) provides that the employer shall post the Form 1 in at least one conspicuous place in the employer's establishment where it is likely to come to the attention of the affected employees.

This section also requires the employer to keep the Form 1 posted throughout the required notice period. This period corresponds to the "statutory notice period" - see Part I, s. 1 for a discussion of the definition.

The fact that an employer failed to post or keep posted a copy of the Form 1 will not prevent the notice period from running so long as the form was received by the Director of Employment Standards - see St. Laurent and Nacci v Kelsey Hayes Canada (March 10, 1997), ESC 95-02B (Muir).

Employee Notice - s. 58(6)

58(6) An employee to whom notice has been given under this section shall not terminate his or her employment without first giving the employer written notice,

(a) at least one week before doing so, if his or her period of employment is less than two years; or

(b) at least two weeks before doing so, if his or her period of employment is two years or more.

This section, when read together with s. 58(7), is substantially the same as the corresponding provision (s. 57(15)) of the former *Employment Standards Act*.

Section 58(6) requires an employee who has received notice of mass termination under s. 58(1) to give one or two weeks' written notice to the employer (depending on the employee's period of employment) if the employee wishes to resign before the mass notice period expires. This requirement is subject to the exception set out in s. 58(7). See subsection (7) below for a discussion.

The purpose of this provision is to enable an employer that is, for example, closing down a plant, to know from week to week what its work force will be so that it can close the facility in an orderly manner.

Exception - s. 58(7)

58(7) Subsection (6) does not apply if the employer constructively dismisses the employee or breaches a term of the employment contract, whether or not such a breach would constitute a constructive dismissal.

This section, when read together with s. 58(6), is substantially the same as the corresponding provision (s. 57(15)) of the former *Employment Standards Act*.

Section 58(7) creates an exception to the requirement in s. 58(6) that employees who have received notice of mass termination must give notice to the employer of their intention to resign before the mass notice period expires (see subsection (6) above for a discussion). The exception applies where the employer has constructively dismissed the employee, or has breached a term of the employment contract, whether or not that breach constitutes a constructive dismissal. See ESA Part XV, s. 56(1) for a detailed discussion of the concept of constructive dismissal.

ESA Part XV Section 59 - Period of Employment: Included, Excluded Time

Period of Employment: Included, Excluded Time - s. 59(1)

59(1) Time spent by an employee on leave or other inactive employment is included in determining his or her period of employment.

Section 59(1) states that time spent by an employee on leave (e.g., the Part XIV statutory pregnancy, parental, family medical, family caregiver, critically ill child care, crime-related child death or disappearance, organ donor, personal emergency, emergency, and reservist leaves, and any other type

of leave of absence such as educational leave) or other inactive employment (e.g., temporary lay-off, vacation, sick time) is included when determining an employee's period of employment. This is relevant for purposes of calculating the amount of the employee's notice entitlement (see s. 57).

This section must be read in conjunction with s. 59(2), which provides that time spent on lay-off after the deemed termination date (i.e., from the day after the date the lay-off commenced) is not included when determining an employee's period of employment.

This provision must also be read in conjunction with s. 8 of O Reg 288/01. Section 8(1) defines "period of employment" as the period beginning the day the employment most recently commenced and ending the day notice of termination was provided (if it was provided in accordance with Part XV) or the day the employee's employment is terminated (if notice was not given in accordance with Part XV). Section 8(2) provides that two successive periods of employment that are not more than 13 weeks apart are to be added together and treated as a single period of employment. Refer to section O Reg 288/01 for a detailed discussion of s. 8 of O Reg 288/01.

Period of Employment - s. 59(2)

59(2) Despite subsection (1), if an employee's employment was terminated as a result of a lay-off, no part of the lay-off period after the deemed termination date shall be included in determining his or her period of employment.

Section 59(2) provides that in circumstances where a "temporary lay-off becomes a termination, none of the period of lay-off after the "deemed termination date" (which is, pursuant to s. 56(5), the first day of lay-off) is included in the employee's "period of employment".

The "period of employment" determines the amount of notice the employee is entitled to under s. 57 of the *Employment Standards Act, 2000*. However, it is important to note that eligibility for notice does not depend on "period of employment" but rather is determined by whether the employee has three months of "continuous employment" as per s. 54 of the Act.

As a consequence, time spent on layoff after a deemed termination will not be included in the period of employment for the purposes of determining the amount of notice the employee is entitled to, whereas the time spent on layoff after the deemed termination date will count towards the completion of the three months eligibility requirement for notice under s. 54 of the Act.

For example: An employee was hired January 1. She was laid off one month later on February 1. Thirteen weeks after the layoff began on May 1, her employment is deemed to be terminated as of the date the layoff began on February 1 - see s. 56(5).

Under s. 54, all employment (whether active or inactive) counts towards the three month continuous employment eligibility requirement. This employee has met the three months continuous employment requirement; she was employed for four months from January 1 to May 1 and so is eligible for notice of termination.

The amount of notice (or pay in lieu in this case) she is entitled to is determined by s. 57 and turns on her "period of employment".

Under s. 57 an employee whose "period of employment" is less than one year is entitled to one week's termination notice.

Under s. 59, "period of employment" does not include periods of layoff after the deemed termination date. This employee's "period of employment" is therefore one month (January 1 to February 1). Accordingly, she will be entitled to one week's pay in lieu of notice.

ESA Part XV Section 60 – Requirements During Notice Period

Requirements During Notice Period – s. 60(1)

60(1) During a notice period under section 57or 58, the employer,

(a) shall not reduce the employee's wage rate or alter any other term or condition of employment;

(b) shall in each week pay the employee the wages the employee is entitled to receive, which in no case shall be less than his or her regular wages for a regular work week; and

(c) shall continue to make whatever benefit plan contributions would be required to be made in order to maintain the employee's benefits under the plan until the end of the notice period.

Section 60(1) sets out the employer's obligations with respect to maintaining terms and conditions of employment and payment of wages and benefit plan contributions during the statutory notice period where notice of termination is given. The obligations set out in this section apply only to the statutory notice period. Where an employer gives notice that is greater in length than the statutory notice, these obligations will not apply to the part of the notice period that precedes the statutory notice period. The statutory notice period is defined in ESA Part I, s. 1 as the period equal to the employee's entitlements under the ESA 2000 that ends on the termination date specified in the notice (i.e., the last part of the notice period). For example, where the employer gives 12 weeks' notice, and the notice entitlement is eight weeks, the above-noted obligations would apply only to the last eight weeks of the 12 weeks of notice. Refer to ESA Part I, s. 1 for further discussion of statutory notice periods.

It should also be noted that under O Reg 288/01, s. 7, an employer is not permitted to schedule an employee's vacation during the statutory notice period, unless the employee, after having received the notice agrees to take their vacation during the notice period. Even if the vacation had been scheduled prior to the employer's decision to give notice of termination, the employee's consent would have to be obtained, after the employee received the notice.

Finally, if an employee resigns during the statutory notice period or is terminated in circumstances that would exempt the employee from notice of termination under O Reg 288/01, s. 2, the employer will cease to have any obligations under this section at the point that the employment relationship ends.

No reduction of wage rate or alteration of any other term or condition of employment

Under s. 60(1)(a), an employer is prohibited from reducing the employee's wage rate or altering any other term or condition of employment during the statutory notice period.

This section prevents an employer from modifying the employee's duties during the notice period (which would include laying the employee off), unless the modifications were permitted pursuant to a term or condition of employment. If the employee had been performing the allegedly "new" duties for some time prior to receiving the notice to the degree that the new duties form part of the employment terms or conditions, there would not be a violation of this provision.

For example, in *Royal Oak Mines Inc. v Battochio* (October 30, 1992), ES 189/92 (Muir), a case decided under the former *Employment Standards Act,* an employer gave notice of termination to an employee working in northern Ontario, but required them to work out the notice period at the employer's mine in the

Northwest Territories. The referee found that prior to receiving the notice of termination, the employee had travelled back and forth between Ontario and Northwest Territories on a regular basis in connection with their job duties. On that basis, the referee concluded that the employer had not altered the underlying terms of employment in requiring the employee to work out their notice in the Northwest Territories location.

Pay the employee the wages they are entitled to receive

Under s. 60(1)(b), an employer is required to pay during each week of the statutory notice period, the greater of the wages the employee is entitled to receive (i.e., what was actually earned in each week) and the employee's regular wages for a regular work week. It is the Program's position that because these wages are earned (either actually or notionally) during the notice period, they will also attract vacation pay. If the employee's contract of employment provides for vacation pay to be calculated at a greater rate than the minimum standard, the contract rate will apply.

Where the employee does not have a regular work week, s. 60(2) sets out a method for calculating the entitlement under s. 60(1)(b) by averaging the wages earned in the weeks worked within the 12-week period preceding the date notice was given.

One question that may arise is what are the regular wages for a regular work week when the employee suffered a pay cut or, conversely, a pay increase a short time prior to being given notice? For example, what would the regular wages for a regular work week be for the purposes of the notice period if, a short time prior to the notice being given, the employer had cut the employee's hours by 20 per cent because of a shortage of work that ultimately led to the employee's termination?

Where an employee's hours or pay rate is changed (whether an increase or a decrease) a short time prior to the notice being given, an issue may arise as to whether the resulting change in the employee's earnings changes what would otherwise constitute their regular wages for a regular work week for the purposes of s. 60(1)(b) or whether the pre-change regular wages for a regular work week should be used. This is a question of fact, which can only be answered on a case-by-case basis. Although a change that occurs just prior to termination may look suspicious, the critical factor is not when the change occurred but whether or not the change was bona fide and intended to be permanent. See the following decisions under the former *Employment Standards Act:* *Ingersoll Rand* : *Proto Canada, Division of Ingersoll-Rand Canada Inc. v United Automobile, Aerospace and Agricultural Implement Workers of America et al* (May 12, 1983), ESC 1421 (Roberts) and *Mothers Inc., Little Caesars of Canada and Little Caesars International Inc. v Fraser et al* (September 11, 1991), ESC 2907 (Barton).

Another question that may arise concerns work sharing programs under the federal employment insurance legislation, under which employees' hours are reduced and the resulting reduction in pay is topped up by employment insurance benefits. As work sharing programs are intended to be temporary, the Program does not consider the reduction in wages paid by the employer to affect what would otherwise constitute the employee's regular wages for a regular work week.

It is the Program's position that s. 60(1)(b) means that an employee is to be paid during the notice period whether or not they performed work, and that payments pursuant to a pension, sickness or disability plan or worker’s compensation legislation cannot be used to offset the employer’s obligations with respect to notice of termination or pay in lieu of notice. Section 60(1)(b) requires the employer to pay no less than the amount that would equal an employee's regular wages during the whole of the notice period. The provision does not require the employee to earn any wages during this notice period. See *Loeb*

Packaging Ltd. v Lacroix, 2016 CanLII 32625 (ON LRB), in which the Board upheld the Program's interpretation of s. 60(1)(b).

In addition, because payments such as pension benefits, employment insurance benefits, short-term disability benefits and worker's compensation benefits are not wages under ESA Part I, s. 1, and therefore could not be considered to represent any portion of the regular wages for a regular work week to which the employee is entitled, they could not be used to offset the employer's obligation under s. 60(1)(b). Therefore, the employer is required to pay the greater of the wages actually earned and the employee's regular wages for each week of the notice period, whether the employee was on contractual short-term disability leave, or any other type of leave, such as education leave, or any statutory leave under ESA Part XIV, and whether or not they were in receipt of any benefits, employment insurance benefits or worker's compensation payments.

However, note that if an employee took paid personal emergency leave between January 1, 2018 and December 31, 2018 during the statutory notice period, the employee had an entitlement to personal emergency leave pay as per the provisions that were in force at that time (ESA Part XIV, ss. 50(9), (10) and (11)). This is because personal emergency leave pay was included in the definition of wages (but not regular wages). The personal emergency leave pay would be counted in the wages the employee was entitled to receive in assessing whether the employee received their regular wages for a regular work week.

However, the employer will not be required to continue to pay wages to an employee during any portion of what would have been the notice period that follows the employee's resignation or a termination by the employer for conduct that constitutes wilful neglect of duty, wilful misconduct or disobedience that was not condoned by the employer. For example, if an employee is not on a contractual or statutory leave of absence during the notice period and the employee simply refuses to come in to work during the notice period, the employee would be guilty of wilful neglect of duty and would not be entitled to notice of termination (or pay in lieu of notice) provided that the employer had not previously condoned such behaviour.

Continue to make benefit plan contributions

Under s. 60(1)(c), an employer is required to continue to remit all of the contributions necessary in order to maintain all of the employee benefit plans for the entire notice period. Under this provision, the employer is obliged to continue remitting the employer's share of the contributions to the employee's benefit plans as well as the employee's share (if any) in order to maintain the benefit plans to the end of the notice period.

Assuming the employer had the necessary written authorization, the employer would simply deduct the employee's share of the benefit plan contributions from the wages paid during the notice period and would then remit both the employer and employee share to the insurer to ensure coverage was maintained throughout the notice period.

If the employer does not remit its share of the benefit plan contributions as required by this section, s. 60(3) deems the contributions to be wages (which are otherwise not defined as such under ESA Part I, s. 1) for the purposes of ESA Part XXII, s. 103, which provides the power to issue an order to pay wages against the employer. However, it is important to note that such an order to pay is limited to the amount of the employer's share of the unpaid benefit plan contributions.

If coverage was not maintained during the notice period and the employee incurred costs as result, the order to pay against the employer would not compensate the employee for the value of the benefits that the employee would have enjoyed had the coverage been maintained because such benefits are not wages under ESA Part I, s. 1, although the employee may be able to pursue a civil action to recover those amounts.

Where No Regular Work Week – s. 60(2)

60(2) For the purposes of clause (1)(b), if the employee does not have a regular work week or if the employee is paid on a basis other than time, the employer shall pay the employee an amount equal to the average amount of regular wages earned by the employee per week for the weeks in which the employee worked in the period of 12 weeks immediately preceding the day on which notice was given.

Section 60(2) sets out a method for calculating the employee's pay during each week of the notice period for the purposes of s. 60(1)(b), when the employee does not have a regular work week and where the employee earns wages on a basis other than time (e.g., employees who earn commissions or are paid on a piece rate basis).

Under s. 60(2), the regular wages earned by the employee in the 12-week period preceding the day on which notice of termination was given, are averaged over the weeks worked within the 12-week period. See ESA Part I, s. 1 for a discussion of the term regular wages. This formula is similar to that used for calculating pay in lieu of notice (for employees who do not have a regular work week or who are paid on a basis other than time) where the employee does not receive notice of termination or receives less than the required statutory notice. In ESA Part XV, s. 61(1.1), the wages are averaged over the weeks worked within the 12-week period immediately preceding the date of termination rather than the date notice of termination was given.

It is important to note that s. 60(2) refers to the average amount of regular wages earned in the weeks in which the employee has worked. If the employee has not worked certain weeks during the 12-week period, those weeks are not included in the calculation. For example, if the employee was on a contractual short-term disability leave for one of the 12 weeks prior to being provided with notice, the employee's entitlement would be determined by averaging the regular wages earned over the 11 weeks during which the employee worked. Weeks where the employee was on a leave under ESA Part XIV, contractual leave or other approved leave, vacation, or lay-off is considered as weeks not worked.

The question arises, however, as to how to calculate the minimum weekly entitlement for the notice period if the employee did not work any of the weeks within the designated 12-week period because, for instance, the employee was on a contractual short-term disability leave for the entire designated 12-week period. Because s. 60(2) does not provide a mechanism to calculate the average wages in such a situation, Program policy is that the employer must continue to look back in blocks of 12 weeks, until a 12-week period can be found in which the employee has weeks worked and then average the wages earned over that 12-week period.

For example, an employee was on pregnancy and parental leave for 52 weeks and immediately on her return to work was given notice of termination. The employer looks back in 12-week blocks until it finds a 12-week block that contains at least one week worked by the employee. In this case, the employer looks for:

- 0 to 12 weeks prior to notice being given – no weeks worked

- 12 to 24 weeks prior to notice being given – no weeks worked
- 24 to 36 weeks prior to notice being given – no weeks worked
- 36 to 48 weeks prior to notice being given – no weeks worked
- 48 to 60 weeks prior to notice being given – eight weeks worked

The 12-week block to be used will be the period of time that was 48 through 60 weeks prior to the date notice was given. The employee worked eight weeks during that time, so her regular wages for a regular work week will be the average of her regular wages over those eight weeks.

Benefit Plan Contributions – s. 60(3)

60(3) If an employer fails to contribute to a benefit plan contrary to clause (1)(c), an amount equal to the amount the employer should have contributed shall be deemed to be unpaid wages for the purpose of section 103.

Section 60(3) deems the benefit plan contributions that the employer should have made during the statutory notice period, pursuant to s. 60(1)(c), to be wages for purposes of s. 103, which permits an order to pay wages to be issued to an employer. See also the discussion in ESA Part XV, s. 62(2) regarding benefit plan contributions where the employer has paid termination pay in lieu of giving notice.

It is important to note that this section does not deem the benefits (as opposed to the contributions) to be wages for purposes of ESA Part XXII, s. 103. As a result, an employment standards officer could not issue an order to pay wages for the value of the benefits that the employee would have received had the employer complied with its obligation to continue the contributions during the required period of notice. However, an employee may have a civil remedy with respect to the value of the lost benefits if the employer fails to make the contributions necessary to maintain the benefits during the notice period. See the discussion of s. 60(4) below.

Same – s. 60(4)

60(4) Nothing in subsection (3) precludes the employee from an entitlement that he or she may have under a benefit plan.

Section 60(4) clarifies that s. 60(3) does not prohibit an employee from pursuing a civil remedy with respect to any benefits that they may have otherwise been entitled to under a benefit plan that would have been continued during a period of notice under ESA Part XV, s. 57 or s. 58. See also the discussion at ESA Part XV, s. 62(3) regarding benefit plan contributions where the employer has paid termination pay in lieu of giving notice.

For example, an employee's entitlement to a benefit under a plan may be lost because the employer failed to make the contributions necessary to maintain the benefit plans during the notice period. In this situation, s. 60(3) only provides a remedy for the employer's unpaid contributions as wages. It does not provide a remedy to recover the value of the benefits the employee might have been entitled to under a benefit plan that was discontinued contrary to s. 60(1). Section 60(4) makes it clear that the remedy under s. 60(3) does not in any way restrict an employee's right to seek a remedy elsewhere with respect to the value of the lost benefits.

ESA Part XV Section 61 – Pay Instead of Notice

Pay Instead of Notice – s. 61(1)

61(1) An employer may terminate the employment of an employee without notice or with less notice than is required under section 57 or 58 if the employer,

(a) pays to the employee termination pay in a lump sum equal to the amount the employee would have been entitled to receive under section 60 had notice been given in accordance with that section; and

(b) continues to make whatever benefit plan contributions would be required to be made in order to maintain the benefits to which the employee would have been entitled had he or she continued to be employed during the period of notice that he or she would otherwise have been entitled to receive.

This section specifically permits an employer to pay termination pay in lieu of the notice the employee would have been entitled to receive under ESA Part XV, s. 57 or s. 58.

An employer may terminate an employee's employment under this section if the employer:

- Pays a lump sum payment equal to the amount the employee would have received had the notice been given in accordance with ESA Part XV, s. 60; and
- Continues to make all the contributions necessary in order to maintain all of the employee benefit plans for the entire notice period. The contributions that may be necessary also include contributions from the employee, if any.

As noted in the discussion at ESA Part XV, s. 60(1)(b), an employee who is given notice of termination while on sick or other leave, is entitled to be paid their regular wages during the notice period if the contract of employment is not frustrated or impossible of performance and the employee is not otherwise exempt. This same principle applies to employees who are terminated instead with termination pay under s. 61 as this section requires the calculation to be based on the amount the employee would have received had the employee been given notice in accordance with s. 60.

Where the employer does not give the employee the full notice of termination required under ESA Part XV, s. 57, and continues the employee's regular wages during that partial notice, it is Program policy that such payments reduce the employer's obligations with respect to the pay in lieu owing under s. 61. For example, consider the situation where the employee is entitled to eight weeks' notice of termination under s. 57. The employer provides them with four weeks' notice of termination and continues his or her regular wages during the four weeks. It is the Program's position that the employee is entitled only to an additional four weeks' pay in lieu rather than a full eight weeks.

Sometimes situations will arise in which the employee is terminated without statutory notice, and then the next day obtains new employment at the same or better pay than they received before. Employers will sometimes argue in such a situation that the employee should not receive pay in lieu of notice under s. 61 because the termination did not put the employee "out of pocket". The answer to this is that the legislation does not permit the employer to reduce the pay in lieu obligation under s. 61 by any earnings that the employee is able to earn from a new employer. The termination pay is not compensation for damages and therefore not subject to mitigation. It is a fixed payment that must be made where the employer does not give notice in accordance with ESA Part XV, s. 57. See for example, McDonnell Douglas Canada Ltd. v Topham (April 22, 1993), ES 93-74 (Randall), a case under the former *Employment Standards Act*. This also applies where the employee has been terminated with pay in lieu of notice but is hired back by the employer at some point during what would have been the statutory notice period. Once the employment

relationship is terminated, crystallizing the termination pay entitlement, the employer may not reduce the termination pay by any subsequent earnings.

The question may arise as to whether a Cost of Living Allowance ("COLA") should be included in the termination pay. In Falconbridge Nickel Mines Limited v Sudbury Mine, Mill and Smelter Workers' Union, Local 598 (July 13, 1981), ESC 1021 (Egan), a decision under the former *Employment Standards Act*, the referee held that the calculation of the regular non-overtime rate for purposes of s. 57(14) of the former *Employment Standards Act* should not include the COLA component on the basis that the collective agreement only provided for the COLA increase to be added to the straight time rate when the employee was actually working (as opposed to when they were entitled to pay under the collective agreement but not actually working, e.g., jury duty). However, the Divisional Court in an unreported decision and the Court of Appeal in Re Falconbridge Nickel Mines Ltd. and Egan et al., 1983 CanLII 1931 (ON CA) held the contrary. Thus it is Program policy that the regular rate for the purposes of determining the entitlement to termination pay under s. 61(1) (where the employee has not worked through a notice period) should be adjusted upwards to reflect COLA awards just as it would where the employee had been given notice of termination in accordance with ESA Part XV, s. 57.

Vacation pay is to be paid on an employee's termination pay. In this regard, see *Inco Ltd. v. U.S. W.A.*, a case under the former *Employment Standards Act*. For example, an employee whose vacation pay entitlement is four per cent and is entitled to $1,000 pay in termination pay would be entitled to a further amount of $40 as vacation pay. If the employee's contract of employment provides for vacation pay to be calculated at a greater rate, e.g., eight per cent, then the vacation pay should be calculated accordingly. If the employer provides, however, a greater amount of termination pay than required under this section vacation pay will only be payable on the statutory portion of the termination pay paid in lieu of notice.

No Regular Work Week – s. 61(1.1)

61(1.1) For the purposes of clause (1) (a), if the employee does not have a regular work week or is paid on a basis other than time, the amount the employee would have been entitled to receive under section 60 shall be calculated as if the period of 12 weeks referred to in subsection 60 (2) were the 12-week period immediately preceding the day of termination.

Subsection 61(1) provides for payment of termination pay in a lump sum where an employer terminates the employment of an employee without giving notice or giving less notice than is required under ESA Part XV, ss. 57 or 58. Section 61(1.1) sets out a method for calculating termination pay where the employee does not have a regular work week or is paid on a basis other than time. A similar formula is set out in ESA Part XV, s. 60(2) for calculating the entitlement to pay during the notice period for such employees where notice has been given in accordance with s. 57 or s. 58. However, s. 61(1.1) averages the earnings over the weeks worked in the 12 weeks immediately preceding the date the employee is terminated whereas in s. 60(2) the averaging is done over the 12-week period preceding the date the notice was given. See ESA Part XV, s. 60(2) for the complete discussion.

The question may arise as to how to calculate the termination pay entitlement if the employee did not work any of the weeks within the 12-week period preceding the termination date. For example, where the employer decides to terminate the employment of an employee who has been off sick or on a leave of absence for 12 weeks or more, the formula set out in this section would, on its face, result in a termination pay entitlement of $0. However, the Program's position is that such a result is in implicit conflict with the requirement that an employee whose employment is terminated without notice must be given termination pay. It is therefore Program policy that the employer must continue to look back in blocks of 12 weeks, until a 12-week period can be found in which the employee has weeks worked and then average the wages earned over that 12-week period. See also the discussion at ESA Part XV, s. 60.

Information to Director – s. 61(2)

61(2) An employer who terminates the employment of employees under this section and would otherwise be required to provide notices of termination under section 58 shall comply with clause 58(2)(a).

Section 61(2) provides that an employer who pays termination pay rather than giving notice in a mass termination context, is required to provide the Form 1 to the Director of Employment Standards, although the employer is not required to post the Form 1 as per ESA Part XV, s. 58(2)(b).

ESA Part XV Section 62 - Deemed Active Employment

Deemed Active Employment - s. 62(1)

62(1) If an employer terminates the employment of employees without giving them part or all of the period of notice required under this Part, the employees shall be deemed to have been actively employed during the period for which there should have been notice for the purposes of any benefit plan under which entitlement to benefits might be lost or affected if the employees cease to be actively employed.

Section 62(1) deems the employee to be actively employed during the period of notice under ESA Part XV, s. 57 or s. 58 that should have been, but was not given by the employer, for purposes of entitlement to benefits. This is because some group insurance policies require that the employee be actively employed in order to have coverage under the policy. In the event the insurer denied benefits to an employee on the basis that they were not actively employed, even though s. 62(1) would deem them to be actively employed, the employee's remedy, if any, would be a civil one.

Benefit Plan Contributions - s. 62(2)

62(2) If an employer fails to contribute to a benefit plan contrary to clause 61(1)(b), an amount equal to the amount the employer should have contributed shall be deemed to be unpaid wages for the purpose of section 103.

Section 62(2) deems the benefit plan contributions that the employer should have made pursuant to ESA Part XV, s. 61(1)(b) to be wages for purposes of ESA Part XXII, s. 103, which permits employment standards officers to issue orders to pay wages against employers. Therefore, an order to pay may be issued in regard to such contributions. Note that such contributions are deemed wages for the purposes of s. 103 only. They are accordingly deemed to be wages for the purposes of recovery of such monies by way of an order to pay but not for any other purpose, including ESA Part XI, s. 35.2 so they will not attract vacation pay. See also the discussion at ESA Part XV, s. 60 regarding benefit plan contributions where the employer has given notice of termination.

It is important to note that this section does not deem the benefits (as opposed to the contributions) to be wages for purposes of s. 103. Therefore, an officer cannot issue an order to pay wages for the value of the benefits that the employee would have received had the employer complied with its obligation to continue the contributions during the required period of notice. However, an employee may have a civil remedy with respect to the value of the lost benefits if the employer fails to make the contributions necessary to maintain the benefits during what would have been the statutory notice period. See the discussion of s. 62(3) below.

Benefit Plan Contributions - s. 62(3)

62(3) Nothing in subsection (2) precludes the employee from an entitlement he or she may have under a benefit plan.

Section 62(3) clarifies that s. 62(2) does not prohibit an employee from pursuing a civil remedy with respect to any benefits that they may have otherwise been entitled to under a benefit plan that would have been continued during what would otherwise been a period of notice under ESA Part XV, s. 57 or s. 58. See also the discussion at ESA Part XV, s. 60 regarding benefit plan contributions where the employer has given notice of termination.

For example, an employee's entitlement to a benefit under a plan may be lost because the employer failed to make the contributions necessary to maintain the benefit plans during what would otherwise have been the statutory notice period. In this situation, s. 62(2) only provides a remedy for the employer's unpaid contributions as wages. It does not provide a remedy to recover the value of the benefits the employee might have been entitled to under a benefit plan that was discontinued contrary to ESA Part XV, s. 61(1)(b). Section 62(3) makes it clear that the remedy under s. 62(2) does not in any way restrict an employee's right to seek a remedy elsewhere with respect to the value of the lost benefits.

ESA Part XV Section 63 - What Constitutes Severance

What Constitutes Severance - s. 63(1)

63(1) An employer severs the employment of an employee if,

(a) the employer dismisses the employee or otherwise refuses or is unable to continue employing the employee;

(b) the employer constructively dismisses the employee and the employee resigns from his or her employment in response within a reasonable period;

(c) the employer lays the employee off for 35 weeks or more in any period of 52 consecutive weeks;

(d) the employer lays the employee off because of a permanent discontinuance of all of the employer’s business at an establishment; or

(e) the employer gives the employee notice of termination in accordance with section 57 or 58, the employee gives the employer written notice at least two weeks before resigning and the employee's notice of resignation is to take effect during the statutory notice period.

This section defines when a "severance of employment" has occurred for the purpose of an employee’s entitlement to severance pay. For purposes of determining whether there is an entitlement to notice of termination or termination pay, see ESA Part XV, s. 56, which defines what constitutes a termination of employment.

The definition in this section is exhaustive. Only situations that are specifically described in the definition will be considered to constitute a severing of the employment relationship. Those situations are as follows:

1.The employer dismisses the employee or otherwise refuses or is unable to continue employing the employee - s. 63(1)(a)

Section 63(1)(a) provides that a severance occurs when an employer dismisses or refuses to continue or is unable to continue employing an employee. The term "dismisses" essentially refers to what is commonly known as a "firing". For a detailed discussion of dismisses refer to ESA Part XV, s. 56(1).

This part of the definition also includes the situation where the employer refuses or is unable to continue employing the employee. This phrase captures some situations that would not technically qualify as a dismissal or firing, such as where the employer does not continue the employment of an employee who was on a term contract once the term expires.

The question sometimes arises as to whether an employee is entitled to severance pay where the employee first gives notice of resignation and then the employer terminates the employee prior to the date when the employee would have resigned. For example, the employee gives notice to the employer on March 1 that the employee will resign on May 1. On March 15, the employer tells the employee that the employment relationship is over, effective that day. A literal reading of the legislation might suggest that the employee is entitled to severance pay on the basis that the employer severed the employment of the employee and that the employee's resignation never became effective. However, if the legislation is interpreted purposively, the opposite conclusion should be reached. As the employee would have resigned in any event, it was the employee, not the employer, who precipitated the ending of the employment relationship. Accordingly, the employee is not entitled to severance pay. This is supported by Canada Trust Realty Inc. v Employee (March 12, 1992), ESC 3013 (Novick), a decision under the former *Employment Standards Act*.

2.The employer constructively dismisses the employee and the employee resigns from his or her employment in response within a reasonable period - s. 63(1)(b)

Section 63(1)(b) is identical in meaning to s. 56(1)(b), the corresponding section in the termination of employment provisions. Constructive dismissal exists where an employee in fact resigns, but in law is treated as if they were dismissed by the employer. Constructive dismissal can arise from a number of situations, including forced resignation (e.g., where the employer says, "Quit or else I'll fire you"), harassment and abuse, failure to meet payroll, and where the employer unilaterally and substantially changes a fundamental or essential term or condition of an employee's employment without the consent of the employee.

In order for a constructive dismissal to be considered a severance, the employee must resign in response to the constructive dismissal within a reasonable period.

Refer to ESA Part XV, s. 56(1) for a detailed discussion of constructive dismissal.

Note that O. Reg. 228/20 ("Infectious Disease Emergency Leave") establishes that there is no constructive dismissal under the ESA where a non-unionized employee's employer temporarily reduces or temporarily eliminates the employee's wages or hours of work for reasons related to COVID-19 during the defined COVID-19 period, unless the severance resulting from the constructive dismissal occurred before May 29, 2020. See O. Reg. 228/20 for details

Note also that during the first declared emergency for COVID-19 (which commenced March 17, 2020 and terminated July 24, 2020), orders were issued under the *Emergency Management and Civil Protection Act* (EMCPA) that authorized employers to make some specific unilateral changes to specified terms and

conditions of employment. Upon the termination of the first declared emergency for COVID-19 on July 24, 2020, those orders ceased to be orders under the EMCPA and instead continued as time-limited orders under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020.* The orders, including the period of time to which they relate, can be found by visiting the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* on the Ontario government's e-Laws website and then selecting the "Regulations under this Act" tab.

3.The employer lays the employee off for 35 weeks or more in any period of 52 consecutive weeks - s. 63(1)(c)

Section 63(1)(c) applies if the employee is on a lay-off that equals or exceeds 35 weeks in any period of 52 consecutive weeks. A "week of lay-off is defined in s. 63(2) – refer to the discussion below for a detailed discussion of that term. Note that if the lay-off is as a result of a permanent discontinuance of all of the employer's business at an establishment, then s. 63(1)(d) will apply, rather than s. 63(1)(c). Refer to the discussion of s. 63(1)(d) below.

Note that O. Reg. 228/20 ("Infectious Disease Emergency Leave") provides that during the defined COVID-19 period, non-unionized employees whose wages or hours of work are temporarily reduced or temporarily eliminated by their employer for reasons related to COVID-19 are not considered to be laid off under the ESA (except where the layoff is because of a permanent discontinuance of all of the employer's business at an establishment). See O. Reg. 228/20 for details

The 35 weeks of lay-off need not be consecutive, although they must all occur within a period of 52 consecutive weeks. For example, if the employee is laid off for 20 weeks, returns to work for 17 weeks, and then is laid off again for a further 15 weeks, the employee's employment will be deemed to be severed under s. 63(1)(c) because the employee was laid off for a total of 35 weeks in a period of 52 consecutive weeks.

The 52-week period is a "rolling window". However, neither the employer nor the employee can pick and choose which 52 weeks to use when determining whether the 35-week threshold has been reached. Rather, the threshold is reached and the employment is severed on the first occasion of there being 35 weeks of lay-off in a 52-week period. Consider the following case:

- Employee is laid off for 20 weeks: January 1, 2016 - May 20, 2016
- Employee is laid off for a further 15 weeks: June 26, 2016 - October 9, 2016
- Employee is laid off again for 20 weeks: February 5, 2017 - June 24, 2017

The employee had first been laid off for a total of 35 weeks in a 52-week period as of October 9, 2016. The employee had also been laid off for a total of 35 weeks in the 52-week period ending June 24, 2017.

If the employee had filed a claim in November of 2017, on the basis that the severance pay became due following the severance of their employment on October 9, 2016, the employer could not defeat the employee's claim as being premature by choosing to have the 52-week period run from June 26, 2016, such that the employee had not yet been laid off for a total of 35 weeks within the 52-week period that started running on that date.

It should be noted that in Hagt v E.S. Fox Limited (October 20, 1997), 3833-96-ES (ON LRB), a decision under the former *Employment Standards Act*, the Ontario Labour Relations Board ruled that an employee could choose which 52-week period to base his claim on. There, the employee had been subjected to a series of lay-offs and recalls and, similar to the case of the employee in the hypothetical example above, there were two 52-week periods in which the total number of weeks of lay-off exceeded 35, one of which

(the earlier) would make his claim out-of-time and the other of which would put his claim within the limitation period.

The Board's decision was overturned by a 2-1 majority in an unreported decision of the Divisional Court, with the dissenting judge agreeing with his colleagues that the decision was incorrect but asserting that it should nevertheless be upheld because it was not unreasonable. The Court of Appeal in E.S. Fox Limited v Hagt, 2000 CanLII 26962 (ON CA) reversed the Divisional Court, declaring that it agreed with the dissenting judge in the court below that the decision was not unreasonable. In light of the precise grounds offered by the dissenting Divisional Court judge and the Court of Appeal, the Program is of the view that it is not bound to follow Hagt v E.S. Fox Limited, and since the Program is of the view that there are no compelling policy reasons to hold that an employee or an employer can choose which 52-week period to use, Program policy was and remains that an employee becomes entitled to severance pay at the first point at which there have been a total of 35 weeks of lay-off in a 52-week period.

Weeks of Layoff Prior to a Recall Are Included in the Count

Because a severance occurs when the employer lays the employee off for 35 weeks or more in any period of 52 consecutive weeks, there is no basis to exclude any weeks of lay-off just because they may have occurred prior to an employee accepting a recall.

See for example, the Court of Appeal decision in United Steel v National Steel Car Limited, 2013 ONCA 401 (CanLII). In that case, an employee was laid off in May of 2008. In January 2009, once the lay-off had gone on for 35 weeks, it was deemed to have become a severance of employment. At that point, the employee elected to retain his recall rights.

The lay-off continued until March 16, 2010, 22 months after the layoff began, when the employee accepted a recall. He was laid off again on April 19, 2010 after only five weeks of work and a few days later he renounced his recall rights and asked for his severance pay. At that point in time, the total time spent by the employee on lay-off in the preceding 52 weeks was in excess of 35 weeks.

The employer refused to pay the employee. The employee grieved, and the matter went before an arbitrator who held that the employee had no entitlement. In the arbitrator’s view, it was implicit in the Act’s recall rights provisions that an employee who had initially elected to retain his recall rights and who later accepted a recall could not have any of the time spent on lay-off prior to the recall taken into account in determining whether there was a subsequent severance. Under this approach, which disregards the word "any" in s. 63(1)(c), the employee would have had to have spent another 35 weeks on lay-off after the recall in order to be entitled to severance pay.

On judicial review of the arbitrator’s decision, a majority of the Divisional Court in *United Steel v National Steel Car Limited,* [2012] ONSC 1941 (October 31, 2012) upheld the arbitrator’s decision; however, that Court’s decision was overturned at the Court of Appeal. The Court of Appeal, in adopting the judgment of the dissenting Divisional Court judge, ruled that the recall rights provisions have no bearing on what constitutes a severance within the meaning of s. 63 (or on what constitutes a termination within the meaning of s. 56), and that there is no basis to exclude any weeks of lay-off when determining whether a subsequent severance (or termination) occurred just because they may have occurred prior to an employee accepting a recall.

4.The employer lays the employee off because of a permanent discontinuance of all of the employer's business at an establishment - s. 63(1)(d)

Section 63(1)(d) provides that an employee's employment is severed where the employer lays off the employee due to a permanent discontinuance of all of the employer's business at an establishment. Where this provision applies, the employee's employment is deemed to be severed at the moment the lay-off begins.

For s. 63(1)(d) to apply, the employee must be laid off because of a "permanent discontinuance" of all of the employer's business at an establishment. There is a discussion of the phrase permanent discontinuance in O Reg 288/01, s. 3(4) in the context of the 10 per cent rule and mass notice of termination. The same principles apply, except that the employer's intention with respect to the issue of whether there is a permanent discontinuance may not be as significant in the context of a severance as it is in a mass termination, where the employer is required to give advance notice of the event. In addition, there have been some referee and court decisions on what constitutes a permanent discontinuance for purposes of severance pay. In Agincourt Motor Hotel Limited v Flannigan et al (August 19, 1982), ESC 1272 (Davis), a decision under the former *Employment Standards Act,* the referee held (who was upheld by the court on judicial review) that a sale of a business constitutes a permanent discontinuance of the business of the vendor employer for purposes of s. 58 of the former *Employment Standards Act*. On the other hand, a contracting out of business previously done "in-house" by an employer (which is generally not considered to be a sale under s. 9 of the Act) will not constitute a permanent discontinuance in that it is open to the employer, at the end of the contract, not to renew it and to have the operations revert back to the employer. In this regard, see Otis Elevator Company Limited v United Steelworkers of America et al (November 5, 1985), ESC 1978 (Davis), a decision under the former *Employment Standards Act*.

For s. 63(1)(d) to apply, the permanent discontinuance must be of all of the employer's business at an "establishment". Establishment is defined in ESA Part I, s. 1 as follows:

"Establishment", with respect to an employer, means a location at which the employer carries on business but, if the employer carries on business at more than one location, separate locations constitute one establishment if,

(a) the separate locations are located within the same municipality, or

(b) 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 another employee of the same employer;

An establishment is therefore a location where an employer carries on business. If the employer has more than one location in the same municipality, or a number of locations where seniority rights extend, then these locations will together constitute an establishment.

For example, the employer has three plants in the same municipality. The three plants comprise one establishment. The employer lays off some employees because it is closing down two of those plants. The lay-off will not constitute a severance under s. 63(1)(d), because the employer is not discontinuing all of its business at the establishment. Note, however, that the lay-off may still constitute a severance under s. 63(1)(c) if it equals or exceeds 35 weeks in a 52 consecutive week period. For a detailed discussion of the definition of establishment please see ESA Part I, s. 1.

5.The employer gives the employee notice of termination in accordance with section 57 or 58, the employee gives the employer written notice at least two weeks before resigning and the employee's notice of resignation is to take effect during the statutory notice period - s. 63(1)(e)

Section 63(1)(e) provides that where an employee provides at least two weeks' written notice of resignation after having received notice of termination and the resignation is to take effect during the statutory notice period, this constitutes a severance of the employee's employment. This provision allows employees who have been notified that their employment will end to end the employment relationship earlier than the employer intended without having to forfeit their severance pay entitlement.

The employee must satisfy two requirements in order to avoid forfeiting the right to:

1. The employee provides the employer with at least two weeks' written notice of resignation; and
2. The employee's resignation takes effect during the statutory notice period.

Statutory notice period is defined in ESA Part I, s. 1 as follows:

"Statutory notice period" means,

(a) the period of notice of termination required to be given by an employer under Part XV, or

(b) where the employer provides a greater amount of notice than is required under Part XV, that part of the notice period ending with the termination date specified in the notice which equals the period of notice required under Part XV.

Refer to ESA Part I, s.1 for a detailed discussion of "statutory notice period".

Section 63(1)(e) must be read in conjunction with s. 63(3), which deems the employee's employment to be severed on the day the employer's notice of termination would have taken effect had the resignation not occurred.

Example:

- January 1 - Ten-year employee receives 12 weeks' notice of individual termination (to take effect March 26).
- January 16 - Employee gives two weeks' written notice of resignation (to take effect January 30.
- January 29 - Statutory notice period begins.
- January 30 - Employee's notice of resignation becomes effective.
- March 26 - Deemed severance date.

In this example, the employee is entitled under the Act to eight weeks' notice, so the statutory notice period is the last eight weeks of the 12-week notice period given by the employer. The employee gave two weeks' notice of resignation to the employer and that notice took effect during the statutory notice period. Therefore, this constitutes a severance of employment under s. 63(1)(e).

Since s. 63(3) deems the employee's employment to be severed on the day the employer's notice of termination would have taken effect had the resignation not occurred, in our example, that date, for the dual purpose of determining whether the employee has met the five-year eligibility threshold for severance pay, and for determining the date the employee's entitlement to severance pay arose, is March 26.

Note that s. 65(3) provides that the period between the day the employee's resignation took effect and the day the employee's notice of termination would have taken effect is not included for the purpose of calculating the amount of severance pay. Refer to ESA Part XV, s. 65 for further discussion.

Section 63(1)(e) says that a severance occurs where the employer gives the employee notice of termination "in accordance with s. 57 or s. 58." One question that arises is whether s. 63(1)(e) can apply, thereby allowing an employee who has been notified that their employment will end to resign without forfeiting a severance pay entitlement where the employer has not given the required amount of notice under s. 57 or s. 58. It is Program policy that if the notice given by the employer under s. 57 or s. 58 is deficient, this will not preclude an employee from preserving their entitlement to severance pay so long as they provide at least two weeks' written notice, which is to take effect during that period of statutory notice given by the employer. For example, if the employee was entitled to eight weeks' notice under s. 57 but was given only four weeks' working notice, the employee would be able to retain the right to severance pay by providing two weeks' notice of resignation. To take the opposite view would result in employees being penalized (because they could not resign and retain their severance pay entitlement) because their employer failed to comply with the Act.

Definition - s. 63(2)

63(2) In subsections (2.1) to (2.4),

"excluded week" means a week during which, for one or more days, the employee is not able to work, is not available for work, is subject to a disciplinary suspension or is not provided with work because of a strike or lock-out occurring at his or her place of employment or elsewhere.

Section 63(2) defines "excluded week" as a week during which the employee did not work for one or more days because the employee is not able or available to work, is subject to disciplinary suspension or is not provided with work because of a strike or lock-out occurring at their place of employment or elsewhere. See the discussion of these circumstances in s. 63(2.1) below.

Lay-off, Regular Work Week - s. 63(2.1)

63(2.1) For the purpose of clause 1(c), an employee who has a regular work week is laid off for a week if,

(a) in that week, the employee earns less than one-quarter of the amount he or she would earn at his or her regular rate in a regular work week; and

(b) the week is not an excluded week.

Sections 63(2.1) to 63(2.4) define a "week of lay-off", but only for the purposes of s. 63(1) (i.e., for the purposes of determining whether the employee's employment has been severed). This means that a week of lay-off may be defined differently for other parts of the Act. Specifically, a week of lay-off is defined differently in s. 56(3) to s. 56(3.6) for the purposes of notice of termination.

Section 63(2.1) provides that a week of lay-off where an employee has a regular work week is a week in which the employee receives less than 25 per cent of the wages they would earn at their regular rate in a regular work week. However, a week of lay-off will not include an excluded week as defined in s. 63(2).

This definition is similar to the definition of week of lay-off in s. 56(3.1) for employees with a regular work week in the notice of termination context, except that the notice of termination definition is based on a threshold of "less than one-half" of what the employee would earn in a regular work week at his or her regular rate.

Section 63(2.1) refers to "regular rate" and "regular work week", which are defined terms in s. 1 as follows:

"Regular rate" means, subject to any regulation made under paragraph 10 of subsection 141 (1),

(a) an employee who is paid by the hour, the amount earned for an hour of work in the employee's usual workweek, not counting overtime hours,

(b) otherwise, the amount earned in a given work week divided by the number of non-overtime hours actually worked in that week;

"Regular work week", with respect to an employee who usually works the same number of hours each week, means a week of that many hours but not including overtime hours;

Refer to ESA Part I, s. 1 for a detailed discussion of these terms.

For an employee who has a regular work week, a week of lay-off is a week in which they receive less than 25 per cent of the wages they would earn at their regular rate for a regular work week, unless the week is one in which any of the following four circumstances are present:

The employee is not able to work.

An employee who, for example, is unable to work because of sickness or an injury will not be considered to be on a week of lay-off.

The employee is not available for work.

An employee who, for example, is unavailable for work because they were exercising a right to a statutory leave or on jury duty will not be considered to be on a week of lay-off.

Where an employee on a lay-off has found work with another employer during the lay-off, the employee is not considered not available to work (i.e., they are considered to be available for work with the employer that laid them off, so that time is considered to be weeks of lay-off). This is so whether the new employment is of a temporary or a permanent nature. This is also so with respect to the reasonable period of time an employee takes to return to work after being recalled. The employee would be considered "not available to work" only if the employee is unwilling to return to work for the employer who laid them off within a reasonable time.

The employee is subject to disciplinary suspension.

An employee who is on disciplinary suspension is not on a week of lay-off. It is important to ensure, though, that the disciplinary suspension is bona fide and is pursuant to established company rules and procedures or a contract of employment.

Because of a strike or lock-out.

Where the employee is not provided with work by the employer due to a strike or lock-out at the employee's place of employment, or elsewhere, the employee is not on a week of lay-off.

It is important to emphasize that the strike or lock-out need not be at the employee’s place of employment. For example, if there is a strike or lock-out at a supplier, then the manufacturer that depends upon the supplier for its parts may be forced to close down until the strike or lock-out is over or a new

supplier can be found. In this case the employees of the manufacturer are deemed not to be on a lay-off during the temporary closure that occurs as a result.

It is the Program's position that in order to characterize a week of lockout as an excluded week, the lock-out by the employer must be a legal one under the *Labour Relations Act, 1995*, SO 1995, c 1, Sch A ("LRA 1995"). In those circumstances, the employer's failure to provide work flows from the right to lock out the employees under the LRA 1995 and the employer should not suffer any adverse consequences under the ESA for exercising that right.

On the other hand, if the lock-out is illegal, the failure to provide work is not permissible under LRA 1995. As a consequence, the Program's position is that a week in which employees are illegally locked out is a week of lay-off. However, a week of strike, whether illegal or legal, will be considered by the Program to be an excluded week (i.e., not a week of lay-off) because the employer does not in those circumstances have any control over whether work is provided.

Effect of Excluded Week - s. 63(2.2)

63(2.2) For the purposes of clause 1(c), an excluded week shall be counted as part of the period of 52 weeks.

This subsection provides that an "excluded week" is included in counting the period of 52 weeks referred to in s. 63(1)(c).

Lay-off, No Regular Work Week - s. 63(2.3); Effect of Excluded Week - s. 63(2.4)

63(2.3) For the purpose of clause (1)(c), an employee who does not have a regular work week is laid off for 35 or more weeks in any period of 52 consecutive weeks if for 35 or more weeks in any period of 52 consecutive weeks he or she earns less than one-quarter the average amount he or she earned per week in the period of 12 consecutive weeks that preceded the 52-week period.

63(2.4) For the purposes of subsection (2.3),

(a) an excluded week shall not be counted as part of the 35 or more weeks, but shall be counted as part of the 52-week period; and

(b) if the 12-week period contains an excluded week, the average amount earned shall be calculated based on the earnings in weeks that were not excluded weeks and the number of weeks that were not excluded.

Where employees who do not have regular work weeks, for the purposes of the rule in s. 63(1)(c) that deems an employee's employment to have been severed if they are laid off for 35 weeks or more in any period of 52 consecutive weeks, s. 63(2.3) provides that a week of lay-off is a week in which the employee earns less than one-quarter the average weekly wages that they earned in the 12-week period preceding the commencement of the 52-week period.

Clause 63(2.4)(b) provides that if the 12-week period contains an excluded week, the average amount earned is to be calculated based on the earnings in weeks that were not excluded weeks divided by the number of weeks that were not excluded weeks.

Clause 63(2.4)(a) provides that excluded weeks are not counted as weeks of lay-off for the purposes of determining whether an employee who does not have a regular work week has been laid off for 35 or

more weeks under s. 63(1)(c) and s. 63(2.3). However, excluded weeks do count as part of the 52-week period.

Resignation - s. 63(3)

63(3) An employee's employment that is severed under clause (1) (e) shall be deemed to have been severed on the day the employer's notice of termination would have taken effect if the employee had not resigned.

Section 63(3) provides that where an employee's employment is severed under s. 63(1)(e) (i.e., an employee who has been given notice of termination in accordance with s. 57 or s. 58 has resigned by giving two weeks' written notice that will take effect within the statutory notice period), the employee's employment shall be deemed to be severed on the day that the employer's notice of termination would have taken effect had the employee not resigned. This is relevant for determining whether the employee has met the five-year eligibility threshold for severance pay. Section 63(3) must be read together with s. 65(3), which provides that the period between the date the employee's resignation took effect and the date the employer's notice of termination would have taken effect is not included in the calculation of the amount of the employee's severance pay.

Example:

- January 3 - Ten-year employee receives 12 weeks' notice of individual termination, effective March 28.
- January 28 - Employee gives two weeks' written notice of resignation, effective February 11.
- January 31 - Statutory notice period begins.
- February 11 - Employee's notice of resignation becomes effective.
- March 28 - Employee's deemed severance date

In this example, the employee has resigned within the statutory notice period in accordance with s. 63(1)(e), so the resignation is considered to be a severance of the employment relationship under s. 63(1). The date the employee's employment is deemed to be severed for the purpose of determining whether the employee has met the five-year eligibility threshold for severance pay, and also for determining the date the employee's entitlement to severance pay arose is March 28, not February 11.

ESA Part XV Section 64 – Entitlement to Severance Pay

Entitlement to Severance Pay – s. 64(1)

64(1) An employer who severs an employment relationship with an employee shall pay severance pay to the employee if the employee was employed by the employer for five years or more and,

(a) the severance occurred because of a permanent discontinuance of all or part of the employer's business at an establishment and the employee is one of 50 or more employees who have their employment relationship severed within a six-month period as a result; or

(b) the employer has a payroll of $2.5 million or more.

This section sets out the requirements that must be met for an employee to qualify for severance pay. An employee who is not otherwise exempt from the severance provisions of the ESA 2000 qualifies for severance pay when their employment is severed and they:

1. Have five or more years of employment with the employer; and
2. Were employed by an employer who:
    - Has a global payroll of at least $2.5 million, or
    - Severed the employment of 50 or more employees in a six-month period because of a permanent discontinuance of all or part of the business at an establishment.

The requirements are discussed below

Five or More Years of Employment

An employee must have been employed for at least five years at the time of the severance. It should be noted that only employment in Ontario (or work outside of Ontario that is a continuation of work in Ontario) is considered in determining eligibility for and the calculation of severance pay. For example, if an employee works for ABC Inc. in England for five years and then is transferred to Ontario and has their employment severed two years later, he employee will be considered to have only two years of employment for the purposes of the ESA 2000, including the severance provisions.

Time that will be included in the calculation of the five-year qualifying period is set out in ESA Part XV, s. 65(2) as follows:

65(2) All time spent by the employee in the employer's employ, whether or not continuous and whether or not active, shall be included in determining whether he or she is eligible for severance pay under subsection 64(1) and in calculating his or her severance pay under subsection (1).

Under s. 65(2), all periods of employment (whether active or inactive) are added together for the purposes of determining both eligibility for and the amount of severance pay to which the employee is entitled. Examples of periods of inactive employment that must be included are time spent on layoff, vacation, and leave of absences such as educational, or any leave under Part XIV. However, it is Program policy that time spent on lay-off after the lay-off becomes a severance under ESA Part XV, s. 63(1)(c) (i.e., it equals or exceeds 35 weeks in a period of 52 consecutive weeks) and the time subsequently spent waiting for a recall to work is not counted as employment for the purposes of either eligibility for severance under s. 64(1) or the calculation of the amount of severance pay in s. 65(1).

Multiple periods of employment with the same employer must be added together for the purposes of both eligibility for, and the calculation of, severance pay, regardless of the amount of time between the periods of employment or the reason any of the periods of employment came to an end (e.g., whether the employment ended at the employer's behest or the employee resigned). For a detailed discussion of the time included in determining eligibility for, and the calculation of, severance pay see ESA Part XV, s. 65.

Where an employee's employment is severed under ESA Part XV, s. 63(1)(e) and the employer gives notice of termination and the employee provides two weeks' written notice of resignation that takes effect in the statutory notice period, the date of severance is deemed under ESA Part XV, s. 63(3) to be the date the employer's notice would have taken effect. Therefore, when determining the length of employment for the purposes of the five-year qualifying period, the period of time between the date of resignation and the date the employer's notice would have taken effect (the deemed severance date) is

included. However, when it comes to calculating the amount of severance pay, ESA Part XV, s. 65(3) provides that the period between the date the resignation takes effect and the date the termination would have taken effect is not to be used.

Where an employee's employment is severed without the required written notice under ESA Part XV, s. 57 or s. 58, ESA Part XV, s. 65(4) specifically requires that the period of notice that should have been provided be included in calculating the amount of severance pay. It is Program policy that this period must also be included for the purpose of determining whether the five-year threshold for eligibility for severance pay has been met; otherwise, the employee's severance pay entitlement would be calculated as zero, which would be contrary to the direction in s. 65(4) that it be calculated as if the employee had continued to be employed for the period of notice that should have been given.

$2.5 Million Payroll Test or Severance of 50 or More Due to Closure

Where an employee has five or more years of employment with the employer at the time the severance occurred and either of the two requirements set out in s. 64(1)(a) or (b) is met, the employee will be entitled to severance pay.

$2.5 Million Payroll Test

If the employment of an employee who has been employed for five years or more is severed by an employer with a global payroll of $2.5 million or more, the employee will be entitled to severance pay. The $2.5 million dollar payroll test in s. 64(1)(b) is the condition that triggers most severance pay entitlements and is therefore considered first. If this condition is met there is no need to consider the test in s. 64(1)(a). (Note that it was long-standing Program policy that the $2.5 million threshold was based solely on an employer's payroll **in Ontario**. The Ontario Superior Court considered this position in the decision of *Hawkes v. Max Aicher (North America) Limited, 2021 ONSC 4290*, and found that it was unreasonable. The Program consequently changed its policy and the $2.5 million threshold is now based on the employer's **global** payroll.)

Section 64(2) defines payroll as follows:

64(2) For the purposes of subsection (1), an employer shall be considered to have a payroll of $2.5 million or more if,

(a) the total wages earned by all of the employer's employees in the four weeks that ended with the last day of the last pay period completed prior to the severance of an employee's employment, when multiplied by 13, was $2.5 million or more; or

(b) the total wages earned by all of the employer's employees in the last or second-last fiscal year of the employer prior to the severance of an employee's employment was $2.5 million or more.

See the detailed discussion of the definition of "payroll" below.

Severance of 50 or More Due to Closure

If an employer does not have a global payroll of at least $2.5 million, an employee will still be entitled to severance pay if the employment of 50 or more employees is severed within a six-month period because of a permanent discontinuance of all or part of the employer's business at an establishment.

Prior to 1987, when the severance pay provisions in the former *Employment Standards Act* were amended to extend severance pay to employees of employers with a $2.5 million payroll or more,

employees had to satisfy substantially the same test as is set out in s. 64(1)(a). As a result, most of the cases involving this test arose prior to 1987, especially since, due to wage increases over the years, many employers severing the employment of 50 or more employees in a six-month period will satisfy the payroll test. However, there may be some instances in which an employer who does not meet the payroll threshold will sever the employment of 50 or more employees in a six-month period.

Some of the issues regarding this test in the pre-1987 cases under the former *Employment Standards Act* may still be relevant today. For example, there is the issue of whether or not the six-month period has to be immediately prior to the permanent discontinuance or whether it can be any six-month period as long as the severances are caused by the discontinuance. The Program policy on this issue is that the six-month period need not be immediately prior to the permanent discontinuance, and that any six-month period can be used as long as the severances were caused by the permanent discontinuance.

Another issue regarding this test is the count issue, i.e., did 50 or more employees have their employment severed? The question here is whether or not exempt employees should be included even though they themselves are not entitled to severance pay.

In *Dominion Stores Ltd. v. Butcher et al* (ON SC), a decision under the former *Employment Standards Act*, the Divisional Court upheld a decision that these employees should be included in the count. This case upheld as reasonable the referee's decision in Dominion Stores Ltd. v Butcher et al (February 17, 1987), ESC 2215 (Brown) that stated that exempt, elect-to-work employees should be included in the count for purposes of severance pay. There is, however, another Divisional Court decision that upheld as reasonable a referee's decision that said the exact opposite, United Steelworkers of America, Local 14097 v. Franks (Div. Ct.), 1990 CanLII 6666 (ON SC), a decision under the former *Employment Standards Act*. This decision was appealed to the Ontario Court of Appeal, which held in United Steelworkers of America, Local 14097 v Franks, 1994 CanLII 8708 (ON CA) that the proper standard of review of referees' decisions was reasonableness, rather than the stricter correctness test, and therefore declined to comment on whether or not the referee was correct in law. Thus, the Court of Appeal's decision did not necessitate a change to the Program policy that exempt employees are to be included in the count for purposes of s. 64(1)(a).

A further issue concerning the determination of the count is whether or not employees should be included in the count if they are employees who, having been given notice of termination by the employer, resign before that notice of termination becomes effective. For example, the employees are given, on March 1, eight weeks' notice of termination to be effective on April 25. One of those employees, having found other employment, gives two weeks' notice and resigns on March 15, in accordance with ESA Part XV, s. 63(1)(e). Should that employee be included in the count for purposes of determining whether or not the threshold of 50 severances in s. 64(1)(a) has been met? An examination of s. 64(1)(a), read in conjunction with s. 63(1)(e), would indicate that such an employee must be included. It is the number of employees whose employment is severed by an employer that must be included in the count under s. 64(1)(a) and the employment of an employee who resigns in the above manner is considered to have been severed by their employer under s. 63(1)(e). In contrast, an employee who resigns and does not meet the requirements of s. 63(1)(e) would not be included in the count.

Permanent Discontinuance

Other issues regarding s. 64(1)(a) involve what constitutes a permanent discontinuance and also what constitutes "part of the business of the employer". For a detailed discussion of those terms refer to O Reg 288/01, s. 3(4) in the context of the 10 per cent rule and mass notice of termination. The same principles apply, except that the employer's intention with respect to the issue of whether there is a permanent

discontinuance may not be as significant in the context of a severance as it is in the context of a mass termination, where the employer is required to give advance notice of the event. In addition, there have been some referee and court decisions on what constitutes a permanent discontinuance for purposes of severance pay.

In Agincourt Motor Hotel Limited v Flannigan et al (August 19, 1982), ESC 1272 (Davis), a decision under the former *Employment Standards Act*, the referee held (who was upheld by the court on judicial review) that a sale of a business constitutes a permanent discontinuance of the business of the vendor employer for purposes of s. 58 of the former *Employment Standards Act*. On the other hand, a contracting out of business previously done "in-house" by an employer, which is generally not considered to be a sale under ESA Part IV, s. 9, will not constitute a permanent discontinuance in that it is open to the employer, at the end of the contract, not to renew it and to have the operations revert back to the employer. In this regard, see Otis Elevator Company Limited v United Steelworkers of America et al (November 5, 1985), ESC 1978 (Davis), a decision under the former *Employment Standards Act*.

Payroll – s. 64(2)

64(2) For the purposes of subsection (1), an employer shall be considered to have a payroll of $2.5 million or more if,

(a) the total wages earned by all of the employer's employees in the four weeks that ended with the last day of the last pay period completed prior to the severance of an employee's employment, when multiplied by 13, was $2.5 million or more; or

(b) the total wages earned by all of the employer's employees in the last or second-last fiscal year of the employer prior to the severance of an employee's employment was $2.5 million or more.

The definition of payroll is used to determine whether an employer meets the $2.5 million payroll threshold set out in s. 64(1)(b). The employer is considered to meet the threshold if either the calculation in s. 64(2)(a) or (b) produces a sum of $2.5 million or more.

Where associated or related businesses can be treated as one employer under ESA Part III, s. 4, the payrolls of each individual business are added together to determine whether the $2.5 million payroll threshold is met. This applies whether or not the section 4 associated or related businesses fall within Ontario jurisdiction.

(Note: it was previously Program policy that only the payroll of the individual associated or related businesses that fall **under Ontario jurisdiction** were included in determining whether the payroll of the employer meets the $2.5 million threshold. This Program policy was changed as the result of the Ontario Superior Court decision of *Hawkes v. Max Aicher (North America) Limited, 2021 ONSC 4290*, which held that the $2.5 million threshold must be based on the employer's **global** payroll – including the payroll of associated or related businesses within the meaning of s. 4 that fall **outside of Ontario jurisdiction**.) The definition of payroll requires an examination of the wages earned by employees during three distinct periods preceding a severance. The three periods are:

- Wages earned in a specified four-week period (multiplied by 13)
- Wages earned for the last complete fiscal year, and
- Wages earned for the second-last complete fiscal year.

The employer is considered to have a payroll of $2.5 million or more if the calculation for any one of these three periods results in an amount of $2.5 million or more.

For example, an employer might have had a $2.5 million payroll in the second-last completed fiscal year preceding a severance. Despite the fact that the payroll for the last completed fiscal year is less than $2.5 million, the employer would meet the $2.5 million payroll threshold in s. 64.

Similarly, an employer may not have had a $2.5 million payroll in the last or second last fiscal year, but if the projected payroll for the current year based on the calculation in s. 64(2)(a) exceeds $2.5 million the employer would meet the $2.5 million payroll threshold.

Wages are defined in ESA Part I, s. 1:

"wages" means,

(a) any monetary remuneration payable by an employer to an employee under the terms of an employment contract, oral or written, express or implied,

(b) any payment required to be made by an employer to an employee under this Act, and

(c) any allowances for room or board under an employment contract or prescribed allowances,

but does not include,

(d) tips or other gratuities,

(e) any sums paid as gifts or bonuses that are dependent on the discretion of the employer and that are not related to hours, production or efficiency,

(f) expenses and travelling allowances, or

(g) subject to subsections 60(3) or 62(2), employer contributions to a benefit plan and payments to which an employee is entitled from a benefit plan;

Exceptions – s. 64(3)

64(3) Prescribed employees are not entitled to severance pay under this section.

This section provides that prescribed employees are not entitled to severance pay under s. 64. The prescribed employees are identified in O Reg 288/01, s. 9. Refer to O Reg 288/01 for a complete discussion of the prescribed employees.

Note: For information on the application of the wilful disobedience exemption established in para. 6 of ss. 9(1) of O Reg 288/01 where an employee is not vaccinated against, or tested for, COVID-19 in accordance with the employer's policy, also refer to "ESA Termination and Severance Liabilities Where an Employee is Not Vaccinated Against or Tested For COVID-19".

As with all exemptions from a minimum standard, the onus is on the employer to establish on a balance of probabilities that the exemption applies.

Location Deemed an Establishment – s. 64(4)

64(4) A location shall be deemed to be an establishment under subsection (1) if,

(a) there is a permanent discontinuance of all or part of an employer's business at the location;

(b) the location is part of an establishment consisting of two or more locations; and

(c) the employer severs the employment relationship of 50 or more employees within a six-month period as a result.

Section 64(4) applies where the employer has a global payroll of less than $2.5 million and so what is at issue is whether or not the employer has severed the employment of 50 or more employees in six months or less because of a permanent discontinuance of all or part of the business of an employer at the establishment.

ESA Part I, s. 1 defines an establishment as a single location or in certain circumstances two or more locations. Despite this definition, s. 64(4) deems a single location that is part of an establishment under the s. 1 definition to be an establishment for the purpose of determining whether an employer is liable to pay severance pay under s. 64(1)(a).

This section addresses a situation where, for example, the employer has two or more locations in the same municipality, and hence together they comprise one establishment as that term is defined in ESA Part I, s. 1. If the employer moves all or part of its production from location A to location B, there is a permanent discontinuance at location A, but, applying the s. 1 definition, there is no such discontinuance at the establishment as a whole. In this situation, s. 64(4) deems location A to be a separate establishment for the purposes of severance pay if the employment of 50 or more employees is severed in six months or less because of the permanent discontinuance at location A.

ESA Part XV Section 65 – Calculating Severance Pay

Calculating Severance Pay – s. 65(1)

65(1) Severance pay under this section shall be calculated by multiplying the employee's regular wages for a regular work week by the sum of,

(a) the number of years of employment the employee has completed; and

(b) the number of months of employment not included in clause (a) that the employee has completed, divided by 12.

This section determines the amount of severance pay to which a qualified employee is entitled. It provides that an employee will be entitled to an amount equal to the employee's regular wages for a regular work week multiplied by the sum of the employee's completed years, and completed months not included in a completed year divided by 12. However, this section must be read in conjunction with s. 65(5), which sets out a maximum amount of severance pay an employee is entitled to under s. 65(1). It caps the entitlement at an amount equal to the employee's regular wages for a regular work week for 26 weeks.

For example, if the employee has 10 years, and 6 ¾ months of employment and the employee's regular wages for a regular work week is $1,000, the employee's severance pay will be $10,500. The calculation is as follows:

1. Regular wages for a regular work week: $1,000
2. Number of completed years of employment: 10
3. Number of completed months divided by 12: 6/12 = 0.5

4. Add the number from #2 to the number from #3: 10 + 0.5 = 10.5
5. Multiply regular wages for a regular work week by number arrived at in #4: $1,000 x 10.5 = $10,500

Regular wages and regular work week are defined in ESA Part I, s. 1 as follows:

"regular wages" means wages other than overtime pay, public holiday pay, premium pay, vacation pay, domestic or sexual violence leave pay, termination pay, severance pay and termination of assignment pay, and entitlements under a provision of an employee's contract of employment that under subsection 5(2) prevail over Part VIII, Part X, Part XI, section 49.7, Part XV or section 74.10.1;

"regular work week", with respect to an employee who usually works the same number of hours each week, means a week of that many hours but not including overtime hours;

Also see ESA Part XV, s. 60(1)(b) for a discussion of Program policy regarding the interpretation of the phrase "regular wages for a regular work week" when there have been changes to an employee's pay and/or hours of work shortly before the employment relationship is terminated. This policy also applies to the calculation of severance pay.

Section 65(6) sets out how to determine "the employee's regular wages for a regular work week" for employees who do not have a regular work week or are paid on a basis other than time. See s. 65(6) below for a detailed discussion.

Length of Employment

The determination of an employee's length of employment for the purposes of calculating the amount of severance pay under s. 65(1) is not necessarily identical to the determination of whether the employee has met the five-year threshold to qualify for a severance entitlement. See the discussion ESA Part XV, s. 64(1) with respect to employment that is considered in determining eligibility for severance pay.

It should be noted that only employment in Ontario (or work outside of Ontario that is a continuation of work in Ontario) is considered in determining eligibility for and the calculation of severance pay. For example, if an employee works for ABC Inc. in England for five years and then is transferred to Ontario and has their employment severed two years later, the employee will be considered to have only two years of employment for the purposes of the *Employment Standards Act, 2000*, including the severance provisions.

Under s. 65(2), all periods of employment (whether active or inactive) are added together for the purposes of determining both eligibility for and the amount of severance pay to which the employee is entitled. Examples of periods of inactive employment that must be included in these determinations are: time spent on lay-off, vacation and leave of absences such as educational leave and leaves under Part XIV.

However, it is Program policy that time spent on lay-off after the lay-off becomes a severance under ESA Part XV, s. 63(1)(c) (i.e., it equals or exceeds 35 weeks in a period of 52 consecutive weeks) and the time subsequently spent waiting for a recall to work is not counted as employment for the purposes of either eligibility for severance under s. 64(1) or the calculation of the amount of severance pay under s. 65(1).

Multiple periods of employment with the same employer must be added together for the purposes of both eligibility for, and the calculation of the amount of, severance pay, regardless of the amount of time

between the periods of employment or the reason any of the periods of employment came to an end (e.g., whether the employee quit or had their employment severed at the employer's behest). See s. 65(2) below for a detailed discussion on the time included in determining eligibility for and the calculation of the amount of severance pay.

Where the employment of an employee is severed under ESA Part XV, s. 63(1)(e) (i.e., the employer provides notice of termination and the employee provides two weeks' written notice of resignation that takes effect in the statutory notice period), the date of severance is deemed under ESA Part XV, s. 63(3) to be the date the employer's notice would have taken effect. Therefore, when determining the length of employment for the purposes of determining eligibility to severance pay (i.e., for purposes of the five-year qualifying period), the period of time between the date of resignation and the date the employer's notice would have taken effect (the deemed severance date) is included.

However, when it comes to calculating the amount of severance pay, s. 65(3) provides that the period between when the resignation takes effect and when the termination would have taken effect is not to be used. See s. 65(3) below for further discussion.

Where an employee's employment is severed without the required written notice under ESA Part XV, ss. 57 or 58, s. 65(4) specifically requires that the period of notice that should have been provided be included in calculating the amount of severance pay. It is Program policy that this period must also be included for the purpose of determining whether the five-year threshold for eligibility for severance pay has been met; otherwise, the employee's severance pay entitlement would be calculated as zero, which would be contrary to the direction in s. 65(4) that it be calculated as if the employee had continued to be employed for the period of notice that should have been given. See s. 65(4) below for a detailed discussion.

Severance Pay for Seasonal Employees

One question that arises is how to calculate severance pay for seasonal employees. In *Standard Commercial Tobacco Co. of Canada Ltd. v Canadian Union of Operating Engineers and General Workers,* [1988] 31 OAC 74 (Ont Div Ct), the Ontario Divisional Court upheld the decision of referee Brown in *Standard Commercial Tobacco Co. of Canada Ltd. v Canadian Union of Operating Engineers and General Workers* (March 18, 1987), ESC 2225 (Brown), a decision made under the former *Employment Standards Act,* which considered the situation of seasonal employees in the tobacco industry who were laid off at the end of each season with recall rights under the terms of the collective agreement, and then recalled at the beginning of the next season of work. The employment relationship continued during the period of lay-off. The referee held that in such a situation, the employees' number of years of employment should be determined by including the active seasons as well as the non-active seasons in which the employees were on lay-off. However, the referee went on to say that, in determining what the employees' wages were for a regular non-overtime work week, for purposes of severance pay, the officer should take the number of hours worked by the employee in the year in which they are entitled to severance pay, and then divide that figure by 52 weeks.

For example, if a seasonal employee is entitled to severance pay in 2012 and during that year they worked 1560 hours at $20 an hour, the employee's wages for a regular non-overtime work week would be 1560 divided by 52 = 30 times the hourly rate of $20 which comes to $600. This would be the result according to the Standard case, even though the employee's non-overtime wages while they were working were higher, e.g., $1000 a week. *Standard Commercial Tobacco Co. of Canada Ltd. v Canadian Union of Operating Engineers and General Workers* thus has the effect of prorating the seasonal

employee's actual wages for purposes of severance pay because the employee does not work the entire year.

Although the Divisional Court in upholding the referee's decision did not consider this particular point, the Program has adopted the referee's method of calculating severance pay for seasonal employees in situations that closely match the situation in *Standard Commercial Tobacco Co. of Canada Ltd. v Canadian Union of Operating Engineers and General Workers*. For example, the workers in the case were employees who had an established seasonal work cycle from year to year and whose employment relationship did not end at the end of each season. Thus the method that effectively prorates the employee's regular wages for a regular work week should be applied in similar situations where the employees have a very specific regular pattern of seasonal work and whose employment relationships are not severed at the end of each season. This method should not be used in situations where the seasonal employees do not have a regular yearly cycle, i.e., where the season varies in length from year to year or whose employment relationships are severed at the end of each season.

No Vacation Pay on Severance Pay

It should also be noted that, although it is the policy of the Program that the statutory minimum of four or six per cent for vacation pay as determined in accordance with ESA Part XI, s. 35.2 (or, where there is a greater right or benefit respecting vacation pay, that greater amount) should be levied on the employee's termination pay, it is also the policy of the Program that the employee's severance pay, on the other hand, will not attract vacation pay. For example, if the employee's employment is terminated and severed and the employee is owed $4,000 termination pay and $5,000 severance pay, vacation pay (in this example the statutory entitlement is four per cent) will be levied on the termination pay but not the severance pay, so the total owing will be $9,160. If the employee's contract of employment provides for vacation pay to be calculated at a greater amount than the employee's statutory entitlement under s. 35.2, the amount (paid in respect of termination pay only) will be increased accordingly. For a discussion of the rationale for levying vacation pay on termination pay refer to ESA Part XV, s. 61(1).

Non-Continuous Employment – s. 65(2)

65(2) All time spent by the employee in the employer's employ, whether or not continuous and whether or not active, shall be included in determining whether he or she is eligible for severance pay under subsection 64(1) and in calculating his or her severance pay under subsection (1).

This provision defines the time that is to be included in determining an employee's length of employment for the purpose of determining if an employee qualifies for severance and, if they do, the time that is included to determine the amount of severance pay to which the employee is entitled. All time spent in the employer's employ, whether continuous or not, whether active or not, shall be included. It should be noted, however, that only employment in Ontario or work outside of Ontario that is a continuation of work in Ontario is considered in determining eligibility for and the calculation of the amount of severance pay.

For example, if an employee works for ABC Inc. in England for five years and then is transferred to Ontario and has their employment severed two years later, the employee will be considered to have only two years of employment for the purposes of the Act, including eligibility for and the calculation of the amount of severance pay under ESA Part XV, s. 64(1) and s. 65(1). See *Singer v Tullett & Tokyo Forex (Canada) Ltd.* (July 26, 1996), ESC 96-167 (Novick), a decision under the former *Employment Standards Act*.

Whether or Not Active

Examples of periods of inactive employment that must be included are time spent on lay-off, vacation and leaves of absence such as educational leave or leaves under Part XIV. The only exception to this is where the lay-off becomes a severance under ESA Part XV, s. 63(1)(c) (i.e., a lay-off that lasts 35 weeks in any period of 52 consecutive weeks) and the employee retains the right to be recalled. The time spent waiting to be recalled beyond the point of the severance will not be counted as employment for purposes of ESA Part XV, s. 64(1) or s. 65(1).

In *Brock Telecom (Northern Telecom Canada Limited) and Microtel Limited v Communications and Electrical Workers of Canada Union, Local 526* (August 5, 1991), ESC 2893 (Haefling), a decision under the former *Employment Standards Act*, the referee held that all of the time spent on layoff with recall rights, even if beyond the 35-week point, should be included in length of employment. However, this case does not represent Program policy and should not be followed, as it would result in the inclusion of time in the calculation of the length of employment that accrued after the employment relationship was explicitly considered to have been severed under the ESA 2000.

Note that the provision that states that a lay-off becomes a severance when the lay-off has lasted 35 weeks in any period of 52 consecutive weeks (the 35 week rule) in ESA Part XV, s. 63(1)(c) only applies to lay-offs that commenced on or after June 15, 1987. The reference to the requirement that the lay-off commence on or after June 15, 1987, appeared in the legislation when it became law in 1987, but was removed when the statute was re-issued in the Revised Statutes of Ontario 1990. The removal of the reference to June 15, 1987, did not mean that the 35 week rule can be applied to lay-offs commencing prior to June 15, 1987, however, since the Statute Revision Commissioners preparing the RSO 1990 did not have the mandate to change the meaning or content of the statute, but only to perform a "clean-up" and renumber the statutes. Likewise, the absence of the reference to lay-offs commencing on or after June 15, 1987, in the *Employment Standards Act, 2000* does not mean that the 35 week rule can be applied retroactively. Therefore, if a lay-off commenced prior to June 15,1987, the entire length of the lay-off (whether it exceeds 35 weeks or not) is included in length of employment for purposes of determining eligibility for and the calculation of the amount of severance pay.

Example 1:

- Employee is hired September 2, 2000
- Employee is laid off January 1, 2008
- 35 weeks of lay-off expire and severance pay paid into trust September 2, 2008
- Employee is recalled and severance pay returned to employer September 2, 2009
- Employee is laid off January 1, 2013
- 35 weeks of lay-off expire and severance pay paid into trust September 2, 2013
- Employee renounces recall rights and receives severance pay June 1, 2014

In this case, the employee's length of employment for purposes of severance pay would be the period from September 2, 2000, to September 2, 2008, plus the period from September 2, 2009, to September 2, 2013, for a total of 12 years of employment. (Although the employee retained the right to recall between September 2, 2008, and September 2, 2009, and again between September 2, 2013, and June 1, 2014, this time is not included because the lay-off in both cases became a severance under s. 63(1)(c).) Thus the employee in this example would be entitled to 12 weeks of severance pay.

Example 2:

- Employee is hired September 2, 1980
- Employee is laid off with recall rights January 1, 1987
- Employee is recalled to work January 1, 1989
- 35 weeks of lay-off expire and severance pay paid to Director in trust September 2, 2014
- Employee renounces recall rights and receives severance pay June 1, 2015

In this example, the entire length of the first lay-off would be included, but only the first 35 weeks of the second lay-off would be included in calculating length of employment for purposes of s. 64(1) and s. 65(1). Thus, in this example, the employee's length of employment for purposes of s. 64(1) and s. 65(1) would be from September 2, 1980, to September 2, 2014, i.e., 34 years.

Whether Continuous or Not

Multiple periods of employment with the same employer must be added together regardless of the amount of time between the periods of employment or the reason any of the periods of employment came to an end (e.g., whether the employee resigned or had their employment severed at the employer's behest). Situations sometimes arise where an employee works on and off for an employer over time. The employee returns to work with this same employer and then the employment is subsequently severed. How is the calculation of the employee's length of service made in this type of situation? The employee's length of service is calculated by adding together all stretches of employment, regardless of how long the gap(s) between periods of employment was or why the employment relationship had previously ended. This is so even if the earlier employment was with a different company that was subsequently purchased by the current employer. See *National Electrical Carbon Canada/Morganite Canada Corporation o/a Thermal Ceramics v Reader* (July 23, 1998), 0744-97-ES (Sargeant), a decision under the former *Employment Standards Act*.

Where the employee's first stretch of employment ended in a resignation rather than a dismissal, the two stretches of employment must be added together to determine the employee's length of employment for purposes of calculating the amount of severance pay. This is supported by two unreported Divisional Court cases, *Re Oakridge Ford Sales (1981) Ltd*. and *Re Standard Tube Canada Inc.*, both issued under the former *Employment Standards Act*. It should be noted that, prior to those court cases, there was at least one referee's decision to the contrary on that particular point - for example, see *Canada Trust Co. v Holmes* (June 13, 1990), ESC 2710 (Brown), a decision under the former *Employment Standards Act*. However that decision is contrary to the two court cases above and should not be followed.

In a case where the employee had already received severance pay in regards to a previous stretch of employment, the amount of severance pay already paid may be deducted from the severance pay owing pursuant to paragraph 3 of s. 65(8). For more information on deductions from severance pay, refer to s. 65(8) below.

The issue arises whether an employee who is employed on a series of fixed-term contracts or is a seasonal employee is entitled to severance pay. Whether the terms are consecutive or broken, s. 65(2) requires that all this time shall be included in determining whether the employee is eligible for severance pay under s. 64(1) and in calculating the amount of their severance pay under s. 65(1). Therefore, if the employee's length of employment meets or exceeds the five-year requirement set out in s. 64(1), they will be entitled to severance pay in accordance with their length of employment as determined under s. 65(1).

Exception – s. 65(2.1)

65(2.1) Despite subsection (2), when an employee in receipt of an actuarially unreduced pension benefit has his or her employment severed by an employer on or after November 6, 2009, time spent in the employer's employ for which the employee received service credits in the calculation of that benefit shall not be included in determining whether he or she is eligible for severance pay under subsection 64(1) and in calculating his or her severance pay under subsection (1).

This subsection was added by the *Good Government Act, 2009*, SO 2009, c 33, and applies to employees whose employment is severed on or after November 6, 2009. Under this subsection, if an employee is receiving an actuarially unreduced pension benefit and then has their employment severed, time employed with the employer for which they received service credits that were used to calculate the pension benefit, will not be included in determining whether the employee is eligible for severance meeting the five year threshold as per ESA Part XV, s. 64(1) or for the purposes of calculating the amount of the severance entitlement under s. 65(1).

This subsection applies, for example, to situations where an employee had previously retired on an actuarially unreduced pension and is subsequently rehired by the employer and then later still has their employment severed (on or after November 6, 2009).

This provision is not to be confused with the exemption from severance in O Reg 288/01, s. 9(1) paragraph 3 that applies to an employee who, on having their employment severed, retires and receives an actuarially unreduced pension benefit. See the discussion regarding this exemption at O Reg 288/01, s. 9(1) para. 3.

Section 65(2.1) is not an exemption from severance. It applies to exclude time for which the employee has received service credits in the calculation of their actuarially unreduced pension for the purposes of determining eligibility for and quantum of severance pay.

Example 1

Employee A is employed by Company A for 25 years. Their employment is then severed but they are able to and does then retire with an actuarially unreduced pension benefit that reflects any service credits that they would have been expected to have earned in the normal course had their employment not been severed. Assume 25 years' worth of service credits in this example. O Reg 288/01, s. 9(1) paragraph 3 applies to exempt employee A from severance pay.

Employee A is subsequently rehired by Company A and works seven more years for the company. Their employment is again severed. Because they were in receipt of an actuarially unreduced pension benefit BEFORE being severed this second time, the exemption in O Reg 288/01, s. 9(1) paragraph 3 has no application. Employee A is not exempt from severance entitlements.

However, because the service credits for the previous 25 years of employment had been included when calculating their actuarially unreduced pension benefit, they are not, as per s. 65(2.1) included when determining whether they meet the five year eligibility threshold under ESA Part XV, s. 64(1) or for calculating the quantum of his severance pay as per s. 65(1). Only their most recent seven years of employment will be considered. Assuming the employer has a global payroll of $2.5 million or more, this employee will be entitled to severance pay (having met the five year eligibility threshold) and the quantum will be calculated as seven weeks of severance pay.

Example 2

Employee B worked for company B for 30 years and retired with an actuarially unreduced pension benefit based on 30 years' worth of service credits. There was no severance pay payable at this time because their employment was not severed by their employer.

Employee B was subsequently rehired by company B and worked for an additional three years. Their employment was then severed. Because they were in receipt of an actuarially unreduced pension benefit BEFORE being severed, O Reg 288/01, s. 9(1) paragraph 3 does not apply to exempt them from severance entitlements.

However, as the service credits for the previous 30 years employment had been included when calculating their actuarially unreduced pension benefit, they are not, as per s. 65(2.1), included when determining eligibility for severance under ESA Part XV, s. 64(1) or calculating quantum of severance pay under s. 65(1). They are considered to have only three years of employment with company B for the purposes of determining severance entitlements and therefore does not meet the five year threshold for eligibility.

Where Employee Resigns – s. 65(3)

65(3) If an employee's employment is severed under clause 63(1)(e), the period between the day the employee's notice of resignation took effect and the day the employer's notice of termination would have taken effect shall not be considered in calculating the amount of severance pay to which the employee is entitled.

Section 65(3) creates an exception to s. 65(2) with respect to employment included in the calculation of severance pay. This exception applies when an employee resigns during a statutory notice period in accordance with ESA Part XV, s. 63(1)(e).

Under ESA Part XV, s. 63(1)(e) and s. 63(3), an employee who has been given notice of termination in accordance with ESA Part XV, s. 57 or s. 58 and who provides two weeks' notice of resignation that takes effect during the statutory notice period, is deemed to be severed on the date the employer's notice would have taken effect. Further, s. 65(2) provides that the period of employment up to the date of the deemed severance (i.e., the date the employer's notice would have taken effect) is included in determining eligibility for severance pay (i.e., the five-year employment threshold) as well as the calculation of the amount of severance pay.

However, s. 65(3) provides that the period of time between the date the employee's notice of resignation takes effect and the date the employer's notice of termination would have taken effect (the deemed date of severance) does not count in the calculation of the amount of severance pay owing (although this period continues to count with respect to determining eligibility for severance pay).

For example, an employee was provided with eight weeks' written notice of termination that would end on March 28. The employee provides two weeks' written notice of resignation on February 1 (the effective date of which falls within the statutory notice period). For the purpose of calculating the amount of severance pay owing, the employee's length of employment is counted only up to February 14, the employee's last day of work. No account is taken of the period between February 15 and March 28 for the purposes of calculating the amount of severance pay, even though March 28 is deemed to be the severance date by ESA Part XV, s. 63(3).

However, under s. 65(2), the length of employment for the purpose of determining eligibility for severance pay includes the inactive time up to the deemed severance date. In the above example, the employee's

employment is deemed severed on March 28. Therefore, account is taken of the period between February 15 and March 28 for the purpose of determining whether the employee is eligible for severance pay.

In summary, in determining eligibility for severance pay, the period after the resignation takes effect is included under ESA Part XV, s. 63(3) and s. 65(2). In calculating the amount of severance pay, the period after the resignation takes effect is excluded as per s. 65(3).

Termination Without Notice – s. 65(4)

65(4) If an employer terminates the employment of an employee without providing the notice, if any, required under section 57 or 58, the amount of severance pay to which the employee is entitled shall be calculated as if the employee continued to be employed for a period equal to the period of notice that should have been given and was not.

This section provides that where notice of termination required to be given under ESA Part XV, s. 57 or s. 58 is not provided, the period of the notice that should have been provided is to be included in the employee's length of employment for purposes of calculating the amount of severance pay under s. 65(1).

For example, where an employee, who was terminated on February 1 should have been provided with eight weeks' written notice of termination, the employee's length of employment for the purpose of calculating the amount of severance pay will include the period up to March 28.

It is Program policy that this period must also be included for the purpose of determining whether the five-year threshold for eligibility for severance pay has been met; otherwise, the employee's severance pay entitlement would be calculated as zero, which would be contrary to the s. 65(4) direction that it be calculated as if the employee had continued to be employed for the period of notice that should have been given.

Limit – s. 65(5)

65(5) An employee's severance pay entitlement under this section shall not exceed an amount equal to the employee's regular wages for a regular work week for 26 weeks.

This section sets out a maximum amount of severance pay an employee may be entitled to under s. 65(1). It caps the entitlement at an amount equal to the employee's regular wages for a regular work week for 26 weeks.

Regular wages and regular work week are defined in ESA Part I, s. 1 as follows:

"regular wages" means wages other than overtime pay, public holiday pay, premium pay, vacation pay, domestic or sexual violence leave pay, termination pay, severance pay and termination of assignment pay, and entitlements under a provision of an employee's contract of employment that under subsection 5 (2) prevail over Part VIII, Part X, Part XI. section 49.7, Part XV or section 74.10.1;

"regular work week", with respect to an employee who usually works the same number of hours each week, means a week of that many hours but not including overtime hours;

See also s. 65(1) above for a discussion of Program policy regarding the phrase "regular wages for a regular work week" in the context of severance pay calculations.

Where No Regular Work Week – s. 65(6)

65(6) For the purposes of subsections (1) and (5), if the employee does not have a regular work week or if the employee is paid on a basis other than time, the employee's regular wages for a regular work week shall be deemed to be the average amount of regular wages earned by the employee for the weeks in which the employee worked in the period of 12 weeks preceding the date on which,

(a) the employee's employment was severed; or

(b) if the employee's employment was severed under clause 63 (1) (c) or (d), the date on which the lay-off began.

This section outlines how to determine an employee's regular wages for a regular work week where the employee does not have a "regular work week" or is paid on a basis other than time.

Regular wages and regular work week are defined in ESA Part I, s. 1 as follows:

"regular wages" means wages other than overtime pay, public holiday pay, premium pay, vacation pay, domestic or sexual violence leave pay, termination pay, severance pay and termination of assignment pay, and entitlements under a provision of an employee's contract of employment that under subsection 5 (2) prevail over Part VIII, Part X, Part XI, section 49.7, Part XV or section 74.10.1;

"regular work week", with respect to an employee who usually works the same number of hours each week, means a week of that many hours but not including overtime hours;

Section 65(6) provides for an averaging of the employee's regular wages received over the 12 weeks worked immediately preceding the day the employee's employment was severed or, where the employee's employment was deemed severed as a result of being on a lay-off, the day the lay-off began.

The formula requires that only the weeks in which the employee worked be included. Therefore, if the employee has not worked at all during certain weeks in the designated 12-week period, then those weeks are not included in the calculation. For example, if the employee was on a contractual short-term disability leave for one of the 12 weeks and did not work at all during that week, their regular wages would be determined by averaging the regular wages earned over the 11 weeks in which they worked. Weeks where the employee was away from work all week on a leave under Part XIV, contractual leave, other approved leave, vacation or lay-off are considered weeks not worked. As noted above, where the employment was severed as a result of a lay-off under ESA Part XV, ss. 63(1)(c) or (d), the 12-week period precedes the date on which the lay-off began.

The question arises as to how to complete the calculation where the employee who does not have a regular work week or is paid on a basis other than time was, for example, on a contractual short-term disability leave or other leave for the entire designated 12-week period. Because s. 65(6) does not provide a mechanism to calculate the average wages in that situation, Program policy is that the employer must continue to look back in blocks of 12 weeks, until a 12-week period can be found in which the employee has at least one week worked and then average the wages earned over the number of weeks worked in that 12-week period.

For example, an employee was on pregnancy and parental leave for 52 weeks prior to her employment being severed. Note that a combined pregnancy and parental leave may be longer than 52 weeks, up to a

maximum entitlement of 78 weeks. The employer looks back in 12-week blocks until it finds a 12-week block that contains some weeks worked by the employee. In this case, the employer looks:

- 0-12 weeks prior to the severance – no weeks worked
- 12-24 weeks prior to the severance – no weeks worked
- 24-36 weeks prior to the severance – no weeks worked
- 36-48 weeks prior to the severance – no weeks worked
- 48-60 weeks prior to the severance – eight weeks worked.

The 12-week block to be used will be the period of time that was 48 through 60 weeks prior to the severance. The employee worked eight weeks during that time, so her regular wages for a regular work week will be the average of her regular wages over those eight weeks.

In Addition to Other Amounts – s. 65(7)

65(7) Subject to subsection (8), severance pay under this section is in addition to any other amount to which an employee is entitled under this Act or his or her employment contract.

This section provides that severance pay is payable in addition to any other payment owing under the Act. For example, if an employee was dismissed without notice after 10 years of employment, they would be entitled to eight weeks' termination pay under ESA Part XV, s. 61(1) and 10 weeks of severance pay under ESA Part XV, s. 64(1). This section provides that the eight weeks of termination pay (an amount the employee is entitled to under the Act) is payable in addition to the 10 weeks of severance pay, preventing one from being set-off against the other. Further, this section provides that severance pay is payable in addition to any payments owing under a contract of employment.

This section is subject to s. 65(8), which permits certain set-offs/deductions from severance pay.

Set-off, Deduction – s. 65(8)

65(8) Only the following set-offs and deductions may be made in calculating severance pay under this section:

1. Supplementary unemployment benefits the employee receives after his or her employment is severed and before the severance pay becomes payable to the employee.

2. An amount paid to an employee for loss of employment under a provision of the employment contract if it is based upon length of employment, length of service or seniority.

3. Severance pay that was previously paid to the employee under this Act, a predecessor of this Act or a contractual provision described in paragraph 2.

Section 65(8) outlines the set-offs and deductions that may be made when calculating an employee's severance pay. Three types of set-offs/deductions are permitted: supplementary unemployment benefits, contractual amounts for the loss of employment and severance pay previously paid under the former *Employment Standards Act* or the ESA 2000.

Deductions for Supplementary Unemployment Benefits

Paragraph 1 of s. 65(8) provides that supplementary unemployment benefits ("SUBs") that an employee receives after the employment is severed and before the severance becomes payable may be set-off/deducted when calculating severance pay.

SUBs are amounts that an employer pays to an employee to top up the employee's employment insurance benefits. For example, if the employee is receiving $300 a week under the Employment Insurance Act, the SUBs plan that the insurer has set up might entitle the employee to a further $100 a week while they are unemployed. The term "supplementary unemployment benefit" is not defined in the Act. However, it is defined in the federal *Income Tax Act*, RSC 1985, c 1 (5th Supp). It is still possible for a plan that does not meet the definition in the Income Tax Act to be considered a SUBs plan for purposes of s. 65(8). If the plan is a bona fide plan and is for the purpose of topping up the employee's employment insurance benefits then the SUBs will be deductible.

Example:

- January 6 - Employee is laid off
- January 20 - SUBs commence
- September 6 - Employee's employment deemed severed under ESA Part XV, s. 63 and severance pay is paid in trust
- November 1 - Employee renounces recall rights and severance pay paid to employee; SUBs end

In this situation, the first question is whether the employer can deduct from the severance pay the SUBs that were paid to the employee between January 20 and September 6. The answer is no, since s. 65(8) refers to SUBs received after the employment is severed but before the severance pay becomes payable. In the above-noted example only the SUBs received by the employee between September 6, the date the severance occurs, and November 1, the date the severance pay becomes payable, can be deducted from the severance pay owing to the employee.

Deductions for Contractual Payments

Paragraph 2 in this section provides that an amount paid to an employee for the loss of employment under a contract of employment where the payment is based on length of employment, length of service or seniority may be set-off/deducted from severance pay. For example, an employee whose employment is severed after 25 years of service receives payment of two weeks per year to a maximum of 20 weeks under a contract of employment. Under s. 65(1), the employee is entitled to 25 weeks of severance pay. In this case, s. 65(8) provides that the employer may set-off/deduct the 20 weeks paid to the employee from the severance pay.

Furthermore, if the employer, pursuant to a provision of an employment contract, gives a greater amount of termination pay than is required under the Act, the employer may set-off/deduct the excess termination pay from the severance pay entitlement.

Where the employer agrees to provide salary continuance after termination, and the agreement specifically states that severance pay is included in the amounts paid, ESA Part V, s. 11(5) will not invalidate the agreement.

Deductions for Previously Paid Severance Pay

Paragraph 3 of s. 65(8) provides that an employer may deduct the amount of severance pay paid previously under the Act, a predecessor of the Act or a contractual provision of an employment contract. Under paragraph 3 it is the actual amount of severance pay paid previously that may be set-off/deducted.

Example:

- January 1, 2002 - Employee hired at a salary of $1,000.00 per week
- January 1, 2008 - Employee dismissed and paid $6,000 severance pay (6 years x $1,000)
- January 1, 2010 - Employee rehired at a salary of $2,000 per week
- January 1, 2015 - Employee dismissed

The question arises as to how the employee's severance pay should be calculated for purposes of the 2015 dismissal. In this example, the employee would be considered to have 11 years of employment with the employer (six years during the first period and five years during the second). Based on the employee's length of employment of 11 years and their current salary of $2,000 per week, the employee would be entitled to severance pay in the amount of $22,000 before taking into account any severance pay previously paid. Paragraph 3 allows an employer to take into account the severance pay previously paid by setting-off/deducting the amount paid from the current entitlement. Therefore, the employee is entitled to $22,000 - $6,000 = $16,000 following the 2015 dismissal.

The question sometimes arises as to what happens where the employee is bound by a severance pay settlement with respect to an earlier dismissal, either because the union has entered into such a settlement with the employer or because the employee has entered into such a settlement himself or herself. In this situation, the employer is limited to deducting the actual amount of severance pay that was paid as the settlement. Using the example discussed above, if a settlement of $3,000 had been reached with respect to the first dismissal, the employer would be entitled to set-off/deduct only $3,000 from the $22,000 total, resulting in the employee receiving $19,000 of severance pay following the 2015 dismissal.

The situation may also arise where the amount of the settlement exceeds the amount of severance pay that was required under the statute in force at the time the employment was severed. In this situation, the employer is permitted to deduct the actual amount of the settlement that was for severance pay. Using the example discussed above but with a settlement of $10,000 in respect of the first dismissal, the employer would be entitled to set-off/deduct $10,000 from the $22,000 total, resulting in the employee receiving $12,000 of severance pay following the 2015 dismissal.

ESA Part XV Section 66 - Instalments

Instalments - s. 66(1)

66(1) An employer may pay severance pay to an employee who is entitled to it in instalments with the agreement of the employee or the approval of the Director.

Section 66(1) provides that an employer may pay severance pay in instalments directly to an employee where the employee and employer agree (in writing - see s. 1(3) of the Act) or with the approval of the Director of Employment Standards. See Delegation of Powers for a listing of the persons to whom this power of the Director has been delegated.

Note that where an employer and an employee have agreed to an instalment plan to pay an employee severance pay under this section, the provisions in s. 67 of the *Employment Standards Act, 2000*

regarding the election to retain recall rights or to be paid severance pay forthwith do not apply (see s. 67(2)). Therefore, an employee who agrees to an instalment plan is not required to make an election with respect to the payment of severance pay or retention of recall rights. Consequently, the employee preserves recall rights because he or she is not required to make an election and the employer is not required to pay any unpaid severance pay into trust. Note, however, that s. 67 will continue to apply with respect to an election for the payment of termination pay forthwith or the retention of recall rights.

However, if an employer pays severance pay by instalment to an employee under a plan approved by the Director (as opposed to under an agreement between the employer and employee), s. 67 will continue to apply with respect to the election to be paid severance pay forthwith or to retain recall rights. In this situation, the employee will retain the right to be recalled, unless he or she expressly elects to be paid the severance pay under s. 67(3). Further, in the absence of such an election, the employer will be required to either pay the severance instalments to the Director in trust under s. 67(6) or, if the employee is represented by a trade union, pay the severance instalments in trust as agreed by the union and the employer or to the Director in trust in the absence of such an agreement under s. 67(7). It is important to note that the employer will be required to meet its obligations as set out in ss. 67(6) or (7) unless the employee has expressly elected to accept the severance pay. Hence, an employer may wish to obtain this election from its employees prior to making any severance pay payments.

Some of the factors that the Director may consider in determining whether to approve the instalment plan may include:

1. The possibility that the company would be forced into bankruptcy or receivership if the instalment plan were not granted.
2. The possibility that the employer would not be able to meet all of the instalment payments in a timely fashion.
3. The views of the union, if any, and the employees concerning the proposed instalment plan.
4. Whether there are related companies that may have the funds to pay the severance pay without resorting to an instalment plan.
5. Whether the proposal contains a provision for the payment of interest.
6. The reasons the parties were unable to reach an agreement on their own.

Note: this list is not intended to be exhaustive.

Restriction - s. 66(2)

66(2) The period over which instalments can be paid must not exceed three years.

Section 66(2) places a maximum payment period of three years for an instalment plan.

Default - s. 66(3)

66(3) If the employer fails to make an instalment payment, all severance pay not previously paid shall become payable immediately.

Section 66(3) provides that where an employer fails to make an instalment payment, the remaining severance pay becomes payable immediately.

The question may arise as to what happens to the employee's recall rights where the employer defaults on the plan:

Instalment Plan Based on Employer-Employee Agreement

Where the instalment plan for the payment of severance pay is based on an agreement between the employer and employee, the provisions regarding the employee's election between being paid severance pay or retaining the right to be recalled do not apply (s. 67(2)). Thus the employee maintains recalls rights (unless he or she had already made an election to be paid termination pay forthwith and is deemed to have abandoned recall rights) as well as the entitlement to be paid severance pay in instalments. If the employer defaults on the instalment plan, all outstanding severance pay becomes payable immediately to the employee. The employee's right to be recalled would remain unaffected.

Director-Approved Instalment Plan

Under a Director-approved instalment plan, the s. 67 provisions on the employee's election between recall rights and being paid severance pay do apply. Where the employee fails to make an election or chooses not be paid the severance pay, he or she would retain recall rights. Where the employee elects to be paid the severance pay, pursuant to s. 67(5), the employee is deemed to have abandoned his/her right to recall. However, it is Program policy that the employee could escape from this election, on the basis that it would be either an express or implied condition of the election that the employer completes all of the instalments. If this were not the case, situations of obvious unfairness would arise. For example, consider the following situation: the employee elects to give up recall rights and take severance, a short time later the employer defaults on the instalments, goes into bankruptcy, and some time later a purchaser buys the business and hires back all those employees with recall rights. In that situation, not to allow the employee to consider his or her election void would be to deprive him or her of both severance pay and recall rights, which is not the intent of the section. However, this proposition has not yet been tested before the Ontario Labour Relations Board, an arbitrator or a court. To provide more certain protection against these types of situations it is advisable that instalment plans contain a specific condition that any election to forfeit any recall rights be void if all the severance instalments are not paid by the employer pursuant to the plan.

ESA Part XV Section 67 - Where Election May Be Made

Note: O. Reg. 764/20 establishes a special rule that permits employers and trade unions in the hospitality, tourism, and convention and trade show industries to agree that the regulation applies instead of some of the provisions in s. 67. The special rules lasts from December 17, 2020 until July 30, 2022. See the discussion of O. Reg. 764/20 for details.

Where Election May Be Made - s. 67(1)

67(1) This section applies if an employee who has a right to be recalled for employment under his or her employment contract is entitled to,

(a) termination pay under section 61 because of a lay-off of 35 weeks or more; or

(b) severance pay.

Section 67(1) sets out the circumstances in which the provisions regarding the election of recall rights apply. This section is subject to s. 67(2) of the *Employment Standards Act, 2000*, discussed in subsection (2) below.

Section 67(1) states that s. 67 will apply where an employee has the right to be recalled for employment under a contract of employment (which includes a collective agreement) and either a) or b) below applies:

Termination pay is due under section 61 because of a lay-off of 35 weeks or more - s. 67(1)(a)

Employees who are entitled to termination pay because of a temporary lay-off that equals or exceeds 35 weeks in a period of 52 consecutive weeks (s. 56(2)(b) or s. 56(2)(c)) are subject to s. 67. In that case, the employer of such an employee is also subject to s. 67.

This section does not apply if the termination pay comes due for reasons other than as a result of a lay-off that equals or exceeds 35 weeks in a period of 52 consecutive weeks. Therefore, it will not apply where, for example, there is a termination because of a lay-off that exceeds 13 weeks in a 20-week consecutive period (s. 56(2)(a)). In that case, the employee is not required under the Act to make an election in order to receive termination pay after 13 weeks of lay-off and will not be deemed under the Act to have abandoned the right to be recalled in accepting that payment. If the employee is entitled to severance pay, however, he or she will be required to make an election with respect to the payment of the severance pay and the retention of recall rights. It should also be noted that a collective agreement or contract of employment may provide for the loss of recall rights as a consequence of an employee's acceptance of termination pay that comes due other than as a result of a lay-off that equals or exceeds 35 weeks in a period of 52 consecutive weeks.

Severance pay is due - s. 67(1)(b)

Subject to s. 67(2), employees who are entitled to severance pay under s. 64(1) of the Act are subject to the provisions of s. 67. The employee's employer is likewise subject to the provisions of s. 67.

Typically, a right of recall will be contained in a collective agreement. However, s. 67(1) is not limited to situations where the right of recall is contained in a collective agreement. It is possible that a non-unionized employee might have a right of recall in the terms and conditions of his or her employment. However, these instances will be somewhat unusual. It will have to be demonstrated clearly that the right of recall in a non-unionized situation was formalized as part of the employment contract and not merely ad hoc, in order for the recall rights to be within the meaning of s. 67(1).

Exception - s. 67(2)

67(2) Clause (1)(b) does not apply if the employer and employee have agreed that the severance pay shall be paid in instalments under section 66.

Section 67(2) provides that, despite s. 67(1)(b), the provisions of s. 67 will not apply with respect to the severance entitlement where an employer and an employee have agreed to pay an employee severance pay in instalments under s. 66. See ESA Part XV, s. 66 for a detailed discussion of severance instalment plans under s. 66 of the Act. As such, an employee who agrees to accept severance pay by instalment will not be required to make an election as between the payment of his or her severance pay and retaining the right to recall, and the employer will not be required to pay the severance pay into trust.

However, s. 67 will apply where an instalment plan is in place because the Director has approved the payment of severance pay by instalments (as opposed to it being in place as a result of employee agreement). Accordingly, in that case, the employee must elect either to be paid the severance pay (by instalment) or retain his or her recall rights. If that employee also has the right to termination pay because of a lay-off of 35 weeks or more, the same election must be made with respect to both the termination pay and severance pay entitlements - see s. 67(4). Note that if that employee does not make an election, or elects not to be paid the termination and severance pay, the employee will not be deemed to have abandoned the right to be recalled under s. 67(5) even though the employer pays the employee severance pay by instalment under a plan approved by the Director, since the employee has not expressly elected to be paid the severance pay under s. 67(3).

Nature of Election - s. 67(3)

67(3) The employee may elect to be paid the termination pay or severance pay forthwith or to retain the right to be recalled.

This section is similar to the corresponding provisions (ss. 57(19) and 58(10)) of the former *Employment Standards Act*.

This section provides that an employee may choose to have termination pay or severance pay paid to them immediately, or instead may choose to retain the right to be recalled.

In *Moore Packaging Corp. v Canadian Paperworkers Union, Local 1150* (1993), 34 LAC (4th) 293 (Ont Arb Bd), a decision under the former *Employment Standards Act*, the arbitrator held that an employee must make an express election prior to receipt of the severance pay if he or she is to be deemed to have elected "to be paid the severance pay forthwith". The decision states that if there is no such express prior election and the employer sends the severance pay to the employee, the employee's subsequent cashing of the cheque may not, by itself, constitute an election to receive the severance pay forthwith within the meaning of the section. This is on the basis that the employee, in cashing such a cheque, may not have had the specific intent to elect to choose between severance pay and recall rights. From an employer's perspective, it would make sense, therefore, to attempt to ensure that the employee was given the opportunity to specifically choose between severance pay and recall rights sometime prior to the date for payment, and also to ensure that the employee fully understood the consequences of his or her choice vis-à-vis recall rights, prior to making such a choice.

Note, however, that this provision does not apply with respect to the employee's severance pay entitlement if the employee and employer have agreed to (as opposed to the Director approving) the payment of severance pay by instalment under s. 66 of the Act. In that event, s. 67(2) provides that the provisions of s. 67 (including s. 67(3)) do not apply with respect to the severance pay entitlement.

Consistency - s. 67(4)

67(4) An employee who is entitled to both termination pay and severance pay shall make the same election in respect of each.

This section is similar in part to the corresponding provisions (ss. 57(20) and 58(11)) of the former *Employment Standards Act*.

Section 67(4) provides that if an employee is entitled to termination pay on or after 35 weeks of lay-off in a period of 52 consecutive weeks and to severance pay, the employee must make the same election with

respect to both. Note, however, that this requirement does not apply if the employee and employer have agreed to (as opposed to the Director approving) the payment of severance pay by instalment under s. 66 of the Act. In that event, s. 67(2) provides that the provisions of s. 67 (including s. 67(4)) do not apply with respect to the severance pay entitlement.

Deemed Abandonment - s. 67(5)

67(5) An employee who elects to be paid shall be deemed to have abandoned the right to be recalled.

This section is similar in part to the corresponding provisions (ss. 57(20) and 58(11)) of the former *Employment Standards Act*.

Section 67(5) provides that where an employee elects to be paid termination pay that became due because of a lay-off of 35 weeks in a period of 52 consecutive weeks, or severance pay, he or she will be deemed to have abandoned his or her right to be recalled.

Note, however, that this provision does not apply if the employee and employer have agreed to (as opposed to the Director approving) the payment of severance pay by instalment under s. 66 of the Act. In that event, s. 67(2) provides that the provisions of s. 67 (including s. 67(5)) do not apply with respect to the severance pay entitlement.

Employee Not Represented By Trade Union - s. 67(6)

67(6) If an employee who is not represented by a trade union elects to retain the right to be recalled or fails to make an election, the employer shall pay the termination pay and severance pay to which the employee is entitled to the Director in trust.

This section is similar in part to the corresponding provisions (ss. 57(21) and 58(12)) of the former *Employment Standards Act*.

Section 67(6) provides that where an employee who is not represented by a trade union is entitled to termination pay because of a lay-off of 35 weeks in a period of 52 consecutive weeks and/or severance pay, and elects to retain the right to be recalled or makes no election, the employer must pay the termination and/or severance pay to the Director in trust.

Section 67(6) only applies where the employee is not represented by a trade union. For trust arrangements for employees who are represented by a trade union, refer to s. 67(7).

It should also be noted that the requirement to pay termination pay and severance pay to the Director in Trust does not apply if the employee and employer have agreed to (as opposed to the Director approving) the payment of severance pay by instalment under s. 66 of the Act. In that event, s. 67(2) provides that the provisions of s. 67 (including s. 67(6)) do not apply with respect to the severance pay entitlement.

Provision for the pay out of monies held in trust is made in ss. 67(8) and (9). Refer to the discussion in subsections (8) and (9) below.

Employee Represented By Trade Union - s. 67(7)

67(7) If an employee who is represented by a trade union elects to retain the right to be recalled or fails to make an election,

(a) the employer and the trade union shall attempt to negotiate an arrangement for holding the money in trust, and, if the negotiations are successful, the money shall be held in trust in accordance with the arrangement agreed upon; and

(b) if the trade union advises the Director and the employer in writing that efforts to negotiate such an arrangement have been unsuccessful, the employer shall pay the termination pay and severance pay to which the employee is entitled to the Director in trust.

This section is similar in part to the corresponding provisions (ss. 57(21) and 58(12)) of the former *Employment Standards Act*. The requirement that the employer and union attempt to negotiate a trust arrangement was introduced by the ESA 2000.

Section 67(7) provides that where an employee who is represented by a trade union is entitled to termination pay because of a lay-off of 35 weeks in a period of 52 consecutive weeks and/or severance pay and elects to retain the right to be recalled, or fails to make an election, the employer and the trade union must attempt to negotiate, in good faith, an arrangement for holding the termination and/or severance pay in trust. Where the parties agree to an arrangement, the monies must be held in accordance with the arrangement. Where the parties cannot agree on an arrangement and the trade union advises the Director and the employer in writing that efforts have failed, the employer must pay the termination and/or severance pay to the Director in trust.

Where the parties either do not attempt to negotiate an agreement or the union does not notify the Director and the employer in writing that no agreement could be reached, there will not be an obligation for the employer to pay the monies to the Director and there will not be an obligation for the Director to hold the monies in trust.

It should be noted that this section only applies where an employee is represented by a trade union. For trust arrangements for employees who are not represented by a trade union, refer to s. 67(6).

Provision for the pay out of monies held in trust is made in ss. 67(8) and (9). Refer to the discussion in subsections (8) and (9) below.

Where Employee Accepts Recall - s. 67(8)

67(8) If the employee accepts employment made available under the right of recall, the amount held in trust shall be paid out of trust to the employer and the employee shall be deemed to have abandoned the right to termination pay and severance pay paid into trust.

Section 67(8) provides that where the employee accepts a recall to work, the monies held in trust must be paid out to the employer and the employee is deemed to have abandoned the right to termination and severance pay.

Subsection 67(8) deals only with the issue of what happens to the termination and severance pay that was paid into trust when an employee accepts a recall; neither it, nor any other provision in s. 67, has any bearing on what constitutes a termination within the meaning of s. 56 or what constitutes a severance within the meaning of s. 63. See the Court of Appeal decision in *United Steel v National Steel Car Limited,* 2013 ONCA 401 (CanLII), where the Court rejected the employer's argument that s. 67 means that an employee who accepts a recall cannot have any of the time spent on lay-off prior to the recall taken into account in determining whether there was a subsequent termination or severance. See ESA Part XV, s. 63(1) for further discussion of this case.

Employee Refuses to Return to Work

Sometimes situations will arise in which the employer recalls an employee who had elected to retain recall rights under s. 67 and the employee refuses to return to work. Because the employee's refusal occurs after the point at which the employee became entitled to termination pay or severance pay, the employee's refusal to accept the recall cannot disentitle him or her to that termination pay or severance pay. Specifically, none of the exemptions in ss. 2(1) or 9(1) of O Reg 288/01 apply to exempt such an employee from termination or severance pay to which he or she is already entitled. While paragraph 7 of s. 2(1) of O Reg 288/01 provides that an employee on a temporary lay-off is exempt from the termination provisions if he or she does not return to work when recalled, it does not apply to a refusal to return to work that occurs after the point at which the right to termination pay has crystallized. Further, there is no exemption from severance pay in O Reg 288/01 that corresponds to paragraph 7 of s. 2(1) of the regulation. Accordingly, an employee who has been recalled after his or her termination or severance entitlements have crystallized may refuse to return to work and then renounce his or her recall rights, in which case he or she will be entitled to receive any termination or severance pay held in trust in accordance with s. 67(9) - see the discussion below. Alternatively, an employee could refuse the recall but choose to retain the recall rights (if he or she did not lose them under the terms of the contract or collective agreement for having refused to return to work when recalled), in which case the money would continue to be held in trust. If the employee's refusal resulted in the automatic termination of recall rights under the terms of the contract or collective agreement, then the result would be the same as if the recall rights had expired, i.e., the money would be paid out of trust to the employee.

Period of Employment Calculation When Termination After Recall

Situations may also arise in which a long service employee who had been laid off for 35 weeks in a period of 52 consecutive weeks elects to retain recall rights and then, after more than 13 weeks elapse, accepts a recall, only to have the employer terminate the employee's employment two weeks later. How is the employee's length of service calculated for purposes of notice of termination in this case? Because of the "period of employment" rule in s. 8 of O Reg 288/01, only the last two weeks of employment would be considered in calculating the employee's period of employment. As a result, the employee would be entitled to one week's notice or one week's termination pay. While the employee's period of employment is only two weeks, the employee was "continuously employed for three months or more" within the meaning of s. 54 and so is entitled to notice or termination pay in accordance with s. 57(a).

Recall Rights Expired or Renounced - s. 67(9)

67(9) If the employee renounces the right to be recalled or the right expires, the amount held in trust shall be paid to the employee and, if the right to be recalled had not expired, the employee shall be deemed to have abandoned the right.

This section is similar in part to the corresponding provisions (ss. 57(21) and 58(12)) of the former *Employment Standards Act*.

Section 67(9) provides that where the employee renounces the right to be recalled or the rights expire, the monies held in trust must be paid out to the employee and the employee is deemed to have abandoned the right to be recalled.

Although the section does not identify a specific person as being responsible for making this payment, it is implied that the person who holds the monies in trust is required to make the payment. It may be the

Director or another person pursuant to the employer-trade union arrangement who holds the monies in trust.

ESA Part XV.1 Non-Compete Agreements

Part XV.1 of the ESA prohibits, with certain exceptions, employers from entering into employment contracts or other agreements with an employee that are, or that include, a non-compete agreement.

Part XV.1 was added to the ESA 2000 by the *Working for Workers Act, 2021* (WFWA). Although the WFWA received Royal Assent on December 2, 2021, Part XV.1 was deemed to have come into force on October 25, 2021 (which was the day that the WFWA was introduced in the Legislature).

As such, Part XV.1 prohibited employers from entering into non-compete agreements starting October 25, 2021, and any such agreements that were entered into on or after October 25, 2021 are void.

Part XV.1 does not prohibit or void non-compete agreements that were entered into prior to October 25, 2021.

Before the WFWA, disputes about enforceability of non-compete clauses were resolved through the courts. Nothing in Part XV.1 prohibits employees and employers from resolving disputes about the enforceability of non-compete agreements in the courts, regardless of when they were entered into, if they choose to do so.

ESA Part XV.1 Section 67.1 – Definitions

Definitions - s. 67.1

67.1 In this Part, and for the purposes of Part XVIII (Reprisal), section 74.12, Part XXI (Who Enforces this Act and What They Can Do), Part XXII (Complaints and Enforcement), Part XXIII (Reviews by the Board), Part XXIV (Collection), Part XXV (Offences and Prosecutions), Part XXVI (Miscellaneous Evidentiary Provisions) and Part XXVII (Regulations) insofar as matters concerning this Part are concerned,

"employee" means an employee as defined in subsection 1 (1) and includes an applicant for employment;

"employer" means an employer as defined in subsection 1 (1) and includes a prospective employer;

"non-compete agreement" means an agreement, or any part of an agreement, between an employer and an employee that prohibits the employee from engaging in any business, work, occupation, profession, project or other activity that is in competition with the employer's business after the employment relationship between the employee and the employer ends.

Section 67.1 provides enhanced definitions of "employee" and "employer", and a definition of "non-compete agreement", which apply for the purposes of Part XV.1 and the following provisions of the *Employment Standards Act, 2000* insofar as matters concerning this Part are concerned:

- Part XVII: Reprisal
- Section 74.12: Reprisal by Client
- Part XXI: Who Enforces this Act and What They Can Do
- Part XXII: Complaints and Enforcement
- Part XXIII: Reviews by the Board

- Part XXIV: Collection
- Part XXV: Offences and Prosecutions
- Part XXVI: Miscellaneous Evidentiary Provisions
- Part XXVII: Regulations

Employee

“employee” means an employee as defined in subsection 1 (1) and includes an applicant for employment;

The definition of "employee" in s. 67.1 expands the definition provided in s. 1(1) of the Act. Section 1(1) defines "employee" as follows:

1(1) "employee" includes,

(a) a person, including an officer of a corporation, who performs work for an employer for wages,

(b) a person who supplies services to an employer for wages,

(c) a person who receives training from a person who is an employer, if the skill in which the person is being trained is a skill used by the employer’s employees, or

(d) a person who is a homeworker,

and includes a person who was an employee.

For matters concerning the Non-Compete Agreements Part of the Act, the definition of "employee" is expanded to include an applicant for employment.

Employer

“employer” means an employer as defined in subsection 1 (1) and includes a prospective employer;

The definition of "employer" in s. 67.1 expands the definition in s. 1(1) of the Act. Section 1(1) defines "employer" as follows:

1(1) "employer" includes,

(a) an owner, proprietor, manager, superintendent, overseer, receiver or trustee of an activity, business, work, trade, occupation, profession, project or undertaking who has control or direction of, or is directly or indirectly responsible for, the employment of a person in it, and

(b) any persons treated as one employer under section 4, and includes a person who was an employer.

For matters concerning the Non-Compete Agreements Part of the Act, the definition of "employer" is expanded to include a prospective employer.

Non-compete agreement

“non-compete agreement” means an agreement, or any part of an agreement, between an employer and an employee that prohibits the employee from engaging in any business, work, occupation, profession, project or other activity that is in competition with the employer’s business after the employment relationship between the employee and the employer ends.

Subsection 67.2(1) prohibits employers, with certain exceptions, from entering into employment contracts or other agreements that are, or that include, a “non-compete agreement”.

“Non-compete agreement” is defined to mean an agreement, or any part of an agreement, between an employer and an employee (which includes a prospective employer and an applicant for employment as per the other definitions in s. 67.1), that prohibits the employee from engaging in any business, work, occupation, profession, project or other activity that is in competition with the employer’s business after the employment relationship between the employee and the employer ends.

“**Prohibits**”

An agreement, or part of an agreement, is a “non-compete agreement” only if it “**prohibits**” the employee from engaging in any business, work, occupation, profession, project or other activity that is in competition with the employer’s business after the end of the employment relationship.

It is Program policy that an agreement, or part of an agreement, is a “non-compete agreement” only if it **explicitly prohibits the employee from competing**.

For example, an employer and an employee enter into an agreement, or part of an agreement, that requires the employee to pay the employer substantial fees to reimburse the employer for training or other costs if the employee quits. That agreement (or part of an agreement) does not explicitly prohibit the employee from competing and as such is not a “non-compete agreement”.

As another example, an agreement, or part of an agreement, that prohibits employees from soliciting the employer’s customers is not a “non-compete agreement”. (See below for more information on “non-solicit” clauses.) It is Program policy that a non-solicit clause will not be considered to be a “non-compete agreement” even if for practical purposes the circumstances (e.g. industry or geography) are such that the non-solicit clause renders it imposible for an employee to start a competing business or to work for a competitor.

For example, an employee is employed to sell a very specialized medical instrument where every potential purchaser of the product is a client of the current employer. The employee and employer entered into a non-solicit agreement that prohibits the employee from contacting any firm that was a customer of the employer at any time during the employee’s employment with the employer for two years after the end of the employment relationship. It is Program policy that this agreement is not a “non-compete agreement” because it does not explicitly prohibit the employee from engaging in any business (work, etc.) that is in competition with the employer’s business, even though for practical purposes the non-solicit clause renders it impossible for the employee to start the employee’s own business that would compete with the employer. (An employee who believes a non-solicit clause is unreasonable may choose to challenge its enforceability in the courts.)

Whether or Not Prohibition is Reasonable is Irrelevant

Disputes between employers and employees about the enforceability of non-compete agreements have historically been adjudicated by the courts, which generally have ruled that such agreements are not enforceable unless they are reasonable and in the public interest. An agreement, or part of an agreement, that fits the s. 67.1 definition of “non-compete agreement” will be considered to be a non-compete agreement whether or not it is reasonable or in the public interest.

Whether or Not Prohibition is Time Limited is Irrelevant

An agreement, or part of an agreement, that prohibits an employee from engaging in any business (work, etc.) that competes with the employer after the end of the employment relationship may be a “non-compete agreement” whether or not the prohibition is time-limited.

For example, an agreement that prohibits the employee from engaging in work that is in competition with the employer’s business for six months after the employment relationship ends is a “non-compete agreement”. An agreement that has no expiry date on the prohibition is also a “non-compete agreement”.

Whether or Not Prohibition is Geographically Restricted is Irrelevant

An agreement, or part of an agreement, that prohibits an employee from engaging in any business (work, etc.) that competes with the employer after the end of the employment relationship may be a “non-compete agreement” whether or not the prohibition is geographically restricted.

For example, an agreement that prohibits the employee from engaging in work that is in competition with the employer’s business after the employment relationships ends within 100 km of the employer’s workplace is a “non-compete agreement”. An agreement that has no geographic restriction on the prohibition is also a “non-compete agreement”.

Non-Compete vs Non-Solicit and Non-Disclosure

Non-compete, non-solicit and non-disclosure clauses or agreements are three main types of what are called restrictrive covenant clauses in employment contracts. A restrictive covenant prevents someone from doing something or from using property in a certain way.

A **non-solicit** (or non-solicitation) clause or agreement is a provision in an employment contract that prohibits an employee from soliciting – i.e. actively pursuing, sometimes referred to as “poaching” - clients, customers, vendors, business partners or other employees of their employer, during the employment relationship and/or after the employment relationship has ended. Often, but not always, the non-solict provision applies for a specified period after the end of the employment relationship, rather than indefinitely.

A **non-disclosure** clause or agreement is a provision in an employment contract that prohibits an employee from disclosing proprietary or confidential company information and processes.

The definition of “non-compete agreement” in s. 67.1 does not capture non-solicit agreements or non-disclosure agreements. As such, the prohibition in s. 67.2 with respect to entering into non-compete agreements does not apply to agreements that are non-solicit or non-disclosure agreements.

Some employers and employees may not use precise terminology when drafting their agreements and may use “non-compete” / “compete” incorrectly or interchangeably with “non-solicit” / “solicit” or “non-disclosure”. When determining whether an agreement falls within the definition of a non-compete agreement, the Program looks at what activities the agreement prohibits. For example, an employment contract may have a heading that says “Non-Competition” in relation to a clause that says, “The employee will not, for two years after the end of the employment relationship contact any person, firm, corporation, or governmental agency who was a customer of the employer at any time during the employee’s employment with the employer.” Despite the heading “Non-Competition”, the substance of the clause is about soliciting rather than competing and as such does not fall into the definition of “non-compete agreement”.

ESA Part XV.1 Section 67.2 – Prohibition

Prohibition - s. 67.2(1), (2)

67.2 (1) No employer shall enter into an employment contract or other agreement with an employee that is, or that includes, a non-compete agreement.

(2) For greater certainty, subsection 5 (1) applies and if an employer contravenes subsection (1), the non-compete agreement is void.

Subsection 67.2(1) prohibits employers from entering into an employment contract or any other agreement with an employee that includes a non-compete agreement, or that is a non-compete agreement. "Non-compete agreement" is defined in s. 67.1

For greater certainty, ss. 67.2(2) reinforces that the effect of ss. 5(1) of the ESA (the "no contracting out" provision) is to void any non-compete agreement that was entered into in contravention of ss. 67.2(1).

These provisions must be read in conjunction with ss. 67.2(3) and (4), which establish exceptions to the prohibition.

Subsections 67.2(1) and (2) only prohibit and void the parts/words of an employment contract or other agreement that fit within the definition of "non-compete agreement". This means, for example, that where an employment contract contains both a prohibited non-compete agreement and a non-solicit clause that is not prohibited, only the non-compete agreement is prohibited and voided. (See the definition of "non-compete agreement" in s. 67.1 for a discussion of these terms.)

These subsections, along with the rest of Part XV.1, were added to the ESA by the *Working for Workers Act, 2021* (WFWA). Although the WFWA received Royal Assent on December 2, 2021, Part XV.1 was deemed to have come into force on October 25, 2021, which was the day that the WFWA was introduced in the Legislature. As such, employers were prohibited from entering into non-compete agreements starting October 25, 2021, and any such agreements that were entered into on or after October 25, 2021 are void. Non-compete agreements that were entered into prior to October 25, 2021 are not prohibited, and are not voided, by the ESA.

"Employee" and "Employer"

Section 67.1 contains expanded definitions of "employee" and "employer" that apply for the purposes of Part XV.1. The expanded definitions include an applicant for employment and a prospective employer.

As such, the prohibition against entering into non-compete agreements applies even before the employment relationship begins, and if a prospective employer and an applicant for employment enter into a non-compete agreement, it is void.

The definition of "employee" also includes "a person who **was** an employee". As such, the prohibition against entering into non-compete agreements continues to apply after the employment relationship ends and any non-compete agreement entered after the end of the employment relationship is also void.

Enforcement and Remedies

Disputes between employers and employees about the enforceability of non-compete agreements have historically been adjudicated by the courts, which generally have ruled that such agreements are not enforceable unless they are reasonable and in the public interest.

Part XV.1 does not prohibit employees and employers from resolving disputes about the enforceability of non-compete agreements in the courts. (See s. 8 of the ESA.) Although Part XV.1 creates, with two

exceptions, a prohibition against entering into all non-compete agreements on or after October 25, 2021 – regardless of whether a court would have ruled the agreement to be enforceable - parties may wish to go to court to resolve issues about, for example, the enforceability of non-compete agreements that were entered into prior to October 25, 2021, or if there is a dispute as to whether one of the exceptions applies or whether an agreement entered into on or after October 25, 2021 fits within the definition of a prohibited "non-compete agreement".

With respect to the Employment Standards Program, claimants may file a claim alleging, for example:

- that their employer entered into a prohibited non-compete agreement with them, or
- that they were reprised against because they refused to enter into a non-compete agreement, asked their employer to comply with Part XV.1, or engaged in any other protected activity under s. 74.

Because the definition of "employee" in s. 67.1 includes applicants for employment and former employees, the allegations may be made with respect to events that occur before the employment relationship is entered into, during it, or after it ends.

Where an employer is found to have contravened s. 67.2, an Employment Standards Officer may:

- issue a compliance order pursuant to s. 108,
- issue a notice of contravention pursuant to s. 113, and the prescribed penalties in Reg. 289/01 would apply, and/or
- where the officer finds that the employer committed a reprisal, issue an order to compensate and/or an order to reinstate pursuant to s. 104. Note that there is no authority to issue an Order to Hire where the reprisal consisted of the prospective employer refusing to hire the applicant employee.

The officer also has the authority to initiate a prosecution under the *Provincial Offences Act* (POA). (Note: at the time of writing, there was no authority to issue Part I "tickets" under the POA for contraventions of s. 67.2.)

Exception – sale, etc., of business - s. 67.2(3)

67.2 (3) If there is a sale of a business or a part of a business and, as a part of the sale, the purchaser and seller enter into an agreement that prohibits the seller from engaging in any business, work, occupation, profession, project or other activity that is in competition with the purchaser's business after the sale and, immediately following the sale, the seller becomes an employee of the purchaser, subsection (1) does not apply with respect to that agreement.

Subsection 67.2(3) establishes one of the exceptions to the prohibition against entering into non-compete agreements.

It establishes that where:

1. there is a sale of a business or a part of a businesss, and
2. immediately following the sale the seller becomes an employee of the purchaser, and
3. as part of the sale the purchaser and seller enter into an agreement that prohibits the seller from engaging in any business, work, occupation, profession, project or other activity that is in competition with the purchaser's business after the sale,

then the prohibition against entering into non-compete agreements per ss. 67.2(1) does not apply to that agreement.

"Sale" is defined in ss. 67.2(5) to include a lease.

Because of the second condition – that the seller becomes an employee of the purchaser – this exception only applies where the seller is an individual or individuals – i.e. where the business that is sold operated as a sole proprietorship or a partnership. **As such, the exception in s. 67.2(3) does not apply in the context of the sale of a corporation and, as such, the purchaser is prohibited by ss. 67.2(1) from entering into non-compete agreements with any employees of the seller that it employs (subject to the "executive" exception in ss. 67.2(4)).**

- (Note: the definition of "non-compete agreement" in s. 67.1 applies only to agreements between employees and employers. Agreements prohibiting competition in the context of a sale of a business may be characterized by the parties as agreements between employers and employees, or they may be characterized as something else, such as being part of the sales agreement between the seller and the purchaser. For Part XV.1 purposes, it does not matter how that contractual term is characterized, as the agreement is not prohibited by the ESA in either situation.
    - If it is an agreement between an employee and an employer, it would fit into the definition of "non-compete agreement" but it would not be prohibited by ss. 67.2(1) since the exception in ss. 67.2(3) would apply.
    - If it is any other type of agreement, such as part of the sales agreement between the purchaser and the seller, it would not fit into the definition of "non-compete agreement" and would not be prohibited by ss. 67.2(1).

Exception - executives - s. 67.2(4)

67.2 (4) Subsection (1) does not apply with respect to an employee who is an executive.

Subsection 67.2(4) establishes another exception to the prohibition against entering into non-compete agreements. It provides that the prohibition in ss. 67.2(1) does not apply with respect to an employee who is an executive.

"Executive" is defined in s. 67.2(5). See below for information.

Definitions – s. 67.2(5)

67.2 (5) In this section,

"executive" means any person who holds the office of chief executive officer, president, chief administrative officer, chief operating officer, chief financial officer, chief information officer, chief legal officer, chief human resources officer or chief corporate development officer, or holds any other chief executive position;

"sale" includes a lease.

Subsection 67.2(5) establishes definitions for the terms “executive” and “sale” in s. 67.2. These terms are used in the context of the exceptions set out in ss. (3) and (4) to the prohibition against entering into non-compete agreements.

“**Executive**” is defined to mean any person who holds the office of chief executive officer, president, chief administrative officer, chief operating officer, chief financial officer, chief information officer, chief legal officer, chief human resources officer or chief corporate development officer, or holds any other chief executive position]

Accordingly, the prohibition in s. 67.2(1) against employers entering into non-compete agreements does not apply with respect to any employee who holds any of the listed offices, or any other chief executive position.

When determining whether the exception to the prohibiton applies, it is the job title held by the employee that matters. The Program does not generally look behind the title and assess whether the employee’s duties appear to be at an executive level.

The exception to the prohibition will apply if the employee holds one of the listed job titles, even if they simultaneously hold other job titles that are not listed.

“**Sale**” is defined to include a lease. Note that the definition of “sale” for purposes of s. 67.2 is narrower from the definition of “sells” and “sale” in s. 9 of the Act (in Part IV, Continuity of Employment), where it includes a lease, a transfer and a disposition in any other manner.

ESA Part XVI - Lie Detectors

The intent of Part XVI of the *Employment Standards Act, 2000* is to prohibit the use of lie detectors by employers and prospective employers for personnel screening purposes. To this end, no one can require, request, enable or influence, indirectly or directly, an employee to submit to a lie detector test.

The Honourable Russell H. Ramsay, then Minister of Labour, on October 25, 1983, in his remarks upon the second reading of Bill 86, *Employment Standards Amendment Act, 1983,* SO 1983, c 55, provided the following reasons for introducing this legislation:

. . . The use of lie detectors in the work place is unacceptable to the government. They constitute an unwarranted invasion of privacy. They are of questionable accuracy and reliability. They engender a sense of fear in the work place that is destructive to good employer-employee relations.

ESA Part XVI Section 68 - Definitions

68 In this Part, and for purposes of Part XVIII (Reprisal), Part XXI (Who Enforces this Act and What They Can Do), Part XXII (Complaints and Enforcement), Part XXIII (Reviews by the Board), Part XXIV (Collection), Part XXV (Offences and Prosecutions), Part XXVI (Miscellaneous Evidentiary Provisions), Part XXVII (Regulations) and Part XXVIII (Transition, Amendment, Repeals, Commencement and Short Title), insofar as matters concerning this Part are concerned,

"employee" means an employee as defined in subsection 1(1) and includes an applicant for employment, a police officer and a person who is an applicant to be a police officer;

"employer" means an employer as defined in subsection 1(1) and includes a prospective employer and a police governing body;

"lie detector test" means an analysis, examination, interrogation or test that is taken or performed,

(a) by means of or in conjunction with a device, instrument or machine, and

(b) for the purpose of assessing or purporting to assess the credibility of a person.

Section 68 was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009,* SO 2009, c 9, effective November 6, 2009 to incorporate a reference to s. 74.12, which prohibits clients of temporary help agencies from reprising against assignment employees of temporary help agencies.

This provision is similar to s. 46 of the former *Employment Standards Act*. Section 68 sets out enhanced definitions of "employee" and "employer" and the definition of "lie detector test", which apply for the purposes of the following provisions of the *Employment Standards Act, 2000*, including Part XVI, as far as matters concerning this Part are concerned:

- Part XVII: Reprisal
- Section 74.12: Reprisal by client
- Part XXI: Who Enforces this Act and What The Can Do
- Part XXII: Complaints and Enforcement

- Part XXIII: Reviews by the Board
- Part XXIV: Collection
- Part XXV: Offences and Prosecutions
- Part XXVI: Miscellaneous Evidentiary Provisions
- Part XXVII: Regulations
- Part XXVIII: Transition

Employee

"employee" means an employee as defined in subsection 1(1) and includes an applicant for employment, a police officer and a person who is an applicant to be a police officer;

The definition of "employee" in s. 68 expands the definition provided in s. 1(1) of the Act. Section 1(1) defines "employee" as follows:

1(1) "employee" includes,

(a) a person, including an officer of a corporation, who performs work for an employer for wages,

(b) a person who supplies services to an employer for wages,

(c) a person who receives training from a person who is an employer, as set out in subsection (2), or

(d) a person who is a homeworker,

and includes a person who was an employee.

"person" includes a trade union.

In s. 68, for matters concerning "lie detectors", the definition of "employee" is expanded to include an applicant for employment, a police officer and a person applying to become a police officer.

Employer

"employer" means an employer as defined in subsection 1(1) and includes a prospective employer and a police governing body;

The definition of "employer" in s. 68 similarly expands the definition in s. 1(1) of the Act. Section 1(1) defines "employer" as follows:

1(1) "employer" includes,

(a) an owner, proprietor, manager, superintendent, overseer, receiver or trustee of an activity, business, work, trade, occupation, profession, project or undertaking who has control or direction of, or is directly or indirectly responsible for, the employment of a person in it, and

(b) any persons treated as one employer under section 4, and includes a person who was an employer.

"person" includes a trade union.

In s. 68, for matters concerning "lie detectors", the definition of "employer" is expanded to include a prospective employer as well as a police governing body (i.e., Police Services Board).

Lie Detector Test

"lie detector test" means an analysis, examination, interrogation or test that is taken or performed,

(a) by means of or in conjunction with a device, instrument or machine, and

(b) for the purpose of assessing or purporting to assess the credibility of a person.

"Lie detector" is a popular rather than scientific term. No machine literally "detects lies." The definition in this provision encompasses any type of test taken or performed in conjunction with any type of device, instrument or machine, and for the purpose of assessing or purporting to assess the credibility of a person.

A "lie detector" commonly refers to a standard field polygraph that monitors several physiological variables by means of separate pens independently recording certain measures on a moving paper chart. The machine is connected to four "involuntary" or "autonomic" response measures and records changes in those measures. The machine does not measure lying. Rather, it indicates variations in physiological responses that are, in theory at least, not subject to the control of the person tested (Royal Commission into Metropolitan Toronto Police Practices, *Report of the Royal Commission into Metropolitan Toronto Police Practices* (Toronto: The Commission, 1976) at c XXIII). A "lie detector" may also include a "Psychological Stress Evaluator", that is, a voice stress analyser. This instrument is designed to register and measure changes in an individual's stress levels as reflected in his or her voice.

The definition of "lie detector test" does not include surveillance devices that are used to observe employees without assessing or purporting to assess their credibility. In other words, an employer is not precluded from testing an employee by observing and recording his or her actions. This is so, even if it involves the surreptitious observation of an employee by means of a device, since it is the employee's actions that are being observed, rather than his or her credibility in relation to statements the employee makes about his or her actions.

ESA Part XVI Section 69 - Right to Refuse Test

69 Subject to section 71, an employee has a right not to,

(a) take a lie detector test;

(b) be asked to take a lie detector test; or

(c) be required to take a lie detector test

This provision is similar to s. 47(1) of the former *Employment Standards Act*. Section 69 establishes that employees, as defined under s. 68 of the *Employment Standards Act, 2000*, have a right not to take, be asked to take or be required to take a lie detector test.

The only exception to the employee's right not to be asked to take a lie detector test is provided by s. 71 of this Part, which states that a person may be asked by a police officer to take, consent to take and take a lie detector test administered on behalf of or by a member of a police force in Ontario during an investigation of an offence. However, nothing in s. 71 compels an employee to take a lie detector test administered by or on behalf of a police force.

ESA Part XVI Section 70 - Prohibition: Testing

Prohibition: Testing - s. 70(1)

70(1) Subject to section 71, no person shall, directly or indirectly, require, request, enable or influence an employee to take a lie detector test.

This provision is substantially the same as the corresponding section (s. 47(2)) of the former *Employment Standards Act*. Section 70(1) prohibits any person (thus including an employer or any third party) from requiring, requesting, enabling or influencing, directly or indirectly, an employee to take a lie detector test. It is thus clear that a security service, personnel agency or any other third party is equally prohibited from requesting or requiring, whether on its own behalf or on behalf of an employer, an employee to submit to a lie detector test.

According to this section, no person may even request an employee to take a test (subject only to s. 71) since such a request would endanger the employee's statutory right not to take a test. A refusal by the employee might put his or her employment at risk, so the employee's consent might not be "free consent". As a result, an employee's right not to take a test could be compromised.

In addition, by prohibiting any person from enabling or influencing, directly or indirectly, an employee to take a lie detector test, this section implicitly prohibits any person from administering a lie detector test where the employee is unaware that he or she is being examined. For example, an employer could not use a voice stress analyser during a telephone conversation with the employee or on a tape recording of the employee's voice.

Prohibition: Disclosure - s. 70(2)

70(2) No person shall disclose to an employer that an employee has taken a lie detector test or disclose to an employer the results of a lie detector test taken by an employee.

This provision is substantially the same as the corresponding section (s. 47(3)) of the former *Employment Standards Act*. Section 70(2) protects the employee by prohibiting any person, including the employee, from informing an employer that the employee has taken a test, and from disclosing to an employer the test results.

ESA Part XVI Section 71 - Consent to Test by Police

71 This Part shall not be interpreted to prevent a person from being asked by a police officer to take, consenting to take and taking a lie detector test administered on behalf of a police force in Ontario or by a member of a police force in Ontario in the course of the investigation of an offence.

This provision is substantially the same as the corresponding section (s. 49) of the former *Employment Standards Act*. Section 71 ensures that s. 70(1) will not operate to preclude the voluntary submission by

an employee (or any other person) to a lie detector test administered by, or on behalf of, a police force in Ontario in the course of the investigation of an offence

Section 71 allows a police officer to ask a person to take a lie detector test administered on behalf of a police force in Ontario or by a member of a police force in Ontario in the course of an investigation of an offence. Although the test may be administered by any other person (including an employer) on behalf of the police, the request to take the test must be made by a police officer. However, nothing in s. 71 compels an employee to take a lie detector test administered by or on behalf of a police force.

In response to the claim that the equivalent section under the former *Employment Standards Act*, s. 49, is inconsistent with the other provisions, former Attorney General Roy McMurtry, based on the 1976 *Report of the Royal Commission into the Metropolitan Police Practices*, stated that:

. . . Polygraphs are not used by the police forces in Ontario as a random screening device. Instead, they are used as only one aspect of an investigation which has focused on one individual, or at most a very small number of individuals. As well, it is sometimes used to assist in determining the credibility of an individual who claims to have been the victim of a specific offence. Such polygraph tests do not result in a sanction, but instead are only one of the factors taken into account in deciding whether to lay charges in a particular situation. The ultimate decision on such charges is made by a court which does not have access to the polygraph results, and accordingly, does not take them into account.

Note: courts in Canada have largely refused to admit polygraph evidence. However, the Quebec Court of Appeal ruled in *R c Béland,* [1984] CA 443 (QCCA) that the results of a polygraph test are admissible as relevant evidence. This decision was appealed to the Supreme Court of Canada and its decision in *R c Béland,* [1987] 2 SCR 398, 1987 CanLII 27 (SCC) was released in 1987. The majority of the justices essentially ruled out the use of the lie detector test results as evidence in court. Justice McIntyre stated in the Supreme Court decision supported by five of the seven judges who heard the case: ". . .the polygraph has no place in the judicial process where it is employed as a tool to determine or to test the credibility of witnesses."

ESA Part XVII - Retail Business Establishments

The provisions found in Part XVII (Retail Business Establishments) of the *Employment Standards Act, 20*00 set out the rights of employees working in most retail business establishments to refuse to work on holidays and Sundays.

ESA Part XVII Section 72 - Application of Part

Application - s. 72(1)

72(1) This Part applies with respect to,

(a) retail business establishments as defined in subsection 1(1) of the *Retail Business Holidays Act*;

(b) employees employed to work in those establishments; and

(c) employers of those employees.

Section 72(1) is similar to s. 50(1) of the former *Employment Standards Act*. Section 72(1) provides that the application of Part XVII is limited to retail business establishments as defined in the *Retail Business Holidays Act,* RSO 1990, c R.30 ("RBHA"), employees who work in these establishments, and employers of these employees. However, s. 72(1) must be read subject to the exemptions in s. 72(2).

"Retail business establishment" is defined in the RBHA in s. 1(1) as follows:

1(1) "retail business" means the selling or offering for sale of goods or services by retail;

"retail business establishment" means the premises where a retail business is carried on.

An exhaustive list of what constitutes retail business establishments could not possibly be created, as many types of businesses are covered: clothing stores, department stores, supermarkets, pharmacies, laundromats, gas stations, car rental agencies, to name a few. In each case, a determination must be made: are goods or services being sold or offered for sale by retail?

The employees in those retail business establishments described in s. 72(1) - and not exempted under s. 72(2) - will have rights to refuse Sunday and holiday work, even if they are employed in businesses that are allowed to open on holidays under the exemptions in s. 3 of the RBHA, under tourism exemption by-laws prescribed under the RBHA, and employees in stores that open illegally on a holiday, in contravention of the RBHA.

All such employees are covered, both full-time and part-time, including non-sales workers such as cleaners, managers and security guards.

Although supervisors and managers may be excluded from Part VII's Hours of Work provisions by virtue of s. 4(1)(b) of O Reg 285/01 (Exemptions, Special Rules and Establishment of Minimum Wage), this exclusion does not mean that they can be required to work on a Sunday or holiday. If they refuse to work on a Sunday or holiday, then they can only be required to work during the remaining days of the week, although the maximum number of hours to be worked on those days is not governed by the *Employment Standards Act, 2000*.

Security guards are often employed by a security service, which then assigns them to a retail business establishment. Such employees also have the right to refuse to work as this Part applies to "employees . . . in . . . [retail business] establishments".

A shopping mall is a "retail business establishment". Therefore, its employees also have the rights set out in this Part; such employees include the cleaning staff, security guards who patrol the common areas of the mall, the people at the coat check and gift-wrapping services, and the person who works in the information booth.

When a store is closed, it is still a "retail business establishment" even though it is not selling goods or services to the public at that particular time; a retail business establishment is a "retail business establishment" all the time, whether open or closed. Therefore, this Part will apply and an employee may avail himself or herself of the right to refuse to work if asked to do so when the store is closed: for example, if the employer wants to take inventory or reorganize the store.

Exception - s. 72(2)

72(2) This Part does not apply with respect to retail business establishments in which the primary retail business is one that,

(a) sells prepared meals;

(b) rents living accommodations;

(c) is open to the public for educational, recreational or amusement purposes; or

(d) sells goods or services incidental to a business described in clause (a), (b) or (c) and is located in the same premises as that business.

Section 72(2) is virtually identical to s. 50(2) of the former *Employment Standards Act*. Section 72(2) describes hospitality-industry businesses, which are exempt from the provisions of this Part as follows:

1. Sells prepared meals - s. 72(2)(a)

Such businesses include restaurants, cafeterias and cafés.

2. Rents living accommodations - s. 72(2)(b)

Such businesses include hotels, motels, motor lodges, inns, and tourist resorts and camps.

2. Is open to the public for educational, recreational or amusement purposes - s. 72(2)(c)

Such businesses include museums, art galleries, sports stadiums and arenas, video arcades, theatres, movie theatres, zoos, amusement parks, bars, taverns and nightclubs.

3. Sells goods or services incidental to a business described in clause (a), (b) or (c) and that is located in the same premises as the business - s. 72(2)(d)

Employees of a business that merely sells goods or services are usually not exempt from this Part. However, if the business selling goods or services is incidental to one of the enumerated businesses in ss. 72(2)(a), (b) or (c), and is located in the same premises as that business, s. 72(2)(d) exempts its employees. Such businesses would include a gift shop in a museum, or a souvenir store in a hotel lobby or a sports stadium.

With the exception of s. 72(2)(d), the exemptions in s. 72(2) only apply to establishments whose primary retail business is one of those enumerated. Thus, for example, employees at a cafeteria in a department store, or the counter in a supermarket that sells ready-to-eat meals, would not be exempted as the primary business of the department store or the supermarket is not the sale of prepared meals. Such employees would still enjoy the rights prescribed by this Part.

The hospitality industry is exempted because of the nature of the industry. The hospitality industry is one of the corner-stones of the provincial economy, and it has been identified as having special needs that require business operations to continue throughout the week.

ESA Part XVII Section 73 - Right to Refuse Work

Right to Refuse Work - s. 73(1)

73(1) An employee may refuse to work on a public holiday or a day declared by proclamation of the Lieutenant Governor to be a holiday for the purposes of the *Retail Business Holidays Act*.

Section 73(1) is similar in effect to s. 50.2(l)(b) of the former *Employment Standards Act*. Section 73(1) provides that employees who work in retail business establishments covered under Part XVII have the right to refuse to work on public holidays as listed in s. 1 of the *Employment Standards Act, 2000* (including Family Day prescribed by s. 1.1 of O Reg 285/01 as a public holiday) and on any day declared by the Lieutenant Governor to be a holiday for the purposes of the *Retail Business Holidays Act*, RSO 1990, c R.30. At the time of writing, no other holiday had been proclaimed by the Lieutenant Governor.

An employee does not have to give any reason for refusing to work on a holiday.

Employers who are permitted to open on public holidays cannot avoid the application of s. 73(1) through hiring practices for new employees that include stipulations or understandings that public holidays are regular days of work; once hired, the employee's right to refuse to work on a public holiday is absolute. Note that as the provision applies only to persons already working at an establishment, i.e., because it applies to "employees", a person cannot make a complaint under the Act if he or she has not been hired because of a refusal to work on holidays. However, such a person may have legitimate grounds for a complaint under the *Human Rights Code,* RSO 1990, c H.19 and should be referred to the Ontario Human Rights Commission.

An issue has arisen as to whether an employee who has given up the right to refuse Sunday work (pursuant to s. 10 of O Reg 285/01 - see the discussion at O Reg 285/01 s. 10) has by doing so also given up the right to refuse to work on a public holiday where the public holiday falls on a Sunday. It is Program policy that the answer to this question is no. The right to refuse Sunday work and the right to refuse work on public holidays are two separate rights, although they may sometimes overlap. An employee may give up the right to refuse Sunday work, but the employee continues to have the right to refuse work on any public holiday. Accordingly, an employee who gave up the right to refuse Sunday work will have the right to refuse to work on a public holiday where the public holiday falls on a Sunday.

Beyond the s. 73 rights to refuse work on Sundays and holidays, there is no general right under the Act of an employee to refuse to work on a particular day. However, if an employee refuses to work any other day because of bona fide religious beliefs, for example, he or she may have a complaint under the *Human Rights Code*. If such is the case, the employee should be referred to the Human Rights Commission.

Same - s. 73(2)

73(2) An employee may refuse to work on a Sunday.

Section 73(2) is similar in effect to s. 50.2(l)(a) of the former *Employment Standards Act* in permitting retail employees to refuse Sunday work. However, the right to refuse Sunday work under the former Act was absolute, whereas the right to refuse Sunday work in s. 73(2) of the ESA 2000 is subject to the exception set out in s. 10 of O Reg 285/01 as follows:

10(1) Despite section 73 of the Act, an employee in a retail business establishment shall not refuse to work on a Sunday if he or she agreed, at the time of being hired, to work on Sundays.

10(2) Subsection (1) does not apply to an employee who declines to work on a Sunday for reasons of religious belief or religious observance.

10(3) The employer shall not make an employee's agreement to work on Sundays a condition of being hired if the condition would be contrary to section 11 of the *Human Rights Code*.

Section 10(1) of O Reg 285/01 states that even though retail employees have the right to refuse to work on Sundays under s. 73(2) of the Act, an employee loses this right if he or she had agreed to work on Sundays at the time he or she was hired by an employer. In accordance with s. 1(3) of the ESA 2000, an agreement made at the time of hiring to work on Sundays must be in writing. The exception created by s. 10(1) only applies to such agreements made on or after September 4, 2001 (the date the ESA, 2000 came into effect). Sunday work agreements made prior to the date of proclamation of the ESA 2000, will not be affected by s. 10(1) of O Reg 285/01.

An employee who is hired on or after September 4, 2001, who did not enter into an agreement at the time of hire to work on Sundays, will be able to decline work on Sundays. In addition, the fact that an employee establishes a pattern of working all, many or few Sundays does not compromise his or her right to refuse to work if there was no agreement to work Sundays made at the time of hiring.

Under s. 10(2) of O Reg 285/01, it is possible for an employee hired on or after September 4, 2001 to enter into an agreement at the time of hiring and yet subsequently refuse to work Sundays for religious reasons, provided the employee gives the appropriate 48 hours' notice before the commencement of each Sunday shift. Further information on the notice provisions is contained in the discussion of s. 73(3) below.

Section 10(3) of O Reg 285/01 prohibits an employer from making an agreement to work Sundays a prerequisite to hiring an employee where this requirement would be contrary to the "adverse effect" discrimination provisions contained in s. 11 of the *Human Rights Code*. "Adverse effect" or constructive discrimination can occur when a workplace practice unintentionally singles out particular persons, which results in their unequal treatment. An employer can, however, establish Sunday work as a condition of employment, provided it is not in violation of this section of the *Human Rights Code*.

As previously noted, the right to refuse Sunday work under s. 73(2) applies only to persons already working at an establishment (i.e., "an employee"), and therefore a person cannot make a complaint under the Act if he or she has not been hired because of a refusal to work on Sundays. The person may, however, have grounds for a complaint under the *Human Rights Code* and should be referred to Ontario's Human Rights Legal Support Centre.

Finally, beyond the s. 73 rights to refuse work on Sundays and holidays, there is no general right under the Act of an employee to refuse to work on a particular day. However, if an employee refuses to work any other day because of bona fide religious beliefs, for example, he or she may have a complaint under the *Human Rights Code*. If such is the case, the employee should be referred to Ontario's Human Rights Legal Support Centre.

Notice of Refusal - s. 73(3)

73(3) An employee who agrees to work on a day referred to in subsection (1) or (2) may then decline to work on that day, but only if he or she gives the employer notice that he or she declines at least 48 hours before he or she was to commence work on that day.

Section 73(3) is similar in effect to s. 50.2(2) of the former *Employment Standards Act*. Section 73(3) provides that an employee who has agreed to work on a Sunday or holiday can subsequently decline to work, provided he or she notifies the employer 48 hours before he or she was to commence work that day.

However, the ability to refuse Sunday work with 48 hours' notice is subject to s. 10 of O Reg 285/01, which precludes employees who had agreed at the time of hiring (on or after September 4, 2001) from refusing to work Sundays except where the employee declines to work on the Sunday for religious reasons (s. 10(2) of O Reg 285/01), or where the agreement to work Sundays was a condition of being hired and such condition would be contrary to section 11 of the *Human Rights Code* (s. 10(3) of O Reg 285/01). In other words, an employee who had agreed at the time of hiring (on or after September 4, 2001) to work on Sundays could not subsequently refuse to work by providing 48 hours' notice of the refusal, unless s. 10(2) or s. 10(3) of O Reg 285/01 applied.[2]

The notice provision ensures that employees can exercise their rights of refusal while enabling the employer to find replacement employees. At the same time, the notice provision is sufficiently short that an employee with a sudden need for a period free from work on a public holiday or on a Sunday is not denied the right to refuse.

If an employee has previously agreed to work on a public holiday or a Sunday, he or she may subsequently refuse to work only if 48 hours’ notice is given as required by this section (and subject to the limitation on refusing Sunday work established by s. 10 of O Reg 285/01). If the employee gives less than 48 hours' notice or does not give notice at all, and he or she is penalized in some way for the refusal, then the employee has no recourse under the Act, even where the refusal was for religious reasons.

[2] Therefore, if an employee had entered into an agreement under s. 10(1) of Reg. 285/01, he or she could subsequently refuse to work on a Sunday for religious reasons as set out in s. 10(2) of the regulation, but in that case, he or she would be required to give notice under s. 73(3) of the refusal to work. If, under s. 10(3) of Reg. 285/01, an employer was prohibited from entering into a s. 10(1) agreement because such an agreement would be contrary to s. 11 of the Ontario *Human Rights Code*, an employee could refuse Sunday work he or she had *otherwise* agreed to perform by providing 48 hours’ notice under s. 73(3).

The notice to decline public holiday or Sunday work does not need to be in writing. Although not necessary, a written notice is of course preferable for evidence purposes in case of a claim.

ESA Part XVIII – Reprisal

Reprisal Prohibited – s. 74(1)

74(1) No employer or person acting on behalf of an employer shall intimidate, dismiss or otherwise penalize an employee or threaten to do so,

(a) because the employee,

- **i. asks the employer to comply with this Act and the regulations,**
- **ii. makes inquiries about his or her rights under this Act,**
- **iii. files a complaint with the Ministry under this Act,**
- **iv. exercises or attempts to exercise a right under this Act,**
- **v. gives information to an employment standards officer,**
- **v.1 makes inquiries about the rate paid to another employee for the purpose of determining or assisting another person in determining whether an employer is complying with Part XII (Equal Pay for Equal Work),**
- **v.2 discloses the employee's rate of pay to another employee for the purpose of determining or assisting another person in determining whether an employer is complying with Part XII (Equal Pay for Equal Work)**
- **vi. testifies or is required to testify or otherwise participates or is going to participate in a proceeding under this Act,**
- **vi. participates in proceedings respecting a by-law or proposed by-law under section 4 of the Retail Business Holidays Act,**
- **vii. is or will become eligible to take a leave, intends to take a leave or takes a leave under Part XIV; or**

(b) because the employer is or may be required, because of a court order or garnishment, to pay to a third party an amount owing by the employer to the employee.

Subsection 74(1) prohibits employers and anyone acting on their behalf from taking reprisal action against employees for asking their employers to comply with the ESA 2000, making inquiries about their rights under the ESA 2000, filing a complaint under the ESA 2000, exercising or attempting to exercise their rights under the ESA 2000, giving information to an employment standards officer, making inquiries about or disclosing rate of pay in relation to compliance with Part XII of the ESA 2000 (Equal Pay for Equal Work) or participating in proceedings under the ESA 2000 or s. 4 of the *Retail Business Holidays Act*, RSO 1990, c R.30. In addition, it prohibits reprisals because an employee is or will be eligible to take, intends to take or takes a leave under Part XIV of the ESA 2000, or because the employee's wages are or may be subject to garnishment or a court order.

Under the ESA 2000 a reprisal contrary to s. 74 may result in the issuance of any or all of the following:

1. A compliance order pursuant to s. 108;

2. An order for reinstatement (or, with respect to the Lie Detector provisions, an order to hire) or compensation or both compensation and reinstatement pursuant to s. 104;
3. A notice of contravention pursuant to s. 113.

A reprisal, like any contravention of the ESA 2000, could also be the subject of a prosecution under the *Provincial Offences Act*, RSO 1990, c P.33.

Determining Whether a Reprisal Has Occurred - the Four-Step Test

The Program applies a four-step test for determining whether an employer, or a person acting on behalf of the employer has engaged in a reprisal contrary to s. 74(1). This four-step test is set out below:

- Step 1: Is the person alleged to have committed a reprisal the employer or a person acting on behalf of the employee's employer?
- Step 2: Did the employer or person acting on behalf of the employer intimidate, dismiss or otherwise penalize or threaten to intimidate, dismiss or otherwise penalize the employee?
- Step 3: Did the employee engage in any of the protected activities set out in clause 74(1)(a) or was the employer required by a court order or garnishment to pay an amount owing to the employee over to a third party as described in clause 74(1)(b)?
- Step 4: Did the employer or person acting on behalf of the employer intimidate, dismiss or otherwise penalize or threaten to intimidate, dismiss or otherwise penalize the employee because they engaged in the protected activities described in clause 74(1)(a) or because of a situation described in clause 74(1)(b)?

If all four questions are answered in the affirmative, a breach of s. 74(1) is established. Note that s. 74(2) places the burden of proof on the employer in the context of an allegation of reprisal, except on review of a notice of contravention under s. 122. Each aspect of this test is discussed in more detail below.

Step 1: Is the person alleged to have committed a reprisal the employee's employer or a person acting on behalf of the employee's employer?

The first determination that must be made is whether the person(s) against whom the allegation of reprisal is made is the employee's employer or a person acting on behalf of the employee's employer. There can be no violation of s. 74(1) if the person in question is not the employee's employer or a person acting on behalf of the employee's employer.

This first determination is made up of two parts: first, is the person who is making the allegation an "employee", and second, is the person whose actions are being complained of the "employer" or someone "acting on behalf of [the] employer".

Employee

Former Employees

The definition of employee in ESA Part I, s. 1 includes a person who was an employee. Accordingly, an individual continues to be protected from reprisal by their former employer (and anyone acting on behalf of the former employer) even after the individual's employment has terminated. For example, employers are prohibited from giving negative job references for a former employee if the negative reference is given because the employee had asserted their ESA 2000 rights when employed by that employer.

Some support for this position may be inferred from the decision of the Ontario Labour Relations Board in Chafe v Home Base Non-Profit Housing, 2005 CanLII 9130 (ON LRB). In that case, the employee had filed a complaint under the ESA 2000 that was dismissed by the investigating officer. After she began working for a new employer she received a letter from her former employer that referred to her complaint and that was critical of her, and which led her to believe that the former employer was attempting to jeopardize her new employment relationship. At that point, she applied for review of the officer's decision. Although the Board dismissed her application as being outside the 30-day appeal period, it noted that the former employer's actions were clearly linked to her complaint and suggested that if those actions continued it might constitute an illegal reprisal for having filed the complaint.

Job Applicants

A job applicant will generally fail this step of the test because a job applicant is not an employee. The only exception is in the context of Part XVI, Lie Detectors. An expanded definition of employee in ESA Part XVI, s. 68 that applies only to Part XVI includes an applicant for employment. Accordingly, a job applicant will pass this first step of the test if the reprisal claim is based on the Lie Detectors provisions - see ESA Part XVI for a more detailed discussion of this issue.

Employer

The definition of "employer" is set out in ESA Part I, s. 1(1) as follows:

1(1) "employer" includes,

(a) an owner, proprietor, manager, superintendent, overseer, receiver or trustee of an activity, business, work, trade, occupation, profession, project or undertaking who has control or direction of, or is directly or indirectly responsible for, the employment of a person in it, and

(b) any persons treated as one employer under section 4, and includes a person who was an employer.

An employer is bound by the actions of those persons who act on its behalf. The phrase "person acting on behalf of the employer" is not a defined term. It is Program policy that this phrase be interpreted broadly. Program policy is that persons acting on behalf of an employer may therefore include the following:

- An officer or manager of the employer;
- A person who is part of the directing mind of the employer: for example a controlling shareholder;
- An employee of the employer, if the employee's conduct was authorized, adopted or condoned by the employer;
- A person who, although not an officer, manager, director or employee of the employer, is someone whom the employer has allowed to speak for the employer or carry out actions on the employer's behalf.
    - Without restricting the generality of the foregoing, this could, depending on the particular circumstances, include the spouse of the employer or the spouse of an officer, manager or director of the employer, an independent contractor with whom the employer is in a business relationship, and a consultant retained by the employer.

Step 2: Did the employer or person acting on behalf of the employer intimidate, dismiss, otherwise penalize or threaten to intimidate, dismiss or otherwise penalize the employee?

Section 74(1) prohibits employers from intimidating, dismissing, otherwise penalizing employees or threatening to do so for enumerated reasons. Such conduct is considered a reprisal and contrary to s. 74(1). Some examples of employer conduct found to constitute a reprisal have included:

- Altering job conditions or responsibilities unfavourably - see Pitts Donut Limited v Smith
- Passing over the employee when offering promotions - see Pitts Donut Limited v Smith
- Branding an employee as a "troublemaker" then unfairly disciplining and harassing the employee because the employee sought to exercise their reinstatement rights - see Pitts Donut Limited v Smith
- Disciplining an employee for poor performance when the work performance was due to pregnancy - see Hernando's Hideaway Inc. v McLeod

The meaning of "intimidate", "dismiss", "penalize" and "threaten" is discussed in greater detail below.

Intimidate

To intimidate is to compel someone, by causing fear in them, to do something or to refrain from doing something. Intimidation can range from the obvious, such as an employer making a public example of employees who have asked about their rights under their Act by terminating them, to the subtle, such as a campaign of veiled threats and innuendos designed to make the employee feel reluctant and fearful about enforcing their rights under the ESA 2000.

For example, a manager might tell employees, "The owner really hates it when you refuse to work extra hours. I would hate to get on his bad side."

For a discussion of prohibited employer actions in the context of attendance management programs and perfect attendance bonuses in relation to statutory leaves of absence, see ESA Part XIV, s. 52(1).

It is Program policy that intimidate is to be interpreted broadly.

Dismiss

To dismiss an employee is to terminate their employment. The term dismissal includes constructive dismissal.

Otherwise Penalize

Generally

The phrase "otherwise penalize" is very broad and will include any punishment or disadvantage imposed on an employee by an employer or a person acting on behalf of an employer. This includes all forms of discipline and any change in the terms and conditions of the employee's employment that are disadvantageous to them, such as lay-offs, pay cuts, reduction of hours, etc. It also includes harassment, such as, for example, where an employer repeatedly addresses an employee who refused to work excess hours as "clock watcher". Any conduct by the employer that has the effect of imposing a penalty (whether large or small) on an employee will come within the meaning of "otherwise penalize".

For a discussion of prohibited employer actions in the context of attendance management programs and perfect attendance bonuses in relation to statutory leaves of absence, see ESA Part XIV, s. 52(1).

Penalty Imposed on Someone Other than the Employee

One question that may arise is whether an employee is otherwise penalized if the employer punishes or imposes a disadvantage on someone other than the employee. It is Program policy that this is possible if the employer's action results in some kind of harm to the employee, whether it be economic, emotional, or has any other effect that harms the employee.

For example, if an employee and the employee's spouse worked for the same employer and the employer fired the employee's spouse because the employee had engaged in a protected activity under s. 74(1)(a), or the employee's wages were subject to garnishment or court order under s. 74(1)(b), the employer could be found to have reprised against the employee contrary to s. 74.

Another example is where the employer (Employer A) of an employee who exercised their ESA 2000 rights knows the employer (Employer B) of the employee's spouse. Employer A, wishing to penalize the employee for exercising their rights but wanting to avoid being in violation of the ESA 2000, contacts Employer B and arranges to have the employee's spouse fired. In this case, Employer A could be found to have penalized the employee who exercised their rights.

Withholding a Reward or Positive Opportunity

A penalty can also include, depending on the circumstances, the withholding of a reward or the withholding of a positive opportunity. That is, there will be a penalty where opportunities or rewards are automatically denied to employees who have exercised a right by refusing to do something, or who have exercised a right by not volunteering to do something.

For example, opportunities to work overtime and, more importantly, to receive overtime pay are automatically denied to employees who sometimes exercise their right to refuse to work excess hours when requested, or to employees who have not volunteered to work excess hours.

Another example is where the employer puts employees who have exercised a right to not work excess hours at the bottom of the list of people to whom the offer of overtime is made.

A third example is where retail employees who do not volunteer to work Sundays are automatically passed over for promotion.

In all of these cases, the employer has imposed a penalty on the employees. A reward or a positive opportunity - overtime pay or a promotion in these examples - has been denied an employee because they exercised an ESA 2000 right. An employee missing out on a positive opportunity is the flip side of the employee having something negative imposed on them - they are both penalties.

Some might argue that employers are not penalizing employees by, for example, not offering weekend overtime opportunities to employees who refused to work excess hours during the week, or by not offering promotion opportunities to retail employees who refuse to work Sundays; they are just providing incentives to encourage employees to work excess hours or on Sundays. It is Program policy that there is nothing wrong with the offer of incentives or rewards for working additional hours. However, the incentive or reward must be made available to all employees; it cannot be denied to employees because they have exercised an ESA 2000 right. If the opportunity to receive the incentive or reward is denied to those employees, it is Program policy that they are being penalized.

Threaten to Intimidate, Dismiss or Otherwise Penalize

The prohibition against reprisal extends to threats by employers to intimidate, dismiss or otherwise penalize an employee. There is no need for an employer to actually intimidate, dismiss or otherwise penalize an employee for the employer's conduct to be captured by s. 74. All that is required is that the employer threatens the employee with intimidation, dismissal or another penalty.

For example, a threat to transfer an employee, where the transfer would or might be considered to be a demotion, or where the new job is less appealing to the employee, if the employee does not sign an agreement to average overtime would likely be considered a threat to penalize an employee, contrary to s. 74(1).

Another example is where a manager tells employees: "The owner really hates it when you refuse to work extra hours; I sure would hate to get on his bad side." Even if the employees were not actually deterred from exercising their right to refuse to work excess hours, this would likely be considered a threat to penalize, or a threat to intimidate, an employee, contrary to s. 74(1).

Issue of Intention in Step 2

It is Program policy that before it can be said that the employer has committed one of the prohibited actions (i.e., dismiss, intimidate, otherwise penalize, or threaten to do any of those things), an element of intention must be established.

Where the employer takes an action with the aim of harming the employee, the element of intention is obviously met.

The necessary element of intention will also be met where an employer takes an action that is genuinely motivated by what it considers legitimate business reasons and not by any desire to cause harm or loss to the employee, but which the employer knows or ought to know will cause harm or loss to the employee.

For example, an employer transfers an employee who refuses to work excess hours from one position to another, because in the employee's original position a refusal to work excess hours hampers the achievement of production goals, but the new position is not nearly as sensitive in that respect. If the new job is one that the employer knew or ought to have known is one that the employee would find significantly less appealing, it does not matter that the employer's motive was not to harm the employee; it is sufficient that the employee did in fact suffer a loss.

The test is whether the employer knew or ought to have known. An employer is presumed to know the natural consequences of its actions; it is no defence for the employer to say that it never turned its mind to whether its action would have a negative impact on the employee. It is Program policy that if the employer had turned its mind to that question it would have realized that there would be a negative impact on the employee, the element of intention is met. Employers cannot avoid liability by not thinking about the consequences for the employee of actions taken in response to the employee's exercise of their right.

The "ought to have known" part of the "knew or ought to have known" tests means that an employer could be seen as having the requisite intent, even if it was not aware of the impact that its action would have on the employee. However, an employer cannot be expected to have perceived the possibility of a negative impact where such impact is based wholly on eccentric preferences or unusual reactions on the part of the employee.

For example, if a single employee with no childcare responsibilities is transferred from one job to another and the only difference between the two jobs is that the employee will start their eight-hour shift one hour earlier and the employee has an unusually intense dislike for rising early in the morning, generally that will not meet the element of intention. The employer could not reasonably have been expected to know the employee had an extreme aversion to getting up early. On the other hand, if the employer knew prior to transferring the employee that the employee had such an intense dislike, the requisite element of intent will be met, because the employer knew.

Step 3: Did the employee engage in any of the protected activities set out in ss. 74(1)(a) or was the employer required by a court order or garnishment to pay an amount owing to the employee over to a third party as described in clause 74(1)(b)?

For the third part of the test to be met, the employee must have engaged in one or more of the protected activities set out or the employer must have been required because of a court order or garnishment to pay money owing to the employee over to a third party:

74(1)(a) the employee:

- **i. asks the employer to comply with the Act or regulations,**
- **ii. makes inquiries about his or her rights under this Act,**
- **iii. files a complaint with the Ministry under this Act,**
- **iv. exercises or attempts to exercise a right under this Act,**
- **v. gives information to an employment standards officer,**
- **v.1 makes inquiries about the rate paid to another employee for the purpose of determining or assisting another person in determining whether an employer is complying with Part XII (Equal Pay for Equal Work),**
- **v.2 discloses the employee's rate of pay to another employee for the purpose of determining or assisting another person in determining whether an employer is complying with Part XII (Equal Pay for Equal Work)**
- **vi. testifies or is required to testify or otherwise participates or is going to participate in a proceeding under this Act,**
- **vi. participates in proceedings respecting a by-law or proposed by-law under section 4 of the Retail Business Holidays Act,**
- **vii. is or will become eligible to take a leave, intends to take a leave or takes a leave under Part XIV; or**

74(1)(b) because the employer is or may be required, because of a court order or garnishment, to pay to a third party an amount owing by the employer to employee.

If the employee did not engage in one of the protected activities or there was no such court order or garnishment, the employee is not protected by s. 74 against reprisal. Each protected activity is discussed in detail below.

An employee is protected from reprisal by their current employer with respect to the activities listed in subparagraphs (a)(ii) through (viii) even if the employee was not employed by the current employer when the employee engaged in the activity. For example, an employer is prohibited from taking reprisal action against an employee because the employee filed a complaint against their former employer.

Asks employer to comply with this Act and regulations

Section 74(1)(a)(i) prohibits an employer and a person acting on behalf of an employer from intimidating, dismissing or otherwise penalizing an employee or threatening to do so because the employee has asked the employer to comply with the ESA 2000 or the regulations.

It is Program policy that the protected activities under s. 74(1)(a)(i) must be broadly interpreted. Generally speaking, any activity in which the employee's objective is to get the employer to comply with the ESA 2000 or regulations should be seen as being protected activities. These include but are not limited to:

- Complaining to the employer or its agent about an alleged breach of the ESA 2000 or the regulations;
- Asking the employer or its agent to comply with the ESA 2000 or the regulations;
- Advising the employer or its agent of an intention to file a complaint under the ESA 2000;
- Asking the employer to comply with an Order issued by an employment standards officer; or
- Commencing a civil action alleging a breach of the ESA 2000 or the regulations.

Makes inquiries about rights under the Act

Section 74(1)(a)(ii) provides that it is a contravention of s. 74(1) for an employer or a person acting on behalf of an employer to intimidate, dismiss or otherwise penalize an employee, or threaten to do so, for making inquiries about their rights under the ESA 2000.

It is Program policy that the protected activity under s. 74(1)(a)(ii) must be broadly interpreted. Generally speaking, any inquiry made by the employee with the objective of finding out what their rights are under the ESA 2000, regardless of to whom the inquiry is directed, should be seen as a protected activity. This would include but is not limited to:

- Inquiries to the Ministry regarding the employee's rights or the employer's obligations under the ESA 2000;
- Inquiries to the employer or its agent regarding the employee's rights or the employer's obligations under the ESA 2000;
- Inquiries to a lawyer or to any other person regarding the employee's rights or the employer's obligations under the ESA 2000.

Files a complaint with the Ministry under this Act

Section 74(1)(a)(iii) provides that it is a contravention of s. 74(1) for an employer, or a person acting on behalf of an employer, to intimidate, dismiss or otherwise penalize an employee, or threaten to do so, for filing a complaint under this Act. See ESA Part XXII, s. 96(1) for a discussion of the provisions for filing a complaint under the ESA 2000.

It is Program policy that the protected activity under s. 74(1)(a)(iii) must be broadly interpreted. Accordingly, there will be protection for an employee under this clause even if the employee tries to file a complaint but uses the wrong form, or files a complaint more than two years after the violation, which, pursuant to s. 96(3), means that it is deemed not to have been filed.

Exercises or attempts to exercise a right under this Act

Section 74(1)(a)(iv) provides that it is a contravention of s. 74(1) for an employer or a person acting on behalf of an employer to intimidate, dismiss or otherwise penalize an employee, or threaten to do so, for exercising or attempting to exercise a right under this Act. This includes, for example, an employee refusing to agree to average hours of work for the purpose of calculating overtime, or attempting to revoke with two weeks' notice an agreement to work excess hours.

This provision will only apply where the employee is exercising or attempting to exercise a right under the ESA 2000. This provision would not apply if the employee is exercising a right under another statute or their contract of employment that is not otherwise a right nor an enforceable greater right or benefit under the ESA 2000.

For example, an employee regularly works 44 hours in a work week. The employee refuses their employer's request that they work an additional four hours in the work week. The employee receives a letter of discipline for their refusal and they allege that their employer has committed a reprisal against them. The employer's conduct cannot constitute a reprisal within the meaning of s. 74(1)(a)(iv) because the employee was not exercising or attempting to exercise a right under the ESA 2000. Employees have no right under the ESA 2000 to refuse to work hours in addition to their regular work week if the additional hours would not result in them working more than the applicable daily limit on the day in question or more than 48 hours in the work week in question.

Another example deals with direct deposit. Section 11(4) of the ESA 2000 permits employers to pay wages by direct deposit if certain conditions are met, such as there being an account in the employee's name. While the employee's agreement to be paid by direct deposit is not required by the ESA 2000, for practical reasons an employee's agreement is necessary as banks do not permit employers to open an account on behalf of an employee. Accordingly, employees who do not wish to be paid by direct deposit can prevent an employer from paying their wages in that manner by refusing to open an account. As it is often more expensive and administratively cumbersome to pay wages by cheque, employers may threaten or penalize employees who do not open an account. It is the Program's view that ESA Part V, s. 11(4) does not grant employees a right to not be paid by direct deposit; it merely sets out conditions that have to be met in order for direct deposit to be permitted under the ESA 2000. Accordingly, employees who refuse to open an account so as to prevent an employer from paying them by direct deposit are not exercising a right under this Act, and therefore are not protected from reprisal.

Another situation deals with sick leave. For example, an employee is absent from work and asserts a right to sick leave, but it is subsequently revealed that the employee was not telling the truth and did not in fact have a right to be absent. The employer is not prohibited by s. 74 from penalizing the employee because the employee was not exercising or attempting to exercise a right under this Act; they did not have a right to take a sick leave.

On the other hand, refusing to sign an authorization allowing a deduction from wages pursuant to s. 13(3) is a protected activity. For example, an employer wants an employee to authorize a deduction from wages that is not one that is prohibited by s. 13(5), the employee refuses, and the employer terminates the employee's employment in response. It is Program policy that the employee, in refusing to provide

their authorization, engaged in a protected activity, and the employer would therefore be in violation of s. 74. The difference between this situation and the direct deposit example above is that in this case, the essential condition for making the deduction - the employee's authorization - is set out in the ESA 2000. In the direct deposit example, the employee's agreement is not a condition that is set out in the ESA 2000. Although the employee's agreement will, as a practical matter, have to be obtained in order for the employer to be able to pay by direct deposit. That is a function of the policies of banks and other financial institutions. It is not a requirement of the ESA 2000.

Another example is the issue of whether an employee is engaging in a protected activity if the employee fails to give advance notice that they are going to take a sick leave, family responsibility leave or a bereavement leave. For a detailed discussion of this issue, see ss. 50(3) and (4) [sick leave], ss. 50.0.1(4) and (5) [family responsibility leave] and ss. 50.0.2(4) and (5) [bereavement leave].

Rights under the ESA 2000 include withdrawing from agreements to give up the default employment standard and receive the entitlements under the alternate employment standard. For example, the default employment standard with respect to meal breaks is to receive an eating period of at least 30 minutes, but employees can agree to the "alternate" employment standard of two shorter eating periods that together total at least 30 minutes. In most cases, employees are entitled to revoke their agreement to the alternate standard and revert back to the default standard, and doing so is a protected activity under this clause. If an employer penalizes an employee because the employee withdrew their agreement, that will be a violation of s. 74.

There are some situations where an employee's ability to revoke an agreement is restricted. For example, an employee can revoke an excess hours agreement only if they give the employer two weeks' written notice. If, during the time when the employee is prevented from revoking the agreement, the employee purports to revoke the agreement and attempts to rely on the default employment standard, the employee cannot be said to be exercising a right under the ESA 2000 because the employee was purporting to exercise the right at a time when the ESA 2000 did not in fact give them the right; the employee therefore will not be protected from reprisal. Other examples where the employee's ability to revoke an agreement to the alternate standard is restricted include:

- ESA Part VIII, s. 22(6): employees cannot withdraw from an overtime averaging agreement before the expiry date in the agreement unless the employer also agrees;
- O Reg 285/01, s. 10: employees in retail business establishments who are hired on or after September 4, 2001, who agree in writing at the time of hire that they will work on Sundays cannot withdraw from that agreement - unless making the agreement a condition of hire was in violation of the *Human Rights Code*, RSO 1990, c H.19, or unless the employee needs the Sunday off for reasons of religious belief or religious observance;
- O Reg 285/01, s. 32(1): employees cannot unilaterally revoke an agreement made at the time of the employee's hiring to work excess daily hours that has been approved by the Director.

It is Program policy that the protection of this clause applies in cases where an employer dismisses, intimidates, penalizes or threatens to do so because it wants to prevent an employee from exercising or attempting to exercise a right under the ESA 2000, even if the employee has not actually exercised or attempted to exercise a right.

For example, one employee asserts their right to receive public holiday pay. The employer terminates that employee, then convenes a meeting of all the other employees and threatens them by telling them that if anyone else tries to get their public holiday pay they too will be fired. Even though none of the other

employees has actually exercised or attempted to exercise their right to public holiday pay, this clause will apply to them, so if they file a reprisal claim they will pass step 3 of the test. To take the opposite view would defeat the intention of s. 74 which is to ensure employees can freely exercise their ESA 2000 rights. It would also permit an absurd result where an employer could avoid liability by pre-emptively threatening employees with dismissal on their first day of employment and every day thereafter. If the Program were to take the view that protection only applies once an employee actually exercises or attempts to exercise a right, then employers who are successful in intimidating employees out of ever exercising or attempting to exercise a right would not ever be found to have violated s. 74.

It is Program policy that the protected activity under s. 74(1)(a)(iv) must be broadly interpreted.

Gives information to an employment standards officer

Section 74(1)(a)(v) prohibits an employer from intimidating, dismissing or otherwise penalizing an employee, or threatening to do so, for giving information to an employment standards officer.

It is Program policy that this provision must be interpreted broadly. Protected activities under this provision include but are not limited to:

- Volunteering information to an employment standards officer;
- Responding to a request for information from an employment standards officer.

Makes inquiries about the rate paid to another employee

The *Fair Workplaces, Better Jobs Act, 2017,* SO 2017, amended the ESA to include s. 74(1)(a)(v.1), effective April 1, 2018. Section 74(1)(a)(v.1) prohibits an employer from reprising against an employee who makes inquiries about the rate paid to another employee for the purpose of determining, or assisting another person in determining, whether an employer is complying with the equal pay for equal work provisions in ESA Part XII.

For example, employee A may ask fellow employee B about their rate of pay in order to determine whether employee A is receiving the same rate of pay for equal work, pursuant to section 42, Part XII. An employer is prohibited from reprising against employee A for making this inquiry.

Effective January 1, 2019, the *Making Ontario Open for Business Act* repealed s. 42.1 which provided equal pay for equal work on the basis on employment status. The question might arise as to what reprisal protection exists in relation to this repealed provision. Section 74(1)(a)(v.1) provides protection against reprisal where an employee made inquiries about the rate that was paid to another employee both during the timeframe that s. 42.1 was in effect (from April 1, 2018 to December 31, 2018) and after its repeal where the purpose of the inquiries is to determine, or to assist another person in determining, whether an employer was in compliance with section 42.1. In other words, the specified inquiries are protected regardless of when they occurred, as long as they relate to a rate that was paid when s. 42.1 was in force (from April 1, 2018 to December 31, 2018).

Discloses his/her rate of pay to another employee

The *Fair Workplaces, Better Jobs Act, 2017,* SO 2017, amended the ESA to include s. 74(1)(a)(v.2), effective April 1, 2018. Section 74(1)(a)(v.2) prohibits an employer from reprising against an employee who discloses their rate of pay to another employee for the purpose of determining, or assisting another person in determining, whether an employer is complying with the equal pay for equal work provisions in section 42, Part XII.

For example, employee A may divulge their rate of pay to employee B to assist employee B in determining whether she is receiving the same rate of pay for equal work, pursuant to Part XII. An employer is prohibited from reprising against employee A for disclosing this information. Note that if employee B also divulged their wage rate to employee A as part of this discussion, the employer is equally prohibited from reprising against employee B.

Effective January 1, 2019, the *Making Ontario Open for Business Act* repealed s. 42.1 which provided equal pay for equal work on the basis on employment status. The question might arise as to what reprisal protection exists in relation to this repealed provision. Section 74(1)(a)(v.2) provides protection against reprisal where an employee discloses their rate of pay to another employee both during the timeframe that s. 42.1 was in effect (from April 1, 2018 to December 31, 2018) and after its repeal where the purpose of the disclosure is to determine, or to assist another person in determining, whether an employer was in compliance with section 42.1.

In other words, the specified disclosure is protected regardless of when it occurred, as long as it relates to a rate that was paid when s. 42.1 was in force (from April 1, 2018 to December 31, 2018).

Testifies, is required to testify or otherwise participates in a proceeding under this Act

Section 74(1)(a)(vi) prohibits an employer from intimidating, dismissing or otherwise penalizing an employee, or threatening to do so, for testifying, being required to testify or otherwise participating in a proceeding under the ESA 2000.

It is Program policy that this section must be interpreted broadly. Protected activities under this section include but are not limited to situations in which the employee is:

- A party to a proceeding;
- A party to a proceeding;
- Required to be a witness in a proceeding; or
- A representative, advocate, agent or an advisor in a proceeding.

It is irrelevant to the application of this section whether the employee's participation is voluntary.

Participates in proceedings under s. 4 of the *Retail Business Holidays Act*

The *Retail Business Holidays Act* (“RBHA”) prohibits most retail stores from opening on holidays as defined in that Act. However, s. 4 of the RBHA establishes a process for making representations at municipal councils regarding existing or proposed tourism exemption by-laws. Section 74(1)(a)(vii) provides protection against reprisal for those employees who participate in this process.

It is Program policy that this section must be interpreted broadly. Protected activities under this section include but are not limited to participation as a:

- Party;
- Witness; or
- Representative, advocate, agent or advisor.

Although participation in this type of a proceeding would almost always be voluntary, it is, as with the protection accorded to participation in proceedings under the ESA 2000 by s. 74(1)(a)(vi), irrelevant whether the employee's participation is voluntary.

Is or will become eligible to take a leave, intends to take a leave or takes a leave under the Act - s. 74(1)(a)(viii)

Section 74(1)(a)(viii) provides protection for employees who are intimidated, dismissed or otherwise penalized or threatened with intimidation, dismissal or other penalties because of the following situations.

An employee who qualifies for protection under this provision may also have rights under the *Human Rights Code* that have been violated, in that they may have been discriminated against because of sex (which includes pregnancy) or family status. Therefore, the claimant may wish to contact Ontario's Human Rights Legal Support Centre in addition to filing a claim with the Ministry of Labour.

Employee is eligible to take a Part XIV leave

This includes pregnancy, parental, family medical, organ donor, family caregiver, critically illness, child death, crime-related child disappearance, domestic or sexual violence, sick, family responsibility, bereavement, emergency, or reservist leave.

For example, an employee's spouse has just given birth. The employee is eligible for parental leave as a new parent but has not yet decided whether he will be taking the leave.

Employee will become eligible to take a Part XIV leave

For example, an employee who has just discovered that she is pregnant will be eligible for pregnancy leave when she is within 17 weeks of her due date and therefore has protection under this section.

For example, in 832746 Ontario Ltd. v Fuller, 2001 CanLII 11289 (ON LRB) the employer terminated the employment of the claimant when she was seven months' pregnant because the employer did not want a pregnant woman working in his bar. The Board found that this was a violation of s. 44 of the former *Employment Standards Act*, which prohibited an employer from penalizing an employee because she was eligible for leave; the employee was eligible for the leave because of her pregnancy, and terminating the employee's employment because she was pregnant was therefore a violation of the former *Employment Standards Act*. Further, although the Board recognized an overlap between the protections afforded under the *Human Rights Code*, RSO 1990, c H.19 and the ESA, it concluded there was no reason to defer the complaint under the ESA 2000 to the *Human Rights Code.* In this regard, see also Bazinet v Thain Industries Ltd., 2004 CanLII 24706 in which the Board noted that assuming the employer is in fact aware of the employee's pregnancy, it must demonstrate that the pregnancy was not a factor in its decision to terminate her employment.

Employee intends to take a Part XIV leave

For example, an employee who is terminated by her employer because she has told other employees that she is attempting to get pregnant and will be taking her full leave entitlement if she is successful would be protected under this section.

Another example is an employee who tells his employer that he will be taking three days of sick leave for surgery that is scheduled for a date four months hence.

A third example is an employee whose mother is terminally ill and who indicates that he will be taking family caregiver leave and family medical leave in the near future.

Employee takes a Part XIV leave

This will obviously also include an employee who "took" a Part XIV leave. That is, after the leave is over, an employer is prohibited from penalizing the employee because the employee took a leave.

Court order or garnishment

Section 74(1)(b) prohibits any employer or a person acting on behalf of an employer from intimidating, dismissing or otherwise penalizing an employee, or threatening to do so, because the employee's wages are the subject of a garnishment or a court-ordered payment to a third party.

Section 7 of the *Wages Act,* RSO 1990, c W.1, deals with garnishment of wages, as defined therein, and stipulates that 80 per cent of a person's net wages are exempt from garnishment. For purposes of the *Wages Act*, net wages equal gross wages less statutory deductions such as income tax, employment insurance and Canada Pension Plan; only deductions authorized by a statute reduce "gross wages" to "net wages". Other deductions, even if properly authorized in writing by the employee, cannot be used to reduce the amount of gross wages for purposes of the *Wages Act* restrictions. If the garnishment is for the enforcement of a support order, the *Wages Act* exempts only 50 per cent of the person's net wages. Nevertheless, the judge issuing the order may use their discretion to decrease the exemption, if the creditor so requests, or increase them, if the debtor so requests. The 50 per cent restriction (with possibility of variation) is also found in the *Family Responsibility and Support Arrears Enforcement Act, 1996,* SO 1996, c 31.

No specific advice concerning the *Wages Act* or the *Family Responsibility and Support Arrears Enforcement Act, 1996* should be given by an employment standards officer. The Wages Act is administered by the Ministry of the Attorney General, and enquiries concerning it may be directed to Crown Law Office - Civil of that ministry. The *Family Responsibility and Support Arrears Enforcement Act, 1996* is administered by the Ministry of Community and Social Services, and enquiries concerning it may be directed to the Family Responsibility Office of that ministry.

Step 4: Did the employer or person acting on behalf of the employer intimidate, dismiss, otherwise penalize or threaten to intimidate, dismiss or otherwise penalize the employee because they engaged in the protected activities listed in paragraph 3?

Sections 74(1)(a) and 74(1)(b) prohibit employers and persons acting on behalf of employers from intimidating, dismissing, or otherwise penalizing employees **because** the employee engaged in the activities listed in 74(1)(a) or because the employee's wages were subject to garnishment or court order as per s. 74(1)(b). Further, a contravention of s. 74 is established if the employer (or person acting on behalf of the employer) was motivated, even partly, to intimidate, dismiss or otherwise penalize an employee because the employee engaged in one or more of the protected activities listed in s. 74(1)(a) or (b). For example, an employer that terminated the employment of an employee both because of serious absenteeism and because the employee routinely refused to work in excess of 48 hours in a work week could be found to have contravened s. 74.

The use of the word because necessitates a consideration of the employer's motivation in taking the action it has taken against the employee. In the context of the exercise of rights to leave in s. 74(1)(a)(viii)

for example, the employee is only protected from intimidation, dismissal or other penalties or threats thereof that are motivated by the rights to a Part XIV leave.

In 384093 Ontario Limited operating as Goodyear Tire Centre v Dietzal (December 18, 1981), ESC 1142 (Hunter), a decision under the former *Employment Standards Act,* an employee had been dismissed when the president of the employer, after having met with an employee whose wages were the subject of a garnishment order issued against it to discuss his displeasure with the employee's "financial irresponsibility", discovered that the employee had not disclosed to him the existence of two earlier garnishment orders. The employer argued that the employee had been dismissed not because of the garnishment orders per se, but rather, because of the employee's lack of candour in not apprising the president of the previous orders. The referee found that the issuance of the orders was the motivation for dismissal and that the dismissal was accordingly unlawful, as being a breach of the predecessor to the current s 74(1)(b). Commenting on the employer's argument that the employee had a duty to disclose the existence of the earlier orders, the referee suggested that even if there was such a duty on the employee, dismissal because of the issuance of a garnishment order was still unlawful.

Civil Action as Reprisal

The question arises as to whether a reprisal is committed where an employer commences a civil action against an employee who has filed an employment standards claim with the Ministry of Labour, in response to that claim and in an attempt to recoup any monies the employee has been or may be awarded through the Ministry.

For example, an employer made a deduction from the wages of an employee because the employee damaged the employer's equipment. The employee filed an employment standards claim, and the officer, finding that the deduction was unlawful, ordered the employer to pay the money back to the employee. In response, the employer sues the employee, claiming that the employee was negligent in the handling of the employer's equipment.

When determining whether a reprisal has been committed, consideration must be given to the motivation behind the civil action. For example, an employer may sue an employee because of a desire to punish the employee for having filed a claim - this is likely to constitute a reprisal. Or, an employer may simply be attempting to recover what is rightfully the employer's by law – this is unlikely to constitute a reprisal. The commencement of a civil action will not generally constitute a reprisal, however, circumstances may arise that lead to the opposite conclusion. Officers who are considering finding a reprisal arising from the commencement of a civil action should consult with the Employment Practices Branch prior to making a determination on the issue of a potential reprisal.

Determining Motivation

It may be necessary for employment standards officers to rely on circumstantial evidence to establish an employer's motivation under s. 74. Accordingly, employment standards officers may have to draw inferences about employer motivation. Whether the requisite intent is established is a factual determination and it will necessarily turn on the circumstances of each case. Note that s. 74(2), subject to s. 122(4), places the burden of proof on the employer in the context of an allegation of reprisal.

Factors that may be relevant to the employment standards officer's determination regarding employer motivation include the following:

- **Whether the employer was aware that the employee had engaged in a protected activity under s. 74(1)(a) or the employee's wages were subject to garnishment or court order under s. 74(1)(b).**

If the employer was not aware, this step of the test cannot be met. An employer cannot be said to have done something "because" an employee engaged in a protected activity if the employer is not even aware that the employee engaged in it. Note, however, that the mere fact that the employer was aware that the employee had engaged in a protected activity, without more, is not enough to establish a violation.

- **The timing of the employer's conduct in relation to when the employer became aware of those activities.**

For example, an employee is fired shortly after testifying against an employer at a hearing convened under the ESA 2000. However, just because the employer's conduct followed closely on the heels of the employee's protected activity does not necessarily mean that the employer did what it did because the employee engaged in the protected activity. A short interval of time in between the two events may obviously raise suspicions, but that is only one factor.

Conversely, just because a long period of time has elapsed between the employee's protected activity and the employer's action does not necessarily mean that the employer did not take its action because of the employee's activity, as an employer may try to disguise a reprisal by waiting some time before taking any action against the employee.

- **Whether the employer has treated the employee differently from other similarly situated employees.**

For example, if the employer has been inconsistent, unreasonable or unduly harsh with the employee.

- **Compelling business reasons for the employer's conduct.**

This includes seasonal business patterns, the finances of the employer, changes in the organizational structure of the employer that do not appear directed at the employee in particular, technological changes, etc. However, just because there may be compelling business reasons does not necessarily mean that a reprisal has not been committed, as there could also be unlawful reasons for the employer's conduct.

Further, if the employer took certain action because the employee exercised their rights, the fact that the action was taken because the employee's exercise of those rights created business problems does not mean that a reprisal did not take place. That is, even if the employer's motivation was not to affect the employee detrimentally, so long as the employer knew or ought to have known that its actions would affect the employee detrimentally, and those actions were taken because the employee exercised their rights, the employer has engaged in a reprisal.

- **The credibility of witnesses.**

Orders for Compensation, Reinstatement or Hire

Where a contravention of Part XVIII (Reprisal) has occurred, s. 104 empowers an employment standards officer to issue an order requiring that the employee be compensated and/or reinstated. In addition, if an applicant for employment has been reprised against (i.e., not hired) because they refused to take a lie detector test, an order to hire the applicant may be issued.

Reinstatement

When is an Order for Reinstatement Appropriate?

An order for reinstatement may be appropriate where the employer has terminated the employee's employment in contravention of s. 74. Reinstatement is considered as a possible remedy in every case where there has been a termination. Where an officer decides that reinstatement is not an appropriate remedy, the narrative should set out the reasons for that decision. When considering whether an order for reinstatement is appropriate in the circumstances, an employment standards officer should consider the following factors:

- Whether the employee wants to be reinstated; and
- Whether there is a reasonable chance that the employee can be successfully re-integrated into the workplace. In this regard, see the Board's considerations when ordering reinstatement in James v Craiglee Nursing Home.

If the employer is opposed to reinstatement, careful consideration of the circumstances should be had before reinstatement is ordered, since the purpose of a reinstatement order is likely to be defeated over the long-term if it is made in spite of the employer's adamant opposition. Nevertheless, there may be cases in which an order for reinstatement is still appropriate, notwithstanding the employer's position.

Similarly, an employee's desire to not be reinstated does not dictate the officer's decision. In some circumstances, it may be appropriate for an officer to issue a reinstatement order even though the employee does not wish to be reinstated. In situations where an officer decides that a reinstatement order is appropriate, but the employee refuses to accept reinstatement, it may be that no compensation is awarded under the head of damages for loss of reasonable expectation of continued employment.

What Position Should the Employee be Reinstated to?

It is Program policy that an order for reinstatement under s. 104(1) should require the employer to reinstate the employee to the position that they most recently held, or, if and only if the employee's former position no longer exists, to a comparable position. This policy position is based, by analogy, on the principles behind the reinstatement obligations set out in ESA Part XIV, s. 53(1) following a Part XIV leave.

If an order for reinstatement is made, an employee will be reinstated to the position that they most recently held - if that position still exists. If the job is still there and if the same work is being done, the employee should be reinstated to perform the same work. This is so irrespective of whether another person is now and has been performing the job.

If the position most recently held by the employee no longer exists, the employee may be reinstated to a comparable position. The question of what constitutes a comparable position is a factual matter that will vary with the circumstances of each case. A position with the same wages and benefits is not necessarily comparable - see C.L.C. (Can Workers' Union, Local 354) v American Can Canada Inc., 1983 CanLII 935 (ON LRB). Rather, one must look at a number of factors, including all the aspects of the new, allegedly comparable job that might make it more or less appealing, objectively speaking, in the eyes of an employee in a similar position to that of the claimant, than the claimant's original job.

In making a determination as to what is a comparable position, it is helpful to refer to the factors set out in C.L.C. (Can Workers' Union, Local 354) v American Can Canada Inc., a case dealing with the question of

what is comparable work under Part XI Pregnancy and Parental Leave of the former *Employment Standards Act*. The factors have been adopted by the Program as policy in dealing the question of what is a "comparable position" under the current Act, and are as follows:

Location of Job

If the position offered by the employer exists in another city or town, the position may or may not be comparable. For example, if commuting would be impossible or would involve a substantial increase in travel time, the position is unlikely to be comparable. In determining whether the position is comparable, the officer should consider the circumstances of the employee in question. The test to be applied is how a reasonable person in the employee's circumstances would view the change. For example, commuting may be possible for an employee with a driver's license, but impossible for an employee without one.

It should also be noted that even if the employment contract permitted the employer to transfer the employee to another city and that therefore (assuming no negative changes in the terms and conditions of employment) the transfer would constitute reasonable alternative employment for the purposes of O Reg 288/01, s. 2(1) para 5, it does not necessarily mean that the obligation to reinstate the employee to a comparable position under this section has been satisfied.

Hours of Work

Including time of the day and the length of the working day; any shift or weekend work.

Quality of Working Environment

Office vs. warehouse vs. store vs. factory; degree of luxury; overall atmosphere; privacy vs. group surroundings; comfortable vs. spartan conditions.

Degree of Responsibility

Including the degree of independence and supervision; degree of initiative required; decision-making authority; ability to input own taste or influence; job satisfaction, etc.

Job Security and Possibility of Advancement

What was/is the likelihood of the job continuing to exist and the opportunity to progress from that job to a higher position; relationship between the employee's background, training and education and the requirements of the job; what are the skills required for advancement in each position?

Prestige and Perquisites

Atmosphere and trappings of an executive, including own office, name and title on an organization chart; personal or position profile, such as opportunities for broader contact with other management personnel; own business card, expense account, administrative assistant; signing authority; social privileges; immediate supervision or instruction of others.

The importance and weight to be given to each of the foregoing factors will vary from case to case, depending on the particular facts in each situation. The new position may not be quite as attractive as the old job in all respects, but so long as, all things considered, it is at least as good if not better than the job the employee had before they had their employment terminated, it will be considered comparable. A test of what is comparable is an objective test, based on what a reasonable employee in the same circumstances as those of the employee would think.

In C.L.C. (Can Workers' Union, Local 354) v American Can Canada Inc. the employee claimed that she had not been reinstated to a position involving comparable work following her return from leave. Prior to her leave, the employee had held an executive position as communication co-ordinator. Upon her return from leave she was given alternative work. The alternative work involved mainly clerical tasks. Although she incurred no loss in wages, benefits or seniority, her new position involved a marked decrease in the degree of responsibility, prestige and perquisites as well as a loss in job security. In addition, her working environment, originally in a private office with access to a personal secretary, deteriorated to a secretarial corner. In light of the foregoing, it was found that the new position did not involve work of a comparable nature and compensation/reinstatement was ordered.

A pre-existing job evaluation system purporting to show equality as between two positions may be relevant but is not determinative of the comparability of the two positions. As the referee in Reed Inc. v Nidd (December 23, 1986), ESC 2002 (Mitchnick) stated, the evaluation system may be relevant as an objective factor. However, subjective factors such as humiliation, embarrassment and loss of prestige must be taken into account as well, but from an objective viewpoint. In other words, for example, would a reasonable employee have felt humiliated in the circumstances?

Furthermore, it may not be sufficient merely to offer the same wage where the wage range of the new position is inferior. For example, a new position at $25,000 per year at a $20,000 to $25,000 range may not be considered comparable to the wage of $25,000 at the former position at a range of $24,000 to $29,000.

To illustrate further, in Bronson Bakery Ltd v Melo and Scott neither the somewhat lesser degree of responsibility nor the minor variance of hours of work were sufficient of themselves to render the two jobs incomparable. The significant reductions in prestige and quality of working environment were the determining factors in finding the employer in breach of the reinstatement requirements.

Although there may appear to be a great deal of emphasis on the employee's feelings towards these factors, the test is objective; that is, how would a reasonable employee in the same circumstances have felt?

For example, in C.L.C. (Can Workers' Union, Local 354) v American Can Canada Inc. Referee Picher indicated that the employee found the change of geographical location (from Etobicoke to Brampton) significant, but he felt that there was no substantial difference on that issue alone and particularly so in light of the fact that the new position may have been even closer to her residence. However, he saw that her concerns on the issue of location were in fact more related to quality of working environment and the positions were clearly not comparable in that respect. The matter is more directly dealt with in Bronson Bakery Ltd v Melo and Scott where the employee was reinstated to a retail position as opposed to her previous office position. The employer argued that most people would prefer the open environment of the store and dealing with the public, and thus submitted that most people would have a different subjective preference from the claimant. However, Referee Fraser found that her viewpoint had a reasonable objective basis, i.e., most people would prefer office work to retail. Accordingly, there should be a reasonable objective basis for a subjective viewpoint on the factors considered.

Duty to Mitigate

The duty to mitigate losses requires the claimant to take necessary steps to reduce their losses arising from the loss of their job. If an employee neglects to mitigate their loss, the amount of compensation should be reduced. See the sections below for discussion of how the duty to mitigate applies to the different heads of damages.

Direct Earnings Loss

Direct earnings loss, or direct wages loss, measures the loss of wages from the date of the reprisal. This head of damages may be appropriate in the context of an order for compensation or compensation and reinstatement where the employee has been terminated or subject to some form or reprisal resulting in actual earnings loss (e.g., a temporary lay-off or a reduction in hours of work). Damages in respect of a direct earnings loss may also be appropriate in circumstances where an employee suffered a reduction in hours or pay or has been denied the opportunity to earn tips, premium pay or overtime. These damages are subject to a duty to mitigate.

Vacation pay is payable on damages awarded under this head where the damages are for lost "wages" as defined in the ESA 2000. Therefore, vacation pay would be payable on the lost overtime pay in the example given in the preceding paragraph, but not on amounts included in the calculation of vacation pay, e.g., tips. For example, where an employee's employment is terminated prior to the commencement of a Part XIV leave, the direct earnings loss would be the wages (plus vacation pay) and any non-wage earnings the employee would have earned between the date of dismissal and the date that the leave should have begun. Employees in such circumstances will also be entitled to any supplementary or top up benefits that the employer would have provided during the leave had the employee's employment not been terminated in contravention of s. 74. Compensation for earnings that would have been earned after the date the employee should have been reinstated is dealt with under heading (2).

For example, if an employer ceased to schedule any hours between 44 and 48 in a week for an employee because they refused to sign an agreement to work more than 48 hours a week, the compensation order could include the overtime pay the employee would have earned between the date the reprisal action commenced and the date such action ceased.

(a) Pre-Reinstatement Compensation

An award is made under this heading only where the employer's reprisal takes the form of a refusal to reinstate an employee after a Part XIV leave and a reinstatement order has been issued. It is intended to compensate the employee for earnings that would have been earned between the date the employee should have been reinstated and the actual date of reinstatement. See for example James v Craiglee Nursing Home, 2004 CanLII 30948 (ON LRB).

Where a reinstatement order is issued in addition to a compensation order, a practical question arises: should the amount of compensation reflect the losses only to the date the reinstatement order is issued, or should it also reflect the reality that some time will elapse after the reinstatement order is issued and before the employee is actually reinstated? Employment standards officers usually inform employers of their intention to issue a reinstatement order, and allow the employer an opportunity to set a realistic date for the reinstatement. If the employer is agreeable to reinstatement and sets a realistic date, the compensation order would reflect the proposed reinstatement date.

If, on the other hand, the employer was not prepared to discuss a date for reinstatement, officers may issue a reinstatement order that is to be effective the date the order is issued, and award compensation calculated as if the reinstatement would take place on that date. If the employer applies to the Ontario Labour Relations Board to review the order, the Board has the authority to adjust the amount of compensation.

The amount of compensation would take into account the employee's duty to mitigate their losses. For instance, where an employee was only able to find a position prior to being properly reinstated, with fewer

hours or a lower rate of pay, they should be compensated for the difference between actual earnings and what would have been earned had they been properly reinstated. See James v Craiglee Nursing Home, 2004 CanLII 30948 (ON LRB).

The amount of the award under this head could also be reduced where the employee failed to make efforts to mitigate their damages. In Rainbow Concrete Industries Limited v. Lentir, 2012 CanLII 58233 (ON LRB) the Board found that the claimant did not make reasonable efforts to mitigate his damages because his job search was inadequate. As a result, the Board reduced the amount of pre-reinstatement damages awarded to the claimant.

(b) Time Required to Find a New Job and Termination Notice or Pay

An award is made under this heading only where the reprisal has resulted in the employee's termination and no reinstatement order is issued. It is Program policy that an employee is entitled to either:

- Compensation for damages being an amount equal to the employee's weekly earnings (including earnings that are not "wages" within the meaning of ESA Part I, s. 1, such as tips, and including vacation pay on those earnings that are "wages") multiplied by the number of weeks it took or should have taken (whichever is less) the employee to find a new job;

  or

- The employee's termination pay entitlement under the ESA 2000 with vacation pay (excludes earning that are not wages, e.g., tips and other gratuities),

  whichever is greater.

If the award is for damages in respect of time required to find a new job, this amount will be reflected in the compensation order issued under s. 104.

If however, the officer is issuing an order for termination pay, that amount (plus vacation pay on the termination pay) will be reflected in an order to pay wages made under s. 103. Such an order is subject to the limitations on recovery under s. 111.

The calculation of the time it would take to find a job begins with the week in which the employee was either given notice of termination or was terminated without notice. Note that if the employment was terminated during a leave under Part XIV of the ESA 2000, the calculation begins with the week in which the leave would have ended.

For example, an employee had three years of employment and, in contravention of s. 74, was fired without notice for refusing to work excess hours. The employment standards officer determined that it should have taken the employee four weeks to find a new job.

Under this heading, the employee would be entitled to an amount equivalent to four weeks of their earnings, including earnings that are not defined as wages under the ESA 2000, and including vacation pay on those earnings that are wages as defined in the ESA 2000 rather than the three weeks of termination pay in lieu of notice to which they would be entitled under ESA Part XV. This amount would be awarded as damages in a compensation order issued under s. 104.

However, if the employment standards officer had determined that it should have taken the employee only two weeks to find a new job, the officer would instead award the three weeks' termination pay in lieu

of notice to which the employee would be entitled under ESA Part XV. This amount would be ordered under s. 103 as unpaid wages.

While the amount assessed under this heading is not limited to an amount that would be awarded in respect of "reasonable notice" by the courts under the common law, any amount received by the employee with respect to their common law notice rights would be deducted from the amount calculated under this head. However, if the amount received under the common law notice rights exceeded the amount calculated under this heading, the excess will not reduce the amounts assessed under other headings. This raises an issue about the general prohibition against employees engaging in duplicative proceedings. An employee is not prohibited from both suing for wrongful dismissal in the courts and filing a reprisal claim with the Employment Standards Program. This is because the s. 97(2) prohibition on duplicative proceedings does not apply to, among other types of claims, reprisal claims. See ESA Part XXII s. 97(2) for a full explanation of this principle.

Expenses Incurred in Seeking New Employment

This head of damages is only considered if the employee's employment is terminated and no reinstatement order is issued. Expenses incurred in seeking new employment include transportation costs in travelling to interviews and any other reasonable expenses; claimants should be advised to keep receipts. Any expenses that would have been incurred even if the employee had not been terminated are not included. For example, if the employee had childcare expenses during the period they were looking for another job, but would have incurred the same day care costs if they had remained at work, these costs will not be included in the order.

Loss of Employee's Reasonable Expectation of Continued Employment with the Former Employer

This head of damages is commonly referred to as compensation for loss of the job itself. Where reinstatement is not ordered because it is not possible, realistic or appropriate, damages may be awarded for the loss of reasonable expectation of employment. They compensate for the loss of the opportunity to continue to be employed, an opportunity that the employer’s wrongful act denied. These damages are prospective in nature, meaning it is necessary to assign a value to future unknown events. They are not subject to a duty to mitigate.

The concept behind this head of damages was set out in Wyeth-Ayerst Canada Inc. v Dowd (January 7, 1998), 2466-96-ES (ON LRB):

Adjudicators and referees have long recognized that there is, to the individual who suffers as a result of an employer's breach of the Act, some inherent value in having had the job. This seems obvious: if an employee has a job, has a regular source of income and benefits, and is suddenly and wrongly deprived of that job, the individual has to begin the process of seeking new employment, suffers loss of income, incurs expenses to look for a new job, and must begin over at a new place of employment if s/he is able to find new employment. The individual may have lost opportunities which would have accrued to him/her at the original place of employment, and may also lose future income. There are additional less tangible benefits to having a job, like accruing seniority or length of tenure, building relationships, and strengthening self-esteem through familiarity with the job requirements. All of these are lost when an employee is terminated.

Adjudicators have generally awarded one month per year of service under this head of damages. See Rainbow Concrete Industries Limited v. Lentir, 2012 CanLII 58233 (ON LRB). However, it is Program policy that the following factors are considered when determining damages for loss of job:

- Economic health of the employer in particular, and the economic health of the industry in general;
- Whether the employee's position was secure or insecure to begin with;
- Whether the employee intended to stay with the company for a long time; and
- If the employee found a new job, and if that job pays more or less or is more or less secure than the previous job.

Other specific factors to look at include the economic health of the industry or the particular employer. If it seemed likely that the claimant's job was not secure to begin with (either because the employer was in financial difficulties or because the claimant did not plan to stay with the employer for long), then the loss of expectation of continued employment would not be significant.

Where an officer feels that a reinstatement order is appropriate but the employee nevertheless refuses to accept reinstatement, then it may be that no compensation should be awarded under this head of damages.

One issue that has arisen is whether a reinstatement order is appropriate where an employee was unlawfully terminated, then found a better job and, primarily because of the better job, does not want to be reinstated to the former job. Is a reinstatement order appropriate in these circumstances such that if the employee refuses reinstatement they should be disentitled to damages under this heading? It is Program policy that where the employee's reason for not wanting to be reinstated is because they found a better job, the employee is acting reasonably, a reinstatement order may not be appropriate, and the employee therefore should be entitled to damages under this heading in these circumstances. To entirely disentitle an employee to damages under this head in these circumstances would reward an employer who has unlawfully dismissed an employee because the employee was effectively forced to find a new job as a result of the employer's unlawful act.

Further, if employees in these circumstances were to lose out on damages under this heading, the point of having this head of damages - the desirability of compensating employees for having been wrongfully deprived of a job to which, by law, they were entitled - would be defeated. However, if the claimant has found another job, the nature of this job should be considered. If it is a better one, pays more and is more secure, then this fact should be considered in assessing the amount. In other words, while the fact that the employee ended up in some ways better off does not mean that nothing should be assessed under this head, it may result in a smaller amount being assessed than would have been the case had they ended up worse off or neither better nor worse off.

In Kingston Independent Nylon Workers Union v Page, a decision under the current Act, the Board noted that in mitigating her damages, the employee had actually found a better job than the one she had with her former employer. As a result, the Board held that the employee needed no compensation for "loss of the job". It assessed $0 under that heading, although the Board did increase the award under the heading "time required to find a new job" to take into account the actual amount of time it took her to find the job.

Also see the following cases decided under the former Act with respect to compensation for loss of reasonable expectation of continued employment or "loss of the job":

- Royce v Huan and Danczkay Properties Inc. (July 12, 1995), ESC 95-136 (Novick)
- Martel v 785364 Ontario Inc. o/a Sunny's Restaurant (June 9, 1995), ESC 95-109 (Novick)

- Douglass-Taylor v Amaka Dental Services (December 4, 1995), ESC 95-225 (Faubert)
- Goulet v Uniglobe Tri-Pro Travel Ltd. (June 16, 1995), ESC 95-115 (Palumbo)
- Spinnaker Industries Inc. v Hoveling (January 22, 1996), ESC 96-12 (Bradbury)
- Wildlife Habitat Canada (Ontario Corporation #588482) v Savard (May 10, 1996), ES 96-101 (Novick)

Emotional Pain and Suffering

This head of damages is intended to compensate for such things as the humiliation and real hurt suffered by a person terminated in violation of the ESA 2000. This head may be considered in all circumstances in which a breach of s. 74 is alleged. Together with compensation for the loss of the reasonable expectation of continued employment, this head of damages is one of the most difficult to quantify. This head of damages is not subject to the duty to mitigate.

Some type of evidence is necessary to support an award of compensation for emotional or mental pain and suffering. In many cases, oral evidence from the employee attesting to their emotional pain and suffering will be adequate to support an award under this heading. In cases where a higher amount of damages is awarded under this heading, evidence in addition to the oral evidence, such as a medical report, may be necessary to support the higher award.

In Rainbow Concrete v Lentir, the claimant provided evidence that he experienced a great deal of emotional pain and suffering as a result of the reprisal, but did not provide any medical evidence. The Board noted that the loss of long-term employment by a functionally illiterate individual with few marketable skills as a result of a baseless allegation of theft presumably gave rise to pain and suffering. The claimant gave evidence that he was extremely depressed, seeking treatment for mental health difficulties and experienced financial difficulties after being terminated, including losing his house and declaring bankruptcy. The Board stated that ordinarily this evidence would give rise to damages in excess of $3000 but this case was complicated because as the claimant was experiencing other problems that may have been factors in his pain and suffering. The Board found that in the absence of medical evidence to distinguish between the causes of the claimant's distress, it was appropriate to simply affirm the ESO's award of $3000 for pain and suffering.

Any consequential physical suffering caused by the emotional pain and suffering should also be considered when making an assessment under this heading. A claimant asserting that they experienced consequential physical suffering should provide some substantiation, such as a medical report.

In Melanie Lamoureaux v. JYSK Linen N Furniture Inc., 2015 CanLII 78257 (ON LRB), the Board awarded $5000 in damages for emotional distress. The Board found that the employer enhanced the employee's distress when it did not inform her that her job had been eliminated when she sought to return to work. The employer's attempt to give the employee the "run around" while it attempted to find her another job exacerbated the harm caused to the employee.

In 169809 Canada Limited o/a Portrait Impressions of Canada (April 16, 1993), ES 93-65 (Alter) the referee awarded 20 per cent of the total compensation awarded for lost wages, car allowance, vacation pay and loss of continued employment, which netted out at $4,942, for emotional pain and suffering. The referee did not refer to any specific facts in support of this amount. In the Program's view, using a percentage formula is not appropriate. On judicial review, the Divisional Court in 169809 Canada Limited o/a Portrait Impressions of Canada, Re, 1995 CanLII 10685 (ON SC) quashed that part of the referee's

decision, indicating that an arbitrary percentage formula was not appropriate, and that there should be some evidence before the referee to support an award for mental pain and suffering.

Severance Pay

An award under this heading is considered only if the employee's employment has been severed and the employee will not be ordered reinstated. Severance pay will only be awarded if the employee would qualify for severance pay pursuant to ESA Part XV, s. 64. See for example Rainbow Concrete Industries Limited v Lentir, 2012 CanLII 58233 (ON LRB).This entitlement will be reflected in a s. 103 order for unpaid wages rather than an order for compensation under s. 104. The order made in respect of severance pay is subject to the limitations on recovery under s. 111.

Benefit Plan Entitlements

If an employer has reprised against an employee by discontinuing their participation in a benefit plan, a compensation order could be issued to compensate the employee for any expenses incurred due to the wrongful discontinuance of the plan. Note that in such a case, a compliance order could also be issued, requiring the employer to reinstate the employee's coverage - assuming that reinstatement of coverage is possible in the circumstances. Note as well that if an applicant for employment was reprised against because of their refusal to take a lie detector test (i.e., the employer refused to hire the applicant because they refused a lie detector test), the employment standards officer could issue an order for compensation for any expenses the applicant incurred that would otherwise have been covered by a benefit plan had the employee been hired in addition to an order to hire the employee - see ESA Part XVI, Lie Detectors.

If an employee was terminated contrary to s. 74 and subsequently reinstated, the employee would be entitled to compensation for the benefit plan coverage they would have had between the date of the termination and the date of reinstatement.

An employee whose employment was terminated contrary to s. 74 and in respect of whom a compensation order was made (but no order for reinstatement) would be entitled to compensation for the benefit plan coverage from the date of termination to the earlier of the date the employee found alternative employment or ought to have found alternative employment.

Reasonable Foreseeable Damages

The heads of damages described under headings (1) to (7) above do not constitute an exhaustive list of damages that can be awarded in a compensation order. While they are the usual or most likely categories of award that are assessed, there may be other types of damages that flow directly from a contravention of s. 74 that are reasonable and foreseeable for which it would be appropriate to make an award for damages.

For example, consider the case of a pregnant employee whose employment was unlawfully terminated, in that the termination occurred because she was planning on taking a pregnancy and parental leave. At the time of the termination, the employee had not worked long enough to qualify for maternity and parental benefits under the *Employment Insurance Act*, although she would have qualified by the date she had planned on beginning her leave. The officer could order an amount under this head of damages that represents the Employment Insurance benefits the employee would have received had she worked long enough to qualify for them.

Method of Calculating an Order

1. Add up all of the employee's losses under items 1 through 8 above. Note that any amounts under items 1, 2(a), 3 - 5, 7 and 8 are assessed as compensation under s. 104 and any amounts under item 2(b) and item 6 are assessed separately as unpaid wages under s. 103.
2. Subtract any sums already received by the employee on account of any of items 1 through 8 above.
    - Note that money received in respect of common law rights to reasonable notice that exceed the amount that would be awarded pursuant to program policy under item 2(b) are subtracted only from that item 2(b) (whether as compensation for time required to find a new job or termination pay in lieu of notice) and not from any other items.
    - Note also that the quantum of an order issued to compensate an employee for an unlawful termination is not reduced by any employment insurance benefits paid to the employee (see Bronson Bakery Ltd v Melo and Scott) recovery of any overpayment with respect to these benefits is the concern of the Canada Employment Insurance Commission, not the Ministry of Labour.
3. Add the greater of $100 or 10 per cent of the amount of the s. 104 order to that order and the greater of $100 or 10 percent to the amount assessed under the s. 103 order (if any) as administration costs.

Limitation Periods

There are two limitation periods that apply with respect to an employee's ability to obtain a remedy under the ESA 2000:

Section 111

This provision limits an employee's ability to recover wages to those that became due within specified periods preceding the date the complaint was filed. Any wages (including vacation pay) that come due on or after that date are recoverable if an employee files a claim for such wages within two years of the date the wages came due.

On February 20, 2015, the *Stronger Workplaces for a Stronger Economy Act* introduced a number of transitional provisions that imposed a six-month limitation period on unpaid wages that became due before February 20, 2015, and a 12-month limitation period for repeated contraventions and vacation pay that became due before February 20, 2015. Sections 111(3.1) to (8) were repealed on February 20, 2017 in accordance with s. 8(6) of Schedule 2 to the *Stronger Workplaces for a Stronger Economy Act*, *2014*.

Although these sections are now repealed, it is Program policy that the limitation periods imposed by the transitional provisions continue to apply to wages, repeated contraventions and vacation pay that became due before February 20, 2015, even if any associated orders are issued after February 20, 2017. This is to preserve the vested legal rights of the parties at the time the contravention occurred. This is relevant in situations where a period of time lapses between the time a claim is filed and the time a claim is investigated. For more information, see ESA Part XXII, s. 111.

Section 96(3)

This provision imposes a two-year limitation period on filing a complaint by stating that a complaint filed more than two years after a contravention has occurred is deemed not to have been filed. Note that there will often be a period of time in between the date an employee engaged in a protected activity and the

date the employer imposed a penalty. It is this latter date on which the contravention occurs. The two-year time limit starts to run only once a reprisal has actually been committed, i.e., from the date the employer imposed the penalty.

For example, an employee working for Employer A asserted her right to meal breaks in early 2014. In mid-2014, she resigned to work for Employer B and then in September 2017 applied for a job with Employer C. Employer A was contacted for a reference on September 6, 2017 and gave a negative reference because the employee had asserted her rights to meal breaks while she worked for Employer A. The reprisal occurred on September 6, 2017 and the two-year time limit in s. 96(3) begins to run from that date. The employee will therefore have until September 5, 2019 to file a reprisal claim. For practical purposes, the impact of this provision is limited to complaints in which reinstatement and/or compensation is sought as a remedy. See ESA Part XXII, s. 96(3) for more information.

Application of Limitation Periods

As a result of these two provisions:

- Compensation for damages flowing from a violation of s. 74 will be recoverable so long as the employee files a claim within two years of the contravention. Compensation includes the heads of damages itemized above, i.e., direct earnings loss, time required to find a new job, expenses incurred in seeking new employment, loss of job, emotional pain and suffering, and other reasonable foreseeable expenses.
- Reinstatement of an employee whose employment was terminated in violation of s. 74 is possible so long as the employee files a claim within two years of the contravention.
- Any unpaid wages (including vacation pay) that came due on or after February 20, 2015 are recoverable, so long as the employee files a claim within two years of the date the wages came due.

Example

An employee who commenced pregnancy leave August 1, 2016 was scheduled to return to work on August 1, 2017. The employee was due for a length-of-service-driven pay increase on July 1, 2017, but was on her unpaid leave at that time. The employer unlawfully reprises against the employee by refusing to give the increase upon the employee's return because she was on leave for a year, and advises her that she will not get a pay increase until July 1, 2018. The employee files a claim on March 1, 2018.

The officer determines that the employee was entitled to the pay increase effective July 1, 2017, and that regular pay days on or after August 1, 2017, when she returned to work, should have reflected the increase. Because the employee had worked from August 1, 2017, to the date the claim was filed, the employer should have been paying the employee the higher wage rate and so far as the ESA 2000 is concerned her pay between August 1, 2017, and March 1, 2018, should have reflected that. The employee thus had unpaid wages between those dates equal to the difference between what she should have been paid and what she was paid.

In this case, all of the unpaid wages came due within the two-year period prior to the date the claim was filed and so all are recoverable under the ESA 2000.

Onus of Proof - s. 74(2)

74(2) Subject to subsection 122(4), in any proceeding under this Act, the burden of proof that an employer did not contravene a provision set out in this section lies upon the employer.

Subject to s. 122(4), this provision places the legal burden of proof on the employer in any complaint alleging that the employer or a person acting on behalf of the employer has committed a reprisal contrary to s. 74. The effect of this provision is to require the employer to rebut an employee's claim that they have been reprised against. The employer must establish, on a balance of probabilities, that the employer did not contravene s. 74.

In the Board's decision in Daitch v Respironics Georgia, Inc., 2004 CanLII 12176 (ON LRB) the claimant sought damages on the basis that his employment was terminated as a reprisal for exercising his right under the ESA 2000 to refuse to work on a public holiday. The only evidence before the Ontario Labour Relations Board was that of the claimant and this evidence disclosed that he had been employed by the company, had exercised his right to take the a public holiday as a day off (directly challenging his employer's direction to work that day) and was terminated three months later for reasons the Board described as "vague". The Board concluded that the employer had thereby failed to discharge the statutory burden of proof to show the termination was not a reprisal under s. 74.

In Bari v. 973864 Ontario Inc. o/a the Hosiery Shop, 2004 CanLII 5733 (ON LRB), the Board found that the employer had not discharged the onus to justify a significant reduction in the pregnant employee's hours and ultimate dismissal, despite its claim that declining revenues were the motivating factor for its actions.

But see also D-Zign Interior Planning & Project Management Inc. v. Madariaga, 2006 CanLII 6003 (ON LRB) where the Board found that the employer had discharged the onus in s. 74(2) of establishing that that the decision to terminate the claimant was in no way connected to her pregnancy or eligibility or intention to take a leave under Part XIV of the ESA 2000.

Section 74(2) is subject to s. 122(4), which provides:

122(4) On a review under this section, the onus is on the Director to establish, on a balance of probabilities, that the person against whom the notice of contravention was issued contravened the provision of this Act indicated in the notice.

Section 122(4) states that in a hearing before the Board arising from a review of a notice of contravention, the Director has the burden of proof. Therefore, if a notice of contravention has been issued with respect to a contravention of s. 74 and the person against whom the notice was issued files an application for review of the notice, the onus shifts to the Director of Employment Standards to show, on a balance of probabilities, that the employer contravened s. 74. For a more detailed discussion of s. 122(4), see ESA Part XXIII, s. 122.

ESA Part XVIII.1 - Temporary Help Agencies

The intent of the provisions found in Part XVIII.1 of the *Employment Standards Act, 2000* is to set out specific obligations and prohibitions relating to temporary help agencies and clients of such agencies and specific rights of assignment employees (and in some cases prospective assignment employees) of temporary help agencies.

These provisions clarify the application of the ESA 2000 public holiday and termination and severance provisions within the context of the temporary help agency/assignment employee employment relationship. Those provisions, particularly those aspects dealing with the concept of lay-off and regular

work weeks are difficult to apply where the employment relationship is based upon an agreement to find assignments to perform work and where such work is not performed for the employer directly but for a third party, i.e., the client of a temporary help agency. The modifications ensure that certain rights afforded to other employees are similarly afforded to assignment employees.

These provisions were also intended to extend the anti-reprisal protections for assignment employees by imposing prohibitions against reprisal on agency clients for whom the assignment employee was performing work. Previously, agency clients could, for example, terminate the assignment of any assignment employee for attempting to exercise rights to refuse excess hours of work while on assignment, without any repercussions under the reprisal provisions found in s. 74 of the Act, because the client was not the employee's employer. In such cases, an assignment employee was effectively unable to exercise his or her rights under the Act without protection from reprisal because the reprisal was effected by someone other than the assignment employee's employer.

Additionally, the provisions imposing a proportional liability for certain unpaid wages of the agency's assignment employees on clients of agencies (agencies as the employer remain liable for the full amount) are intended to reflect the fact that in general, a client benefits from the work of the assignment employee in proportion to the number of hours that the employee worked for the client.

The provisions related to prohibitions against fees and restrictions on entering into employment relationships were intended to reduce barriers to assignment employees and prospective assignment employees finding employment with clients of the agencies.

ESA Part XVIII.1 Section 74.1 – Interpretation – REPEALED

ESA Part XVIII.1 Section 74.2 - Application

74.2 This Part does not apply in relation to an individual who is an assignment employee assigned to provide professional services, personal support services or homemaking services as defined in the *Home Care and Community Services Act, 1994* if the assignment is made under a contract between,

(a) the individual and a community care access corporation within the meaning of the *Community Care Access Corporations Act, 2001*; or

(b) an employer of the individual and a community care access corporation within the meaning of the *Community Care Access Corporations Act, 2001*. 2009, c. 9, s. 3; 2016, c. 30, s. 36 (1).

These sections provides that Part XVIII.1 does not apply to assignment employees who are assigned to provide homemaking, personal support and/ or professional services as defined in the *Home Care and Community Services Act, 1994* (“HCCSA”) if the assignment is made under a contract between a) the assignment employee or b) his or her employer and a community care access corporation within the meaning of the *Community Care Access Corporations Act, 2001,* SO 2001, c 33. Clause (a) is meant to cover the situation in which the relationship between an individual providing services referred to in s. 74.2 and a community care access corporation is that of assignment employee and temporary help agency; in other words, the community care access corporation functions as a temporary help agency vis-á-vis the individual. Clause (b) is meant to cover the situation in which a temporary help agency has a contract with a community care access corporation to provide the services of employees and the agency assigns an assignment employee to perform work for the community care access corporation.

The definitions of homemaking services, personal support services and professional services contained in ss. 2(5) - (7) of the HCCSA are set out below:

2(5) For the purpose of this Act, the following are homemaking services:

1. Housecleaning.

2. Doing laundry.

3. Ironing.

4. Mending.

5. Shopping.

6. Banking.

7. Paying bills.

8. Planning menus.

9. Preparing meals.

10. Caring for children.

11. Assisting a person with any of the activities referred to in paragraphs 1 to 10.

12. Training a person to carry out or assist with any of the activities referred to in paragraphs 1 to 10.

13. Providing prescribed equipment, supplies or other goods.

14. Services prescribed as homemaking services.

2(6) For the purpose of this Act, the following are personal support services:

1. Personal hygiene activities.

2. Routine personal activities of living.

3. Assisting a person with any of the activities referred to in paragraphs 1 and 2.

4. Training a person to carry out or assist with any of the activities referred to in paragraphs 1 and 2.

5. Providing prescribed equipment, supplies or other goods.

6. Services prescribed as personal support services.

2(7) For the purpose of this Act, the following are professional services:

1. Nursing services.

2. Occupational therapy services.

3. Physiotherapy services.

4. Social work services.

5. Speech-language pathology services.

6. Dietetics services.

7. Training a person to provide any of the services referred to in paragraphs 1 to 6.

8. Providing prescribed equipment, supplies or other goods.

9. Services prescribed as professional services.

In addition to providing services as described above, the assignment employee or their employer must have a contract for the assignment with a "community care access corporation" continued under the *Community Care Access Corporations Act, 2001* or incorporated by regulation made under s. 2(4) of the *Community Care Access Corporations Act, 2001*.

ESA Part XVIII.1 Section 74.2.1 – Assignment Employees

74.2.1 This Part does not apply in relation to an individual who is an assignment employee assigned to provide professional services, personal support services or homemaking services as defined in the *Home Care and Community Services Act, 1994* if the assignment is made under a contract between,

(a) the individual and a local health integration network within the meaning of the *Local Health System Integration Act, 2006*; or

(b) an employer of the individual and a local health integration network within the meaning of the *Local Health System Integration Act, 2006*. 2016, c. 30, s. 36 (3).

This sections provides that Part XVIII.1 does not apply to assignment employees who are assigned to provide homemaking, personal support and professional services as defined in the HCCSA if the assignment is made under a contract between a local health integration network (“LHIN”) and either the assignment employee or their employer.

Clause (a) is meant to cover the situation in which the relationship between an individual providing services referred to in s. 74.2.1 and a LHIN is that of assignment employee and temporary help agency; in other words, the LHIN functions as a temporary help agency vis-á-vis the individual. Clause (b) is meant to cover the situation in which a temporary help agency has a contract with a LHIN to provide the services of employees and the agency assigns an assignment employee to perform work for the LHIN.

The definitions of homemaking services, personal support services and professional services contained in ss. 2(5) - (7) of the HCCSA are set out below:

2(5) For the purpose of this Act, the following are homemaking services:

1. Housecleaning.

2. Doing laundry.

3. Ironing.

4. Mending.

5. Shopping.

6. Banking.

7. Paying bills.

8. Planning menus.

9. Preparing meals.

10. Caring for children.

11. Assisting a person with any of the activities referred to in paragraphs 1 to 10.

12. Training a person to carry out or assist with any of the activities referred to in paragraphs 1 to 10.

13. Providing prescribed equipment, supplies or other goods.

14. Services prescribed as homemaking services.

2(6) For the purpose of this Act, the following are personal support services:

1. Personal hygiene activities.

2. Routine personal activities of living.

3. Assisting a person with any of the activities referred to in paragraphs 1 and 2.

4. Training a person to carry out or assist with any of the activities referred to in paragraphs 1 and 2.

5. Providing prescribed equipment, supplies or other goods.

6. Services prescribed as personal support services.

2(7) For the purpose of this Act, the following are professional services:

1. Nursing services.

2. Occupational therapy services.

3. Physiotherapy services.

4. Social work services.

5. Speech-language pathology services.

6. Dietetics services.

7. Training a person to provide any of the services referred to in paragraphs 1 to 6.

8. Providing prescribed equipment, supplies or other goods.

9. Services prescribed as professional services.

In addition to providing services as described above, the assignment employee or their employer must have a contract for the assignment with a LHIN as defined in the *Local Health System Integration Act, 2006,* SO 2006, c 4 ("LHSIA"). Section 2(1) of the LHSIA defines a local health integration network as follows:

"local health integration network" means a corporation that is continued under subsection 3 (1) or incorporated by regulation under subsection 3 (3);

Section 3(1) of the LHSIA provides a list of corporations continued as LHINS:

- Central Local Health Integration Network;
- Central East Local Health Integration Network;
- Central West Local Health Integration Network;
- Champlain Local Health Integration Network;
- Erie St. Clair Local Health Integration Network;
- Hamilton Niagara Haldimand Brant Local Health Integration Network;
- Mississauga Halton Local Health Integration Network;
- North East Local Health Integration Network;
- North Simcoe Muskoka Local Health Integration Network;
- North West Local Health Integration Network;
- South East Local Health Integration Network;
- South West Local Health Integration Network;
- Toronto Central Local Health Integration Network; and
- Waterloo Wellington Local Health Integration Network.

Note that this list is not exhaustive and that other LHINs may be incorporated pursuant to regulation as per s. 3(3) of the LHSIA.

ESA Part XVIII.1 Section 74.3 - Employment Relationship

74.3 Where a temporary help agency and a person agree, whether or not in writing, that the agency will assign or attempt to assign the person to perform work on a temporary basis for clients or potential clients of the agency,

(a) the temporary help agency is the person's employer;

(b) the person is an employee of the temporary help agency.

This section provides that an employment relationship exists between a temporary help agency and a person at the point that they agree (whether or not in writing) that the agency will assign or attempt to assign the person to perform work on a temporary basis for clients or potential clients. It is the existence of such an agreement that establishes the employment relationship.

Whether there is or is not such an agreement is a question of fact. Arguably, if a temporary help agency is simply receiving unsolicited resumes that have been forwarded to the agency, this is not, on its own, evidence that the agency has agreed to assign or attempt to assign the individual to perform work on a temporary basis for clients.

An agreement in writing to that effect would clearly demonstrate that an employment relationship existed between the parties but the agency's agreement may also be expressed by the actions of the agency rather than in writing. For example, agreement would be demonstrated by an attempt by the agency to match the individual who had submitted a resume with a client.

A person does not have to be assigned to perform work for a client of the agency in order for there to be an employment relationship with the agency. The employment relationship is established by the agreement between the parties and not whether the employee is assigned to perform work for a client of the agency. As a result, it is not necessary for an employee's first assignment (if any) to begin on the date of hire. On this point see the discussion of ESA Part XVIII.1, s. 74.4(3).

ESA Part XVIII.1 Section 74.4 - Work Assignment

Work Assignment - s. 74.4(1)

74.4(1) An assignment employee of a temporary help agency is assigned to perform work for a client if the agency arranges for the employee to perform work for a client on a temporary basis and the employee performs such work for the client.

This section provides that an assignment employee of a temporary help agency is assigned to perform work for a client (i.e., is on a work assignment) if the agency arranged for the employee to perform work for the client on a temporary basis and the employee is performing the work. As noted in the definition of assignment employee in ESA Part I, s. 1, the Program's position is that "work on a temporary basis" would obviously include a short term assignment but would also include long term or open ended placements with a client. The work is considered to be temporary because there is no permanent placement with the client; the assignment employee continues to be the employee of the agency and not the client throughout the period of the assignment.

In addition, pursuant to ESA Part I, s. 1(2), an assignment employee is assigned to perform work for a client if the employee is assigned to receive training from the client for the purposes of performing work for that client.

Same - s. 74.4(2)

74.4(2) Where an assignment employee is assigned by a temporary help agency to perform work for a client of the agency, the assignment begins on the first day on which the assignment employee performs work under the assignment and ends at the end of the term of the assignment or when the assignment is ended by the agency, the employee or the client.

This provision clarifies that a work assignment begins on the first day the employee performs work pursuant to the assignment and ends when the term of the assignment ends (where a term of the assignment has been established) or alternatively, when the assignment is ended by the agency, the assignment employee or the client.

For example, an assignment employee accepts an offer of a work assignment from the agency on June 15 and commences performing work for the client under that assignment on June 18. If the terms of the assignment stipulated that the assignment ended on September 15, the assignment would begin June 18 and end on September 15, assuming the employee actually ceased performing work for the client of the agency on that day. If however, the client terminated the assignment on August 21, the assignment would

end on that earlier date. Alternatively, if the employee continued to perform work for the client after September 15, e.g., to November 1, the assignment would end on November 1.

Same - s. 74.4(3)

74.4(3) An assignment employee of a temporary help agency does not cease to be the agency's assignment employee because,

(a) he or she is assigned by the agency to perform work for a client on a temporary basis; or

(b) he or she is not assigned by the agency to perform work for a client on a temporary basis.

This provision clarifies that an assignment employee's employment relationship with a temporary help agency is not ended because the employee is, or is not, on an assignment to perform temporary work for a client of the agency.

The employment relationship is established pursuant to ESA Part XVIII.1, s. 74.3 by a temporary help agency and a person having agreed that the agency will assign or will attempt to assign the person to perform work for a client or potential clients on a temporary basis.

Section 74.4(3) clarifies that being, or not being, on assignment is not the determining factor in ending the employment relationship. Once the employment relationship is established, it will continue whether or not the employee is on assignment and despite gaps between assignments unless the employment relationship is terminated and/or severed.

It should be noted however that a termination or severance of the employment relationship may be triggered by a lay-off lasting a certain number of weeks within a specified period of consecutive weeks. See the discussion at ESA Part XVIII.1, s. 74.11.

Same - s. 74.4(4)

74.4(4) An assignment employee of a temporary help agency is not assigned to perform work for a client because the agency has,

(a) provided the client with the employee's resume;

(b) arranged for the client to interview the employee; or

(c) otherwise introduced the employee to the client.

This subsection clarifies that an assignment employee is not on a work assignment simply because the agency has provided the client with the assignment employee's resume, arranged for the client to interview the employee or otherwise introduced the client to the assignment employee.

Although the agency may do any or all of these things, unless the agency has arranged for the employee to perform work for a client on a temporary basis and the employee is performing such work, the assignment employee is not on assignment per s. 74.4(1).

ESA Part XVIII.1 Section 74.4.1 - Agency to Keep Records re: Work for Client

Agency to Keep Records Re Work for Client - s. 74.4.1(1)

74.4.1(1) In addition to the information that an employer is required to record under Part VI, a temporary help agency shall,

(a) record the number of hours worked by each assignment employee for each client of the agency in each day and each week; and

(b) retain a copy of any written notice provided to an assignment employee under subsection 74.10.1 (1).

This provision requires temporary help agencies to maintain records of the hours worked by their assignment employees in each day and week for each client of the agency and retain a copy of any written notice provided to an assignment employee under ESA s. 74.10.1(1). Corresponding client record keeping obligations with respect to maintaining records of hours worked in each day and each week are set out in s. 74.4.2.

The record keeping obligations in clause (a) were added because of the client joint and several liability for certain unpaid wages of the agency's assignment employees, which is based upon the proportional number of hours worked for each client in any particular pay period, introduced by the *Stronger Workplaces for a Stronger Economy Act, 2014,* SO 2014, c 10. The record keeping obligations in clause (b) were added because of the new provision requiring notice of termination of assignment introduced by the *Fair Workplaces Better Jobs Act, 2017*. See the discussion at ESA Part XVIII.1, s. 74.18 and ESA Part XVIII.1, s.74.10.1.

For a discussion of an employer's general obligations to make and retain records with respect to hours of work see ESA Part VI. Note that there is no provision in s. 74.4.1 that corresponds to the exception regarding records of hours for salaried employees as set out in ESA Part VI, s. 15(3).

Retention of Records - s. 74.4.1(2)

74.4.1(2) The temporary help agency shall retain or arrange for some other person to retain the records required under subsection (1) for three years after the day or week to which the information relates.

Under this section, a temporary help agency must retain the records required under s. 74.4.1(1) or arrange for another person to retain them for three years. The retention period is the same as the three year period for retaining records regarding hours of work under ESA Part VI, s. 15(5) paragraph 3.

Availability - s. 74.4.1(3)

74.4.1(3) The temporary help agency shall ensure that the records required to be retained under this section are readily available for inspection as required by an employment standards officer, even if the agency has arranged for another person to retain them.

If the agency makes arrangements for another person, such as a bookkeeper or accountant, to retain the records made under s. 74.4.1(1), it is the agency's responsibility to ensure that the records are readily available for inspection by an employment standards officer. This provision is similar to ESA Part VI, s. 16, which requires that records that must be retained under ESA Part VI, ss. 15 and 15.1.

ESA Part XVIII.1 Section 74.4.2 - Client to Keep Records re: Work for Client

Client to Keep Records Re Work for Client – s. 74.4.2(1)

74.4.2(1) A client of a temporary help agency shall record the number of hours worked by each assignment employee assigned to perform work for the client in each day and each week.

The *Stronger Workplaces for a Stronger Economy Act, 2014* added this provision to the *Employment Standards Act, 2000.*

This provision requires clients of temporary help agencies to maintain records of the hours of work performed for the client, by each assignment employee of the agency, in each day and each week. Corresponding temporary help agency record keeping obligations are set out in ESA Part XVIII.1, s. 74.4.1.

These new record keeping obligations were added because of the joint and several liability imposed on clients for certain unpaid wages owing to assignment employees that came into force on November 20, 2015 pursuant to ESA Part XVIII.1, s. 74.18.

Client to Keep Records Re Work for Client – s. 74.4.2(2)

74.4.2(2) The client shall retain or arrange for some other person to retain the records required under subsection (1) for three years after the day or week to which the information relates.

Under this section, a client of a temporary help agency must retain the records required under s. 74.4.2(1) or arrange for another person to retain them for three years. The retention period is the same as the three year period for retaining records regarding hours of work under paragraph 3 of ESA Part VI, s. 15(5).

Availability – s. 74.4.2(3)

74.4.2(3) The client shall ensure that the records required to be retained under this section are readily available for inspection as required by an employment standards officer, even if the client has arranged for another person to retain them.

If the client makes arrangements for another person, such as a bookkeeper or accountant, to retain the records made under s. 74.4.2(1), it is the client's responsibility to ensure that the records are readily available for inspection by an employment standards officer. This provision is similar to ESA Part VI, s. 16, which requires that records that must be retained under ESA Part VI, s. 15 and s. 15.1 and must be readily available for inspection.

ESA Part XVIII.1 Section 74.5 - Information re Agency

Information Re Agency - s. 74.5(1)

74.5(1) As soon as possible after a person becomes an assignment employee of a temporary help agency, the agency shall provide the following information, in writing, to the employee:

1. The legal name of the agency, as well as any operating or business name of the agency if different from the legal name.

2. Contact information for the agency, including address, telephone number and one or more contact names.

This section imposes an obligation on a temporary help agency to provide information about the agency to its assignment employee as soon as possible after entering into an employment relationship with him or her as an assignment employee. The agency must provide, in writing, the legal name and any operating name or business name if different than the legal name. The agency is also required to provide an address, telephone number and at least one contact name for the agency.

What is "as soon as possible" will depend upon the circumstances.

This section requires that the information be provided to the assignment employee "in writing". Program policy is that an electronic agreement may constitute an agreement "in writing" under the *Employment Standards Act, 2000*. For further discussion of "agreements in writing" see ESA Part I, s. 1. As a consequence, the Program's position is that an agency would be in compliance with this section if the information in s. 74.5(1) was provided in an electronic document. It may therefore be provided by electronic mail, if the employer ensures the employee has convenient access to e-mail and can easily print the document. In addition, even though it is not sent personally in any format to the employee, the Program takes the position that the agency will be complying with this requirement if the employer ensures the employee has convenient access to an electronic version of the document (and knows how to access it) and a printer (and knows how to use it). In the latter case, simply providing an employee with a website address would be insufficient to meet the requirement to provide the information in writing.

Transition - s. 74.5(2)

74.5(2) Where a person is an assignment employee of a temporary help agency on the day this section comes into force, the agency shall, as soon as possible after that day, provide the information required by subsection (1), in writing, to the employee.

Section 74.5(2) requires an agency to provide the information in s. 74.5(1) to those of its assignment employees already in the agency's employ on the day the amendments made under the *Employment Standards Amendment Act (Temporary Help Agencies), 2009,* SO 2009, c 9 came into force (November 6, 2009). Such employees must be provided with the information (in writing), as soon as possible after November 6, 2009.

What is "as soon as possible" will depend upon the circumstances.

Because the intent of this provision is to ensure that assignment employees who were hired before s. 74.5(1) came into force, receive the information about the agency specified in that provision, the Program's position is that an agency that provided this information prior to November 6, 2009 would be in compliance with s. 74.5(2) so long as the information is still accurate on November 6, 2009 and the employee still has a copy of it.

ESA Part XVIII.1 Section 74.6 - Information Re Assignment

Information Re Assignment - s. 74.6(1)

74.6(1) A temporary help agency shall provide the following information when offering a work assignment with a client to an assignment employee:

1. The legal name of the client, as well as any operating or business name of the client if different from the legal name.

2. Contact information for the client, including address, telephone number and one or more contact names.

3. The hourly or other wage rate or commission, as applicable, and benefits associated with the assignment.

4. The hours of work associated with the assignment.

5. A general description of the work to be performed on the assignment.

6. The pay period and pay day established by the agency in accordance with subsection 11 (1).

7. The estimated term of the assignment, if the information is available at the time of the offer.

This section imposes an obligation on a temporary help agency when offering a work assignment with a client to an assignment employee, to provide certain information about the client and the assignment to the assignment employee. In accordance with s. 74.6(2) the information may initially be provided orally, but must subsequently be provided in writing as soon as possible after offering the assignment.

In accordance with s. 74.6(1), the agency must provide the client's legal name and any operating name or business name if different than the legal name. The agency is also required to provide an address, telephone number and at least one contact name for the client.

In addition, the agency must provide information about the assignment itself as follows:

- Hourly wage rate or other wage rate or commission as applicable and benefits associated with the assignment;
- Hours of work associated with the assignment;
    - Program policy is that this would include both daily and weekly hours of work.
- General description of the work to be performed on the assignment;
- Pay period and pay day as established by the agency in accordance with s. 11(1) of the ESA – see ESA Part V s. 11 for more information regarding the establishment of a pay day and pay period; and
- The estimated term of the assignment if that information is available when the offer is made.

Same - s. 74.6(2)

74.6(2) If information required by subsection (1) is provided orally to the assignment employee, the temporary help agency shall also provide the information to the assignment employee in writing, as soon as possible after offering the work assignment.

This subsection must be read in conjunction with s. 74.6(1), which lists information regarding the client and work assignment that must be provided to an assignment employee at the time the work assignment

is offered. Section 74.6(2) provides that if the information is provided orally, it must subsequently be provided, in writing, as soon as possible after the offer was made. Note that the requirement to provide this information in writing is not relieved even if the assignment employee refused the offer after being provided with the information orally.

What is "as soon as possible" will depend upon the circumstances.

This section requires that the information be provided to the assignment employee "in writing". Program policy is that an electronic agreement may constitute an agreement "in writing" under the *Employment Standards Act, 2000.* For further discussion of "agreements in writing" see ESA Part I, s. 1. As a consequence, the Program's position is that an agency would be in compliance with this section if the information in s. 74.6(1) was provided in an electronic document. It may therefore be provided by electronic mail, if the employer ensures the employee has convenient access to e-mail and can easily print the document. In addition, even though it is not sent personally in any format to the employee, the Program takes the position that the agency will be complying with this requirement if the employer ensures the employee has convenient access to an electronic version of the document (and knows how to access it) and a printer (and knows how to use it). In the latter case, simply providing an employee with a website address would be insufficient to meet the requirement to provide the information in writing.

Transition - s. 74.6(3)

74.6(3) Where an assignment employee is on a work assignment with a client of a temporary help agency or has been offered such an assignment on the day this section comes into force, the agency shall, as soon as possible after that day, provide the information required by subsection (1), in writing, to the employee.

Section 74.6(3) requires that an agency provide the information required by s. 74.6(1) to those of its assignment employees who were offered or who were on a work assignment on November 6, 2009, the day the amendments made under the *Employment Standards Amendment Act (Temporary Help Agencies), 2009,* SO 2009, c 9 came into force. Such employees must be provided with the information (in writing), as soon as possible after November 6, 2009.

ESA Part XVIII.1 Section 74.7 - Information, Rights Under This Act

Information, Rights Under This Act - s. 74.7(1)

74.7(1) The Director shall prepare and publish a document providing such information about the rights and obligations of assignment employees, temporary help agencies and clients under this Part as the Director considers appropriate.

Section 74.7(1) provides that the Director of Employment Standards shall prepare and publish a document that provides information about the rights and obligations of assignment employees, temporary help agencies and clients as the Director considers appropriate.

At the time of writing, the document prepared pursuant to this section is entitled "Your Employment Standards Rights: Temporary Help Agency Assignment Employees." The document is available from Publications Ontario or can be downloaded from the Ministry of Labour's website.

Same - s. 74.7(2)

74.7(2) If the Director believes that a document prepared under subsection (1) has become out of date, the Director shall prepare and publish a new document.

This subsection provides that if the Director believes that the document published under s. 74.7(1) regarding rights and obligations under Part XVIII.1 of the Act is out of date, he or she will prepare and publish a new document.

Same - s. 74.7(3)

74.7(3) As soon as possible after a person becomes an assignment employee of a temporary help agency, the agency shall provide a copy of the most recent document published by the Director under this section to the employee.

This section imposes an obligation on a temporary help agency to provide a copy of the most recent version of the document published by the Director under s. 74.7(1) to its assignment employee as soon as possible after the person becomes an assignment employee of the temporary help agency.

The employer may provide the document as a paper copy or electronically. If the document is made available by access to an internet database, the employer must ensure the employee has reasonable access to the database and a printer and knows how to use the computer and the printer. The document may also be sent to the employee by electronic mail although the employer will again be responsible for ensuring the employee has access to the means of making a paper copy.

What is "as soon as possible" will depend upon the circumstances.

Same - s. 74.7(4)

74.7(4) If the language of an assignment employee is a language other than English, the temporary help agency shall make enquiries as to whether the Director has prepared a translation of the document into that language and, if the Director has done so, the agency shall also provide a copy of the translation to the employee.

This section states that where the language of an assignment employee is a language other than English, the employer is required to inquire as to whether the Director has prepared a translation of the document published under s. 74.7(1) into that language. If a translation of the document into that language has been prepared, the agency is required to provide a copy of that translation together with the English version to the assignment employee.

Transition - s. 74.7(5)

74.7(5) Where a person is an assignment employee of a temporary help agency on the day this section comes into force, the agency shall, as soon as possible after that day, provide the document required by subsection (3) and, where applicable, by subsection (4), to the employee.

Section 74.7(5) requires an agency to provide the document as required under s. 74.7(3) to those of its assignment employees already in the agency's employ on November 6, 2009, the day the amendments made under the *Employment Standards Amendment Act (Temporary Help Agencies), 2009,* SO 2009, c 9 came into force. Such employees must be provided with the most recent copy of the document published under s. 74.7(3) and if applicable, and if it is available at that time, a translation in accordance with s. 74.7(4), as soon as possible after November 6, 2009.

ESA Part XVIII.1 Section 74.8 – Prohibitions

Prohibitions – s. 74.8(1)

74.8(1) A temporary help agency is prohibited from doing any of the following:

1. **Charging a fee to an assignment employee in connection with him or her becoming an assignment employee of the agency.**
2. **Charging a fee to an assignment employee in connection with the agency assigning or attempting to assign him or her to perform work on a temporary basis for clients or potential clients of the agency.**
3. **Charging a fee to an assignment employee of the agency in connection with assisting or instructing him or her on preparing resumes or preparing for job interviews.**
4. **Restricting an assignment employee of the agency from entering into an employment relationship with a client.**
5. **Charging a fee to an assignment employee of the agency in connection with a client of the agency entering into an employment relationship with him or her.**
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, except as permitted by subsection (2).**
9. **Charging a fee that is prescribed as prohibited.**
10. **Imposing a restriction that is prescribed as prohibited**

This section prohibits temporary help agencies ("THAs") from:

- Charging certain fees to assignment employees - paras. 1, 2, 3 and 5;
- Charging certain fees to clients subject to the exception set out in s. 74.8(2) - para. 8;
- Imposing restrictions on assignment employees with respect to entering into employment relationships with clients and vice versa - paras. 4 and 7;
- Imposing restrictions on clients with respect to providing references for assignment employees - para. 6;
- Charging any other fees or imposing any other restrictions that are prescribed by regulation as prohibited (none at time of writing) - paras. 9 and 10.

This section must also be read in conjunction with s. 74.8(4) which provides that references to assignment employee within this section include a prospective assignment employee. These prohibitions will therefore apply to prospective assignment employees where the circumstances or context would allow.

In addition, because the definition of employee in ESA Part I, s. 1 includes a person who was an employee, the prohibitions and restrictions in s. 74.8 would apply with respect to an individual who was

previously an assignment employee of an agency. For example, an agency could not impose a restriction that would restrict a client of the agency from entering into an employment relationship with former employees of the agency or vice versa.

Note that where an agency contravenes certain provisions of s. 74.8, new order making powers within Part XVIII.1 are available in addition to the enforcement tools in ESA Part XXII and prosecution under ESA Part XXV. See ESA Part XVIII.1, s. 74.14 to s. 74.17.

Prohibited Fees to Assignment Employees

Under paragraphs 1, 2, 3 and 5, agencies cannot charge fees to assignment employees in connection with becoming an assignment employee, obtaining work assignments, entering into an employment relationship with a client of the agency, or for assistance in preparing resumes or preparing for job interviews.

Fees in connection with becoming an assignment employee

Any fee associated with a person and an agency agreeing to enter into an employment relationship is prohibited under para. 1 of s. 74.8(1). An employment relationship is defined in the context of assignment employees and temporary help agencies under ESA Part XVIII.1, s. 74.3 as an agreement (whether or not in writing) that the agency will assign or attempt to assign the person to perform work on a temporary basis for clients or potential clients of the agency.

Because the prohibitions in s. 74.8 apply with respect to prospective assignment employees as well as assignment employees, the prohibition in para. 1 applies whether or not there is actually an employment relationship between the person and the agency when the fee is charged.

An agency would therefore be prohibited from charging a fee to a person when that person inquires about signing on with the agency for the purposes of the agency attempting to place them with clients for temporary work. An agency would be likewise prohibited from charging a fee for taking applications, interviewing, or otherwise considering a person for employment as an assignment employee.

Fees in connection with the agency assigning or attempting to assign work

Pursuant to paragraph 2, any fee charged to an assignment employee with respect to assigning or attempting to assign the employee to perform work on a temporary basis for clients is prohibited. For example, an agency would be prohibited from charging a fee to an assignment employee for sending them to interviews with clients for possible work assignments or when a work assignment was offered or accepted.

Fees in connection with assistance or instruction preparing resumes or for job interviews

Pursuant to paragraph 3, agencies are prohibited from charging assignment employees for any assistance or instruction with respect to preparing resumes or preparing for job interviews. Where such services are provided to assignment employees (whether optional or mandatory) they must therefore be provided free of charge.

Generally, an agency would not be prohibited from charging fees for services related to resume preparation and job interview preparation in relation to persons other than assignment employees. However, because s. 74.8(4) provides that references to assignment employees within s. 74.8 include prospective assignment employees, the fact no employment relationship exists between the person and

the agency at the time the service is provided or the fee charged, is not the determining factor when considering whether the fee is prohibited. In such situations it would be necessary to determine whether the person was a prospective assignment employee - see the discussion regarding prospective assignment employees in s. 74.8(4).

Fees in connection with a client entering into employment relationship

Pursuant to paragraph 5, agencies are prohibited from charging any fees in connection with an assignment employee entering into an employment relationship with a client of the agency. As a result, where an assignment employee is offered a position as an employee of the client, they cannot be required to pay the agency any fee in connection with the offer or acceptance of that offer.

Prohibited Fees to Agency Clients

Under paragraph 8, agencies cannot charge fees to a client of the agency in connection with the client entering into an employment relationship with an assignment employee, except as permitted under s. 74.8(2). The prohibition in para. 8 is similar to that in paragraph 5 except that the agency is prohibited in the latter case from charging the fees to an assignment employee in connection with entering into an employment relationship with a client of an agency.

Because s. 74.8(4) provides that references to assignment employees within s. 74.8 include prospective assignment employees, the prohibition against charging a fee also applies even though no employment relationship exists between the person and the agency at the time the client of the agency and the person (prospective assignment employee) enter into an employment relationship. See the discussion regarding prospective assignment employees in s. 74.8(4).

Prohibited Restrictions with Respect to Assignment Employees

Under paragraph 4, agencies are prohibited from restricting an assignment employee of the agency from entering into an employment relationship with a client of the agency. This provision prevents agencies from incorporating terms into an agreement with an assignment employee that would in any way prevent or restrict their ability to enter into an employment relationship with a client of the agency.

Prohibited Restrictions with Respect to Agency Clients

No restrictions on clients providing references

Pursuant to paragraph 6, agencies are prohibited from imposing any restrictions on a client that would restrict the client’s ability to provide an assignment employee of the agency with a reference. Whether the assignment employee was seeking employment with another client of the agency, another agency or an employer with no connection to the agency, the agency is prohibited from restricting the client’s ability to provide the assignment employee with a reference.

No restrictions on clients entering into employment relationships

Paragraph 7 prevents agencies from incorporating terms into an agreement with a client that would in any way prevent or restrict their ability to enter into an employment relationship with an assignment employee of the agency. It is the converse of the prohibition on restrictions on an assignment employee entering into an employment relationship with a client of an agency as set out in paragraph 4. This prohibition prevents an agency from restricting a client from hiring the agency’s assignment employees, whether or not such employees had ever been assigned to perform work for that client.

In addition, because s. 74.8(4) provides that references to assignment employees within s. 74.8 include prospective assignment employees, the prohibition in paragraph 7 applies to prohibit an agency from attempting to restrict a client from entering into an employment relationship with a prospective assignment employee; that is, where no employment relationship exists as yet between the person and the agency.

Prohibited fees and restrictions as prescribed by regulation

Paragraphs 9 and 10 prohibit fees and restrictions as prescribed by regulation. At the time of writing, no fees or restrictions were prescribed.

Exception, par. 8 of subs. (1) – s. 74.8(2)

74.8(2) Where an assignment employee has been assigned by a temporary help agency to perform work on a temporary basis for a client and the employee has begun to perform the work, the agency may charge a fee to the client in the event that the client enters into an employment relationship with the employee, but only during the six-month period beginning on the day on which the employee first began to perform work for the client of the agency.

Under para. 8 of s. 74.8(1), THAs are prohibited from charging fees to a client in connection with the client entering into an employment relationship with an assignment employee except as permitted under this subsection.

Subsection 74.8(2) states the agency may charge a fee to the client in the event the client enters into an employment relationship with the assignment employee, but only where an assignment employee has been assigned to perform work on a temporary basis for that client by the agency (and the employee has begun to perform the work) and the fee is charged within the six-month period beginning on the first day on which the employee began to perform work for the client.

The Program's position is that under some circumstances, the fact that the fee is paid or collected outside the six-month period does not necessarily mean it is not permitted under s. 74.8(2). The question is, when was the fee charged?

For example, assume a contract clearly states that the client will be charged a particular fee, forthwith, if it hires an assignment employee within the six-month period beginning on the first day on which its assignment employee was assigned and began to perform work for the client. If the client does enter into an employment relationship with an assignment employee within that six-month period the fee may, depending on all the circumstances, be considered to have been charged at that time and may be permitted under s. 74.8(2), whether or not it was actually paid or collected within the six-month period.

If an assignment employee was assigned to perform work for a client and began performing the work on May 1, the agency could subsequently charge the client a fee for hiring that assignment employee directly, but only if the client hired the assignment employee before November 1 and the agency charged its fee within that same six-month period. The length of the original assignment and/or whether there was more than one assignment during that period is not relevant to the agency's ability to charge the fee.

If an assignment employee had never been assigned to perform work for a particular client by the agency and was hired directly by that client, the exception in s. 74.8(2) would have no application and the agency would be prohibited pursuant to para. 8 of s. 74.8(1) from charging a fee to the client.

Note that ESA Part XVIII.1, s. 74.15 provides that if a temporary help agency charges a fee to a client in contravention of paragraph 8 or 9 of s. 74.8(1), the client may recover the amount of the fee in a court of competent jurisdiction.

Same – s. 74.8(3)

74.8(3) For the purposes of subsection (2), the six-month period runs regardless of the duration of the assignment or assignments by the agency of the assignment employee to work for the client and regardless of the amount or timing of work performed by the assignment employee.

The six-month period during which the agency may charge a fee to a client runs from the first day that an assignment employee who is assigned by the agency to perform temporary work for the client begins to perform work for that client. The six-month period runs from that date regardless of the length of the first assignment or any subsequent assignments as well as the amount or timing of any work performed by the assignment employee.

For example, employee B was given an assignment by agency A to perform work on a temporary basis for client C commencing February 1, 2010 and ending December 1, 2010. This was the very first time employee B was ever assigned by agency A to perform work for client C. If B was reassigned to perform work for C in January 2011 and C chose to enter into an employment relationship directly with B in March 2011, A would be prohibited from charging C a fee for doing so. The six-month period during which the agency A was permitted to charge a fee ended six months after B first began to perform work for client C (i.e., the six-month period ended on July 31, 2010).

As another example, agency A assigns employee B to perform temporary work for the very first time with client C on February 1, 2010. The assignment was "part-time" (only 24 hours per week) and ended on February 26. Agency A did not assign B to perform work for client C again. On September 1, 2010, the client entered into an employment relationship directly with B. The agency could not charge C a fee for doing so because the six-month period during which the agency A was permitted to charge a fee ended six months after B first began to perform work for client C (i.e., it ended on July 31, 2010).

Again, the six-month period within which the agency could charge a fee begins on the date the employee is assigned and first begins to perform work for the client of the agency regardless of the duration of the first assignment and whether or not there were any subsequent assignments prior to the client and assignment employee entering into the employment relationship. The hours of work or amount of work associated with the first and any subsequent assignments are not a consideration in the timing of the six-month period.

Same – s. 74.8(4)

74.8(4) In this section, "assignment employee" includes a prospective assignment employee.

Under this subsection, references to assignment employee within s. 74.8 include a prospective assignment employee. As a result, the prohibitions against charging certain fees and prohibitions against imposing restrictions on clients and assignment employees from entering into employment relationships with one another, as well as restrictions that would prevent clients from providing references for assignment employees are also applicable as context or circumstances require, to prospective assignment employees.

Although ESA Part I, s. 1 defines assignment employee as an employee employed by a temporary help agency for the purpose of being assigned to perform work on temporary basis for clients of the agency, the ESA 2000 does not define prospective assignment employee.

It is the Program's position that where an agency may consider, is considering or has considered entering into an employment relationship as defined in ESA Part XVIII.I, s. 74.3 with an individual, that individual will be considered a prospective assignment employee for the purposes of the prohibitions in s. 74.8.

Evidence that would support a determination that an agency may consider, is considering or has considered entering into an employment relationship with an individual could include:

- Inviting an individual to fill out a job application or to leave a resume with the agency
- Reviewing a resume or job application (whether solicited or not) in order to assess the individual's suitability for employment with the agency
- Inviting an individual to attend a job interview
- Making an offer (whether in writing or orally) to enter into an employment relationship with the agency (i.e., for the purposes of assigning or attempting to assign the individual to perform work on a temporary basis for client(s) of the agency.)

As the effect of s. 74.8(4) is to extend the prohibitions in s. 74.8 in relation to prospective assignment employees, fees or restrictions could be charged to or imposed with respect to persons who were neither assignment employees nor prospective assignment employees. As a result, an agency could offer resume writing services or job interview services to persons other than assignment employees or prospective assignment employees and not be in violation of s. 74.8. However, whether an individual is a prospective assignment employee will depend upon whether the evidence shows that the agency intended to enter or considered entering into an employment relationship with the individual at the time the otherwise prohibited fee was charged or restriction imposed.

For example, an individual might seek assistance in preparing a resume from an agency that provides such services both independently and as part of its operation as a temporary help agency. If the individual paid a fee for the assistance received, the fee would not be prohibited if the individual was neither an assignment employee nor a prospective assignment employee. If the parties had not entered into an employment relationship as defined in ESA Part XVIII.1, s. 74.3 at that time, the individual would clearly not be an assignment employee. But, if the evidence showed that the agency's intention was to hold the individual's resume for the purposes of reviewing it and possibly offering an assignment to that individual at a later date, it would be open, depending upon all the other facts before the officer, for that officer to conclude that the individual was a prospective assignment employee at the time the fees had been charged and to issue an order under ESA Part XVIII.1, s. 74.14 to recover the prohibited fees.

Finally, as noted above, s. 74.8(4) will apply to prohibit charging certain fees and imposing certain restrictions with respect to prospective assignment employees in addition to assignment employees, as context or circumstances require. For example, the prohibition in para. 1 of s. 74.8(1) readily applies to prospective assignment employees as it prohibits fees being charged to an individual in connection with becoming an assignment employee. As a result, an agency would be prohibited from charging a fee for submitting an application for employment or a resume, or attending a job interview, regardless of whether or not the individual was ultimately offered or accepted an offer of employment.

On the other hand, the prohibition in paragraph 6 of s. 74.8(1) against restricting a client from providing a reference for an assignment employee of the agency would not under ordinary circumstances apply to

prospective assignment employees. Presumably, in order for the client to be in a position to provide a reference, the individual would have to have been assigned by the agency to perform work for the client. Thus, the individual would have to be an assignment employee of the agency.

ESA Part XVIII.1 Section 74.9 - Void Provisions

Void Provisions - s. 74.9(1)

74.9(1) A provision in an agreement between a temporary help agency and an assignment employee of the agency that is inconsistent with section 74.8 is void.

This section provides that any provision in an agreement between a temporary help agency and an assignment employee that are inconsistent with s. 74.8 (e.g., charges a prohibited fee as per paras. 1,2,3 or 5 of s. 74.8(1) or imposes a prohibited restriction as per para. 4 of s. 74.8(1) is void. Under s. 74.9(4), this provision also applies with respect to agreements between a temporary help agency and a "prospective assignment employee." See the discussion in ESA Part XVIII.1, s. 74.8(4).

Same - s. 74.9(2)

74.9(2) A provision in an agreement between a temporary help agency and a client that is inconsistent with section 74.8 is void.

This section provides that any provision in an agreement between a temporary help agency and client that is inconsistent with s. 74.8 (e.g. charges a prohibited fee as per s. 74.8(1) para. 8 or imposes a prohibited restriction as per s. 74.8(1) paras. 6 or 7) is void.

Transition - s. 74.9(3)

74.9(3) Subsections (1) and (2) apply to provisions regardless of whether the agreement was entered into before or after the date on which section 74.8 comes into force.

Under this provision, terms of agreements between agencies and assignment employees or between agencies and their clients that are inconsistent with s. 74.8 are void, whether the agreement was entered into before the date these amendments to the *Employment Standards Act, 2000* came into force (November 6, 2009) or after that date.

However, where such terms existed in an agreement prior to November 6, 2009 and fees were actually charged and/or restrictions imposed prior to that date; no order could issue under s. 74.14 with respect to those fees and no order could issue under s. 74.16 for losses suffered with respect to those restrictions as neither the fees nor the restrictions were prohibited until November 6, 2009.

Interpretation - s. 74.9(4)

74.9(4) In this section, "assignment employee" includes a prospective assignment employee.

Under this provision, the reference to "assignment employee" in subsection 74.9 includes a prospective assignment employee. As a result, a term in an agreement between an agency and a prospective assignment employee that, for example, required the prospective assignment employee to pay a fee to become an assignment employee of the agency, (e.g. entering into an agreement for the purposes of the agency assigning or attempting to assign the person to perform work for clients or potential clients of the

agency), would be void. Such a term would be void regardless of whether the agreement was entered into before or after November 6, 2009, the date on which s. 74.9 came into force.

See the discussion of the term "prospective assignment employee" in ESA Part XVIII.1, s. 74.8(4).

ESA Part XVIII.1 Section 74.10 - Public Holiday Pay

Public Holiday Pay - s. 74.10(1)

74.10(1) For the purposes of determining entitlement to public holiday pay under subsection 29(2.1), an assignment employee of a temporary help agency is on a layoff on a public holiday if the public holiday falls on a day on which the employee is not assigned by the agency to perform work for a client of the agency.

Subsection 74.10(1) clarifies the application of s. 29(2.1) of the Act as it applies to most assignment employees of temporary help agencies, by providing that a lay-off for the purposes of that section means a day on which the assignment employee is not on an assignment to perform temporary work for a client of the agency. The provisions that clarify what constitutes a layoff for the purposes of determining entitlements to notice of termination/termination pay in lieu of notice and/or severance pay for assignment employees in s. 74.11 are not relevant when determining public holiday entitlements for assignment employees pursuant to s. 29(2.1).

Note that pursuant to s. 74.2, Part XVIII.1 of the Act (which includes s. 74.10(1)) does not apply to those assignment employees who provide professional services, personal support services or homemaking services as defined in the *Long-Term Care Act, 1994,* SO 1994, c 26 (renamed the *Home Care and Community Services Act, 1994* as of July 1, 2010) if the assignment is made under a contract between the employee or his or her employer and a community care access corporation within the meaning of the *Community Care Access Corporations Act, 2001,* SO 2001, c 33. As a result, the application of s. 29(2.1) is not modified in respect of such employees by s. 74.10(1).

The Program's position is that a public holiday will be considered to fall on a day that is ordinarily a working day for an assignment employee only if the employee is on assignment and the holiday falls on a day that he or she would be working pursuant to the assignment (assuming there had been no holiday). In that case only, s. 26, 27 or 28 apply to determine the employee's public holiday entitlements. In all other cases, the employee's public holiday entitlements will be determined under s. 29 and 30.

Because public holiday entitlements can be affected by the timing of a termination of employment, it is important to note that subsection 74.4(3) provides that an assignment employee does not cease to be employed by the temporary help agency when he or she is assigned to perform work for an agency client (i.e., he or she is on assignment with a client) nor is his or her employment considered terminated by the agency merely because the assignment with a client has ended and the agency has not yet given a new assignment. A period of non-assignment will not in itself trigger a termination of the employment relationship, unless the weeks of non-assignment constitute weeks of lay-off under s. 74.11 and those weeks of lay-off go on longer than the period of "temporary lay-off".

This could be relevant to the application of s. 29(2.1) of the Act insofar as assignment employees are concerned. Subsection 29(2.1) provides that where a public holiday falls on a day that would not be a working day for an employee and the employee is on lay-off on that day, the employee is entitled to public holiday pay for that day but has no other entitlement under Part X. For purposes of s. 29(2.1), s. 74.10(1) of the Act provides that where an assignment employee is not on assignment on a day on which a public

holiday falls, the assignment employee is considered to be on lay-off on that day. Note, however, that s. 29(2.2) provides that if an employee's employment has been terminated because of a lay-off lasting longer than a temporary lay-off, s. 29(2.1) does not apply in respect of a public holiday falling on or after the day on which the temporary lay-off period was exceeded. Note also that under s. 74.10(2), the period of a temporary lay-off for an assignment employee must be determined in accordance with s. 56 of the Act as modified by the special rules in s. 74.11.

The fact that an assignment employee's employment is not considered terminated merely because his or her assignment with a client of the temporary help agency employer has ended and the agency has not yet given him or her a new assignment could also be relevant to the application of section 32 of the Act. Section 32 provides that where an employee was entitled to a substitute day off work for a public holiday but his or her employment was terminated before the substitute day was taken, the employee will be entitled to public holiday pay for that day. However, the mere ending of an assignment employee's assignment does not in itself mean that his or her employment has been terminated, even if no new assignment has yet been given. Generally speaking, in that situation the assignment employee will be considered to be on lay-off, and s. 32 will not apply unless the lay-off ends up exceeding the period of a temporary lay-off before the substitute day is taken.

Note that s. 29(2.1) must be read in conjunction with s. 29(2.2). Under s. 29(2.2) if an employee is terminated pursuant to clause 56(1)(c) (by a layoff that exceeds a period of temporary lay-off) and the employee continues to be on a lay-off after that day (e.g. where employment has been terminated but has not yet been severed), s. 29(2.1) does not apply. See ESA Part X, s. 29 for a discussion of s. 29(2.2). Note as well that s. 74.10(2) provides that for the purposes of applying s. 29(2.2) to an assignment employee, the period of temporary lay-off is determined in accordance with s. 56 as modified by s. 74.11. See the discussion of s. 74.11 in ESA Part XVIII.1.

Section 74.10(1) came into force on November 6, 2009. Prior to that date, the Program took the view that an assignment employee who qualified for public holiday entitlements was on a lay-off for the purposes of s. 29(2.1) if the employee was not on assignment and the agency had not made an offer of an assignment that would, if accepted, have resulted in the employee being on assignment when the public holiday fell. If the employee had refused all offers of assignments that would have resulted in the employee being on assignment when the holiday fell or had advised the agency that he or she was not available for assignment in a week in which a holiday fell, he or she was not considered to be on a lay-off for the purposes of s. 29(2.1). This Program policy no longer applies with the coming into force of s. 74.10(1), although it would continue to apply with respect to public holidays that fell prior to November 6, 2009.

Same - s. 74.10(2)

74.10(2) For the purposes of subsection 29 (2.2), the period of a temporary lay-off of an assignment employee by a temporary help agency shall be determined in accordance with section 56 as modified by section 74.11 for the purposes of Part XV.

This provision came into force on November 6, 2009. Under s. 74.10(2), the reference to a period of temporary lay-off within s. 29(2.2) with respect to an assignment employee, is determined in accordance with the modifications made to s. 56 of the Act by s. 74.11. See the discussion of s. 29(2.2) ESA Part X, s. 29. Note however that pursuant to s. 74.2, Part XVIII.1 of the Act, which includes s. 74.10(2), does not apply to those assignment employees who provide professional services, personal support services or homemaking services as defined in the *Long-Term Care Act, 1994* (renamed the *Home Care and Community Services Act, 1994* as of July 1, 2010) if the assignment is made under a contract between

the employee or his or her employer and a community care access corporation within the meaning of the *Community Care Access Corporations Act, 2001*. As a result, the application of s. 29(2.2) is not modified in respect of such employees by s. 74.10(2).

Pursuant to s. 74.11, a period of temporary lay-off for the purposes of s. 56 of the Act is a period of 13 weeks within 20 consecutive weeks or under certain circumstances, 35 weeks within 52 consecutive weeks in which the assignment employee is not assigned to perform work on a temporary basis for a client of the agency. Section 74.11 also modifies "excluded week" (weeks that are not counted as weeks of lay-off but are counted in the 20 and 52 consecutive week periods) to mean a week in which for one or more days, an assignment employee is not able to work, is not available for work, refuses an offer by an agency that would not constitute constructive dismissal of the employee by the agency, is subject to a disciplinary suspension or is not assigned to perform work for a client of the agency because of a strike or lock-out occurring at the agency. See the discussion of s. 74.11 in ESA Part XVIII.1.

ESA Part XVIII.1 Section 74.10.1 – Termination of Assignment (Temporary Help Agency)

Termination of Assignment - s. 74.10.1(1)

74.10.1(1) A temporary help agency shall provide an assignment employee with one week's written notice or pay in lieu of notice if,

(a) the assignment employee is assigned to perform work for a client;

(b) the assignment had an estimated term of three months or more at the time it was offered to the employee; and

(c) the assignment is terminated before the end of its estimated term.

Section 74.10.1(1) requires that a temporary help agency provide one week's written notice of the termination of an assignment to an assignment employee, provided that the assignment employee was assigned to perform work for a client for an estimated duration of three months or more at the time it was offered to the employee, and if the assignment is terminated before the end of the estimated term date. If the temporary help agency elects to pay one week's wages as termination of assignment pay in lieu of the written notice, it must be done in accordance with s. 74.10.1(2). Termination of assignment and termination of employment are distinctly different.

If an assignment employee was provided with notice of termination of assignment and subsequently (i.e., after the notice of termination of assignment has expired or pay in lieu of notice is paid) the employee's employment is terminated, the employee will be entitled to their full notice of termination of employment pursuant to ESA Part XV, s. 57 or s. 58, as modified by ESA Part XVIII.1, s.74.11. Any notice or pay in lieu paid in respect of a notice of termination of assignment cannot be used to offset the obligation to provide notice of termination of employment under s. 57 or s. 58, as modified by s.74.11.

However, when the employment of an assignment employee is terminated at the same time as the assignment with a client is terminated, the notice of termination of assignment can be given concurrently with notice of termination provided under s. 57 or s. 58, as modified by s. 74.11. For example, an employee has been employed for eight months and is on an assignment that is expected to last 5 months. The THA terminates the assignment employee's employment and the assignment will also end. The THA sends a letter to the employee stating both the employee's employment and assignment will

end in one week, i.e. one weeks written notice is provided. It is program policy that this satisfies the minimum notice requirement for both termination of assignment and termination of employment. The THA is not required to add one week of notice for termination of the assignment to the one week notice of termination of employment to provide the employee with two weeks of notice.

An assignment employee that has been employed for eight months, and regularly works Monday to Friday and is on an assignment that is expected to last five months is provided with one weeks written notice of termination of assignment on Monday. Subsequently on Thursday of the same week, the employee is provided with written notice that their employment is terminated with the THA as of Friday. The THA has met the requirement of providing one week written notice of termination of assignment and nothing further is required. The employee was worked two days after being provided with written notice of termination and would be entitled to the remainder of the week's notice as pay in lieu of notice of termination.

Three Conditions for Entitlement

In order for an employee to be entitled to the one week written notice or pay in lieu of notice, all three conditions set out in 74.10.1(1) must be met.

Assigned to Perform Work

(a) the assignment employee is assigned to perform work for a client;

The assignment employee must actually be assigned to perform work for a client. See ESA Part I, s. 1 for a discussion of what is considered to be assigned to perform work.

Term of Three Months or More

(b) the assignment had an estimated term of three months or more at the time it was offered to the employee;

In order to qualify for notice under s. 74.10.1, the estimated term of the assignment at the time the assignment was offered to the employee must be three months or more. There is no requirement that the employee has worked for the client business for three months. The question is simply whether or not the assignment had an estimated term of three months or more at the time it was offered to the employee. Note that there is no obligation to provide an assignment employee with this information if it is not available at the time the offer is made in accordance with ESA Part XVIII.1, s. 74.6(1) para 7. It should be noted that the intent is for the notice to be provided if at the time of the offer of assignment, it was estimated to last a term of three months or more. If a THA offers concurrent 11 week assignments, whether with the same client business or not, the assignment employee is not entitled to notice of termination of assignment. This is because at the time of the offer the assignment was not for longer than three months and therefore no notice is required. If at the time the assignment was offered it was only to last one month, and is extended beyond three months, the employee is not entitled to one weeks written notice. An officer will have to investigate to determine if there is evidence that the offer of assignment was to last longer than three months.

Assignment Terminated Before End of Term

(c) the assignment is terminated before the end of its estimated term.

Lastly, if the employee's assignment with the client is terminated before the estimated end of the term which at the time of the offer of assignment was made was three months or more, the employee will be entitled to one weeks' written notice or pay in lieu of notice as per s. 74.10.1(2).

Pay During Notice Period

There is no equivalent in s. 74.10.1 to ESA Part XV, ss. 60(1) or (2), which set out an employee's entitlements to wages during a week of the notice of termination of employment under ESA Part XV, ss. 57 or 58. In the absence of such provisions, Program policy is that an officer will determine the employee's entitlement to pay during the one week's notice of termination of an assignment provided under s. 74.10.1 based on what the employee would have earned had the assignment not been ended.

If the employee worked through the notice period then the employee is generally entitled to the wages actually earned. However, if an employee alleged that proper notice had not been provided because for example, no work was provided during the week of notice or the hours of work had been unilaterally reduced during the week of notice, the officer would have to determine whether the work arrangements during the week of notice were nonetheless reflective of the actual terms of the assignment. If they were not, the officer could conclude that the employee was not provided with the entitlement to the one week notice required under this section. For example, if the officer found the assignment employee's hours were significantly reduced during the week of notice as compared to the weekly hours regularly worked by the employee, the officer may conclude that the employer failed to provide the notice required under this section and so assess for the difference between what was paid during the notice period and what the employee would otherwise have earned.

A determination as to what the employee would have earned during the notice period will depend on what the work arrangements actually were during the assignment. For example, if the employee had a regular work week and was paid on the basis of time, it would be reasonable to find that the employee's entitlement during the one week notice period was equivalent to a regular week's wages. Evidence as to what the employee's regular wages were or what hours the employee worked in a regular work week might be found within the terms of the assignment or by reviewing the employee's pay statements to see what the employee earned in the weeks preceding the week of notice, if that is different from the terms of assignment.

If the employee did not have a regular work week or was paid on a basis other than time, it would be reasonable in the absence of other evidence (e.g., a schedule showing the specific hours that the employee would have been required to work in the week of notice) to assess the entitlement on the basis of an average of weekly earnings. Factors an officer might consider in determining how to average earnings could include such things as whether there is any kind of repeating cycle with respect to hours of work, whether there has been a recent trend showing a reduction or an increase in hours worked and whether the employee has been absent from work because of illness or vacation. The officer may determine after reviewing all relevant factors that the most reasonable way to determine what the employee would have worked in the notice period is an average of the weeks worked at this assignment, or the last 12 weeks if greater than three months. If the officer has evidence from the employee or client business that the assignment for the week in question was to five days per week, even though the employee normally was assigned work for three days, the employee is entitled to five days pay in lieu of notice. For example, the client business was planning on attending a conference that week and required the assignment employee to answer the phones for five days that week, then the entitlement is five days even though the assignment was only for three days per week.

Amount of Pay in Lieu - s. 74.10.1(2)

74.10.1(2) For the purposes of subsection (1), the amount of the pay in lieu of notice shall be equal to the wages the assignment employee would have been entitled to receive had one week's notice been given in accordance with that subsection.

Subsection 74.10.1(1) permits a temporary help agency to pay termination of assignment pay in lieu of the notice. Subsection 74.10.1(2) provides that the pay in lieu of such notice must be equal to the amount the assignment employee would have received had the one week's notice been given in accordance with s. 74.10.1(1).

Therefore, the Program's policy regarding the calculation of the entitlement to pay during the working notice period where there is an allegation that proper notice has not been provided is also applicable when making the determination regarding the entitlement to pay in lieu when no notice is provided under s. 74.101.1(1). In situations where the assignment employee is working two or more assignments at the same time, and only has one assignment terminated, the termination of assignment pay in lieu of notice will be calculated to reflect only the wages the assignment employee would have earned had they continued with the terminated assignment. The wages the assignment employee earns for the separate assignments which are not terminated are not included in the calculations of termination of assignment pay.

Vacation pay accrues not only on an assignment employee's wages during the one week notice of termination of assignment set out in s. 74.10.1(1) but also on any pay in lieu of notice paid under s. 74.10.1(2). For example, if the assignment employee is entitled to $500 in respect of pay in lieu, the employee would also be entitled to a further amount of $20 or $30 for vacation pay based on the statutory minimum of four per cent or six percent in accordance with ESA Part XI, s. 35.2.

If the assignment employee's contract of employment provides for vacation pay to be calculated at a greater rate, then the vacation pay should be calculated accordingly. Such vacation pay would be due and payable in accordance with ESA Part XI, s. 36 unless the employment relationship with the temporary help agency is terminated at the same time the assignment with the client of the agency is terminated, in which case all outstanding vacation pay would be due in accordance with ESA Part V, s. 11(5).

Exception - s. 74.10.1(3)

74.10.1(3) Subsection (1) does not apply if the temporary help agency offers the assignment employee a work assignment with a client during the notice period that is reasonable in the circumstances and that has an estimated term of one week or more.

Under this subsection, the temporary help agency is not required to provide written notice of termination of assignment or pay in lieu to the assignment employee under s. 74.10.1(1), provided that the temporary help agency offers the assignment employee a work assignment with a client, which is reasonable under the circumstances with an estimated term of 1 week or more during the notice period. At least one week of the work assignment must coincide with the notice period to qualify under this section.

What is reasonable in the circumstances with respect to the offered work assignment will depend on the terms and conditions of the offer versus the assignment that is being terminated. For example, the officer might consider the hours of work, the work schedule, the nature of the work and the rate of pay for the work in deciding whether or not the assignment offered is reasonable.

In the event that the temporary help agency offers the assignment employee another assignment, which is reasonable under the circumstances and is of an estimated term of one week or more during the notice period, and the assignment employee refuses this offer, s. 74.10.1(1) will not apply, and the assignment employee will have no entitlement to notice of termination of assignment, nor to pay in lieu of notice of termination of assignment.

Same - s. 74.10.1(4)

74.10.1(4) Subsection (1) does not apply if,

(a) the assignment employee has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the temporary help agency or the client;

(b) the assignment has become impossible to perform or has been frustrated by a fortuitous or unforeseeable event or circumstance; or

(c) the assignment is terminated during or as a result of a strike or lock-out at the location of the assignment.

This subsection set outs three situations in which a temporary help agency is relieved of the obligation to provide an assignment employee with notice of termination of assignment in accordance with s. 74.10.1(1).

Wilful Misconduct, Disobediuence or Wilful Neglect of Duty

(a) the assignment employee has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the temporary help agency or the client

An assignment employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and that has not been condoned by the temporary help agency or the client is not entitled to notice of termination of assignment or pay in lieu.

The rationale for this exemption is the view that a temporary help agency should not be obliged to provide an assignment employee with either notice of termination of assignment or pay in lieu of notice where that assignment employee was guilty of wilful misconduct, disobedience or neglect of duty.

This exemption will apply only if all of the following criteria are met:

1. The assignment employee's conduct is wilful
2. The assignment employee is guilty of:
    - misconduct, or
    - disobedience, or
    - neglect of duty
3. The assignment employee's conduct is not trivial
4. The assignment employee's conduct has not been condoned by the temporary help agency or the client

As the following discussion demonstrates, this exemption is narrower than the concept of just cause applied in the common law and in collective agreement disputes. In other words, an arbitrator or a judge

may find that there was just cause to dismiss an employee, but this does not necessarily mean that the exemption in s. 74.10.1(4)(a) applies.

This exemption is substantially the same as the exemption in O Reg 288/01, s. 2(1) para. 3, which applies with respect to the notice of termination of employment obligations in the Act.

Impossible to Perform or Frustrated

(b) the assignment has become impossible to perform or has been frustrated by a fortuitous or unforeseeable event or circumstance;

An employee whose assignment has become impossible to perform or is frustrated by a fortuitous or unforeseeable event or circumstance is not entitled to notice of termination of assignment.

The effect of the exemption is to relieve the employer from the obligation to give notice of termination of assignment or pay in lieu of notice where there is a supervening unforeseeable event that strikes at the very root of the assignment that is not the fault of the employer and that is not provided for in the assignment itself.

The rationale for this exemption is the recognition that employers cannot give advance notice of termination of an assignment where the termination is caused by events that the employer cannot reasonably be expected to anticipate or foresee. It is also consistent with the common law view that frustration of a contract brings the contract to an end automatically by operation of law. For example, where frustration of an employment contract occurs, the common law does not regard the employer as having terminated the contract. In determining the applicability of the frustration and impossibility exemption it is important to bear in mind three general principles.

1. The event that allegedly caused the assignment to be frustrated must be something that strikes at the very basis of the assignment; it is not enough that the event has made the assignment a more difficult or expensive proposition for the temporary help agency or the client.
2. The event must not have been caused through fault of the temporary help agency or the client.
3. The assignment must not have addressed the possibility that the event might occur and have provided for its consequences.

The question may arise as to whether an assignment would be frustrated or rendered impossible to perform because the assignment employee has been on a leave under Part XIV. Given that the assignment employee is exercising a statutory right, it is Program policy that the assignment would not be frustrated or rendered impossible to perform in these circumstances.

This exemption is similar the exemption in O Reg 288/01, s. 2(1) para. 4, which applies with respect to the notice of termination of employment obligations in the Act.

Strike or Lock-out

(c) the assignment is terminated during or as a result of a strike or lock-out at the location of the assignment.

An assignment employee whose assignment is terminated as a result of a strike or lock-out at the location of the assignment is not entitled to notice of termination of assignment or pay in lieu.

The rationale for this exemption is that while the possibility that a strike or lock-out at the client business might occur therefore disrupting the client business, this is not a foreseeable event for the temporary help agency.

With respect to lock-outs, the exemption will apply only if the lock-out is a legal one under the *Labour Relations Act, 1995,* SO 1995, c 1, Sch A.

The exemption applies only if the strike or lock-out was at the location of the assignment. The term "location of the assignment" is not defined in the ESA 2000, and it is not necessarily the same as establishment as defined in ESA Part I, s. 1. When a client of a temporary help agency has plants across the province, does a strike at a plant in Thunder Bay, for example, constitute a strike at "location of the assignment" of an assignment employee who works at the client's Mississauga plant? The answer is no. "The location of the assignment" means the actual plant or office of the client where the assignment employee works.

The exemption applies when the employee's assignment is terminated during a strike or lock-out, or as a result of a strike or lock-out. The meaning of "during" a strike or lock-out is self-evident. An assignment employee whose assignment is terminated during a strike or lock-out, for whatever reason, would not be entitled to notice of termination of assignment or pay in lieu. Further, if an assignment employee was given notice of termination of assignment prior to a strike or lock-out but whose assignment was terminated (for example) during a subsequent strike and before the notice period had ended, this exemption would relieve the temporary help agency of any obligation with respect to the balance of the notice period or pay in lieu of notice. There is no requirement that the assignment employee be a member of the striking or lock-out bargaining unit.

More difficult is the concept of "as a result of" a strike or lock-out. It is Program policy that in order to take advantage of the exemption, the temporary help agency must show that the strike had adverse consequences to the client business and therefore necessitated the termination of the assignment. In this regard, see *Hayes Danc Inc. operating as Spicer Reman Centre v 15 Employees* (December 29, 1989), ESC 2609 (Solomatenko), a decision under the former *Employment Standards Act* with respect to notice of termination obligations under the former Act.

Furthermore, if the strike was little more than a catalyst, precipitating a closure that would have likely happened anyway, even without the strike, then a termination of an assignment will not be "as a result of" the strike within the meaning of the exemption. The strike must be the major cause of the termination of assignment in order for the exemption to apply. If the major cause is instead, for example, lower demand, increased competition, or aging equipment and processes, and the strike is merely "the straw that broke the camel's back", then the exemption will not apply. See *Robson Lang Leathers Limited v Legacy et al* (January 19, 1979), ESC 574 (Picher), a decision under the former *Employment Standards Act* with respect to notice of termination of employment obligations under the former Act.

This exemption is substantially the same as the exemption in O Reg 288/01, s. 2(1) para. 8, which applies with respect to the notice of termination of employment obligations in the Act.

ESA Part XVIII.1 Section 74.11 – Termination and Severance

Termination and Severance - s. 74.11

Application of s. 74.11

Section 74.11 modifies the application of certain notice of termination and severance pay provisions in Part XV of the *Employment Standards Act, 2000* insofar as assignment employees of temporary help agencies are concerned. Section 74.11 is in Part XVIII.1 (Temporary Help Agencies), which was added to the ESA 2000 by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009* and came into force on November 6, 2009.

The modifications set out in paragraphs 1 through 14 of s. 74.11 primarily clarify how and when a termination or severance is triggered by a layoff and how termination and severance pay are calculated for assignment employees. As amended by the *Good Government Act, 2009*, s. 74.11 also modifies the circumstances under which mass notice entitlements are triggered for assignment employees. Sections of Part XV not modified by s. 74.11 apply as written to assignment employees and their temporary help agency employers.

It should be noted that transitional provisions regarding the application of s. 74.11 are contained in O Reg 398/09 which is a defined industry regulation for the temporary help agency industry. While most of the regulation is now of historical interest only, it is important to note that the regulation clarifies that nothing in the regulation shall be interpreted to exclude time spent by an assignment employee in the employ of a temporary help agency before November 6, 2009 for the purposes of determining an entitlement under Part XV. This rule applies for purposes of references in the Act or regulations to "period of employment", "continuous employment", "employment whether or not continuous and whether or not active" and "number of years or months of employment".

For a detailed discussion, see O Reg 398/09.

Section 74.11 was amended by the *Good Government Act, 2009* to provide that on or after November 6, 2009, the trigger for mass notice entitlements set out in s. 58(1) of the ESA 2000 no longer applies with respect to assignment employees. Instead, assignment employees are entitled to an equivalent number of weeks of "mass" notice as are provided to non-assignment employees (in accordance with s. 3(1) of O Reg 288/01) if the assignments of 50 or more assignment employees at a single client's establishment ended or were ended and, as a result, the agency terminated the employment of 50 or more such employees within a four-week period.

Note that pursuant to s. 74.2, Part XVIII.1 of the Act does not apply to those assignment employees who provide professional services, personal support services or homemaking services as defined in the *Long - Term Care Act, 1994,* SO 1994, c 26 (renamed the *Home Care and Community Services Act, 1994* as of July 1, 2010) if the assignment is made under a contract between the employee or his or her employer and a community care access corporation within the meaning of the *Community Care Access Corporations Act, 2001,* SO 2001, c 33. As a result, Parts X and XV of the ESA 2000 apply without modification to these employees.

Application of O Reg 288/01 Termination and Severance of Employment

The provisions of O Reg 288/01 (as amended) generally apply to temporary help agencies and assignment employees to whom Part XVIII.1 applies.

One issue with respect to the application of O Reg 288/01 concerns the "term or task" exemption from notice in para. 1 of s. 2(1). That exemption applies to relieve employers from the requirement to provide notice of termination or termination pay to an employee who is "hired on the basis that his or her employment is to terminate on the expiry of a definite term or completion of a specific task".

Generally speaking, the term or task exemption would rarely, if ever, apply to assignment employees because of the nature of the employment relationship between assignment employees and temporary help agencies. That employment relationship is described in s. 74.3 as arising when the parties agree that the employee is hired for the purposes of being assigned to perform work on a temporary basis for clients or prospective clients of the agency. In addition, s. 74.4 clarifies that the end of a work assignment does not in and of itself terminate the employment relationship between the agency and an assignment employee.

In other words, the employment relationship is premised on an agreement that the agency will place or seek to place the assignment employee in assignments and the employment relationship continues between such assignments unless it is otherwise terminated. As a result, even though an assignment (to a client) might be for a specific term or task, generally the employment (with the agency) is not; the ending of the assignment will not in and of itself end the employment relationship or in and of itself attract the application of the term or task exemption in s. 2(1) para. 1 of O Reg 288/01.

That is not to say however, that an agency could not employ an assignment employee on a term or task basis. If, for example, an agency hires an employee for the purposes of placing them in an assignment with a defined term or task and the understanding of the parties is that the employment relationship will terminate at the end of that assignment, and it does, the term or task exemption might be applicable, depending on all the facts, subject to s. 2(2) of the regulation. Again, whether or not an assignment employee is employed on a term or task basis must be determined on the particular facts of each case.

A second issue regarding the application of O Reg 288/01 concerns the exemptions from notice and severance entitlements in para. 5 of s. 2(1) and para. 4 of s. 9(1) of the regulation where the employee is terminated after refusing an offer of reasonable alternative employment with the employer. The question posed is whether in refusing an assignment (e.g. of a type contemplated by the contract of employment between the agency and the assignment employee) would be considered a refusal of an offer of reasonable alternative employment. The Program's position is that an offer of a work assignment to perform work for a client on a temporary basis cannot constitute an offer of "reasonable alternative employment". The Act defines the employment relationship between an assignment employee and temporary help agency by the fact that the agency will assign or attempt to assign the employee to perform work on a temporary basis. As a result, an offer of an assignment is not an offer of alternative employment.

The situation would be different if a temporary help agency were offering an assignment employee employment (for example) as the agency's own permanent full-time front desk receptionist. In that case, the agency would be offering alternative employment (as opposed to an offer of an assignment to perform work for a client of the agency). If the offer of such alternative employment were refused and the agency terminated the employment of the employee, the question would be whether the offer was reasonable for the purposes of applying the exemptions in para. 5 of s. 2(1) and para. 4 of s. 9(1).

A third issue regarding the application of O Reg 288/01 concerns s. 6 of the regulation. That section provides that where an employee has been given notice of termination in accordance with the Act and regulations, the employer may provide temporary employment within the 13-week period following the termination date without affecting the date of termination or the employee's period of employment.

As noted in the preceding discussion, the employment relationship with an assignment employee is defined by the agency hiring an assignment employee for the purpose of assigning or attempting to assign the employee to perform work for clients of the agency. Further, the ending of an assignment does not in and of itself end the employment relationship - see ESA Part 18.1, s. 74.3 and s. 74.4**.**

Unless the employer had given notice of termination to take effect on a specific date, an offer of a new assignment to perform work within 13 weeks after the preceding assignment ended would simply be an offer of a work assignment within the ongoing employment relationship, as opposed to an offer of "temporary work" that delays actual termination (but not the legal termination date) under s. 6 of O Reg 288/01.

Similarly, it is important to distinguish between the end of an assignment and the termination of the employment relationship in applying s. 8(2) of O Reg 288/01. Section 8 operates to tie together periods of employment separated by 13 weeks or less for the purposes of determining entitlements to notice of termination or pay in lieu of notice. Unless the employment relationship is terminated, s. 8(2) has no application. For example, even though an assignment has ended, unless the employment relationship is also terminated when the assignment ends, the employment relationship is ongoing. All time employed (including periods of time between assignments) is included for determining both eligibility and the amount of the notice entitlement. For a more detailed discussion, see O Reg 288/01, s. 8(2).

Section 74.11 para. 1

74.11 For the purposes of the application of Part XV to temporary help agencies and their assignment employees, the following modifications apply:

1. A temporary help agency lays off an assignment employee for a week if the employee is not assigned by the agency to perform work for a client of the agency during the week.

For most employees, s. 56(3.1) defines a week of lay-off as a week, other than an "excluded week", in which the employee earns less than one-half of his regular wages. However, for assignment employees, this definition is displaced by paragraph 1 of s. 74.11. Under paragraph 1, a week of lay-off is a week in which an assignment employee "is not assigned by the agency to perform work for a client of the agency, during the week".

"Assigned by the agency to perform work" refers to being on an assignment to perform work for a client of the agency. Once an employee has commenced an assignment with a client of the agency he or she is considered to be assigned by the agency to perform work (or on assignment) for that client until the assignment ends - see ESA Part 18.1, s. 74.4(2). As a result, despite the fact that an employee may not actually have performed any work for the client in a given week during the course of the assignment, that week would not be considered a "week of lay-off". For example, assume an agency assigned an employee to a 6 month term assignment with one of its clients. Pursuant to the terms of the assignment, the employee regularly worked Monday through Friday each week. However, the client unexpectedly shut down for a few weeks during the course of the six-month assignment. Despite not performing any work for the client in those weeks, the assignment employee is not considered to have been on lay-off during those weeks, as the employee continued to be on assignment during those weeks. This underscores the fact that, in contrast to the situation under subsection 56(3.1), a week of lay-off for an assignment employee is not defined on the basis of the extent to which earnings have been reduced.

This paragraph must be read subject to the definition of "excluded week" in paragraph 2 as well as paragraph 3 which provides that an excluded week is not counted as a week of lay-off but is included in the 20 or 52 week period within which weeks of lay-off are counted for the purposes of determining whether a termination is triggered.

Note that with respect to assignment employees of temporary help agencies, O Reg 398/09 specifies that "weeks of lay-off as well as the periods of 20 or 52 consecutive weeks (within which weeks of lay-off are

counted) are to be counted only from November 6, 2009 forward for the purposes of triggering termination (and severance)."

Section 74.11 para. 2

74.11 For the purposes of the application of Part XV to temporary help agencies and their assignment employees, the following modifications apply:

2. For the purposes of paragraphs 3 and 10, "excluded week" means a week during which, for one or more days, the assignment employee is not able to work, is not available for work, refuses an offer by the agency that would not constitute constructive dismissal of the employee by the agency, is subject to a disciplinary suspension or is not assigned to perform work for a client of the agency because of a strike or lock-out occurring at the agency.

This provision displaces, in the case of assignment employees, the definition of "excluded week" found in s. 56(3) and s. 63(2) of the Act. It defines an excluded week as a week during which for one or more days the employee is not able to work, is not available for work, refuses an offer by the agency that would not constitute constructive dismissal of the employee by the agency, or is subject to disciplinary suspension. It also specifies that an excluded week is a week in which the employee is not assigned to perform work because of a strike or lock-out at the agency as compared to "a strike or lock-out occurring at [the employee's] place of employment or elsewhere". Note: the underlined text highlights differences between the definitions in s. 56(3), s. 63(2) and s. 74.11 para. 2.

The definition of excluded week is relevant for the purposes of paragraph 3 of s. 74.11, which provides that an excluded week is not counted as a week of lay-off but is counted as part of the period of consecutive weeks within which the specified weeks of lay-off must fall in order to trigger a termination under s. 56(1)(c).

These situations are discussed in more detail below:

1. **The employee is not able to work.**

A week in which an assignment employee is unable to work because of illness or injury for one or more days is an excluded week and is not considered to be a week of lay-off even if the employee has not been assigned to perform work during that week.

2. **The employee is not available for work.**

A week in which for one or more days an assignment employee is "not available to work" (say because he or she was taking time off for personal reasons) is an excluded week and is not considered to be a week of lay-off, even if the employee had not been assigned to perform work during that week. "Personal reasons" would include (for example) being on a personal emergency, pregnancy or parental leave.

Availability is a question of fact. In practice, the question of whether an employee is available for work or not would often be answered directly by the employee at the time the agency offers an assignment. In other cases, such as where the employee has not been offered an assignment by the agency in a given week, the question of availability must be answered on the basis of whether the employee could and would have been available for work had the agency offered him or her an assignment. The fact that an employee was working elsewhere during the week does not necessarily mean that he or she is not available to work.

For example, if an assignment employee of temporary help agency A is assigned to perform work for a client of agency B or has taken direct employment with employer C (assuming that the employee has not frustrated his or her contract of employment with agency A by taking such work) those weeks may, depending on the circumstances, still be weeks in which the employee was available for work vis á vis agency A and in that case would be considered weeks of lay-off as far as agency A's notice (and severance pay) obligations are concerned.

3. The employee refuses an offer that would not otherwise constitute a constructive dismissal.

Paragraph 2 of s. 74.11 includes within the definition of "excluded week" a week in which for one or more days, an assignment employee refuses an offer by an agency that would not constitute a constructive dismissal. For example, if the employment contract specified that the agency would offer the assignment employee positions of particular kind or with specific hours or pay, an offer that was substantially different to what was contemplated in the contract and was adverse to the employee could constitute a constructive dismissal. A discussion of general principles that may have application to the determination of whether an offer of an assignment would constitute a constructive dismissal can be found in ESA Part XV, s. 56(1).

In cases where there is a dispute as to the terms of the employment contract, it is necessary to consider both implicit and explicit terms. Implicit terms are often not in writing and may be established by past practice or custom or judicial ruling. Explicit terms and conditions of employment might be the subject of an oral or written employment contract or may be contained in oral or written workplace policies.

For example, an assignment employee has worked for an agency for several years and has been offered and accepted temporary work assignments paying anything between the minimum wage rate and three or four times that rate; in the absence of any evidence to suggest the terms or conditions of employment have changed, an officer could find there is an implicit term that offers of such assignments are acceptable under the contract of employment. As a result, a week in which the employee refused an offer of an assignment paying the minimum wage would be an excluded week and not a week of lay-off.

It should be remembered that the purpose of this paragraph is not to find a constructive dismissal under s. 56(1)(b) (or s. 63(1)(b)), which results in termination (or severance) only if the employee actually resigns, but rather to identify a job offer as one which would constitute a constructive dismissal. The purpose of the section is to identify weeks that are excluded within the meaning of s. 74.11 para. 2, and so determine if and when a termination is or will be triggered by a lay-off under s. 56(1)(c).

4. The employee is subject to disciplinary suspension.

An employee who is on disciplinary suspension is not on a week of lay-off. It is important to ensure, though, that the disciplinary suspension is bona fide and is pursuant to established company rules and procedures or a contract of employment.

5. Because of a strike or lock-out occurring at the agency.

Where an assignment employee is not provided with work during a week by the agency due to a strike or lock-out at the agency, the employee is not on a week of lay-off. Note that in contrast, under s. 56(3) and s. 63(2), the strike or lock-out may occur at the employee's place of employment or elsewhere.

It is the Program's position that in order to characterize a week of lock-out as an excluded week, the lock-out by the employer must be a legal one under the *Labour Relations Act, 1995,* SO 1995, c 1, Sch A. In

those circumstances, the employer's failure to provide work flows from the right to lock out the employees under the *Labour Relations Act, 1995* and the employer should not suffer any adverse consequences for exercising that right.

On the other hand, if the lock-out is illegal, the failure to provide work is not permissible under *Labour Relations Act, 1995*. As a consequence, the Program's position is that a week in which employees are illegally locked out is a week of lay-off. However, a week of strike, whether illegal or legal, will be considered by the Program to be an excluded week (i.e. not a week of lay-off) because the employer does not in those circumstances have any control over whether work is provided.

Section 74.11 para. 3

74.11 For the purposes of the application of Part XV to temporary help agencies and their assignment employees, the following modifications apply:

3. An excluded week shall not be counted as part of the 13 or 35 weeks referred to in subsection 56(2) but shall be counted as part of the 20 or 52 consecutive week periods referred to in subsection 56(2).

Paragraph 3 describes the effect of excluded weeks in counting weeks of lay-off and establishing the period within which those weeks are counted to trigger a termination of employment by lay-off. It effectively displaces ss. 56(3.2), (3.4) and (3.6). An excluded week is not counted as a week of layoff but is included in the period of 20 or 52 consecutive weeks for the purposes of determining whether a period of temporary lay-off as defined in s. 56(2) has been exceeded, thereby triggering a termination under s. 56(1)(c).

As was noted above, because the temporary lay-off rules for assignment employees of temporary help agencies introduce a new regime for such employees effective November 6, 2009, it is program policy that the new regime applies only in respect of lay-offs that occur on or after that date (or, where a lay-off began before that date, only in respect of that portion of the lay-off that began on that date). Similarly, for purposes of the 20-consecutive week period or 52-consecutive week period that one looks to in order to determine whether there have been a sufficient number of weeks of lay-off within that period to trigger a termination, only weeks that begin on or after November 6th, 2009 are taken into account.

Section 74.11 para. 4

74.11 For the purposes of the application of Part XV to temporary help agencies and their assignment employees, the following modifications apply:

4. Subsections 56(3) to (3.6) do not apply to temporary help agencies and their assignment employees.

Paragraph 4 states that s. 56(3) to s. 56(3.6) of Part XV do not apply with respect to assignment employees of temporary help agencies. Those subsections a) define a "week of lay-off" with respect to both employees who have a regular work week and employees who do not have a regular work week, b) define an "excluded week" and c) provide that excluded weeks are not included when counting weeks of lay-off but are included when counting 20 or 52 consecutive weeks for the purposes of determining whether a lay-off exceeds a period of temporary lay-off so as to trigger a termination under s. 56(1)(c). For the purposes of determining entitlements to notice and termination for assignment employees, ss. 56(3) to (3.6) are effectively displaced by paragraphs 1, 2 and 3 of s. 74.11.

Section 74.11 para 4.1

74.11 For the purposes of the application of Part XV to temporary help agencies and their assignment employees, the following modifications apply:

4.2 On and after November 6, 2009, subsection 58(1) does not apply to a temporary help agency in respect of its assignment employees.

With the exception of the changes made by paragraphs 4.1, 4.2, 4.3, and 5 of s. 74.11, the balance of the mass notice provisions in s. 58 of the Act and in s. 3 of O Reg 288/01 otherwise apply as written to temporary help agencies with respect to their assignment employees.

Paragraph 4.1 of s. 74.11 provides that on or after November 6, 2009, s. 58(1) of the ESA 2000 does not apply to a temporary help agency in respect of its assignment employees.

As of that date, an assignment employee's right to mass notice of termination is triggered under the circumstances as set out in paragraph 4.2, which provides that notice entitlements as per paragraph 4.3 must be provided to assignment employees if the assignments of 50 or more assignment employees at a single client's establishment ended or were ended and as a result, the temporary help agency terminated the employment of 50 or more such employee within a four-week period.

Section 74.11 para. 4.2

74.11 For the purposes of the application of Part XV to temporary help agencies and their assignment employees, the following modifications apply:

4.2 On and after November 6, 2009, a temporary help agency shall give notice of termination to its assignment employees in accordance with paragraph 4.3 rather than in accordance with section 57 if,

- **i. 50 or more assignment employees of the agency who were assigned to perform work for the same client of the agency at the same establishment of that client were terminated in the same four-week period, and**
- **ii. the terminations resulted from the term of the assignments ending or from the assignments being ended by the agency or by the client.**

Paragraph 4.2 provides that as of November 6, 2009, an assignment employee would only be entitled to mass notice where he or she was one of 50 or more assignment employees who had been on assignment at a client's establishment and who were terminated within a four-week period by the agency because the assignments of those 50 or more assignment employees ended or were ended by the client or the agency.

Section 74.11 para. 4.3

74.11 For the purposes of the application of Part XV to temporary help agencies and their assignment employees, the following modifications apply:

4.3 In the circumstances described in paragraph 4.2, notice of termination shall be given for the prescribed period, or if no applicable periods are prescribed,

i. at least eight weeks before termination, if the number of assignment employees whose employment is terminated is 50 or more but fewer than 200,

ii. at least 12 weeks before termination, if the number of assignment employees whose employment is terminated is 200 or more but fewer than 500,

iii. at least 16 weeks before termination, if the number of assignment employees whose employment is terminated is 500 or more.

Paragraph 4.3 sets out the mass notice of termination entitlements when 50 or more assignment employees are terminated as per paragraph 4.2 as follows:

- At least 8 weeks' notice if 50 or more but less than 200 are terminated;
- At least 12 weeks' notice if 200 or more but less than 500 are terminated;
- At last 16 weeks if 500 or more are terminated.

Note that the number of weeks of mass notice that assignment employees are entitled to under paragraph 4.3 of s. 74.11 are the same as those to which non-assignment employees are entitled to pursuant to s. 58(1) of the Act and s. 3(1) of O Reg 288/01.

As noted above, O Reg 398/09 provides that as of November 6, 2009, the four-week periods within which terminations are to be counted for the purposes of triggering a mass notice entitlement for assignment employees must either end before November 6, 2009 or begin on or after November 6, 2009. As a result, s. 58(1) of the Act and s. 3(1) of O Reg 288/01 would apply to determine the mass notice entitlements of assignment employees if they were one of at least 50 employees terminated in a four-week period ending before November 6, 2009 (assuming they were not exempt from notice because they were "elect to work" employees). Paragraphs 4.2 and 4.3 of s. 74.11 would apply to determine the mass notice entitlements of assignment employees if they were terminated in a four-week period beginning on or after November 6, 2009.

Section 74.11 para. 5

74.11 For the purposes of the application of Part XV to temporary help agencies and their assignment employees, the following modifications apply:

5. A temporary help agency shall, in addition to meeting the posting requirements set out in clause 58(2)(b) and subsection 58(5), provide the information required to be provided to the Director under clause 58(2)(a) to each employee to whom it is required to give notice in accordance with paragraph 4.3 on the first day of the notice period or as soon after that as is reasonably possible.

Paragraph 5 modifies the requirements to provide certain information to assignment employees when giving notice of a mass termination in accordance with paragraph 4.3.

In addition to the requirements in s. 58(2)(b) and s. 58(5) to post certain information in the workplace, paragraph 5 of s. 74.11 states that the information provided to the Director of Employment Standards under clause 58(2)(a), must also be provided individually to each assignment employee who is entitled to mass notice in accordance with para. 4.3, by the temporary help agency on the first day of the notice period or as soon after that as is reasonably possible.

The information that must be provided to each assignment employee is the prescribed information provided to the Director in a Form 1 (the form approved by the Director).

Note that paragraph 5 does not specify how the information is to be provided; there is no requirement that it be provided in writing.

If the information is not provided on the first day of notice it must be provided as soon after that date as is reasonably possible. A determination of what is reasonable will depend upon all of the facts.

As noted above, all other provisions in Part XV of the Act and O Reg 288/01 related to mass notice will apply to assignment employees without modification. See the discussions regarding mass notice entitlements in the manual at ESA Part XV, s. 58 and O Reg 288/01, s .3.

Section 74.11 para. 6

74.11 For the purposes of the application of Part XV to temporary help agencies and their assignment employees, the following modifications apply:

6. Clauses 60 (1) (a) and (b) and subsection 60 (2) do not apply to temporary help agencies and their assignment employees.

Paragraph 6 states that s. 60(1)(a) and (b) and s. 60(2) of Part XV do not apply to temporary help agencies and their assignment employees. Those provisions prohibit the employer from altering the wage rate during a notice period under s. 57 or s. 58. They also require the employer to pay during each week of notice the wages the employee is entitled to receive (i.e., what is earned during that week) and in no case to pay less than his or her regular wages for a regular work week, and if the employee does not have a regular work week, no less than the average amount of regular wages earned per week in each week of work in the 12 weeks preceding the date notice was given.

Section 74.11 para. 7

74.11 For the purposes of the application of Part XV to temporary help agencies and their assignment employees, the following modifications apply:

7. A temporary help agency that gives notice of termination to an assignment employee in accordance with section 57 or paragraph 4.3 of this section shall, during each week of the notice period, pay the assignment employee the wages he or she is entitled to receive, which in no case shall be less than,

- **i. in the case of any termination other than under clause 56 (1) (c), the total amount of the wages earned by the assignment employee for work performed for clients of the agency during the 12-week period ending on the last day on which the employee performed work for a client of the agency, divided by 12, or**
- **ii. in the case of a termination under clause 56 (1) (c), the total amount of wages earned by the assignment employee for work performed for clients of the agency during the 12-week period immediately preceding the deemed termination date, divided by 12.**

Paragraph 7 sets out the method for calculating entitlements to pay during each week of a notice period with respect to assignment employees of temporary help agencies. It effectively replaces the provisions for calculating pay during the notice period as they are set out in s. 60(1)(a), (b) and s. 60(2). It should be

noted that where notice is not given, the entitlement to pay in lieu of notice (see paragraph 8 below) is based on the amounts to which the employee would be entitled, had notice been given, under paragraph 7.

Calculating Wage Entitlements During Notice Periods

1. **If the termination is triggered under s. 56(1)(a) or (b) (i.e., is not triggered by a lay-off that exceeded a period of temporary lay-off) the agency is required to pay during each week of notice, the greater of:**
    a) **the wages the employee is entitled to receive (i.e., what he or she earned in each week); and**
    b) **the total amount of wages earned in the 12 weeks preceding the last day work was performed for a client of the agency, divided by 12.**

Note that b) refers to all wages earned in the 12 week period including overtime pay, public holiday pay, premium pay and vacation pay. It refers to the wages earned for work performed for all clients of the agency within the 12 week period if there is more than one - not just the last client in that period for whom work was performed.

2. **If the termination is triggered under s. 56(1)(c) (i.e., by a lay-off that exceeded a period of temporary lay-off), the agency is required to pay during each week of notice, the greater of:**
    a) **the wages the employee is entitled to receive (i.e. what he or she earned in each week) and**
    b) **the total amount of wages earned in the 12 weeks preceding the deemed termination date divided by 12.**

Note that b) refers to all wages earned in the 12 week period preceding the deemed termination date, including overtime pay, public holiday pay, premium pay and vacation pay. It refers to the wages earned for work performed for all clients of the agency within the 12 week period if there is more than one - not just the last client in that period for whom work was performed. When a termination is triggered by a layoff that exceeds a period of temporary lay-off pursuant to s. 56(1)(c) the deemed termination date is the first day of the lay-off as per s. 56(5). For the purposes of triggering a termination under s. 56(1)(c), weeks of lay-off are counted in accordance with s. 74.11 paras. 1 through 4.

With respect to the calculation of termination pay during the period of working notice described in ii) above, it should be noted that generally, the ability to provide working notice under the ESA when a termination is triggered by a lay-off that exceeds a period of temporary lay-off, is limited to situations in which an employer who is bound by a collective agreement gives working notice of an indefinite lay-off and the lay-off does in fact exceed a period of temporary lay-off. Such a notice is treated as a notice of termination pursuant to s. 4(2) of O Reg 288/01 - see O Reg 288/01, s. 4(2) for a discussion of this provision. A non-union employer could give notice of termination in anticipation of a future lay-off that it expects will last longer than a period of temporary lay-off, but technically, in that case, the termination is effected by the notice itself, resulting in a termination under clause 56(1)(a) rather than by a lay-off exceeding a period of temporary lay-off.

Section 74.11 para. 8

74.11 For the purposes of the application of Part XV to temporary help agencies and their assignment employees, the following modifications apply:

8. The lump sum that an assignment employee is entitled to be paid under clause 61 (1) (a) is a lump sum equal to the amount the employee would have been entitled to receive under paragraph 7 had notice been given in accordance with section 57 or paragraph 4.3 of this section.

Paragraph 8 sets out how to calculate pay in lieu of notice for an assignment employee. Under paragraph 8, the pay in lieu of notice entitlement for an assignment employee is the lump sum equal to the total amount the employee would have been entitled to receive during a period of working notice as calculated under paragraph 7 above.

Section 74.11 para. 9

74.11 For the purposes of the application of Part XV to temporary help agencies and their assignment employees, the following modifications apply:

9. Subsection 61 (1.1) does not apply to temporary help agencies and their assignment employees.

Paragraph 9 states that s. 61(1.1) which provides a method of calculating pay in lieu of notice for employees who do not have a regular work week does not apply to temporary help agencies and their assignment employees.

Section 74.11 para. 9.1

74.11 For the purposes of the application of Part XV to temporary help agencies and their assignment employees, the following modifications apply:

9.1 For the purposes of the application of clause 63(1)(e) to an assignment employee, the reference to section 58 in that clause shall be read as a reference to paragraph 4.3 of this section.

Paragraph 9.1 provides that reference to s. 58 in s. 63(1)(e) is read as a reference to paragraph 4.3 of s. 74.11 with respect to assignment employees.

Section 63(1)(e) provides that a severance occurs if an employer has provided notice of termination in accordance with s. 57 or s. 58 of the Act and the employee resigns during the statutory notice period by giving the employer two weeks' written notice of the resignation.

As a result of paragraph 9.1, s. 63(1)(e) is read with respect to assignment employees as referring to a notice of termination under s. 57 and mass notice of termination under paragraph 4.3 of s. 74.11 instead of s. 58.

Section 74.11 para. 10

74.11 For the purposes of the application of Part XV to temporary help agencies and their assignment employees, the following modifications apply:

10. An excluded week shall not be counted as part of the 35 weeks referred to in clause 63 (1) (c) but shall be counted as part of the 52 consecutive week period referred to in clause 63 (1) (c).

Paragraph 10 of s. 74.11 describes the effect of excluded weeks for the purposes of determining whether a severance is triggered by a lay-off. Specifically, an excluded week is not counted as a week of lay-off but is included in the period of 52 consecutive weeks for the purposes of determining whether a

severance has been triggered by a lay-off of 35 weeks or more in a period of 52 consecutive weeks as set out in s. 63(1)(c).

Section 74.11 para. 11

74.11 For the purposes of the application of Part XV to temporary help agencies and their assignment employees, the following modifications apply:

11. Subsections 63 (2) to (2.4) do not apply to temporary help agencies and their assignment employees.

Paragraph 11 provides that the provisions in Part XV which define a "week of lay-off", define an "excluded week" and describe the effect of such excluded weeks (ss. 63(2) to 63(2.4)) do not apply in respect of assignment employees. Those provisions of s. 63 are effectively displaced by paragraphs 1, 2 and 10 of s. 74.11.

Note that with respect to assignment employees of temporary help agencies, O. Reg. 398/09 specifies that weeks of lay-off as well as the period of 52 consecutive weeks (within which weeks of lay-off are counted) are to be counted only from November 6, 2009 forward for the purposes of triggering severance.

Section 74.11 para. 1 reads as follows:

A temporary help agency lays off an assignment employee for a week if the employee is not assigned by the agency to perform work for a client of the agency during the week.

Under paragraph 1, a "week of lay-off" for the purposes of the application of Part XV and specifically the application of s. 63(1)(c), is a week in which an assignment employee "is not assigned by the agency to perform work for a client of the agency, during the week". This provision effectively replaces ss. 63(2.1) and (2.3) of Part XV, which specify what a week of lay-off means with respect to an employee who has a regular work week and an employee who does not have a regular work week for severance purposes.

Unlike the Part XV provisions (ss. 63(2.1) and (2.3)) displaced by this paragraph, a week of lay-off is not defined on the basis of a reduction in earnings.

This paragraph must be read subject to the definition of excluded week in paragraph 2 as well as paragraph 10 which provides that an excluded week is not counted as a week of lay-off but is included in the 52 week period within which weeks of lay-off are counted for the purposes of determining whether a severance is triggered. As noted above, it is the Program's position that weeks prior to November 6, 2009 will not be counted for the purposes of triggering a severance by lay-off.

Section 74.11 para. 2 reads as follows:

For the purposes of paragraphs 3 and 10, "excluded week" means a week during which, for one or more days, the assignment employee is not able to work, is not available for work, refuses an offer by the agency that would not constitute constructive dismissal of the employee by the agency, is subject to a disciplinary suspension or is not assigned to perform work for a client of the agency because of a strike or lock-out occurring at the agency.

This provision displaces the definition of "excluded week" found in s. 63(2) of the Act by defining "excluded week" for the purposes of applying the severance provisions in Part XV to assignment employees as a week during which for one or more days the employee is not able to work, is not

available for work, refuses an offer by the agency that would not constitute constructive dismissal of the employee by the agency, or is subject to disciplinary suspension. It also specifies that an excluded week is a week in which the employee is not assigned to perform work because of a strike or lock-out at the agency as compared to "a strike or lock-out occurring at [the employee's] place of employment or elsewhere".

Note: the underlined text highlights differences between the definitions in s. 63(2) and s. 74.11 para. 2.

Section 74.11 para 12

74.11 For the purposes of the application of Part XV to temporary help agencies and their assignment employees, the following modifications apply:

12. Subsections 65(1), (5) and (6) do not apply to temporary help agencies and their assignment employees.

Paragraphs 12, 12.1, 13 and 14 of section 74.11 modify the application of certain provisions in section 65 related to the calculation of severance pay with respect to assignment employees.

Paragraph 12 provides that ss. 65(1), (5) and (6), which set out the method for calculating the severance pay entitlements for employees who have a regular work week and employees who do not have a regular work week as well as establishing the maximum severance pay (26 weeks), do not apply to assignment employees. These provisions are effectively displaced insofar as assignment employees are concerned by paragraphs 13 and 14 of s. 74.11.

Section 74.11 para 12.1

74.11 For the purposes of the application of Part XV to temporary help agencies and their assignment employees, the following modifications apply:

12.1 For the purposes of the application of subsection 65(4) to an assignment employee, the reference to section 58 in that subsection shall be read as a reference to paragraph 4.3 of this section.

Paragraph 12.1 provides that s. 65(4), which specifies severance pay is to be calculated as including the period of time for which notice should have been given under s. 57 or s. 58 but was not, is to be read as referring to the notice that should have been given under s. 57 or paragraph 4.3 of s. 74.11.

Section 74.11 para 13

74.11 For the purposes of the application of Part XV to temporary help agencies and their assignment employees, the following modifications apply:

13. If a temporary help agency severs the employment of an assignment employee under clause 63(1)(a), (b), (d) or (e), severance pay shall be calculated by,

- **i. dividing the total amount of wages earned by the assignment employee for work performed for clients of the agency during the 12-week period ending on the last day on which the employee performed work for a client of the agency by 12, and**
- **ii. multiplying the result obtained under subparagraph i by the lesser of 26 and the sum of,**

A. the number of years of employment the employee has completed, and

B. the number of months of employment not included in sub-sub-paragraph A that the employee has completed, divided by 12.

In accordance with paragraph 13, a qualified assignment employee whose employment is severed other than through a lay-off that exceeds 35 weeks in a period of 52 consecutive weeks is entitled to an amount as calculated under paragraph 13.

Note that clause i refers to all wages earned in the 12-week period ending on the last day that the employee performed work for a client of the agency, including overtime pay, public holiday pay, premium pay and vacation pay. It refers to the wages earned for work performed for all clients of the agency within the 12-week period if there is more than one - not just the last client in that period for whom work was performed.

The total amount of wages earned in the 12-week period is divided by 12 to represent a week's severance pay. That amount is multiplied by the number of weeks of severance pay that the employee is entitled to (to a maximum of 26 weeks). The number of weeks of severance to which the employee is entitled is the number of completed years of employment plus completed months of employment (the latter divided by 12).

Section 74.11 para. 14

74.11 For the purposes of the application of Part XV to temporary help agencies and their assignment employees, the following modifications apply:

14. If a temporary help agency severs the employment of an assignment employee under clause 63(1)(c), severance pay shall be calculated by,

i. dividing the total amount of wages earned by the assignment employee for work performed for clients of the agency during the 12-week period immediately preceding the first day of the lay-off by 12, and

ii. multiplying the result obtained under subparagraph i by the lesser of 26 and the sum of,

A. the number of years of employment the employee has completed, and

B. the number of months of employment not included in sub-sub-paragraph A that the employee has completed, divided by 12.

Paragraph 14 applies to determine severance entitlements when the employment of an assignment employee is severed because of a lay-off that equals or exceeds 35 weeks in a period of 52 consecutive weeks pursuant to s. 63(1)(c).

Note that clause i refers to all wages earned in the 12-week period immediately preceding the first day of the lay-off, including overtime pay, public holiday pay, premium pay and vacation pay. It refers to the wages earned for work performed for all clients of the agency within the 12-week period if there is more than one - not just the last client in that period for whom work was performed.

The total amount of wages earned in the 12-week period is divided by 12 to represent a week's severance pay. That amount is multiplied by the number of weeks of severance pay that the employee is entitled to (to a maximum of 26 weeks). The number of weeks of severance to which the employee is

entitled is the number of completed years of employment plus completed months of employment (the latter divided by 12).

ESA Part XVIII.1 Section 74.11.1 - Transition

74.11.1 A temporary help agency that fails to meet the notice requirements of paragraph 4.3 of section 74.11 during the period beginning on November 6, 2009 and ending on the day before the *Good Government Act, 2009* receives Royal Assent has the obligations that the agency would have had if the failure had occurred on or after the day the *Good Government Act, 2009* receives Royal Assent.

This provision was added by the *Good Government Act, 2009,* SO 2009, c 33. It is a transition provision that allows the new "mass" notice rules in section 74.11 para. 4.3 to apply as if they had been in force on November 6, 2009 (when Part XVIII.1 came into force.)

Section 74.11 para. 4.3 provides that (in the circumstances described in para. 4.2 of s. 74.11) assignment employees are entitled to notice of termination of at least:

- 8 weeks' notice if the employment of 50 or more but less than 200 assignment employees is terminated
- 12 weeks' notice if the employment of 200 or more but less than 500 assignment
- 16 weeks' notice if the employment of 500 or more assignment employees is terminated

Paragraph 4.2 of s. 74.11 provides that the notice requirements in paragraph 4.3 apply if 50 or more assignment employees who were assigned to perform work for the same client of the agency at a single establishment of that client were terminated in the same four-week period and the terminations resulted because the term of the assignments ended or the assignments were ended by the agency or client. Note that paragraph 4.1 of s. 74.11 also provides that s. 58(1) does not apply to assignment employees of temporary help agencies as of November 6, 2009.

See the discussion in ESA Part XVIII.1, s. 74.11 regarding paragraphs 4.2 and 4.3.

ESA Part XVIII.1 Section 74.12 – Reprisal by Client Prohibited

Reprisal by Client Prohibited – s. 74.12(1)

74.12(1) No client of a temporary help agency or person acting on behalf of a client of a temporary help agency shall intimidate an assignment employee, refuse to have an assignment employee perform work for the client, terminate the assignment of an assignment employee, or otherwise penalize an assignment employee or threaten to do so,

(a) because the assignment employee,

i. asks the client or the temporary help agency to comply with their respective obligations under this Act and the regulations,

ii. makes inquiries about his or her rights under this Act,

iii. files a complaint with the Ministry under this Act,

iv. exercises or attempts to exercise a right under this Act,

v. gives information to an employment standards officer,

v.1 makes inquiries about the rate paid to an employee of the client for the purpose of determining or assisting another person in determining whether a temporary help agency complied with section 42.2, as it read immediately before the day section 10 of Schedule 1 to the *Making Ontario Open for Business Act, 2018* came into force,

v.2 discloses the assignment employee's rate of pay to an employee of the client for the purpose of determining or assisting another person in determining whether a temporary help agency complied with section 42.2, as it read immediately before the day section 10 of Schedule 1 to the *Making Ontario Open for Business Act, 2018* came into force,

v.3 discloses the rate paid to an employee of the client to the assignment employee's temporary help agency for the purposes of determining or assisting another person in determining whether a temporary help agency complied with section 42.2, as it read immediately before the day section 10 of Schedule 1 to the *Making Ontario Open for Business Act, 2018* came into force,

vi. testifies or is required to testify or otherwise participates or is going to participate in a proceeding under this Act,

vii. participates in proceedings respecting a by-law or proposed by-law under section 4 of the Retail Business Holidays Act,

viii. is or will become eligible to take a leave, intends to take a leave or takes a leave under Part XIV; or

(b) because the client or temporary help agency is or may be required, because of a court order or garnishment, to pay to a third party an amount owing to the assignment employee.

Application

This anti-reprisal provision was introduced by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009*, and came into force on November 6, 2009. Clauses (v. 1), (v.2) and (v.3) were later added to s. 74.12(1)(a) pursuant to the *Fair Workplaces Better Jobs Act, 2017* effective April 1, 2018 to provide additional protections in the context of section 42.2, which establishes equal pay for equal work on the basis of assignment employee status. Clauses (v.1), (v.2) and (v.3) were subsequently amended pursuant to the *Making Ontario Open for Business Act, 2018* effective January 1, 2019 to reflect the repeal of section 42.2.

Section 74.12 prohibits a client of a temporary help agency from reprising against an assignment employee of the agency on the same grounds as are set out in ESA Part XVIII, s. 74 and also:

1) because the assignment employee asks the client to comply with its obligations under the *Employment Standards Act, 2000* or regulations,

2) because the assignment employee inquires about the rate paid to an employee of the client for the purpose of determining or assisting another person in determining whether a temporary help agency was complying with section 42.2 when it was in force,

3) because the assignment employee discloses their rate of pay to an employee of the client for the purpose of determining or assisting another person in determining whether a temporary help agency was complying with section 42.2 when it was in force,

4) because the assignment employee discloses the rate paid to a client employee to their temporary help agency for the purpose of determining or assisting another person in determining whether a temporary help agency was complying with section 42.2 when it was in force, and

5) because the client is or may be required, because of a court order or garnishment, to pay a third party an amount owing to the assignment employee.

This provision is otherwise virtually identical to ESA Part XVIII, s. 74, which prohibits reprisals by an employee's employer. Note that reprisals by a temporary help agency as an employer of an assignment employee continue to be prohibited under s. 74.

The intention of s. 74.12 is to ensure that assignment employees can pursue their rights under the ESA 2000 and participate in proceedings under the ESA 2000 or s. 4 of the *Retail Business Holidays Act,* RSO 1990, c R.30 free from any reprisal by a client of their temporary help agency employer.

There are no eligibility requirements. Section 74.12 applies to clients of temporary help agencies and any person who falls within the definition of assignment employee in ESA Part I, s. 1(1) and who is not otherwise excluded from the application of Part XVIII.1 by ESA Part XVIII.1, s. 74.2.

Enforcement

A contravention of s. 74.12 may result in an order for compensation and/ or reinstatement into an assignment that is issued under ESA Part XVIII.1, s. 74.17 rather than a compensation and/or reinstatement order issued under ESA Part XXII, s. 104. Note that s. 104 orders can be issued for contraventions of Part XIV, Part XVI, Part XVII and Part XVIII only. In addition to an order under s. 74.17, an employment standards officer may also issue a compliance order to a client under ESA Part XXII, s. 108 and/or a notice of contravention under ESA Part XVII, s. 113.

See the discussion of the enforcement mechanisms of reinstatement and compensation in ESA Part XVIII.1, s. 74.17.

Determining Whether a Reprisal has Occurred - The Four-Step Test

The Program has developed a four-step test in determining whether a reprisal occurs under ESA Part XVIII, s. 74 and this same approach (modified as necessary) is used when applying s. 74.12.

The four-step test in the context of client reprisals is set out below:

1. Is the person alleged to have committed a reprisal against an assignment employee a client of the temporary help agency that employs that assignment employee, or a person acting on behalf of such a client?
2. Did the client or person acting on behalf of the client intimidate an assignment employee, refuse to have an assignment employee perform work for the client, terminate the assignment of an assignment employee, or otherwise penalize an assignment employee or threaten to do so?
3. Did the assignment employee engage in any of the protected activities set out in s. 74.12(1)(a) or s. 74.12(1)(b)?
4. Did the client or person acting on behalf of the client intimidate an assignment employee, refuse to have an assignment employee perform work for the client, terminate the assignment of an

assignment employee, or otherwise penalize an assignment employee or threaten to do so because they engaged in the protected activities referenced in step 3?

If all four questions are answered in the affirmative, a breach of s. 74.12(1) is established. Note that s. 74.12(2) places the burden of proof on the client in the context of an allegation of reprisal subject to ESA Part XXIII, s. 122(4), which provides that where there is a review of a notice of contravention, the onus is on the Director of Employment Standards to establish on a balance of probabilities that the person against whom the notice was issued contravened the provisions of the ESA 2000 as indicated in the notice of contravention.

Each aspect of the test is discussed in more detail below:

Step 1: Is the person a client business or a person acting on their behalf?

Is the person alleged to have committed a reprisal against an assignment employee a client of the temporary help agency that employs that assignment employee, or a person acting on behalf of such a client?

In determining whether a reprisal has occurred, it is necessary to first determine whether the person allegedly reprised against is an assignment employee of a temporary help agency and secondly, whether the person alleged to have committed the reprisal is the client of the temporary help agency or a person acting on behalf of a client of the temporary help agency that employs the assignment employee.

Temporary help agency

A temporary help agency is defined in ESA Part I, s. 1(1). An agency employs "assignment employees" for the purpose of assigning or attempting to assign the employee to perform work for clients of the agency on a temporary basis. Pursuant to ESA Part XVIII.1, s. 74.3, the employment relationship between the agency and the assignment employee is established where the parties agree (whether or not such agreement is in writing) that the agency will assign or attempt to assign the employee to perform work on a temporary basis for clients.

Assignment employee

The definition of assignment employee in ESA Part I, s. 1(1) refers to an employee which is defined in ESA Part I, s. 1 to include a person who was an employee. Accordingly, an individual continues to be protected from a reprisal by a client of the agency for having engaged in a protected activity while they were employed by the agency, even after the individual's employment has terminated.

For a detailed discussion of these protected activities under ESA Part XVIII, s. 74, see the discussion of step three of the four-part reprisal test, which is relevant, with necessary modifications, in applying s. 74.12(1)(a)(i)-(viii) and s. 74.12(1)(b).

Because s. 74.12 applies only to assignment employees (which as per the above discussion includes a person who was an assignment employee), prospective assignment employees are not accorded the anti-reprisal protection of s. 74.12. However, it is important to note that once an individual becomes an assignment employee, a client of the agency may be subject to the prohibitions in s. 74.12 with respect to that assignment employee, even though the assignment employee had not yet commenced an assignment with the client. (For an example of when this might occur, see the discussion under Step 2 below.)

Client

Client is defined in ESA Part I, s. 1(1) as a person or entity having an arrangement with a temporary help agency under which the agency agrees to assign or attempt to assign its assignment employee(s) to perform work for the person or entity on a temporary basis. As a result, a client is prohibited from reprising against an assignment employee in s. 74.12 whether or not the assignment employee had been placed with the client. For an example of when this might occur, see the discussion under Step 2 below.

A client is also bound by the actions of those persons who act on its behalf. The phrase "acting on behalf of such a client" is not a defined term. It is Program policy that the phrase be interpreted broadly, in the same way the phrase "on behalf of the employer" is interpreted broadly for the purposes of ESA Part XVIII, s. 74. As person acting on behalf of a client may therefore include:

- An officer or manager of the client;
- A person who is part of the directing mind of the client: for example, a controlling shareholder;
- An employee of the client, if the employee's conduct was authorized, adopted or condoned by the client;
- A person, who although not an officer, manager, director or employee of the client, is someone whom the client has allowed to speak for the client or carry out actions on the client's behalf. Without restricting the generality of the foregoing, this could, depending upon the particular circumstances, include the spouse of the client or the spouse of an officer, manager or director of the client, an independent contractor with whom the client is in business relationship, and a consultant retained by the client.

See the discussion in ESA Part I, s. 1 regarding the terms "temporary help agency", "assignment employee" and "client" referenced above and ESA Part XVIII.1, s. 74.3 regarding the employment relationship between an assignment employee and a temporary help agency.

Step 2: Did the client or person acting on their behalf reprise against the assignment employee?

Did the client or person acting on behalf of the client intimidate an assignment employee, refuse to have an assignment employee perform work for the client, terminate the assignment of an assignment employee, or otherwise penalize an assignment employee or threaten to do so?

The second step of the test requires a determination that there has been a reprisal. Section 74.12(1) is similar to the prohibition against reprisals in ESA Part XVIII, s. 74(1). However, what may constitute a reprisal under s. 74.12(1) includes terminating the assignment of an assignment employee and /or refusing to have an assignment employee perform work for the client rather than dismissing an employee. This change reflects the fact that assignment employees are employed by the agency rather than the client, and as a result, the client is not in a position to reprise against an assignment employee through a dismissal.

There are potentially a number of ways in which a client could reprise against an assignment employee by terminating the assignment of an assignment employee or refusing to have an assignment employee perform work for the client. They would include:

- Prematurely ending an assignment;

- Refusing to allow the assignment employee to commence an assignment (despite a contract with the agency for the placement); or
- Refusing to consider the assignment employee for a placement.

Examples of Reprisals:

An assignment employee was on a four-month assignment with a client and two weeks into the assignment, asked the client whether they have a right to meal breaks. Annoyed by the inquiry, the client decided to end the assignment and asked the temporary help agency to find them a replacement for the balance of the four-month assignment.

An agency and client entered into an arrangement for a six-month assignment. The assignment employee who was the subject of the arrangement happened to be seven months' pregnant at the time. When the assignment employee arrived at the client's office, the client advised her she would not be suitable for the job because it appeared she would have to stop working to take a leave when the baby was born. She was told to go back to the agency and the client cancelled the contract with the agency.

A client of a temporary help agency was seeking an assignment employee for a one-year assignment. The client interviewed several assignment employees for the placement and ultimately advised the agency that they had identified one individual as a tentative candidate for the position. However, the client asked the agency to first obtain an agreement from the assignment employee to work on all public holidays falling in the one-year assignment, before offering the assignment to the employee. The agency informed the client that the assignment employee in question refused to sign such an agreement. The client responded by telling the agency they were no longer interested in that particular assignment employee and asked the agency to ensure that any other employees sent for an interview had already signed such an agreement.

For a discussion of what actions may constitute a reprisal under ESA Part XVIII, s. 74(1), see the discussion of step two of the four-step test. That discussion is relevant, with necessary modifications, in applying s. 74.12.

Step 3: Did the assignment employee engaged in any of the protected activities?

Did the assignment employee engage in any of the protected activities set out in s. 74.12(1)(a) or s. 74.12(1)(b)?

Under s. 74.12(1)(a), a client of a temporary help agency is prohibited from reprising against an assignment employee because the assignment employee engages in any of the activities listed in clauses (i) to (viii) and s. 74.1(1)(b).

These listed activities are identical to those in s. 74(1)(a) with the exception of five clauses.

s. 74(1)(a)(i) versus s. 74.12(1)(a)(i)

Per s. 74(1)(a)(i) the employer is prohibited from reprising against an employee because the employee asks the employer to comply with the ESA 2000 and the regulations. Pursuant to s. 74.12(1)(a)(i), a client is prohibited from reprising against an assignment employee because the assignment employee asks the

client or the temporary help agency to comply with their respective obligations under the ESA 2000 and the regulations.

In other words, a client will contravene this section not only if it reprises against the assignment employee for asking the client itself to comply with the ESA 2000 and regulations, but also for reprising against the assignment employee for asking the temporary help agency to comply with its obligations under the ESA 2000 and regulations.

s. 74(1)(a)(v.1) versus s. 74.12(a)(v.1)

Per s. 74(1)(a)(v.1), the *employer* is prohibited from reprising against an employee because the employee makes inquires about the rate paid to another employee for the purpose of determining or assisting another person in determining whether an employer is complying with Part XII (Equal Pay for Equal Work).

Pursuant to s. 74.12(1)(a)(v.1), a *client* is prohibited from reprising against an assignment employee because the assignment employee makes inquires about the rate paid to an employee of the client for the purpose of determining or assisting another person in determining whether a temporary help agency complied with section 42.2 when it was in force. This protection applies to inquiries made to the client, the client's employees, or to anyone else.

Section 42.2, which provided equal pay for equal work on the basis of assignment employment status, was repealed effective January 1, 2019. Accordingly, the question might arise as to what reprisal protection exists in relation to this repealed provision.

Section 74.12(1)(a)(v.1) provides protection against reprisal where an employee made inquiries about the rate that was paid to an employee of the client both during the timeframe that s. 42.2 was in effect (from April 1, 2018 to December 31, 2018) and after its repeal where the purpose of the inquiries is to determine, or to assist another person in determining, whether an employer was in compliance with section 42.2.

In other words, the specified inquiries are protected regardless of when they occurred, as long as they relate to a rate that was paid when s. 42.2 was in force (from April 1, 2018 to December 31, 2018).

s. 74(1)(a)(v.2) versus 74.12(1)(a)(v.2)

Per s. 74(1)(a)(v.2) the *employer* is prohibited from reprising against an employee because the employee discloses their rate of pay to another employee for the purpose of determining or assisting another person in determining whether an employer is complying with Part XII (Equal Pay for Equal Work).

Pursuant to s. 74.12(1)(a)(v.2), a *client* is prohibited from reprising against an assignment employee because the assignment employee discloses their rate of pay to an employee of the client for the purpose of determining or assisting another person in determining whether a temporary help agency complied with section 42.2 when it was in force.

Section 42.2, which provided equal pay for equal work on the basis of assignment employment status, was repealed effective January 1, 2019. Accordingly, the question might arise as to what reprisal protection exists in relation to this repealed provision.

Section 74.12(1)(a)(v.2) provides protection against reprisal where an assignment employee discloses their rate of pay to an employee of the client both during the timeframe that s. 42.2 was in effect (from

April 1, 2018 to December 31, 2018) and after its repeal where the purpose of the disclosure is to determine, or to assist another person in determining, whether an employer was in compliance with section 42.2.

In other words, the specified disclosure is protected regardless of when it occurred, as long as it relates to a rate that was paid when s. 42.2 was in force (from April 1, 2018 to December 31, 2018).

s. 74.12(1)(a)(v.3)

This clause applies only to assignment employees. There is therefore no equivalent provision in s. 74(1). This provision prohibits a client from reprising against an assignment employee where the assignment employee discloses the rate paid to a client employee to their temporary help agency employer for the purposes of determining, or assisting another person in determining, whether a temporary help agency complied with section 42.2 when it was in force.

Section 42.2, which provided equal pay for equal work on the basis of assignment employment status, was repealed effective January 1, 2019. Accordingly, the question might arise as to what reprisal protection exists in relation to this repealed provision.

Section 74.12(1)(a)(v.3) provides protection against reprisal where an assignment employee discloses to their temporary help agency employer the rate paid to a client employee both during the timeframe that s. 42.2 was in effect (from April 1, 2018 to December 31, 2018) and after its repeal where the purpose of the disclosure is to determine, or to assist another person in determining, whether an employer was in compliance with section 42.2.

In other words, the specified disclosure is protected regardless of when it occurred, as long as it relates to a rate that was paid when s. 42.2 was in force (from April 1, 2018 to December 31, 2018).

s. 74(1)(b) versus 74.12(1)(b)

Under s. 74.12(1)(b), a client of a temporary help agency is prohibited from reprising against an assignment employee not because of any activity engaged in by the employee but because the client or temporary help agency is or may be subject to a court order or garnishment that would require the client or agency to pay monies owed to the assignment employee by either the client or agency, to a third party. This prohibited ground is virtually identical to s. 74(1)(b) except that ESA Part XVIII, s. 74 refers to an employer who is required to pay a third party an amount owing by the employer to the employee.

Specifically, the prohibition in s. 74.12(1)(b) is distinguished from the prohibition in s. 74(1)(b) by the fact that the prohibition is against the client (rather than the employer) reprising against an assignment employee because either the employer (i.e. the temporary help agency) OR the client is required by a court order or garnishment to pay an amount that either the temporary help agency or the client owes to the assignment employee.

For a detailed discussion of the prohibited grounds under ESA Part XVIII, s. 74, see the discussion of step three of the four-step test. That discussion is relevant, with necessary modifications, in applying s. 74.12(1)(a) and (b).

Step 4: Did the reprisal occur because the employee engaged in a protected activity?

Did the client or person acting on behalf of the client intimidate an assignment employee, refuse to have an assignment employee perform work for the client, terminate the assignment of an assignment employee, or otherwise penalize an assignment employee or threaten to do so because they engaged in the protected activities reference in step 3?

Sections 74.12(1)(a) and 74.12(1)(b) prohibit clients of temporary help agencies and persons acting on behalf of them from intimidating an assignment employee, refusing to have an assignment employee perform work for the client, terminating the assignment of an assignment employee, or otherwise penalizing an assignment employee or threatening to do so because the assignment employee engaged in the activities listed in s. 74.12(1)(a) or because monies owing to the assignment employee by the client or the temporary help agency were subject to garnishment or court order as per s. 74.12(1)(b). A contravention is established even if the client was motivated only in part to intimidate an assignment employee, refuse to have the assignment employee perform work for the client etc. because the assignment employee engaged in or more of the protected activities listed in s. 74.12(1)(a) or s. 74.12(1)(b).

The use of the word "because" necessitates a consideration of the client's motivation in taking the action it has taken. For a detailed discussion regarding motivation in establishing a contravention of ESA Part XVIII, s. 74, see the discussion of step four of the four-step test. That discussion is relevant, with necessary modifications, in applying s. 74.12(1)(a) and (b).

Onus of Proof – s. 74.12(2)

74.12(2) Subject to subsection 122 (4), in any proceeding under this Act, the burden of proof that a client did not contravene a provision set out in this section lies upon the client.

Section 74.12(2) places the burden of proof upon a client to show that the client did not contravene the anti-reprisal provisions in s. 74.12(1).

This provision is virtually identical to s. 74(2), which places the burden of proof upon an employer to show that the employer did not contravene the anti-reprisal provisions in s. 74(1).

Note however that ESA Part XXIII, s. 122(4) provides that where there is a review of a notice of contravention, the onus is on the Director of Employment Standards to prove, on a balance of probabilities, that the person against whom the notice of contravention was issued contravened the provisions of the ESA 2000 indicated in the notice. For a detailed discussion of this onus, see ESA Part XVIII, s. 74(2).

ESA Part XVIII.1 Section 74.12.1 - Steps Required Before Complaint Assigned – REPEALED

ESA Part XVIII.1 Section 74.13 - Meeting under s. 102

Meeting Under s. 102 - s. 74.13(1)

74.13(1) For the purposes of the application of section 102 in respect of this Part, the following modifications apply:

1. In addition to the circumstances set out in subsection 102(1), the following are circumstances in which an employment standards officer may require persons to attend a meeting under that subsection:

i. **The officer is investigating a complaint against a client.**

ii. **The officer, while inspecting a place under section 91 or 92, comes to have reasonable grounds to believe that a client has contravened this Act or the regulations with respect to an assignment employee.**

iii. **The officer acquires information that suggests to him or her the possibility that a client may have contravened this Act or the regulations with respect to an assignment employee or prospective assignment employee.**

iv. **The officer wishes to determine whether a client, in whose residence an assignment employee or prospective assignment employee resides, is complying with the Act.**

2. In addition to the persons referred to in subsection 102(2), the following persons may be required to attend the meeting:

i. **The client.**

ii. **If the client is a corporation, a director or employee of the corporation.**

iii. **An assignment employee or prospective assignment employee.**

3. If a person who was served with a notice under section 102 and who failed to comply with the notice is a client, a reference to an employer in paragraphs 1 and 2 of subsection 102 (10) is a reference to the client.

4. If a person who was served with a notice under section 102 and who failed to comply with the notice is an assignment employee or prospective assignment employee, a reference to an employee in paragraphs 1 and 2 of subsection 102 (10) is a reference to an assignment employee or prospective assignment employee, as the case requires.

Section 74.13 provides that where section 102 is applied with respect to Part XVIII.1 of the Act, certain modifications to that section apply. Please see ESA Part XXII, s. 102 for a detailed discussion of s. 102.

Section 74.13(1) was amended by the *Open for Business Act, 2010,* SO 2010, c 16, effective November 29, 2010 to set out additional circumstances in which employment standards officers are permitted to require s. 102 meetings in the context of Part XVIII.1 and to reflect the addition of a new subsection (10) to s. 102. Under that section, if one party fails to attend a s. 102 meeting, an officer may make a decision on the basis of:

- Any evidence or submissions provided by that party before the meeting;
- Any evidence or submissions provided by the other party before or during the meeting; and
- Any other factors the officer considers relevant.

Paragraph 1 of s. 74.13(1) gives an employment standards officer the authority to require certain persons to attend a s. 102 meeting where:

1. The officer is investigating a complaint against a client of a temporary help agency;
2. The officer conducts an inspection under s. 91 or 92 and comes to have reasonable grounds to believe that a client has contravened the legislation with respect to an assignment employee;
3. The officer acquires information that suggests the possibility of a contravention of the Act or regulations in relation to an assignment employee or prospective assignment employee; or
4. An officer wishes to confirm that a client is complying with the Act with respect to an assignment employee or prospective assignment employee who lives in the client's home.

Pursuant to paragraph 2 of s. 74.13(1), an officer may require any of the following persons to attend a s. 102 meeting:

- The client;
- A director or employee of a client where the client is a corporation; and
- An assignment employee or prospective assignment employee.

Paragraph 3 of s. 74.13(1) provides that the references to an employer in paragraph 1 of s. 102(10) will be read as references to a client of a temporary help agency. As a result, if a client who was served with a notice to attend a s. 102 meeting or to bring records or other documents to the meeting fails to comply with that notice, the officer may make a determination without entertaining any further evidence or submissions from the client.

Similarly, paragraph 4 of s. 74.13(1) provides that references to an employee in paragraph 2 of s. 102(10) will be read as references to a temporary help agency assignment employee or prospective assignment employee. As a result, if an assignment employee or prospective assignment employee who was served with a notice to attend as. 102 meeting or to bring records or other documents to the meeting fails to comply with that notice, the officer may make a determination without entertaining any further evidence or submissions from the assignment employee or prospective assignment employee.

Note that an employment standards officer is not required to hold meetings under section 102; other methods of investigation or inspection may be used.

Interpretation, Corporation - s. 74.13(2)

s. 74.13(2) For the purposes of paragraph 3 of subsection (1), if a client is a corporation, a reference to the client includes a director or employee who was served with a notice requiring him or her to attend the meeting or to bring or make available any records or other documents.

Subsection 74.13 (2) provides that if a client of a temporary help agency is a corporation, the reference in paragraph 3 of s. 74.13(1) will include a director or employee of the corporation who was served with a notice to attend a s. 102 meeting or bring or make available records or other documents to such a meeting.

As a result, if an employee or director of a corporate client was served with a notice to attend a s. 102 meeting or to bring records or other documents to such a meeting and fails to comply with that notice, the officer may make a determination without entertaining any further evidence or submissions from the client.

ESA Part XVIII.1 Section 74.13.1 - Time for Response

Time for Response - s. 74.13.1(1)

74.13.1(1) For the purposes of the application of section 102.1 in respect of this Part, the following modifications apply:

1. In addition to the circumstances set out in subsection 102.1 (1), the following are circumstances in which an employment standards officer may, after giving written notice, require persons to provide evidence or submissions to the officer within the period of time that he or she specifies in the notice:

- **i. The officer is investigating a complaint against a client.**
- **ii. The officer, while inspecting a place under section 91 or 92, comes to have reasonable grounds to believe that a client has contravened this Act or the regulations with respect to an assignment employee or prospective assignment employee.**
- **iii. The officer acquires information that suggests to him or her the possibility that a client may have contravened this Act or the regulations with respect to an assignment employee or prospective assignment employee.**
- **iv. The officer wishes to determine whether a client in whose residence an assignment employee or prospective assignment employee resides is complying with this Act.**

2. If a person who was served with a notice under section 102.1 and who failed to comply with the notice is a client, a reference to an employer in paragraphs 1 and 2 of subsection 102.1 (1) is a reference to a client.

3. If a person who was served with a notice under section 102.1 and who failed to comply with the notice is an assignment employee or prospective assignment employee, a reference to an employee in paragraphs 1 and 2 of subsection 102.1 (3) is a reference to an assignment employee or prospective assignment employee as the case requires.

This section was added to specify modifications required for the application of s. 102.1 (added by the *Open for Business Act, 2010* effective November 29, 2010) to temporary help agencies, their assignment employees and agency clients. Section 102.1 allows an employment standards officer to give notice that a party must provide evidence or submissions within a specified time period. Under that section, if one party fails to comply with the notice to provide evidence or submissions, an officer may make a decision on the basis of:

- Any evidence or submissions provided by that party before the notice was served;
- Any evidence or submissions provided by the other party before or in response to and within the time specified in the notice; and
- Any other factors the officers considers relevant.

Paragraph 1 of s. 74.13.1(1) sets out circumstances (in addition to those listed in s. 102.1) in which an employment standards officer may give notice to certain persons to provide evidence or submissions, as follows:

1. The officer is investigating a complaint against a client of a temporary help agency;

2. The officer is conducting an inspection under section 91 or 92 and comes to have reasonable grounds to believe that a client has contravened the legislation with respect to an assignment employee;
3. The officer acquires information that suggests the possibility of a contravention of the Act or regulations by a client in relation to an assignment employee or prospective assignment employee; or
4. The officer wishes to confirm that a client is complying with the Act with respect to an assignment employee or a prospective assignment employee who lives in the client's home.

Paragraphs 2 and 3 of s. 74.13.1(1) provide that where a temporary help agency client or assignment employee fails to comply with a s. 102.1 notice, the references to an employer or an employee in s. 102.1 are to be read as references to, respectively, a client and an assignment employee.

As a result, if a client who was served with a notice to provide evidence or submissions within a specified time period fails to comply with that notice, the officer may make a determination without entertaining any further evidence or submissions from the client.

Similarly, if an assignment employee who was served with a notice to provide evidence or submissions within a specified time period fails to comply with that notice, the officer may make a determination without entertaining any further evidence or submissions from the assignment employee.

Interpretation, Corporation - s. 74.13.1(2)

s. 74.13.1(2) For the purposes of subsection (1), if a client is a corporation, a reference to the client or person includes a director or employee who was served with a notice requiring him or her to attend the meeting or to bring or make available any records or other documents.

Section 74.13.1(2) is a new subsection added by the *Open for Business Act, 2010*, effective November 29, 2010.

This subsection provides that if a temporary help agency's client, as referred to in paragraph 2 of s. 74.13.1(1) is a corporation, the term "client" includes a director or employee of the corporation who was served with a notice under subsection (1).

As a result, if an employee or director of a corporate client was served with a notice to provide evidence or submissions pursuant to s. 102.1 and fails to comply with that notice, the officer may make a determination without entertaining any further evidence or submissions from the client.

ESA Part XVIII.1 Section 74.14 - Order to Recover Fees

Order to Recover Fees - s. 74.14(1)

74.14(1) If an employment standards officer finds that a temporary help agency charged a fee to an assignment employee or prospective assignment employee in contravention of paragraph 1, 2, 3, 5 or 9 of subsection 74.8 (1), the officer may,

(a) arrange with the agency that it repay the amount of the fee directly to the assignment employee or prospective assignment employee;

(a.1) order the agency to repay the amount of the fee to the assignment employee or prospective assignment employee; or

(b) order the agency to pay the amount of the fee to the Director in trust.

Section 74.14 applies where it is found that temporary help agency has charged a fee to an assignment employee or a prospective assignment employee in contravention of ESA Part XVIII.1, s. 74.8, paragraphs 1, 2, 3, 5 or 9.

Section 74.14(1)(a) states that where the officer finds a prohibited fee has been charged, the officer may arrange with the temporary help agency that it repay the amount of the fee to the assignment employee or prospective assignment employee directly, without an order being issued.

Section 74.14(1)(a.1) states that where an officer finds a prohibited fee has been charged, the officer may issue an order requiring the temporary help agency to repay the amount of the fee directly to the assignment employee or prospective assignment employee. Note that an order to repay fees issued under clause (a.1) does not include administrative costs. See s. 74.14(2) below.

Section 74.14(1)(b) states that where the officer finds that a prohibited fee has been charged, the officer may issue an order to the agency requiring the amount of the fee be paid to the Director of Employment Standards in trust. Note that an order to pay fees issued under clause (b) will include administrative costs. See subsection 74.14(2) below.

Assignment employees and prospective assignment employees seeking to recover fees are subject to the two-year limitation period for filing a complaint established under ESA Part XXII, s. 96(3). Subsection 96(3) provides that a complaint filed more than two years after the contravention has occurred will be deemed not to have been filed - see ESA Part XXII, s. 96. Note that an order issued under s. 74.14(1)(a.1) or s. 74.14(1)(b) is not subject to the limitation on recovery of wages imposed by s. 111 since an order to recover fees does not relate to wages. Finally, it should be noted that in addition to issuing an order to recover fees under either paragraphs (a.1) or (b) of s. 74.14(1), an officer could also issue a compliance order under ESA Part XXII, s. 108 and a notice of contravention under ESA Part XXII, s. 113 where there was a violation of s. 74.8(1) paragraphs 1, 2, 3, 5 or 9 as they may be issued in respect of any violation of the Act. See ESA Part XXII for a discussion of compliance orders and notices of contravention.

Administrative Costs - s. 74.14(2)

74.14(2) An order issued under clause (1) (b) shall also require the temporary help agency to pay to the Director in trust an amount for administrative costs equal to the greater of $100 and 10 per cent of the amount owing.

Section 74.14(2) provides that the order issued under s. 74.14(1)(b) shall, in addition to the amount of the fees owing, also contain an amount for administrative costs equal to 10 per cent of the amount owing or $100, whichever is greater. Note that there is no provision for the payment of administrative costs on an order issued under s. 74.14(a.1).

Both the fees and the administrative costs must be paid to the Director in trust. For example, if the amount of the fees to be repaid is $600, the administrative costs added to the order would be $100. If the amount of the fees owing is $2,000, the administrative costs added to the order would be $200.

There is no cap on the amount of administrative cost that may be imposed.

Administrative costs are not intended to be a penalty and the Program does not use them as such.

Contents of Order - s. 74.14(3)

74.14(3) The order shall state the paragraph of subsection 74.8 (1) that was contravened and the amount to be paid.

Subsection 74.14(3) provides that an order whether issued under s. 74.14(1)(a.1) or s. 74.14(1)(b) must state the paragraph of ESA Part XVIII.1, s. 74.8(1) that led to the order and the amount to be paid by the agency. Only a contravention of, s. 74.8(1) paras 1, 2, 3, 5 or 9 may lead to an order under this section.

The fact that a temporary help agency against whom an order has been issued had previous knowledge of the paragraph of s. 74.8(1) that was contravened and/or the amount owing does not relieve the officer of the requirement to set out this information in the order to recover fees.

Application of s. 103 (3) and (6) to (9) - s. 74.14(4)

74.14(4) Subsections 103 (3) and (6) to (9) apply with respect to an order issued under this section with necessary modifications and for the purpose, without limiting the generality of the foregoing, a reference to an employee is a reference to an assignment employee or prospective assignment employee.

Subsection 74.14(4) establishes that ESA Part XXII, ss. 103(3) and (6) to (9) apply, with necessary modifications, to orders to recover fees. In the context of an order to recover fees, any reference to an employee within those subsections of s. 103 is also a reference to an assignment employee or a prospective assignment employee as follows:

1. Section 103(3): A single order may be issued with respect to fee repayment for more than one assignment employee or prospective assignment employee.
2. Section 103(6): The order must be served on the temporary help agency in accordance with s. 95.
3. Section 103(7): A letter advising of the issuance of an order must be served in accordance with s. 95 on any assignment employee or prospective assignment employee named in the order.
4. Section 103(8): The temporary help agency against whom an order is issued must comply with its terms.
5. Section 103(9): Where the temporary help agency fails to apply for a review of the order within the time period for applying for such a review, the order becomes final and binding.

Application of s. 105 - s. 74.14(5)

74.14(5) Section 105 applies with respect to repayment of fees by a temporary help agency to an assignment employee or prospective assignment employee with necessary modifications, including but not limited to the following:

1. The reference to clause 103 (1) (a) in subsection 105 (1) is a reference to clause (1) (a) of this section.

2. A reference to an employee is a reference to an assignment employee or prospective assignment employee to whom a fee is to be paid.

Section 74.14(5) indicates that ESA Part XXII, s. 105 applies, with necessary modifications, to the repayment of fees to an assignment employee or a prospective assignment employee. Two of the modifications that apply are set out in paragraphs 1 and 2 above.

Section 105 states:

105(1) If an employment standards officer has arranged with an employer or ordered an employer to pay wages under clause 103(1)(a) or (a.1) to the employee and the employer is unable to locate the employee despite having made reasonable efforts to do so, the employer shall pay the wages to the Director in trust.

105(2) If an employment standards officer has received money for an employee under a settlement but the employee cannot be located, the money shall be paid to the Director in trust.

105(3) Money paid to or held by the Director in trust under this section vests in the Crown but may, without interest, be paid out to the employee, the employee's estate or such other person as the Director considers is entitled to it.

Therefore, where an employment standards officer has arranged with a temporary help agency or ordered a temporary help agency to repay monies (fees) owing directly to an assignment employee or a prospective assignment employee under s. 74.14(1)(a) (when no order has been issued) or 74.14(1)(a.1) (when an order is issued) but the agency is unable to find the assignment employee or prospective assignment employee after having made a reasonable effort to do so, the agency must pay the amount of the fees owing to the Director of Employment Standards in trust. A trust is imposed upon the Director in the name of the Ministry to preserve the assignment employee or prospective assignment employee's right to the funds collected.

Where there has been a payment into trust with respect to money owed to an assignment employee or a prospective assignment employee and the individual cannot be located, the funds vest in the crown. These funds effectively become part of the government's general revenues.

The language of the s. 105(3) is permissive; that is the Director is given the discretion to pay out the funds collected, without interest, to another person the Director thinks is entitled to it instead of the assignment employee or prospective assignment employee, or to the assignment employee or prospective assignment employee themselves if they are subsequently located. The Director **may** do this; there is no requirement in the section that the Director do so.

ESA Part XVIII.1 Section 74.15 - Recovery of Prohibited Fees by Client

74.15 If a temporary help agency charges a fee to a client in contravention of paragraph 8 or 9 of subsection 74.8 (1), the client may recover the amount of the fee in a court of competent jurisdiction.

Section 74.15 provides that where a temporary help agency charges a fee to a client in contravention of paragraph 8 or 9 of s. 74.8(1), the client may commence a civil action in a court of competent jurisdiction to recover the amount of the fee paid.

A client is not precluded from filing a claim under the *Employment Standards Act, 2000* for an alleged violation of this section since s. 96 establishes that any "person" may file a claim. However, an employment standards officer cannot order that the prohibited fees be repaid; the only remedy available

when an officer finds a client was charged a fee in contravention of paragraph 8 or 9 of s. 74.8(1) is the issuance of a notice of contravention or a compliance order against the agency. While a notice of contravention carries a fine, neither a notice of contravention nor a compliance order can require the repayment of fees charged in contravention of paragraph 8 or 9.

ESA Part XVIII.1 Section 74.16 - Order for Compensation, Temporary Help Agency

Order for Compensation, Temporary Help Agency - s. 74.16(1)

74.16(1) If an employment standards officer finds that a temporary help agency has contravened paragraph 4, 6, 7 or 10 of subsection 74.8 (1), the officer may order that the assignment employee or prospective assignment employee be compensated for any loss he or she incurred as a result of the contravention.

Section 74.16 enables an employment standards officer to issue an order to compensate an assignment employee or prospective assignment employee for damages that result when a temporary help agency contravenes ESA Part XVIII.1, paragraphs 4, 6, 7, or 10. Those paragraphs state that a temporary help agency is prohibited from doing any of the following:

4. Restricting an assignment employee of the agency from entering into an employment relationship with a 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.

10. Imposing a restriction that is prescribed as prohibited. [Note that none were prescribed at the time of writing.]

Assignment employees or prospective assignment employees seeking a s. 74.16 order for compensation are subject to the two-year limitation period for filing a complaint established under ESA Part XXII, s. 96(3), which provides that a complaint filed more than two years after the contravention has occurred will be deemed not to have been filed.

As is the case with compensation orders issued under s. 74.17 and ESA Part XXII, s. 104, damages awards made under s. 74.16 are not subject to the limitation on the recovery of wages imposed by ESA Part XXII, s. 111, which limits the recovery of wages to those wages that come due within two years preceding date the claim is filed. Because the compensation awarded in s. 74.16 orders does not come due until the officer issues the order, ESA Part XXII, s. 111 does not restrict recovery of such compensation.

A compensation order may include a number of types of damages. The order is not simply expressed as a lump-sum amount, but rather reflects a precise and detailed breakdown of the monetary amounts assessed under each head of damages. For a discussion of the heads of damages associated with a compensation order issued under s. 104, see ESA Part XVIII, s. 74(1).

Heads of Damages

While that discussion relates primarily to reprisals under ESA Part XVIII, s. 74, some modified version of the damages awarded under that section may also apply to a compensation order issued under s. 74.16. For example, when there is a violation of paragraph 4 or 7 that resulted in an assignment employee not obtaining employment with a client of the agency, the following heads of damage may apply:

1. Loss of any earnings over the time that is required to find other direct employment;
2. Compensation for the lost opportunity for direct employment with the client;
3. Loss of any benefits (in the form of benefit plans) associated with direct employment with the client;
4. Actual expenses incurred in seeking other employment;
5. Emotional pain and suffering; and;
6. Any other reasonable foreseeable damages.

Although similar heads of damages are considered in the context of reprisals, the damages suffered by an assignment employee as a result of a contravention of paragraphs 4, 6, 7 or 10 of s. 74.8 reflect the unique nature of the relationship between the assignment employee and their temporary help agency employer and clients of the agency. For example, under the first heading, the intention is to quantify any wage losses suffered over the time it may take or should reasonably have taken the assignment employee to obtain direct employment with another employer – that is, employment other than as a temporary help agency assignment employee. Although there may be a lengthy period in which the employee is unable to find other direct employment, they may in large measure be able to mitigate their losses because they continue to work for the agency as an assignment employee. It is in fact possible that the employee would suffer no actual damages in the time it takes to find direct employment with another employer if at all.

That said, even if alternate direct employment was subsequently found, the new position may be inferior to the one the employee would have had with the client and in that case, some compensation may be appropriate for the lost opportunity for direct employment with the client, as indicated in the second head of damages noted above. For example, compensation may be awarded under this heading if the alternate position does not have the same opportunities for advancement, does not have the same perks as the position with the agency's client and/or did not give the employee the same advantages that might result because of past work experience with that client through previous assignments.

An award might also be made under this second heading if no alternate direct employment was obtained at all. In that case, the award would attempt to compensate the employee for such things as lost promotional opportunities, regular hours, etc., associated with the lost opportunity for direct employment with the client.

Awards made under headings (3) to (6) above are subject to the same considerations as discussed in awards made under ESA Part XXII, s. 104 for contraventions of s. 74(1). See the discussion in ESA Part XVIII, s. 74(1).

Again, it should be noted that it is also possible that a contravention of paragraphs 4, 6 and 7 would not necessarily result in damages to an assignment employee or prospective assignment employee. For example, an agency may have a term in a contract with an assignment employee that is contrary to paragraph 4 of s. 74.8(1). The assignment employee may file a claim but if there is no evidence before the officer that the restriction in the contract actually prevented the assignment employee from obtaining employment with a client there may be no actual damages flowing from the contravention.

Where an agency has contravened paragraph 6 of s. 74.8(1) by imposing a restriction on a client's ability to provide a job reference, it is possible that the damages flowing from that contravention could be minimal because the lack of such a reference may not have prevented the assignment employee from (for example) obtaining other employment.

As another example, an agency may have included a provision in a contract between a client and a temporary help agency that was contrary to paragraph 7 of s. 74.8(1) but the client may not have intended to directly employ the assignment employee who filed the complaint under s. 74.8. Again, in those circumstances, no damages would flow from the breach of paragraph 7 as far as the assignment employee was personally concerned.

However, in the situations described above, the agency would be subject to other enforcement action for the breach of paragraphs 4, 6 or 7 of s. 74.8, such as a notice of contravention, a compliance order and the term itself would be deemed to be void pursuant to paragraph 9.

Finally, also note that as in any case where a compensation order may be made, an assignment employee or prospective assignment employee has a duty to mitigate their damages - see ESA Part XVIII, s. 74(1) for a discussion.

Terms of Orders - s. 74.16(2)

74.16(2) If an order issued under this section requires a temporary help agency to compensate an assignment employee or prospective assignment employee, it shall also require the agency to,

(a) pay to the Director in trust,

(i) the amount of the compensation, and

(ii) an amount for administration costs equal to the greater of $100 and 10 per cent of the amount of compensation; or

(b) pay the amount of the compensation to the assignment employee or prospective assignment employee.

Where an order is issued for compensation under s. 74.16(1), s. 74.16(2) provides that the order must also require the agency to pay the amount of compensation to either the Director in trust pursuant to s. 76.16(2)(a) or to the assignment employee or prospective assignment employee pursuant to s. 76.16(2)(b). If the terms of the order require the temporary help agency to pay the amount of the compensation to the Director in trust, the agency will also be required to pay an amount for administration costs equal to the greater of 10 percent of the compensation or $100. Note that the required terms in s. 74.16(2)(b) do not include administrative costs.

Contents of Order - s. 74.16(3)

74.16(3) The order shall state the paragraph of subsection 74.8 (1) that was contravened and the amount to be paid.

Subsection 74.16(3) provides that an order must set out the paragraph of ESA Part XVIII.1, s. 74.8(1) that led to the order and the order must also state the amount to be paid by the agency. Only a contravention of s. 74.8(1) paragraphs 4, 6, 7 or 10 may lead to an order under that section.

The fact that the temporary help agency against whom an order is issued had previous knowledge of the paragraph of s. 74.8(1) that was contravened, and/or of the amount owing, does not relieve the officer of the requirement to set out this information as part of the order.

Application of s. 103 (3) and (6) to (9) - s. 74.16(4)

74.16(4) Subsections 103 (3) and (6) to (9) apply with respect to orders issued under this section with necessary modifications and for the purpose, without limiting the generality of the foregoing, a reference to an employee is a reference to an assignment employee or prospective assignment employee.

Subsection 74.16(4) provides that ESA Part XXII, ss. 103(3), (6) to (9) apply, with necessary modifications, to orders for compensation issued against temporary help agencies under s. 74.16. When read in the context of a compensation order issued under s. 74.16, any reference to an employee within those subsections of ESA Part XXII, s. 103 is deemed to be a reference to an assignment employee or a prospective assignment employee as follows:

- Section 103(3): A single order may be issued with respect to compensation owing to more than one employee
- Section 103(6): The order must be served on the temporary help agency in accordance with s. 95
- Section 103(7): A letter must be served, in accordance with s. 95, on an assignment employee or prospective assignment employee affected by the order
- Section 103(8): The temporary help agency against whom an order is issued must comply with its terms
- Section 103(9): Where the temporary help agency fails to apply for a review of the order within the time period for applying for such a review, the order becomes final and binding.

ESA Part XVIII.1 Section 74.17 - Order re Client Reprisal

Order re Client Reprisal - s. 74.17(1)

74.17(1) If an employment standards officer finds that section 74.12 has been contravened with respect to an assignment employee, the officer may order that the employee be compensated for any loss he or she incurred as a result of the contravention or that he or she be reinstated in the assignment or that he or she be both compensated and reinstated.

Section 74.17 applies where an employment standards officer finds that a client of a temporary help agency has contravened ESA Part XVIII.1, s. 74.12 with respect to an assignment employee. In that situation, the officer may order that the assignment employee be compensated for any loss incurred due to the contravention, be reinstated in the assignment, or be both compensated and reinstated.

Assignment employees seeking compensation/reinstatement under this section are subject to the two-year limitation period for filing a complaint established under ESA Part XXII, s. 96(3), which provides that a complaint filed more than two years after the contravention has occurred will be deemed not to have been filed. Damages awards made under s. 74.17 are not subject to the limitation on recovery of wages imposed by ESA Part XXII, s. 111, which limits the recovery of wages to those wages that come due within two years preceding the date the claim is filed. Because the compensation awarded in s. 74.17

orders does not come due until the officer issues the order, s. 111 does not restrict recovery of that compensation.

An order issued under this section may include a number of types of damages. The order is not expressed simply as a lump-sum amount, but rather reflects a precise and detailed breakdown of the monetary amounts assessed under each head of damages. For a discussion of compensation in the context of reprisal by an employer, see ESA Part XVIII, s. 74(1).

In cases where there is a reprisal by a client, the damages awards as discussed in ESA Part XVIII, s. 74(1) may not be relevant in all aspects. Primarily, the differences will be related to the fact that a client has no direct employment relationship with an assignment employee. Reprisals may therefore take the form of a client prematurely ending the assignment. For example, assume an assignment employee had a two-month term assignment with client A. Within just a few days of the commencement of that assignment and in response to inquiries from the assignment employee about their rights to a meal break under the ESA 2000, client A ended the assignment. An employment standards officer may, in that case, conclude that client A contravened s. 74.12. However, in assessing the damages (assuming that reinstatement into the assignment was not an option), the officer may consider the following:

1. Loss of direct earnings incurred as a result of the loss of the assignment (in the example above might be up to two months' worth of earnings lost);
2. Loss of any benefits (in the form of benefit plans) associated with the assignment;
3. Emotional pain and suffering; and
4. Actual expenses (if any) that might have been incurred in trying to find a reasonable alternate assignment or other work.

Any damages assessment is subject to consideration of the assignment employee's duty to mitigate their losses. For example, if the assignment employee refused the agency's offers of reasonable alternate assignments after the assignment with client A was ended, the damages award and particularly any amounts under 1) above would be significantly reduced.

The question may arise as to when an order for reinstatement in the assignment is appropriate – see the discussion at ESA Part XVIII, s. 74(1). In the context of orders issued under s. 74.17, it is important to note that any reinstatement order is limited to the terms of the original assignment with the client, assuming those terms are in compliance with the ESA 2000.

Because such a reinstatement order necessarily involves the agency as the employer of the assignment employee and a party to the contract with the client, the Act stipulates that the agency has an obligation under s. 74.17(4) to do whatever it can do to enable compliance by the client. For more information on this point see the discussion below at s. 74.17(4).

One question that arises concerns the ability of an officer to order a client to place as opposed to reinstate an assignment employee into an assignment. For example, assume a client is looking for an assignment employee to fill a 12-month assignment. The agency sends a resume to the client who then asks to schedule an interview with the assignment employee. At the interview, the client notes the assignment employee is pregnant and suggests that she would have been perfect for the position but because of a conflict between the timing of the assignment and her impending pregnancy/parental leave she will not be given the assignment. The client's actions in this case would clearly constitute a reprisal under s. 74.12; however, the remedy under s. 74.17(1) would be limited to a compensation order as that

section does not provide for an order requiring a client to place an assignment employee into an assignment.

Terms of Orders - s. 74.17(2)

74.17(2) If an order issued under this section requires the client to compensate an assignment employee, it shall also require the client to,

(a) pay to the Director in trust,

(i) the amount of the compensation; and

(ii) an amount for administration costs equal to the greater of $100 and 10 per cent of the amount of compensation; or

(b) pay the amount of the compensation to the assignment employee.

Where an order is issued for compensation under s. 74.17(1), s. 74.17(2) provides that the order must also require the client to pay the amount of the compensation to either the Director in trust pursuant to s. 74.17(2)(a) or to the assignment employee pursuant to s. 74.17(2)(b). If the terms of the order require the client to pay the amount of the compensation to the Director in trust, the client will also be required to pay an amount for administration costs equal to the greater of 10 percent of the compensation or $100. Note that the required terms in s. 74.17(2)(b) do not include administrative costs.

Application of s. 103 (3) and (5) to (9) - s. 74.17(3)

74.17(3) Subsections 103 (3) and (5) to (9) apply with respect to orders issued under this section with necessary modifications, including but not limited to the following:

1. A reference to an employer is a reference to a client.

2. A reference to an employee is a reference to an assignment employee.

Subsection 74.17(3) provides that ESA Part XXII, ss. 103(3), (5) to (9) apply, with necessary modifications, to orders issued under s. 74.17 for client reprisal. In the context of an order for client reprisal, any reference to an employer within those subsections in s. 103 is deemed to be a reference to a client and any reference to an employee is deemed to be a reference to an assignment employee as follows:

1. Section 103(3): a single order may be issued with respect to more than one assignment employee affected by a client reprisal.
2. Section 103(5): the order must contain, or be accompanied by, information setting out the nature of the amount found to be owing to the assignment employee.
3. Section 103(6): the order must be served on the client in accordance with section 95.
4. Section 103(7): a letter must be served on an assignment employee affected by the order in accordance with s. 95.
5. Section 103(8): the client against whom the order is issued must comply with it according to its terms.

6. Section 103(9): where the client fails to apply for a review of the order within the time period for applying for such a review, the order becomes final and binding.

Agency Obligation - s. 74.17(4)

74.17(4) If an order is issued under this section requiring a client to reinstate an assignment employee in the assignment, the temporary help agency shall do whatever it can reasonably do in order to enable compliance by the client with the order.

This provision applies where an employment standards officer has issued an order under s. 74.17 requiring a client of a temporary help agency to reinstate an assignment employee into a particular assignment. Section 74.17(4) places an obligation on the temporary help agency to do whatever it can reasonably do to enable the client's compliance with the order.

For example, a temporary help agency has an ongoing contract with a client for the provision of clerical services. The temporary help agency places an assignment employee with the client to provide filing services. The assignment employee will soon be taking a pregnancy leave. If the client subsequently reprises against the assignment employee by refusing to have her continue to perform the work assignment because she plans to take a pregnancy leave, an employment standards officer could order that the client reinstate that assignment employee into the filing assignment. The temporary help agency must then do whatever it can reasonably do in order to enable the client to comply with the order. Depending on the circumstances this may include, for instance, liaising with the client to ensure the assignment employee is reinstated into the assignment, re-opening the contract with the client for the assignment, or taking other reasonable steps to ensure the assignment employee can return to performing work for the client.

ESA Part XVIII.1 Section 74.18 – Agency and Client Jointly and Severally Liable

Agency and Client Jointly and Severally Liable – s. 74.18(1)

74.18(1) Subject to subsection (2), if an assignment employee was assigned to perform work for a client of a temporary help agency during a pay period, and the agency fails to pay the employee some or all of the wages described in subsection (3) that are owing to the employee for that pay period, the agency and the client are jointly and severally liable for the wages.

The *Stronger Workplaces for a Stronger Economy Act, 2014,* SO 2014, c 10 added this provision to the ESA 2000. This section imposes joint and several liability on temporary help agencies and the clients of temporary help agencies for certain unpaid wages of the agency's assignment employees, as described in s. 74.18(3), owed in respect of any pay period. This provision came into force on November 20, 2015 together with the provisions in ESA Part XVIII.1, s. 74.4.1 and s. 74.4.2 that impose new record keeping obligations on both agencies and their clients to record the hours worked by each assignment employee of the agency in each day and week for the client.

Transitional

As this joint and several liability for certain wages applies as of November 20, 2015, Program policy is that clients may be liable only for such wages as are earned on or after that date. Therefore, a client would not be liable for any wages that were earned in a pay period that ended prior to November 20,

2015 nor for any of the wages earned prior to November 20, 2015 in a pay period that began prior to that date but that ended on or after November 20, 2015.

Practically then, if a pay period begins prior to November 20, 2015 but ends on or after November 20, 2015, s. 74.18 would be applied as if the pay period began November 20, 2015.

Note that this joint and several liability imposed on the client is proportional if an assignment employee has performed work for more than one client in the pay period in respect of which the wages are unpaid. See the discussion of ss. 74.18(2) and (3) further below in this section.

Same, More than One Client – s. 74.18(2)

74.18(2) If an assignment employee was assigned to perform work for more than one client of a temporary help agency during a pay period, and the agency fails to pay the employee some or all of the wages described in subsection (3) that are owing to the employee for that pay period, each client is jointly and severally liable with the agency for a share of the total wages owed to the employee that is in proportion to the number of hours the employee worked for that client during the pay period relative to the total number of hours the employee worked for all clients during the pay period.

This provision states that the joint and several liability imposed on clients of agencies for certain unpaid wages of the agency's assignment employees as described in s. 74.18(3) is a proportional liability if the assignment employee has performed work for more than one client of the agency in the specific pay period for which the wages are owed.

Therefore, while the agency is liable for the full amount of any unpaid wages, each client is liable only for the unpaid wages as described in s. 74.18(3) earned in any given pay period in an amount that is proportional to the hours worked for the client in the pay period, relative to the total hours worked.

For example, assume an assignment employee was owed $2000 in unpaid wages as described in s. 74.18(3) for a single pay period. The employee had worked the following hours in the pay period:

- Total hours worked: 80
- For client A - 20 hours
- For client B - 40 hours
- For client C - 15 hours
- For client D - 5 hours

The proportionate liability of each client is based on the number of hours worked for each client relative to the total hours worked in the pay period:

- For client A: 20 hours/80 hours = 25% X $2000 or $500
- For client B: 40 hours/80 hours = 50% X $2000 or $1000
- For client C: 15 hours/80 hours = 18.75% X $2000 or $375
- For client D: 5 hours/80 hours = 6.25% X $2000 or $125

The agency is liable for the full $2000.

Also see the discussion of s.74.18(3) below, which sets out the types of wages that clients are liable for and provides examples in which different types of wages are unpaid in respect of the same pay period.

Transitional

As noted in the discussion of s. 74.18(1) above, Program policy is that a client of a temporary help agency will not be liable for any wages earned in a pay period that ends before November 20, 2015 or in any portion of a pay period preceding November 20, 2015.

For example, assume an assignment employee was owed $2000 in unpaid wages as described in s. 74.18(3) for a single pay period, but the pay period in question began on November 16, 2015 and ended November 29, 2015. Only those wages earned and only those hours worked for clients on or after November 20, 2015 would be included in the calculation of each client's proportional liability.

In this case, assume the employee worked a total of 80 hours and 40 of those hours were worked between November 20, 2015 and November 29, 2015 (inclusive).

The first step in determining the liability of the clients would be to determine what portion of the wages as described under s. 74.18(3) were earned in respect of the 40 hours worked between November 20, 2015 and November 29, 2015 (inclusive). Assume that of the $2000 owed in respect of the pay period beginning November 16, 2015 and ending November 29, 2015 that $1000 was earned on or after November 20, 2015.

Secondly, the proportionate liability would be determined with respect to only those clients for whom the employee performed work between November 20, 2015 and November 29, 2015 (inclusive) based on the proportion of hours worked for each such client between November 20, 2015 and November 29, 2015.

Total hours worked: 80

Hours worked November 20 to 29, 2015 inclusive: 40

Hours worked prior to November 20, 2015:

- For client A: 20 hours
- For client B: 40 hours
- For client C: 15 hours
- For client D: 5 hours

Hours worked November 20 – 29, 2015:

- For client A: 8 hours
- For client B: 32 hours
- For client C: No hours
- For client D: No hours

The proportionate liability of each client is based on the number of hours worked for each client relative to the total hours worked in that portion of the pay period beginning November 20, 2015 and ending November 29, 2015:

- For client A: 8 hours/40hours = 20% x $1000 or $200
- For client B: 32 hours/40 hours = 80% x $1000 or $800
- For client C: 0 hours/40 hours = 0% x $1000 or $0.00
- For client D: 0 hours/40 hours = 0% x $1000 or $0.00

The agency is liable for the full $2000. However, in assessing the clients' joint and several liability, the employment standards officer would look only at those hours worked and wages earned between November 20, 2015 and November 29, 2015 (inclusive) as set out in the example above.

Wages for which Client may be Liable – s. 74.18(3)

74.18(3) A client of a temporary help agency may be jointly and severally liable under this section for the following wages:

1. Regular wages that were earned during the relevant pay period.

2. Overtime pay that was earned during the relevant pay period.

3. Public holiday pay that was earned during the relevant pay period.

4. Premium pay that was earned during the relevant pay period.

Subsection 74.18(3) describes those wages of a temporary help agency's assignment employees for which the clients of the agency may be jointly and severally liable. The wages are limited to regular wages, overtime pay, public holiday pay and premium pay.

Regular wages are defined in ESA Part I, s. 1. The definition specifically excludes overtime pay, public holiday pay, premium pay for work performed on a public holiday, vacation pay, domestic or sexual violence leave pay, termination pay, severance pay and termination of assignment pay, and any greater right or benefit to which the employee is entitled pursuant to ESA Part III, s. 5(2) in respect of such wages. Regular wages would, however, include wages for work performed such as the employee's hourly rate or salary, piece rate, shift premiums and commissions.

In addition to regular wages, clients are jointly and severally liable under this subsection for overtime pay, public holiday pay and premium pay. The liability for these specific wages, i.e., overtime pay, public holiday pay and premium pay (for work performed on a public holiday), will therefore extend to any greater right or benefit to which the employee is entitled pursuant to ESA Part III, s. 5(2) in respect of overtime pay, public holiday pay and premium pay.

In accordance with this subsection, clients have no liability for vacation pay, termination pay or severance pay.

Calculating each client's liability for the unpaid wages is determined in accordance with the method described in s. 74.18(2). Effectively, a client is proportionately liable for a share of the total wages as described in s. 74.18(3) that are unpaid in respect of any particular pay period, if the assignment employee has performed work for more than one client of the agency in the specific pay period for which such wages are owed.

Specifically, amounts owing in respect of any or all the wages described in s. 74.18(3) are added together. Each client's proportionate liability is then calculated by multiplying that amount by the ratio of

the number of hours worked for the client in the pay period divided by the total hours worked for all clients in that pay period.

Example 1

An employee has a two-week pay period and total wages owed for that pay period as follows:

- $100 in respect of overtime pay for week 1 of the pay period
- $200 for premium pay for work performed on Christmas Day and Boxing Day in week 2 of the pay period
- Employee worked 20 hours for client B in week 2
- Employee worked a total of 60 hours in the pay period

The employee is owed a total of $300 and the agency is liable for that full amount.

Client A is liable for a proportionate amount of the total wages described in subsection 3 that are owing for the pay period = $300 (that is, both the overtime pay and premium pay owing in respect of the pay period). The proportionate liability is based on the relative number hours the assignment employee worked for Client A as compared to the total hours worked in the pay period as follows:

- $300 X 40 hours/60 hours = $200

Client B is liable for a proportionate amount for the pay period as follows:

- $300 X 20 hours/60 hours = $100

Example 2

An employee is terminated at the end of a two-week pay period and is owed wages in respect of that last pay period as follows:

- $200 in respect of overtime pay for week 1 of the pay period
- $300 for premium pay for work performed on Christmas Day and Boxing Day in week 2 of the pay period
- $1000 in respect of regular wages for weeks 1 and 2 of the pay period
- $500 termination pay in lieu of working notice
- $200 in respect of unpaid vacation pay
- Employee worked 20 hours for client A in each of weeks 1 and 2
- Employee worked 20 hours for client B in week 2
- Employee worked a total of 60 hours in the pay period

The employee is owed a total of $2200 and the agency is liable for that full amount. However, in accordance with s. 74.18(3), the clients of the agency have no liability with respect to the $200 in outstanding vacation pay or the $500 termination pay in lieu of notice owing to this employee.

Client A is liable for a proportionate amount of the total wages described in s. 74.18(3) that are owing for the pay period = $1500 (that is, the overtime pay, premium public holiday pay and regular wages only

owing in respect of the pay period). The proportionate liability is based on the relative number hours the assignment employee worked for Client A as compared to the total hours worked in the pay period as follows:

- $1500 X 40 hours/60 hours = $1000

Client B is liable for a proportionate amount for the pay period as follows:

- $1500 X 20 hours/60 hours = $500

Agency Primarily Responsible – s. 74.18(4)

74.18(4) Despite subsections (1) and (2), the temporary help agency is primarily responsible for an assignment employee's wages, but proceedings against the agency under this Act do not have to be exhausted before proceedings may be commenced to collect wages from the client of the agency.

Section 74.18(4) provides that a temporary help agency, as the employer of an assignment employee, is primarily responsible for the employee's wages, but the proceedings against the employer do not have to run their full course before proceedings may be commenced against a client of the agency.

See also the discussion in ESA Part XX, s. 81(2), a similar provision that applies in the context of a corporate director's liabilities for the wages of an employee of a corporate employer.

Enforcement – Client Deemed to be Employer – s. 74.18(5)

74.18(5) For the purposes of enforcing the liability of a client of a temporary help agency under this section, the client is deemed to be an employer of the assignment employee.

This provision allows certain enforcement provisions of the ESA 2000 that apply with respect to employers to be used in relation to clients of temporary help agencies for the purposes of enforcing client liability for the wages of the agency's assignment employees, just as if the client was the employer of the assignment employee, including provisions in:

- Part XX: Liability of Directors
- Part XXI: Who Enforces this Act and What They Can Do
- Part XXII: Complaints and Enforcement
- Part XXIII: Reviews of the Board
- Part XXV: Offences and Prosecutions

In other words, any provision that would apply with respect to the employer (in relation to the enforcement of entitlements to unpaid wages) may be read to refer to a client of a temporary help agency if a liability for unpaid wages has been found in accordance with s. 74.18. For example, an employment standards officer may require the client to attend a meeting under ESA Part XXII, s. 102 or issue an order under ESA Part XXII, s. 103 or s. 106.

Same – Orders – s. 74.18(6)

74.18(6) Without restricting the generality of subsection (5), an order issued by an employment standards officer against a client of a temporary help agency to enforce a liability under this section shall be treated as if it were an order against an employer for the purposes of this Act.

This provision specifies that whereas the client of a temporary help agency is deemed to be the employer of an assignment employee for the purposes of enforcing the joint and several liability of a client under s. 74.18, specifically, the order issued by an employment standards officer under ESA Part XXII, s. 103 against the client is treated as if it were an order against the employer.

This means for example that a client could appeal such an order to the Ontario Labour Relations Board. It also means that the directors of a client that was a corporation are subject to the director liability provisions in ESA Part XX as if they were directors of an employer.

ESA Part XIX - Building Services Providers

The intent of the building services provisions contained in Part XIX (Building Services Providers) is two-fold. First, the provisions impose obligations for the payment of termination pay, severance pay and vacation pay (in respect of employees of the replaced provider) when there is a change in the provider of building services. Second, the provisions aim to ensure that the persons bidding on a contract in the building services sector have all the necessary information about the employees' wage rates, etc., in order to estimate their potential termination and severance obligations when preparing their bids and to make offers to employees of the replaced provider if they should win the contract.

ESA Part XIX Section 75 - New Provider

New Provider - s. 75(1)

75(1) This Part applies if a building services provider for a building is replaced by a new provider.

Section 75(1) is similar to s. 13.1(2) of the former *Employment Standards Act*. Section 75(1) states that this Part applies if a building services provider provides building services at a building, stops providing those services and is replaced by a new provider. A building services provider may be replaced in the following situations:

1. Contracting out - where the building owner or manager is using its own "in-house" staff to perform the building services, but then decides to have an outside contractor perform those services;
2. Change of contractors - where the building owner or manager is using contractor A to provide the building services, but then decides to award the contract instead to contractor B; or
3. Contracting in - where the building owner or manager is using a contractor to provide the building services, but decides instead to use its own "in-house" staff to perform those services.

In addition, the two providers (e.g., the replaced provider and the new provider) must be providing the same general category of building services at the premises. If, for example, a building owner discontinued its food service contract with A and contemporaneously entered into a security services contract with B, B could not be said to be "replacing" A at the premises.

New Provider - s. 75(2)

75(2) The new provider shall comply with Part XV (Termination and Severance of Employment) with respect to every employee of the replaced provider who is engaged in providing services at the premises and whom the new provider does not employ as if the new provider had terminated and severed the employee's employment.

This provision is substantially the same as s. 13.1(4) under the former Employment Standards Act. Section 75(2) provides that if the new provider does not employ an employee of the previous provider who was engaged in providing services at the premises, the new provider shall comply with Part XV of the Employment Standards Act, 2000 (Termination and Severance of Employment) with regards to the employee as if the new provider had terminated and severed the employee's employment. An employee of the replaced provider who was not engaged in providing services at the premises would not be entitled to notice and or severance pay from the new provider if the new provider did not employ him or her. Those obligations would continue to lie with the replaced provider.

Note that the requirement that the employee be engaged in providing services at the premises is not mirrored in s. 10 of the Act. Consequently, continuity of employment will be afforded to employees of the replaced provider who are employed by a new provider, whether they were engaged in providing services at the premises or not.

The obligations imposed under this section are subject to s. 75(4) which states that the new provider is not required to comply with subsection (2) with respect to an employee retained by the replaced provider or any prescribed employees.

There is often a gap between the time a contract is awarded to a new provider and the date the new provider actually begins providing the services. The obligations to comply with Part XV (Termination and Severance of Employment) are imposed on the new provider and cannot be discharged until the changeover date. For a discussion of the definition "Changeover date" see O Reg 287, s. 2(5). It is the Program's position that it is inherent in the notion of compliance with Part XV that the employees cannot be provided with notice by a new provider if they are still in the employ of the replace provider. Therefore, if a successful bidder purported to give notice to the current provider's employees prior to the changeover date, such notice would be invalid.

One question that arises is when can it be said that the new provider has not employed the employees of the replaced provider, thereby triggering the obligations to comply with Part XV? Section 75(2) provides that a new provider will be required to comply with Part XV of the Act if he or she does not hire the employees of the replaced provider. It is Program policy that although there may be continuity of employment for employees of the replaced provider terminated before the changeover date in accordance with s. 10 of the Act (which provides for continuity of employment if the employees are hired by the new provider within the earlier of 13 weeks after the last day of employment with the replaced provider or the changeover date), the new provider's obligations with respect to notice of termination and severance pay under s. 75(2) apply only to persons who were employees of the replaced provider as of the changeover date and who were not hired within 13 weeks of the changeover date. The new provider would have no liability for Part XV obligations under this section with respect to employees of the replaced provider terminated by the replaced provider either before the changeover date or more than 13 weeks after the changeover date.

However, the obligations to comply with Part XV are also subject to s. 75(4), which provides that no termination and severance obligations will be imposed on the new provider with respect to any "prescribed" employees (i.e., prescribed under s. 2(1) of O Reg 287/01) or if the employee continues to

be employed by the replaced provider. See ESA Part IV for a more detailed discussion of s. 10 of the Act and further below in this section for a more detailed discussion of s. 75(4) of the Act.

Example:

- An employee worked 90 per cent of his time for the replaced provider at building A and 10 per cent of his time for the replaced provider at building B.
- Employee continued to work for the replaced provider at building B after a new provider took over the contract for building services at building A.
- The new provider would have no Part XV obligations with respect to the employee, even though it did not hire that employee within 13 weeks of the changeover date, because the employee continued to be employed by the replaced provider.

The commencement of a lay-off does not trigger the end of an employment relationship. If an employee is on temporary lay-off for the purposes of notice of termination or a lay-off for the purposes of severance pay or both, he or she is considered to be employed. Note that even though an employee may have ceased to be on temporary lay-off after 13 weeks for the purposes of the notice of termination provisions in the Act, if he or she remains on lay-off for severance purposes for a further 22 weeks, the employee will continue to be employed for that additional 22 weeks.

Example 1:

- If an employee were laid off one week before the changeover date and the lay-off ceased to be temporary 13 weeks later (and assuming the replaced provider had no severance obligations with respect to the employee), the employee's last day of employment would be 12 weeks after the changeover date.
- Because the employee continued to be employed by the replaced provider as of the changeover date, the new provider would have Part XV obligations imposed under s. 75(2) if it did not hire the employee within 13-week period after the changeover date - unless the employee fell within one of the categories of exempt employees set out in s. 2(1) of O Reg 287/01.

Example 2:

- Employee A is placed on temporary lay-off 20 weeks before the changeover date and ceased to be on temporary lay-off for notice of termination purposes seven weeks before the changeover date but continued to be on lay-off for severance purposes until 15 weeks after the changeover date.
- In this case, employee continued to be employed by the replaced provider as of the changeover date. However, the employee also continued to be employed by the replaced provider for the full 13 weeks after the changeover date and under s. 75(4), the new provider would be exempt from the obligation to comply with Part XV even though it did not hire the employee in the 13-week period following the changeover.

It should also be noted that the deemed termination date as set out in s. 56(5), which provides that where an employee is temporarily laid off and the lay-off subsequently ceases to be temporary that his or her employment is deemed to be terminated on the first day of the lay-off, has no application with respect to assigning the liability for termination pay (which is determined under this Part), although it will be relevant in determining the quantum (which is determined under Part XV).

Example:

- Employer A loses contract for building services to employer B.
- Changeover date is June 14.
- A's employee is laid off one week before the changeover date (June 7). Temporary lay-off for notice of termination purposes ends September 6 (13 weeks after the lay-off began and 12 weeks after the changeover date). A's employee has no severance entitlement.
- Employer B did not hire employee on or before September 13 (i.e., 13 weeks after the changeover date).
- Employer B is liable for Part XV termination pay. However, the employee's entitlement to notice of termination (or pay in lieu) will be determined on the basis of his or her employment ending on the deemed termination date under s. 56(5), i.e., June 7.

Same - s. 75(3)

75(3) The new provider shall be deemed to have been the employee's employer for the purpose of subsection (2).

Section 75(3) states that the new provider is deemed to be the employer of all employees of the previous provider whom it chooses not to employ, for purposes of Part XV (Termination and Severance of Employment). As a result, the entitlements to notice or termination pay and/or severance pay for those employees are based on the employees' service with the replaced provider. Even though the new provider did not enter into an employment relationship with the employee, the employee's period of service with the previous provider will be used to calculate his or her entitlement to termination and severance pay. Note, however, that as the building service provisions under the former Act (continued in Part XIX of the ESA 2000) were retrospective to June 4, 1992, only, this section can only be used to credit an employee for his or her employment with a replaced provides prior to June 4, 1992, if the replaced provider was providing service at the premises on that date.

Exception - s. 75(4)

75(4) The new provider is not required to comply with subsection (2) with respect to,

(a) an employee who is retained by the replaced provider; or

(b) any prescribed employees.

This provision is similar in effect to s. 13.1(4) and s. 1 of O Reg 138/96 of the former Employment Standards Act. Section 75(4) confirms that the new provider is exempted from the obligations in s. 75(2) (i.e., termination and severance obligations) with respect to employees retained by the previous provider or those employees prescribed by regulation. Section 75(4) must therefore be read in conjunction with the list of "prescribed employees" in s. 2(1) of O Reg 287/01. Employees retained by the replaced provider - s. 75(4)(a)

1. Employees retained by the replaced provider – s. 75(4)(a)

Section 75(4)(a) relieves a new provider of the obligation to comply with Part XV with respect to employees of the replaced provider that it does not employ, if they continue to be employed by the

replaced provider. As noted in the discussion of s. 75(2) of the Act, s. 75(4) refers, in effect, only to employees who continue to be employed by the replaced provider more than 13 weeks after the changeover date.

An employee will continue to be employed by a replaced provider if he or she is retained by the replaced provider (e.g., to work at another building site). The employee will also be considered to be employed by the replaced provider if he or she is on a lay-off for the purposes of notice of termination (see s. 56(3) and/or severance pay (s. 63(2)).

Example:

- If an employee worked at two sites for the replaced provider prior to a changeover at one of the sites, or was moved to a new site by the replaced provider, and his or her regular non-overtime pay after the changeover date was:
    - Not less than 50 per cent of what it was prior to the changeover (for purposes of termination of employment, s. 56(3)); and
    - Not less than 25 per cent of what it was at the original site (for purposes of severance of employment, s. 63(2)),
- Then the employee will be considered to have been retained by the replaced provider and the new provider will not have any obligations under Part XV (Termination and Severance of Employment) with respect to that employee.

If an employee's regular non-overtime pay with the replaced provider falls below the thresholds set out in s. 56(3) or s. 63(2), then the employee will be deemed to be on a lay-off and there will be a deemed termination or severance by the replaced provider after the lay-off has reached a certain point (i.e., 13 or 35 weeks in the case of termination pay, depending, for example, on whether benefits are continued [ss. 56(2) and 56(3)] and 35 weeks in the case of severance pay [s. 63(1)]). If the employee continues to be on lay-off for either both notice of termination or severance purposes 13 weeks after the changeover date, the employee will consider to have been retained by the replaced provider under s. 75(4) and the new provider will have no obligations under Part XV. In that case, liabilities for termination and/or severance will remain with the replaced provider.

2. Any prescribed employees - s. 74(4)(b)

Section 2(1) of O Reg 287/01 lists four additional classes of employees in respect of which the new provider is relieved of the obligation to comply with s. 75(2). For a detailed discussion of these employees, see O Reg 287/01, s. 2(1).

3. Other Issues

Some other questions that arise concerning the Part XIX (Building Services Providers) obligations of the new provider, under s. 75(2) are as follows:

1. **For purposes of severance pay, is the $2.5 million payroll threshold determined with reference to the new provider's payroll, or with reference to the replaced provider's payroll?**
    - Answer: It is determined with reference to the new provider's payroll.

2. **If the new provider is under federal labour jurisdiction, e.g., a bank, and contracts in services that were previously contracted out, does s. 75(2) apply?**
    - Answer: No, s. 75(2) does not apply. The Act only applies to employees and their employers who are provincially regulated, s. 3(2). Therefore, the employee would be considered terminated by the previous provider, which would be responsible for the Part XV (Termination and Severance of Employment) entitlements of the employees.
3. **Does the answer in "2" still apply if the replaced provider is under federal labour jurisdiction and contracts the work out to a new provider under provincial labour jurisdiction?**
    - Answer: Yes, it does, except that the replaced provider's obligations would be under the *Canada Labour Code*, RSC 1985, c L-2.
4. **What if the owner or manager of the premises falls under federal jurisdiction (e.g., a Canadian Airport Authority) but both the replaced provider and new provider fall under provincial jurisdiction (e.g., they provide food services which are not integral to the operation of the airport)?**
    - Answer: Section 75 will apply to both the replaced and the new provider. In addition, the information requirements in s. 77 of the Act may be enforced against the building owner/manager, even though it operates as a federal undertaking. See *UFCW, Local 1000A v Cara Operations Ltd.*, 2001 CanLII 18382 (ON LRB).
5. **What if the previous provider gave the employee notice of termination, or pay in lieu, and severance pay and the new provider does not hire the employee? Can the new provider receive "credit" for the termination notice/pay and severance pay given by the previous provider?**
    - Answer: Severance pay given by the replaced provider can be offset by the new provider under paragraph 3 of s. 65(8), which provides as follows:
        - **65(8) Only the following set-offs and deductions may be made in calculating severance pay under this section:**
            - **... 3. Severance pay that was previously paid to the employee under this Act, a predecessor of this Act or a contractual provision described in paragraph 2.**
        - There is no corresponding "offsetting" provision in respect of termination pay. The new provider therefore cannot rely on the notice, or pay in lieu thereof, that was given by the replaced provider to settle the successor's s. 75(2) obligations.
6. **What if the employees of the replaced provider were unionized and there was a collective agreement in place? The new provider does not employ the employees of the replaced provider (and is not exempted from its Part XV (Termination and Severance of Employment) obligations by Reg. 287/01). Are the employees prevented from filing a claim against the new provider because of s. 99 of the Act (which prohibits employees to whom a collective agreement applies from filing a complaint under the Act)?**
    - Answer: No. The collective agreement that applies to the employees is with the replaced provider, while the complaint is against the new provider. Generally speaking, under the *Labour Relations Act,* 1995, SO 1995, c 1, Sch 1, the collective agreement does not follow through to bind the purchaser in the building services sector, so it cannot be used

by employees to enforce their ESA 2000 rights against the new provider. Accordingly, they are entitled to file a claim. See *UFCW, Local 1000A v Cara Operations Ltd*.

ESA Part XIX Section 76 - Vacation Pay

Vacation Pay - s. 76(1)

76(1) A provider who ceases to provide services at a premises and who ceases to employ an employee shall pay to the employee the amount of any accrued vacation pay.

This provision is substantially the same as s. 13.1(6) of the former *Employment Standards Act*. Section 76(1) states that when a provider of building services is replaced by a new provider and ceases to employ an employee, the replaced provider shall pay the employee the amount of any vacation pay accrued (even though it may not yet be due).

The obligation to pay any accrued vacation pay (whether due or not) at the time the replaced provider ceases to employ the employee would ordinarily be imposed under s. 11(5) of the *Employment Standards Act, 2000*. Therefore, section 76(1) is assumed to have relevance only where such employees are hired by the new provider, triggering the continuity of employment obligations under s. 10 of the Act. In that case (i.e., where the new provider hires employees of the replaced provider), s. 76(1) eliminates the possibility of any argument that the new provider might have liability for the accrued vacation pay entitlements of the replaced provider's employees.

Normally, a replaced provider would have built the cost of its employees' vacation pay into the amount of its original bid, and that cost, along with other costs, would be reflected in the contract price; it would therefore be a windfall for the replaced provider if the new provider were required to pick up the liability for any of the vacation pay that accrued during the term of the replaced provider's contract with the building owner or manager.

See additional discussion on the Program's policy regarding continuity of employment and vacation pay liability in the building services context in ESA Part IV, s. 10(2).

Vacation Pay - s. 76(2)

76(2) A payment under subsection (1) shall be made within the later of,

(a) seven days after the day the employee's employment with the employer ceases; or

(b) the day that would have been the employee's next regular pay day.

This provision requires that the replaced provider pay accrued vacation pay to employees pursuant to s. 76(1) on or before the later of two dates:

1. Seven days after the day the employee ceased to be employed by the previous provider; or
2. The day that would have been the employee's next regular pay day.

This provision is different from the corresponding provision (s. 13.1(7)) of the former *Employment Standards Act* which required the previous provider to pay accrued vacation pay within seven days after the earlier of: (1) the day the employee ceased to be employed by the previous employer or (2) the day on which the previous employer ceased to provide services at the premises.

Section 76(2) is consistent with the provisions in the ESA 2000 regarding the payment of wages when employment ends (s. 11(5)). Section 11(5) states that the employee's wages must be paid no later than

the later of seven days after employment ends or the day that would have been the employee's next pay day.

ESA Part XIX Section 77 - Information Request, Possible New Provider

Information Request, Possible New Provider - s. 77(1)

77(1) Where a person is seeking to become the new provider at a premises, the owner or manager of the premises shall upon request give to that person the prescribed information about the employees who on the date of the request are engaged in providing services at the premises.

This section is substantially the same as s. 13.1(10) under the former *Employment Standards Act*.

This provision is designed to ensure that bidders on a building services contract have the information they require to determine the amount of their bid. In particular, this subsection enables the bidders to estimate the extent of their potential liability under Part XV (Termination and Severance of Employment) of the *Employment Standards Act, 2000*. The reference to "prescribed" information means prescribed by regulation. Sections 3(1), (3), (4) and (5) of O Reg 287/01 set out the information that must be provided by the owner or manager of the premises under s. 77(1). If an owner or manager of the premises fails to provide the required information, an employment standards officer could issue a compliance order under s. 108 and/or a notice of contravention under s. 113. There is no authority however for issuing a compensation order under s. 104 in favour of a person seeking to become a new building services provider where that person suffers damages as a result of a failure on the part of the owner or manager to provide information under s. 77(1).

The definition of "request date" as it is used in these provisions, is set out in s. 3(6) of the same regulation as follows:

3(6) In this section,

"request date" means the date on which information is requested under subsection 77 (1) or (2) of the Act, as the case may be.

For information regarding sections 3(1), (3), (4) and (5) of O Reg 287/01, see O Reg 287/01.

Information Request, New Provider - s. 77(2)

77(2) Where a person becomes the new provider at a premises, the owner or manager of the premises shall upon request give to that person the prescribed information about the employees who on the date of the request are engaged in providing services for the premises.

This section is substantially the same as s. 13.1(9) of the former *Employment Standards Act*.

Section 77(2) provides that a new provider is entitled to additional information as prescribed. The prescribed information is set out in s. 3(2) of O Reg 287/01 as follows:

3(2) The following is the information about each employee that the owner or manager of the premises shall give for the purposes of subsection 77 (2) of the Act:

1. The information listed in paragraphs 1 to 8 of subsection (1).

2. The employee's name, residential address and telephone number.

The new provider of services is consequently entitled to request additional and updated information regarding employees of the previous provider who are performing work at the premises. All information, including the information listed in paragraphs 1 to 8 of s. 3(1) (see O Reg 287/01, s.3(1) of the Manual for further discussion) which may have been provided at the time the new provider was bidding on the contract, must be accurate as of the date of the subsequent request under s. 77(2).

Paragraph 2 of s. 3(2) of O Reg 287/01 also allows the new provider to request the names, addresses and telephone numbers of the employees engaged in providing services at the premises on the date the request for information is made.

During the period from the time the new provider is awarded the contract to the "changeover date" of the contract, when the new provider begins to provide services at the building premises, the employees' names, residential addresses and telephone numbers can be used to:

- Contact employees to make job offers, or
- Arrange payment of termination pay and/or severance pay if applicable directly to the employees in question if they are terminated at the time of the "changeover date".

This subsection ensures that the new provider has access to the necessary information to determine the actual Part XV (Termination and Severance of Employment) entitlements for employees of the replaced provider. If an owner or manager of the premises fails to provide the required information, an employment standards officer could issue a compliance order under s. 108 and/or a notice of contravention under s. 113. There is no authority however for issuing a compensation order under s. 104 in favour of a new building services provider where the new provider suffers damages as a result of a failure on the part of the owner or manager to provide information under s. 77(2).

Request by Owner or Manager - s. 77(3)

77(3) If an owner or manager requests a provider or former provider to provide information to the owner or manager so that the owner or manager can fulfil a request made under subsection (1) or (2), the provider or former provider shall provide the information.

This provision is substantially similar to s. 13.1(8) of the former *Employment Standards Act*.

The effect of this subsection is to require the incumbent or replaced provider to share certain information with the owner or manager of a building in respect of employees providing services at the premises.

This section is aimed at facilitating the flow of information from the incumbent or replaced provider to those who are bidding on the contract or who have won the contract. This is necessary so that bidders know the extent of their potential liability under Part XV (Termination and Severance of Employment) when they make bids. In addition, it is also necessary so that new providers can determine the precise amount of their liability under Part XV (Termination and Severance of Employment) upon assuming a new building services contract.

The information that is required to be provided under s. 77(1) or (2) is prescribed in s. 3 of O Reg 287/01 and is described in detail in O Reg 287/01, s. 3. If a provider or former provider fails to provide the required information, an employment standards officer could issue a compliance order under s. 108

and/or a notice of contravention under s. 113. There is no authority however for issuing a compensation order under s. 104 in favour of a new building services provider where the new provider suffers damages as a result of a failure on the part of the incumbent provider to provide information under s. 77(3).

ESA Part XIX Section 78 - Use of Information

Use of Information - s. 78(1)

78(1) A person who receives information under this Part shall use that information only for the purpose of complying with this Part or determining the person's obligations or potential obligations under this Part.

This provision is substantially the same as s. 13.1(11) of the former *Employment Standards Act*.

Section 78(1) states that a person who receives information under s. 77 shall use the information only for the purposes of complying with Part XIX (Building Services Providers). This means that a building services company cannot, for example, use the information received under s. 77 to assess the profitability of a business for purposes of buying it.

Confidentiality - s. 78(2)

78(2) A person who receives information under section 77 shall not disclose it, except as authorized under this Part.

This provision is substantially the same as s. 13.1(12) of the former *Employment Standards Act*.

Section 78(2) states that a person receiving information under s. 77 shall not disclose it to anyone except as authorized this Part (i.e., by s. 77). This means that if, for example, a building owner or manager receives information from the incumbent provider about the wage rates paid to the employees, the building owner cannot disclose that information to any persons except as set out in s. 77. However, where the building owner or manager is a provincial or municipal government "institution" as defined under the *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31 or the *Municipal Freedom of Information and Protection of Privacy Act,* RSO 1990, c M.56, the disclosure provisions of those Acts will prevail over the confidentiality provision in s. 78(2) in the event of a conflict.

ESA Part XX - Liability of Directors

The directors' liability provisions of the *Employment Standards Act, 2000* essentially mirror those in the Ontario *Business Corporations Act*, RSO 1990, c B.16 ("OBCA"), but, unlike the OBCA's directors' liability provisions, may be enforced through administrative action under the *Employment Standards Act, 2000*, rather than protracted and expensive civil proceedings. The intention of Part XX (Liability of Directors) is to allow for more efficient enforcement of existing directors' liability, rather than to expand the scope of that liability.

ESA Part XX Section 79 - Definition

79 In this Part, "director" means a director of a corporation and includes a shareholder who is a party to a unanimous shareholder agreement.

This section defines "director" for purposes of Part XX (Liability of Directors).

Director of a Corporation

A director of a corporation is elected by the corporation's shareholders and sits on its board of directors to oversee its business. (Note that when a business is initially incorporated, the directors - referred to as "first directors" - are not elected. Rather, they are named as directors and hold director positions until elections are held.)

Information returns that are required to be filed by the corporation with the Ontario Ministry of Government and Consumer Services (or, if it is federally incorporated, Corporations Canada) are publicly available and should contain the names and addresses of the current directors. If these are not up to date, then the Minute Book from the meetings of the Board of Directors should indicate who the current directors are.

With respect to companies incorporated under the Ontario *Business Corporations Act*, RSO 1990, c B.16 ("OBCA") or the *Canada Business Corporations Act*, RSC 1985, c C-44 ("CBCA"), if there is no registered director because all of the directors have resigned or have been removed by the shareholders without replacement, a person who manages or supervises the management of the business and affairs of the corporation is, subject to certain exceptions, deemed to be a director. See s. 115 of the OBCA and s. 109 of the CBCA.

The OBCA and CBCA provisions mentioned in the preceding paragraph would not apply in the case where a corporation's sole director dies. If subsequent to the director's death, the business of the corporation is managed or supervised by someone who does not become a director, it will be a question of fact as to whether that individual is acting as an agent of the corporation (in which case, subject to s. 137 of the *Employment Standards Act, 2000*, he or she would have no personal liability) or is instead acting as a sole proprietor to whom the corporation's business has been transferred (in which case there would be personal liability). If the individual is acting as an agent of the corporation, wages earned by employees, including wages earned after the individual began acting, would be owed by the corporation (though the estate of the deceased director would also be liable for those wages earned up until the director's death, subject to the limits in Part XX). If the individual is acting as a sole proprietor to whom the corporation's business was transferred, wages earned by employees up to the time of transfer would be owed by the corporation (again, with the estate of the deceased director also liable for those wages earned up until the director's death, subject to the limits in Part XX), while wages earned from the time of transfer onwards would be owed by the sole proprietor.

Shareholders

Section 79 also includes in the definition of "director," for purposes of Part XX, a shareholder who is a party to a unanimous shareholders agreement ("USA").

A USA is an agreement whereby the shareholders may validly restrict, in whole or in part, the powers of the directors to manage the business and affairs of the corporation.

Under the USA, the shareholders have the rights, powers and duties of directors to manage the business and affairs of the corporation to the extent set out in the agreement, and the directors are relieved of their duties and liabilities to the same extent. Thus the shareholders acting under a USA generally stand in the place of the directors. USAs are recognized by both the OBCA and the CBCA.

Typically, unanimous shareholder agreements are used in closely-held, private corporations where there are only a few shareholders. The shareholders that are parties to the USA could be either individuals or corporations. Where the shares are held in trust for an individual, that individual may be found to be a director if he or she controls how the trustee votes his or her shares. See *Vaszi v Ontario (Ministry of Labour)*, 2000 CanLII 12592 (ON LRB).

Section 79 must be read in conjunction with s. 80(1), which indicates that parties to a USA will only be considered as directors for purposes of Part XX to the extent that the actual directors are relieved of liability for wages under the applicable corporations legislation. See s. 80(1) in this Part for more information.

ESA Part XX Section 80 - Application of Part

Application of Part - s. 80(1)

80(1) This Part applies with respect to shareholders described in section 79 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 and the other subsections in s. 80 deal with Step 1 (determining whether directors are excluded from the application of Part XX) in the four step process for applying Part XX.

Section 80(1) indicates that shareholders who are parties to a unanimous shareholders agreement are subject to Part XX only to the extent that the actual directors are relieved under the applicable corporations legislation of liability to pay wages to the corporation's employees.

Section 108(5) of the Ontario *Business Corporations Act*, RSO 1990, c B.16 ("OBCA") states:

A shareholder who is a party to a unanimous shareholder agreement has all the rights, powers, duties and liabilities of a director of the corporation, whether arising under this Act or otherwise, to which the agreement relates to the extent that the agreement restricts the discretion or powers of the directors to manage or supervise the management of the business and affairs of the corporation and the directors are thereby relieved of their duties and liabilities, including any liabilities under section 131, to the same extent.

Section 146(5) of the *Canada Business Corporations Act*, RSC 1985, c C-44 ("CBCA") states:

A shareholder who is a party to a unanimous shareholder agreement has all the rights, powers and duties of a director of the corporation to which the agreement relates to the extent that the agreement restricts the powers of the directors to manage the business and affairs of the corporation, and the directors who are thereby relieved of their duties and liabilities, including any liabilities under section 119, to the same extent.

Accordingly, a unanimous shareholders agreement may have the effect of imposing liability on shareholders under Part XX of the *Employment Standards Act, 2000* (and relieving the actual directors of their Part XX liabilities), but only to the extent that the actual directors of the corporation are relieved of their obligations for wages under the OBCA or CBCA.

Generally speaking, unanimous shareholders agreements come to the attention of an employment standards officer when he or she notifies a director of potential liability under the Act; a director who alleges that his or her liabilities for wages are relieved by such an agreement will be asked to provide a copy of that agreement.

Non-Application - s. 80(2)

80(2) This Part does not apply with respect to directors of corporations to which Part III of the *Corporations Act* applies or to which the *Co-operative Corporations Act* applies.

This section is identical to s. 58.19(3) of the former *Employment Standards Act*.

This section indicates that Part XX does not apply to directors of corporations to which:

- Part III of the Ontario *Corporations Act*, RSO 1990, c C.38 applies, or
- The Ontario *Co-operative Corporations Act,* RSO 1990, c C.35 applies.

As such, those types of directors do not have any liabilities as directors under the ESA, 2000.

Part III of the Ontario *Corporations Act* applies to not-for-profit corporations.

The *Co-operative Corporations Act* is provincial legislation that governs such entities as housing co-ops. It applies to corporations incorporated as cooperatives and carrying on business on a co-operative basis. The phrase "cooperative basis" is defined in s. 1(1) of the *Co-operative Corporations Act* as follows:

(a) each member or delegate has only one vote,

(b) no member or delegate may vote by proxy,

(c) interest on loan capital and dividends on share capital are limited to a percentage fixed by this Act or the articles of incorporation, and

(d) the enterprise of the corporation is operated as nearly as possible at cost after providing for reasonable reserves and the payment or crediting of interest on loan capital or dividends on share capital; and

(e) any surplus funds arising from the business of the organization, after providing for such reasonable reserves and interest or dividends, unless used to maintain or improve services of the organization for its members or donated for community welfare or the propagation of co-operative principles, are distributed in whole or in part among the members in proportion to the volume of business they have done with or through the organization.

Same - s. 80(3)

80(3) This Part does not apply with respect to directors, or persons who perform functions similar to those of a director, of a college of a health profession or a group of health professions that is established or continued under an Act of the Legislature.

Section 80(3) states that Part XX does not apply to directors (or persons performing similar functions as a director) of a college of a health profession or of a college of a group of health professions that is established or continued under an Ontario statute. As such, those types of directors do not have any liabilities as directors under the ESA 2000.

For example, the College of Physicians and Surgeons of Ontario is established under the *Regulated Health Professions Act, 1991*, SO 1991, c 18. Accordingly, Part XX does not apply to the directors of the College of Physicians and Surgeons of Ontario.

Same - s. 80(4)

80(4) This Part does not apply with respect to directors of corporations,

(a) that have been incorporated in another jurisdiction;

(b) that have objects that are similar to the objects of corporations to which Part III of the Corporations Act applies or to which the Co-operative Corporations Act applies; and

(c) that are carried on without the purpose of gain.

Section 80(4) provides that Part XX of the Act does not apply to directors of corporations that are incorporated in another jurisdiction (usually federally-incorporated companies that are subject to provincial labour jurisdiction and are doing business in Ontario) if they:

- Have purposes similar to those corporations mentioned in s. 80(2) (i.e. not-for-profit corporations, and corporations such as housing co-ops); and
- Are carried on without the purpose of gain.

Directors are exempt from the application of Part XX only if all three conditions set out in paragraphs (a), (b) and (c) are met. See, for example, *Pensler v Adams,* 2012 ONSC 2369 (CanLII) where the Divisional Court dismissed an application for review of *Pensler v Adams*, 2011 CanLII 32018 (ON LRB), a decision by the Ontario Labour Relations Board in which the Board rejected the director's argument that s. 80(4) should be interpreted as exempting directors from Part XX if any of paragraphs (a), (b) or (c) apply.

ESA Part XX Section 81 - Director's Liability for Wages

Directors' Liability for Wages - s. 81(1)

81(1) The directors of an employer are jointly and severally liable for wages as provided in this Part if,

(a) the employer is insolvent, the employee has caused a claim for unpaid wages to be filed with the receiver appointed by a court with respect to the employer or with the employer's trustee in bankruptcy and the claim has not been paid;

(b) an employment standards officer has made an order that the employer is liable for wages, unless the amount set out in the order has been paid or the employer has applied to have it reviewed;

(c) an employment standards officer has made an order that a director is liable for wages, unless the amount set out in the order has been paid or the employer or the director has applied to have it reviewed; or

(d) the Board has issued, amended or affirmed an order under section 119, the order, as issued, amended or affirmed, requires the employer or the directors to pay wages and the amount set out in the order has not been paid.

This section deals with step two in the four step process for applying ESA Part XX, which is determining whether one of the circumstances in which directors will be liable exists

Subsection 81(1) sets out the four circumstances in which directors' liability for certain unpaid wages is established.

Joint and Several Liability

Subject to s. 81(7) the liability is joint and several. Joint and several liability does not mean that every director is necessarily liable for all of the monies that a single director is liable for under the *Employment Standards Act, 2000*. Rather, it means that each individual director can be ordered to pay the full amount of liability as opposed to apportioning the total liability amongst the directors. Each individual director's liability is ascertained by applying ss. 81(3)-(7), which entails having regard to the dates the director was a director.

When more than one director’s order to pay ("DOTP") is issued because there are multiple directors, all of whom have liability, the joint and several liability principle will often result in the sum total of those DOTPs exceeding the amount owed to the employee or employees. If the application of the joint and several liability principle results in more money being recovered from the directors than was owed to the employee(s), the excess is refunded to the directors on a pro rata basis.

Example – individual directors have same liabilities:

- Corporate employer failed to pay or appeal an order for $1200 in unpaid vacation pay
- Unpaid vacation pay accrued at the rate of $100 per month during each month in 2011
- Director A was a director throughout 2011
- Director B was a director throughout 2011
- Officer applied s. 81(3)-(7) and determined liability of each individual director:
    - Director A: $1200 in vacation pay
    - Director B: $1200 in vacation pay
- Total amount ordered: $2400 in vacation pay

The joint and several liability principle means that the officer can issue orders to the directors for the full amount of their individual liability (i.e., a DOTP to Director A for $1200 and a DOTP to Director B for

$1200) even though the total amount ordered ($2400) exceeds the amount owed to the employee ($1200).

Example – individual directors have different liabilities:

1. Corporate employer failed to pay or appeal an order for $1200 in unpaid vacation pay
2. Unpaid vacation pay accrued at the rate of $100 per month during each month in 2011
3. Director A was a director from January 1 - June 30, 2011
4. Director B was a director throughout 2011
5. Officer applied ss. 81(3)-(7) and determined liability of each individual director:
    - Director A: liable for $600 in vacation pay
    - Director B: liable for $1200 in vacation pay
6. Total amount ordered: $1800

The joint and several liability principle means that the officer can issue orders to the directors for the full amount of their individual liability (i.e., a DOTP to Director A for $600 and a DOTP to Director B for $1200) even though the total amount ordered ($1800) exceeds the amount owed to the employee ($1200).

When Directors' Liability is Established

The four circumstances in which director's liability for certain unpaid wages is established are as follows:

Court-appointed Receivership or Bankruptcy

A director becomes liable for certain unpaid wages where the employee has filed a proof of claim directly with the court-appointed receiver or the trustee, and the claim remains unpaid. Note that the amount that can be ordered to be paid under a DOTP may be affected by payments made under the federal Wage Earner Protection Program ("WEPPA") - see the discussion of WEPPA Payments in s. 81(7) below.

Unpaid Order to Pay Against Employer

A director becomes liable for certain unpaid wages if an employer to whom an order to pay wages was issued neither pays the order in full nor files an application for review under ESA Part XXIII, s. 116.

Unpaid Order Against Directors

This provision works in concert with ESA Part XXII, s. 107. It means that where an employment standards officer issued an order to pay to some but not all of the directors of a corporation, and the order(s) to pay remain(s) unpaid, and neither the employer nor the director has applied to have it reviewed, the other director(s) who were not yet issued an order become liable for the unpaid wages.

Board Decision

A director becomes liable for certain unpaid wages if a decision of the Ontario Labour Relations Board orders the employer or director(s) to pay wages to the employees, and the amount ordered has not been fully paid.

Employer Primarily Responsible - s. 81(2)

81(2) Despite subsection (1), the employer is primarily responsible for an employee's wages but proceedings against the employer under this Act do not have to be exhausted before proceedings may be commenced to collect wages from directors under this Part.

Subsection 81(2) provides that the employer is primarily responsible for the employee's wages, but the proceedings against the employer do not have to run their full course before an order to pay can be issued against a director.

See also *Re v Sagar Aggarwal, a director of 1189508 Ontario Ltd*. This decision, made under the former *Employment Standards Act*, also ruled that the Ministry need not first execute against the assets of a more active director before turning to a director who took no active part in the business.

Wages - s. 81(3); Vacation Pay - s. 81(4); Holiday Pay - s. 81(5); Overtime Wages - s. 81(6)

81(3) The wages that directors are liable for under this Part are wages, not including termination pay and severance pay as they are provided for under this Act or an employment contract and not including amounts that are deemed to be wages under this Act.

81(4) The vacation pay that directors are liable for is the greater of the minimum vacation pay provided in Part XI (Vacation with Pay) and the amount contractually agreed to by the employer and the employee.

81(5) The amount of holiday pay that directors are liable for is the greater of the amount payable for holidays at the rate as determined under this Act and the regulations and the amount for the holidays at the rate as contractually agreed to by the employer and the employee.

81(6) The overtime wages that directors are liable for are the greater of the amount of overtime pay provided in Part VIII (Overtime Pay) and the amount contractually agreed to by the employer and the employee.

These subsections deal with step three in the four-step process for applying ESA Part XX: establishing which types of unpaid wages directors are liable for.

Directors are liable for:

- Vacation pay pursuant to s. 81(4);
- Public holiday pay pursuant to s. 81(5);
- Overtime pay pursuant to s. 81(6); and
- Regular earnings pursuant to s. 81(3).

Note that “regular earnings” is a non-statutory term used to refer to all wages other than vacation pay, public holiday pay, overtime pay, termination pay (or vacation pay on termination pay) and severance pay, and amounts that are deemed to be wages under the ESA 2000. Regular earnings would be, for example, earnings derived from hourly wages, salary, commission earnings, piecework earnings, shift premiums, and non-discretionary bonuses. It also includes any top-up required to be paid under ESA Part XV, s. 60(1)(b).

Directors are not liable for:

- Termination pay or severance pay, whether the termination and severance pay is owing under the ESA 2000 or under a contract of employment.
- Vacation pay that is payable on termination pay in lieu of notice. This is because this sort of vacation pay is derivative of termination pay, and directors are not liable for termination pay. In contrast, because directors are liable for the wages to which an employee is entitled during a working period of notice, including any top-up required to be paid under ESA Part XV, s. 60(1)(b), they will be liable for the vacation pay earned on such wages.
- Amounts that are deemed to be wages under the ESA 2000. For example, unpaid benefit plan contributions during the notice period pursuant to ESA Part XV, ss. 60(3) and 62(2), and amounts owing under the equal pay for equal work provisions pursuant to ESA Part XII, s. 42(5).
- Amounts that are not wages as defined in ESA Part I, s. 1, for example, tips or other gratuities, discretionary bonuses, expenses, travelling allowances.
- Administrative costs that are ordered to be paid in a corporate employer order to pay wages.
- Non-wage compensation that is ordered to be paid in a corporate employer order to compensate.

Directors' Maximum Liability - s. 81(7)

81(7) The directors of an employer corporation are jointly and severally liable to the employees of the corporation for all debts not exceeding six months' wages, as described in subsection (3), that become payable while they are directors for services performed for the corporation and for the vacation pay accrued while they are directors for not more than 12 months under this Act and the regulations made under it or under any collective agreement made by the corporation.

This section deals with step four in the four-step process for applying Part XX: determining the quantum of unpaid wages a director is liable for.

The wording of s. 81(7) is consistent with the directors' liability provision in s. 131(1) of the Ontario *Business Corporations Act*, RSO 1990, c B.16 ("OBCA"). The OBCA provision must be enforced through civil proceedings, whereas s. 81 liability can be enforced with the relatively expeditious and inexpensive administrative proceedings provided for in the ESA 2000.

The recoverability of unpaid wages through a DOTP is limited by ESA Part XXII, s. 111, which states that an employee cannot recover wages (including vacation pay) that came due more than two years preceding the date the complaint was filed or an inspection commenced. Because s. 111 also applies to corporate employer orders to pay wages, for practical purposes, the determination of an individual director's liability starts by referencing the monies that were assessed to have been owing by the corporate employer within the confines of s. 111. Accordingly, to determine each individual director's maximum liability:

1. Ascertain what the corporate employer's liabilities are within the confines of s. 111 - both in terms of amounts and the dates;
2. With respect to those monies that the corporate employer is liable for under s. 111, as ascertained above, apply s. 81(7), which provides that:
    - With respect to any unpaid regular earnings, public holiday pay and overtime pay:
        - Each individual director is liable for those amounts that became payable while they were director, up to a maximum amount.

- The maximum amount is a theoretical number that is determined by calculating what the employee's regular earnings (i.e., not including vacation pay, public holiday pay, overtime pay, termination pay or severance pay) would be over a period of six months. For example, if an employee has an annual salary of $50,000, the maximum the director could be liable for with respect to unpaid regular earnings, public holiday pay and overtime pay is $25,000.

3. With respect to any unpaid vacation pay:
    - Each individual director is liable for the unpaid vacation pay that accrued while they were a director, up to a limit.
    - The limit is: a director is only liable for up to 12 months of the unpaid vacation pay that the corporate employer was liable for under s. 111 that accrued while the director was a director. Note that the 12 months do not have to be consecutive.

Limitations on Recovery

Directors' liability under s. 81 for wages other than vacation pay is limited to debts not exceeding six months' wages, as described in s. 81(3), that became payable while they were directors. The word “debts” is a substantially broader term than wages, but the reference to s. 81(3) makes it clear that liability is imposed only for debts that fall within the definition of wages - in fact, only a sub-group of them, since there is no directors' liability for termination pay, severance pay or amounts that are deemed to be wages. The real significance of the use of the word debts is that it repeats wording that is used in s. 131 of the OBCA and in other business corporations legislation that imposes liability on directors for amounts owed to employees; it thereby effectively incorporates the case law under that legislation. That case law is clear that the limitation of all debts not exceeding six months' wages was intended to create merely a quantitative limit and not a limitation based on the nature of the debt; in other words, all debts owed to employees were covered, whether or not they were wages, though subject to certain other limitations, but the liability could not exceed an amount equivalent to six months' wages. See, for example, *Proulx v Sahelian Goldfields Inc*., 2001 CanLII 6255 (ON CA).

As noted above, liability imposed under s. 81 is very definitely limited to wages, but the fact that the language in which liability is imposed echoes that used in business corporations legislation shows that the phrase “six months' wages” was intended merely to set a limit on quantum and was not meant to require that the wages in question have been payable in any particular six months or any particular six-month period, although insofar as any individual director's liability is concerned, the wages must have become payable while that director was in office. However, note that the ESA Part XX, s. 111 limitations imposed on an officer's authority to issue an order to pay may have an impact on recoverability through such an order.

Unlike the reference to six months' wages in s. 81(7), the reference to two years in ESA Part XX, s. 111 do not establish limitations based on an amount; rather they establish limitations relating to when the wages in question became due.

The limitation on the recovery of vacation pay in ESA Part XX, s. 111 is related to when the vacation pay came due. Subsection 81(7) limits directors’ liability for vacation pay to what was accrued while they are directors, for up to 12 months. That means the officer must first determine what vacation pay came due in the two years preceding the date the claim was filed, as only that vacation pay is recoverable under ESA Part XX, s. 111. The officer would then apply s. 81(7) with the result that the director's liability for the

vacation pay recoverable under ESA Part XX, s. 111 would be limited to that portion that accrued while the director was a director, to a maximum of 12 months of accrued vacation pay.

For example, assume an employee had commenced employment on February 1, 2016 and resigned on March 1, 2017. They have not taken any paid vacation or received any vacation pay during their entire period of employment. When they did not receive any of the outstanding vacation pay on March 15, 2017, the payday following their resignation, they filed a claim for it under the ESA 2000 on April 15, 2017. As all of the vacation pay that accrued during the course of their 13 month employment was due on March 15, 2017, it was all recoverable under s. 111(1). However, in issuing an order against a corporate director of the employer, the director's liability is limited to the vacation pay that accrued while they were a director, to maximum of 12 months of accrued vacation pay. In this case, assuming the director was a director for the full period of the claimant's employment, the director would be liable for any 12 of the 13 months of accrued vacation pay, as per s. 81(7).

Determining Quantum – Examples

Example 1

Facts

A corporate employer order to pay was issued with respect to a claimant who had an annual salary of $40,000 for:

- $1500 in regular earnings, $2000 in overtime pay and $300 in public holiday pay, all of which became payable in 2017
- $400 in vacation pay all of which accrued in 2017
- The corporate employer did not pay or appeal the order.
- The director was a director throughout the 2017 calendar year.

Determining quantum of director liability*:*

Start with the corporate employer assessment - this will be the maximum potential liability for an individual director. In this example, this is:

- $1500 regular earnings
- $2000 overtime pay
- $300 public holiday pay
- $400 in vacation pay

Regular earnings, overtime pay and public holiday pay:

- Was the director a director when any or all of the regular earnings, overtime pay and public holiday pay became payable? Yes. The director was a director when all of those monies became payable.
- Therefore, the director is liable for all of those wages (other than vacation pay) that were part of the corporate employer assessment up to the limit of the amount that is equal to six months' worth of regular earnings.

- With an annual salary of $40,000, six months' regular earnings is $20,000.

Accordingly, the director is liable for all of the unpaid regular earnings ($1500), overtime pay ($2000), and public holiday pay ($300).

Vacation pay:

- Was the director a director when any or all of the vacation pay that the corporate employer is liable for accrued? Yes. The director was a director when all of the vacation pay accrued.
- Therefore, the director is liable for the unpaid vacation pay that was part of the corporate employer assessment, subject to the limit of 12 months' vacation pay accrual.
- The vacation pay at issue accrued during 12 months of 2014.

Accordingly, the director is liable for all of the unpaid vacation pay ($400) and a DOTP can be issued for that amount.

Example 2 - Vacation pay due was accrued over more than 12 months

Facts

- The officer found that the corporate employer owed the claimant $2700 in vacation pay, all of which came due on January 1, 2017 and within the 2 years prior to the claim being filed.
- This unpaid vacation pay had accrued at a rate of $150 per month, over 18 months.
- The corporate employer did not pay or appeal the order.
- The director was a director in all 18 months in which the unpaid vacation pay accrued.

Determining quantum of director liability:

Start with the corporate employer assessment, as limited by s. 111(1). This is the maximum potential liability. In this example, this is $2700 in vacation pay.

- Was the director a director when the vacation pay accrued? Yes. The director was a director when all of the unpaid vacation pay for which the corporate employer was liable accrued.
- Accordingly, the director is liable for all of the unpaid vacation pay that was the subject of the corporate employer assessment, as limited by s. 111(1), subject to the director liability limit of 12 months' accrued vacation pay.
- The vacation pay at issue accrued during 18 months.
- Directors are liable only for unpaid vacation pay that accrued during 12 months.

Therefore, the director is liable only for $1800 in unpaid vacation pay (12 months x $150 per month), and a DOTP can be issued for that amount.

Note: if the amount of vacation pay that accrued monthly changed over the course of the 18 month period, the officer is able to select which 12 months to use when determining the limit on the director's liability.

Transitional Provisions

On February 20, 2015, the *Stronger Workplaces for a Stronger Economy Act* introduced a number of transitional provisions that imposed limitations on recovery. Subsections 111(3.1) to (8) imposed a six-month limitation period on unpaid wages that became due before February 20, 2015, and a 12-month limitation period for repeated contraventions and vacation pay that became due before February 20, 2015. Subsection 103(4) imposed a cap of $10,000 on the amount of wages an employment standards officer could order for a single employee with respect to wages that came due prior to February 20, 2015. Subsection 103(4.1), which was also added to s.103 by the *Stronger Workplaces for a Stronger Economy Act, 2014* effective February 20, 2015, eliminated the $10,000 cap with respect to orders for unpaid wages that come due on or after that date. Subsections 103(4) and 103(4.1) and ss. 111(3.1) to (8) were transitional provisions and were repealed on February 20, 2017.

Although these sections are now repealed, it is Program policy that the $10,000 cap and limitation periods imposed by the transitional provisions continue to apply to wages, repeated contraventions and vacation pay that became due before February 20, 2015, even if any associated orders are issued after February 20, 2017. This is to preserve the vested legal rights of the parties at the time the contravention occurred. This is relevant in situations where a period of time lapses between the time a claim is filed and the time a claim is investigated.

Note, however, that the $10,000 cap imposed on orders against employers by s. 103(4) with respect to wages that came due prior to February 20, 2015 is not applicable to orders issued against directors under s. 106 or s. 107. Accordingly, the $10,000 cap does not apply to orders against directors.

See ESA Part XXII, s. 103 and ESA Part XXII, s. 111 for further discussion on the transitional provisions.

Determining Quantum Under Transitional Provisions - Examples

Example 1 - All wages came due prior to February 20, 2015 AND entitlement is less than $10,000

Facts

A corporate employer order to pay was issued with respect to a claimant who had an annual salary of $40,000 for:

- $1500 in regular earnings, $2000 in overtime pay and $300 in public holiday pay, all of which became payable in 2014.
- $400 in vacation pay all of which accrued in 2014.
- The corporate employer did not pay or appeal the order.
- The director was a director throughout the 2014 calendar year.

Determining quantum of director liability:

Start with the corporate employer assessment as limited by the six month/12-month limitation periods set out in s. 111(3.1), (4) and (3.2), without regard to the $10,000 cap on orders to pay wages that became due prior to February 20, 2015. This will be the maximum potential liability for an individual director. In this example, this is:

- $1500 regular earnings
- $2000 overtime pay

- $300 public holiday pay
- $400 in vacation pay

Regular earnings, overtime pay and public holiday pay:

- Was the director a director when any or all of the regular earnings, overtime pay and public holiday pay became payable? Yes. The director was a director when all of those monies became payable.
- Therefore, the director is liable for all of those wages (other than vacation pay) that were part of the corporate employer assessment within the confines of the six month/12-month limitation periods without regard to the $10,000 cap on orders to pay wages that became due prior to February 20, 2015 up to the limit of the amount that is equal to six months' worth of regular earnings.
- With an annual salary of $40,000, six months' regular earnings is $20,000.

Accordingly, the director is liable for all of the unpaid regular earnings ($1500), overtime pay ($2000), and public holiday pay ($300).

Vacation pay:

- Was the director a director when any or all of the vacation pay that the corporate employer is liable for accrued? Yes. The director was a director when all of the vacation pay accrued.
- Therefore, the director is liable for the unpaid vacation pay that was part of the corporate employer assessment as limited by the 12-month limitation period in s. 111(3.2), subject to the limit of 12 months' vacation pay accrual.
- The vacation pay at issue accrued during 12 months of 2014.

Accordingly, the director is liable for all of the unpaid vacation pay ($400) and a DOTP can be issued for that amount.

Example 2 - All came wages due prior to February 20, 2015 AND corporate liability exceeds $10,000

Although the proof of claim is not subject to s. 111 limitations, the DOTP is, so before determining an individual director's liability, s. 111 must be applied. For example:

Facts

A proof of claim was filed with respect to an employee who had an annual salary of $40,000 for:

- $1500 in regular wages, $2000 in overtime pay and $300 in public holiday pay, all of which became payable in 2014.
- $400 in vacation pay all of which accrued in 2014.
- $8,000 in termination and severance pay that became payable on December 31, 2014.

The director was a director throughout the 2014 calendar year.

Determining quantum of director liability:

Start with the corporate employer assessment as limited by the six-month/12-month limitation periods regarding wages that became due prior to February 20, 2015, but without regard to the $10,000 cap that applies to wages. This is the maximum potential liability for an individual director. In this example, this is:

- $1500 regular earnings
- $2000 overtime pay
- $300 public holiday pay
- $400 in vacation pay
- $0 for termination and severance pay as directors are not liable for these amounts

With respect to regular earnings, overtime pay and public holiday pay:

- Was the director a director when any or all of the regular wages, overtime pay and public holiday pay became payable? Yes. The director was a director when all of those monies became payable.
- Therefore, the director is liable for all of those wages (other than vacation pay) that were part of the corporate employer assessment as limited by the six month/12-month limitations in s. 111 (3.1) and (4) on wages that became due prior to February 20, 2015 without regard to the $10,000 cap, up to the limit of the amount that is equal to six months' worth of regular earnings.
- With an annual salary of $40,000 six months' regular earnings is $20,000.

Accordingly, the director is liable for all of the unpaid regular earnings ($1500), overtime pay ($2000) and public holiday pay ($300).

With respect to vacation pay:

- Was the director a director when any or all of the vacation pay that the corporate employer is liable for accrued? Yes. The director was a director when all of the vacation pay accrued.
- Therefore, the director is liable for the unpaid vacation pay that was part of the corporate employer assessment as limited by the 12-month limitation period in s. 111(3.2), subject to the limit of 12 months' accrued vacation pay.
- The vacation pay at issue accrued during 12 months.

The director is liable for all of the unpaid vacation pay ($400) and a DOTP can be issued for that amount.

Example 3 - All wages due prior to February 20, 2015 AND director liability exceeds $10,000

Facts

- The officer found that the corporate employer owed the claimant $12,000 in overtime pay, $1,000 of which became payable each month of 2014. The officer issued an order to the employer for $10,000 in overtime pay, plus the administrative fee, in accordance with s. 103(4).
- The claimant has an annual salary of $40,000.
- The corporate employer did not pay or appeal the order.
- The director was a director throughout 2014.

Determining quantum of director liability:

Start with the corporate employer assessment, as limited by the six month/12 month limitation periods in s. 111(3.1) and (4) regarding wages that became due prior to February 20, 2015, without regard to the $10,000 cap on the corporate order. This is the maximum potential liability. In this example, this is $12,000 in overtime pay.

- Was the director a director when all or part of the overtime pay became payable? Yes. The director was a director when all of the overtime pay became payable.
- Therefore, the director is liable for all of the overtime pay that was part of the corporate assessment as limited by s. 111(3.1) and (4) without regard to the $10,000 cap, up to the limit of the amount that is equal to six months' worth of regular earnings.
- With an annual salary of $40,000, six months' regular earnings is $20,000.

Accordingly, the director is liable for $12,000 and a DOTP can be issued for that amount.

Resignation of Directors

Timing and Validity of Resignations

In determining a director's potential liability, the timing and validity of any resignation of directorship must be examined. The rules around resignations are:

- Resignation of a director must be in writing - see s. 121(2) of the OBCA
- Resignation can be valid even though the director did not sign the resignation document - see *Navas v Blakemore*, 2005 CanLII 1844 (ON LRB)
- Effective date of a resignation is:
    - Date that the written resignation is received by the corporation (or the date specified in the resignation, if that is later) - see s. 121(2) of the OBCA; or
    - In the case of first directors of a corporation, resignation is not effective unless and until a successor is elected or appointed

Whether (and when) a director has resigned is a question of fact.

In *Navas v Blakemore*, where the director communicated his resignation orally to the Vice President/Executive Director and asked for a letter acknowledging his resignation. The Vice President/Executive Director provided the director with a letter dated November 14 that was addressed to the director and signed by the Vice President/Executive Director, which read in part: "Re: Acceptance of Directorship Resignation: Luis, as requested, I have removed you as a Director of NGMA Products effective immediately." The corporate filings were not updated to reflect any resignation. The OLRB, relying on an *Stewart v Canadian Broadcasting Corp*., 1997 CanLII 12324 (ON SC), ruled that the November 14 letter that originated from the company satisfied the statutory requirement that there be a "written resignation . . . received by the corporation."

Also see *Pollock v Somes,* 2006 CanLII 18686 (ON LRB), where the OLRB accepted a fax return report together with oral evidence from the director as to the content of the fax transmission to conclude that written resignations were received by the corporation on the date indicated on the fax return report, despite what the corporate filings indicated.

Impact of Resignation on Liability for Unpaid Wages

Subsection 81(7) indicates that directors will only be liable for wages other than vacation pay that become payable while they are directors of the corporation. Wages become payable on the regular pay day of the employer, as established by the practice of the employer.

For example, if a director resigns in the middle of a pay period, that director would not be liable for the unpaid wages that became due on the payday following their resignation.

Impact of Resignation on Liability for Unpaid Vacation Pay

Subsection 81(7) states that directors are liable for vacation pay that accrued while they were a director.

For percentage-based vacation pay (e.g., the ESA 2000 minimum standard of either four or six per cent of earnings), a director would be liable for vacation pay calculated on wages the employees earned while they were a director. It is the date the vacation pay was accrued that is relevant to the director's liability, not the date it was to have been paid.

Example:

- Employee accrued vacation pay on all wages as they were earned during the calendar year 2014.
- Employer was required to pay the vacation pay that accrued during 2014 by October 31, 2015.
- Director resigned on January 1, 2015.
- Director would be liable for all the vacation pay that had accrued during 2014 even though they resigned before it came due.

For service-based vacation pay (e.g., 1 ½ days of paid vacation for every month of service), a director would be liable for vacation pay that accrued based on service that occurred while they were a director. Again, a corporate employer's liability for vacation pay is determined by when the vacation pay was due, but a director's individual liability for some or all of that vacation pay is determined by when that vacation pay was accrued.

Absolute Liability

The liability against directors is an absolute liability. This is also known as strict liability.

This means that once it is established that an individual was a director at the relevant time, there is no basis for relief against that person's liability, not even if the director shows that they exercised due diligence.

Directors may argue that they are not liable because they have not been active as a director for years, or that were only ever a director in name only and had no influence over the company. Unless that person can rebut the presumption that they were a director during the relevant period, that person is liable as a director under Part XX even if they did not play any active role in the corporation at the time the liability arose.

See for example *Arcese Inc. v Alves*, 2007 CanLII 35668 (ON LRB) where the OLRB ruled that two directors were liable even though they maintained that they were not the directing minds of the company. They argued that they were directors in name only and had no control or influence over the company, no signing authority, no voting power, and disagreed with many of the actions of the other two directors. The Board ruled that the ESA 2000 "makes no distinction between directors that control a company and those who are directors in name only", and upheld the orders that were made against them.

WEPPA Payments

When an officer is issuing a DOTP where the corporate employer is formally insolvent, the amount that can be ordered to be paid under the DOTP may be affected by payments made under the federal *Wage Earner Protection Program Act,* SC 2005, c 47, s 1 ("WEPPA").

Offset

Where a claimant has received a WEPPA payment and the officer is issuing a DOTP, it is the Program's position that the officer must offset the WEPPA amount from the amount of the DOTP. If the WEPPA payment only accounts for a portion of the wages owed, the DOTP is issued for the outstanding balance to the extent that a director is liable for the outstanding amount.

Allocation of Payment

A regulation under the WEPPA establishes that WEPPA payments are allocated first to wages, second to disbursements of a traveling salesperson under certain conditions, third to vacation pay, fourth to termination pay, and lastly to severance pay.

It is the Program's position that officers must abide by the characterization of the WEPPA payment as supplied by the trustee, who is bound to follow the federal regulation regarding the allocation of the payment.

Wage Definitions

The question has arisen as to how to account for the difference in the definition of wages in the WEPPA versus the ESA definition. In particular, wages under the WEPPA includes "gratuities accounted for by the employer" and the ESA definition excludes tips and gratuities. This raises the question of how the WEPPA payment should be characterized where a claimant is owed gratuities from the employer and is also owed wages as defined in the ESA.

It is the Program's position that, in a situation where gratuities are an issue, the WEPPA payment be allocated based on the same proportion as the claim accepted by the trustee.

For example, if an employee is owed $2500 in wages as defined in the ESA and $2500 in gratuities accounted for by the employer and is paid a $3000 WEPPA payment, then the WEPPA payment could reasonably be seen as allocated 50/50 between the ESA defined wages owed to the employee and the gratuities owed to the employee, barring evidence to the contrary in any given case.

6.82% Deduction

Pursuant to a regulation under the WEPPA, the WEPPA program automatically deducts 6.82% from any amount that is owed to employees. This means that an employee will never be made absolutely whole through a WEPPA payment. Accordingly, there will always be an outstanding amount that could be the subject of a DOTP.

For example, assume an employee has a legitimate claim for $1000 in unpaid wages that attracts director liability. If the WEPPA program makes only a $931.80 payment (due to the regulation requiring a 6.82% reduction), then a director could be ordered to pay $68.20 so that the claimant could be made whole.

Interest - s. 81(8) – REPEALED

Contribution from Other Directors - s. 81(9)

81(9) A director who has satisfied a claim for wages is entitled to contribution in relation to the wages from other directors who are liable for the claim.

Subsection 81(9) provides that if a director pays the wages and vacation pay owing to an employee, pursuant to Part XX, that director is entitled to reimbursement from the other directors liable under Part XX who did not pay their pro rata share, under the joint and several liability principle.

For example, if there are five directors, all of whom were on the Board at the relevant time, and one of the directors is issued an order to pay for the entire amount which they pay, that director is entitled to reimbursement from the other four directors, for 80 per cent of the amount paid (i.e., 20 per cent each). This applies even though the other four directors were not issued orders to pay. This right of reimbursement has to be enforced, however, through a civil action. It may not be enforced through the administrative proceedings under the ESA 2000.

Limitation Periods - s. 81(10)

81(10) A limitation period set out in section 114 prevails over a limitation period in any other Act, unless the other Act states that it is to prevail over this Act.

Subsection 81(10) indicates that if there is a conflict between a limitation period in another statute regarding directors' liability and the limitation periods in ESA Part XXII, s. 114, the limitation period in the ESA 2000 applies, unless the other statute states specifically that the limitation period in that other Act is to prevail over the ESA 2000.

Section 114 states that no order to pay wages, fees or compensation (or notice of contravention) will be issued:

- If the employee filed a complaint more than two years after the date the complaint was filed; or
- If the employee did not file a complaint but the contravention regarding that employee was discovered during the course of an investigation into a complaint filed by another employee more than two years after the date the complaint was filed by the other employee; or
- If no complaint was filed but the contravention was discovered during the course of an inspection by an employment standards officer more than two years after the inspection was commenced.

Subsection 131(2) of the OBCA states:

A director is liable under subsection (1) only if,

(a) the corporation is sued in the action against the director and execution against the corporation is returned unsatisfied in whole or in part; or

(b) before or after the action is commenced, the corporation goes into liquidation, is ordered to be wound up or makes an authorized assignment under the Bankruptcy and Insolvency Act (Canada), or a receiving order under that Act is made against it, and, in any such case, the claim for the debt has been proved.

Similar provisions appear in s. 81(2) of the Ontario *Corporations Act,* RSO 1990, c C.38, which governs non-profit corporations.

It is clear that there is a conflict between the limitation period in the ESA 2000 and the limitation periods in s. 131(2) of the OBCA, and s. 81(2) of the Ontario *Corporations Act*. Since the OBCA and the *Corporations Act* do not expressly state that they are to prevail over the ESA 2000 in the event of a conflict, the limitation periods in the ESA 2000 will apply with respect to the Ministry's ability to issue an order against a director under the ESA 2000. If proceedings are taken under the OBCA or the *Corporations Act*, the limitation periods in those statutes would apply.

ESA Part XX Section 82 - No Relief by Contract, etc.

No Relief by Contract, etc. - s. 82(1)

82(1) No provision in a contract, in the articles of incorporation or the by-laws of a corporation or in a resolution of a corporation relieves a director from the duty to act according to this Act or relieves him or her from liability for breach of it.

This section is identical to s. 58.28(1) under the former *Employment Standards Act*.

Section 82(1) provides that a director cannot contract out of liability under the *Employment Standards Act, 2000*, whether such purported relief is contained in the articles of incorporation, the corporate by-laws, a resolution of the Board of Directors, or the shareholders, or by way of contract. This is in keeping with the general no waiver or no-contracting out provision in s. 5(1) of the ESA 2000.

See, for example, *Otema Store Interiors Ltd. v Aitkaliyev*, 2008 CanLII 20823 (ON LRB) where the director of Otema Store Interiors Ltd. argued that he had no liability under Part XX because a corporation had purchased the assets of Otema Store Interiors Ltd. and a memorandum of understanding that was part of the sale agreement stipulated that the purchaser would pay those employees who were hired by the purchaser any vacation pay that was owing to the employees at the time of the sale. The director of Otema Store Interiors Ltd. argued that he had divested himself of ESA liabilities by way of the memorandum of understanding and should not be held liable for vacation pay that he admitted was owing to the claimants at the time of the sale. The OLRB disagreed. It ruled that s. 82 precluded the Board from giving any weight to the Memorandum of Understanding and affirmed the Director Order to Pay.

What amounts to an exception to the "no contracting out" prohibition occurs where there is a unanimous shareholders' agreement ("USA") that relieves the directors of liability for wages and vacation pay. In such a case, the shareholders and not the actual directors are considered to be the "directors" for the purposes of liability under Part XX. See also the discussion of the definition of directors in s. 79 of the Act, which includes shareholders under a USA, in ESA Part XX.

Indemnification of Directors - s. 82(2)

82(2) An employer may indemnify a director, a former director and the heirs or legal representatives of a director or former director against all costs, charges and expenses, including an amount paid to satisfy an order under this Act, including an order which is the subject of a filing under section 126, reasonably incurred by the director with respect to any civil or administrative action or proceeding to which he or she is a party by reason of being or having been a director of the employer if,

a) he or she has acted honestly and in good faith with a view to the best interests of the employer; and

b) in the case of a proceeding or action that is enforced by a monetary penalty, he or she had reasonable grounds for believing that his or her conduct was lawful.

This section is substantially the same as s. 58.28(2) of the former *Employment Standards Act*.

Section 82(2) mirrors corresponding provisions in corporations legislation, such as the Ontario *Business Corporations Act,* RSO 1990, c B.16, which state that a corporate employer may agree to reimburse a director or former director (or his or her heirs) for amounts incurred as a result of directors' liability provided that the director acted honestly and in good faith with regards to the best interests of the employer, and if the proceedings involve a fine or monetary penalty, where the director reasonably believed that he or she was not breaking the law.

ESA Part XX Section 83 - Civil Remedies Protected

83 No civil remedy that a person may have against a director or that a director may have against a person is suspended or affected by this Part.

This section is substantially the same as s. 58.29 in the former *Employment Standards Act.*

Section 83 states that Part XX does not affect any civil remedies that a director may have against any person or vice-versa. If, for example, an employee wishes to sue a director under the directors' liability provisions of the Ontario *Business Corporations Act,* RSO 1990, c B.16 ("OBCA"), the Ontario *Corporations Act,* RSO 1990, c C.38, or the *Canada Business Corporations Act*, RSC 1985, c C-44, the employee can do so. However, this provision should be read with reference to ss. 97 and 98 of the *Employment Standards Act, 2000* which state that an employee has to choose between filing a claim with the Ministry and commencing a civil action in court for the same matter. For example, if an employee filed a claim with the Ministry under the Act for vacation pay, that employee could not subsequently commence a civil action under the OBCA for that vacation pay. Please refer to ESA Part XXII for a more detailed discussion of ss. 97 and 98. Where a director is relieved of responsibility for wages and vacation pay because there is a unanimous shareholders' agreement, this is consistent with this section, because in such a case the shareholders and not the actual directors are considered to be "directors" for purposes of liability under Part XX.

ESA Part XXI - Who Enforces This Act and What They Can Do

Part XXI (ss. 84 to 95 inclusive) is the source for the powers of those persons responsible for administering the *Employment Standards Act, 2000*.

The intent of these provisions of the Act is to provide for the day-to-day administration of the legislation through the powers and duties of the Minister of Labour, the Director of Employment Standards and employment standards officers.

ESA Part XXI Section 84 - Minister Responsible

84 The Minister is responsible for the administration of this Act.

The Minister of Labour is responsible to the Legislature and to the public for the administration of the *Employment Standards Act, 2000*. The language of this section is identical to the language in s. 59(1) of the former *Employment Standards Act*. That section was used as authority for the proposition that in employee applications for review under the Act, the claimant does not control the process. The Minister is the person responsible for the Act. Therefore, such enforcement processes as investigation, issuing an order and defending an order at a hearing are under the administration of the Minister, and are not under the control of the employee who filed the claim. See *Dominion Electric Protection Co. Ltd. d.b.a ADT Energy Systems v Hand* (September 23, 1985), ESC 1950 (Baum).

ESA Part XXI Section 85 - Director

Director - s. 85(1)

85(1) The Minister shall appoint a person to be the Director of Employment Standards to administer this Act and the regulations.

The Minister of Labour appoints the Director of Employment Standards to administer the *Employment Standards Act, 2000* and the regulations. This section is the source for the Director's powers and duties under the Act. The nature of the Director's powers and duties is spelled out in s. 88.

Acting Director - ss. 85(2) and (3)

85(2) The Director's powers may be exercised and the Director's duties may be performed by an employee of the Ministry appointed as Acting Director if,

- **a) the Director is absent or unable to act; or**
- **b) an individual who was appointed Director has ceased to be the Director and no new Director has been appointed.**

85(3) An Acting Director shall be appointed by the Director or, in the Director's absence, the Deputy Minister of Labour.

This provision is similar to the corresponding section (s. 59) of the former *Employment Standards Act* except that the former *Employment Standards Act* provided for the Minister to appoint an Acting Director. Sections 85 (2) and (3) allow the Director or the Deputy Minister, in the Director's absence, to name an

employee of the Ministry to take over the duties of the Director in an "acting" capacity while the Director is unable to exercise the powers of the office, or while the office is vacant.

ESA Part XXI Section 86 - Employment Standards Officers

Employment Standards Officers - s. 86(1)

86(1) Persons to enforce this Act and the regulations may be appointed as employment standards officers under the *Public Service Act*.

Section 86(1) is the authority for the appointment of employment standards officers. Once appointed, the officers have the authority to exercise powers and duties in accordance with s. 89 of the *Employment Standards Act, 2000*.

Certificate of Appointment - s. 86(2)

86(2) The Deputy Minister of Labour shall issue a certificate of appointment bearing his or her signature or a facsimile of it to every employment standards officer.

Section 86(2) requires that an appointment card be issued to all employment standards officers. The Deputy Minister must issue to each officer a card as evidence of his or her appointment. The card is evidence of the officer's appointment and authority to use the powers set out in ss. 89, 91 and 93.

The corresponding provision in the former *Employment Standards Act* (s. 62) also explicitly required an officer to present his or her card, as authority for the powers exercised or the duties carried out, if requested to do so by any person. This provision is now found in s. 91(5).

ESA Part XXI Section 87 - Delegation

Delegation - s. 87(1); Residual Powers - s. 87(2)

87(1) The Minister may, in writing, delegate any of the Minister's powers or duties under this Act subject to the limitations or conditions set out in the delegation.

87(2) The Minister may exercise a power or perform a duty under this Act even if he or she has delegated it to a person under this section.

Section 87(1) is substantially the same as the corresponding section (s. 59(5)) of the former *Employment Standards Act*. It allows the Minister of Labour to delegate powers and duties to anyone he or she chooses. The delegation must, however, be made in writing.

Section 87(2) was introduced by the *Employment Standards Act, 2000*. It preserves the Minister's ability to exercise powers and perform duties that have been delegated to persons under this section.

ESA Part XXI Section 88 - Powers and Duties of Director

Powers and Duties of Director - s. 88(1)

88(1) The Director may exercise the powers conferred upon the Director under this Act and shall perform the duties imposed upon the Director under this Act.

Subsection 88(1) makes plain the distinction between the powers of the Director (those instances where the *Employment Standards Act, 2000* says that the Director may do something) and the duties of the Director (where it is stipulated that the Director shall do something). This distinction accords with principles of statutory interpretation concerning permissive and mandatory language.

For example, the powers of the Director would include:

- Subsection 88(5) - the power to determine the rate of interest and manner of calculating it under the ESA 2000;
- Subsection 99(6) - the power to permit an employee represented by a trade union that is a party to a collective agreement to file a complaint.

The duties of the Director would include:

- Subsection 88(7) - the duty to pay out monies that had been paid to the Director in trust, to the person entitled to receive it, with interest where no provision has been made elsewhere in the ESA 2000 for paying it out
- Subsection 112(5) - the duty to pay to the employee monies that were paid to the Director in trust with respect to that employee under as. 112 settlement

Policies - s. 88(2)

88(2) The Director may establish policies respecting the interpretation, administration and enforcement of this Act.

This subsection allows the Director to establish policies regarding interpretation, administration and enforcement of the ESA 2000. The purpose of the provision is to promote province-wide, consistent interpretation and application of the ESA 2000.

This subsection should be read together with ESA Part XXI s. 89(2), which states that employment standards officers must follow any policies established by the Director under s. 88(2).

Authorization - s. 88(3)

88(3) The Director may authorize an employment standards officer to exercise a power or to perform a duty conferred upon the Director under this Act, either orally or in writing.

Subsection 88(3) sets out the authority of the Director to delegate various powers and duties to program staff. For information on such delegations see Delegation of Powers.

Note that in addition to the Director's general authority to delegate under s. 88(3), the Director has further, specific delegation authority in ESA Part VII, s. 17.3 and in ESA Part VIII, s. 22.2.

Same: Residual Powers - s. 88(4)

88(4) The Director may exercise a power conferred upon the Director under this Act even if he or she has delegated it to a person under subsection (3).

Section 88(4) preserves the Director's ability to exercise powers that have been delegated to persons under s. 88(3).

Interest - s. 88(5)

88(5) The Director may, with the approval of the Minister, determine the rates of interest and the manner of calculating interest for,

- **amounts owing under different provisions of this Act or the regulations; and**
- **money held by the Director in trust.**

Subsection 88(5) authorizes the Director, with the Minister's approval, to decide what rates of interest and the manner of its calculation for the purposes of the ESA 2000.

The *Fair Workplaces, Better Jobs Act, 2017*, SO 2017, c 22, amended s. 88(5), effective January 1, 2018 to allow the Director of Employment Standards to set multiple rates of interest for any amounts owing under different provisions of the ESA 2000 and its regulations, as well as money held in trust by the Director.

No specific rates of interest are currently in place under this section.

Determinations not Regulations - s. 88(6)

88(6) A determination under subsection (5) is not a regulation within the meaning of Part III (Regulations) of the *Legislation Act, 2006*.

Subsection 88(6) clarifies that the Director's determination of an interest rate under s. 88(5) is not a regulation.

Other Circumstances - s. 88(7)

88(7) Where money has been paid to the Director in trust and no provision is made for paying it out elsewhere in this Act, it shall be paid out to the persons entitled to receive it together with interest at the rate and calculated in the manner determined by the Director under subsection (5).

Subsection 88(7) is intended to provide consistency in the calculation of interest on and payment out of monies that had been paid into the Director in trust, where there are no provisions for paying it out elsewhere in the ESA 2000. For example, this section would apply where employees have elected to retain recall rights under a collective agreement and the termination and/or severance pay monies were paid to the Director in trust and are subsequently paid out to the employer or employees under ESA Part XV, ss. 67(8) and (9).

Surplus Interest - s. 88(8)

88(8) If the interest earned on money held by the Director in trust exceeds the interest paid to the person entitled to receive the money, the Director may use the difference to pay any service charges for the management of the money levied by the financial institution with which the money was deposited.

Subsection 88(8) allows for any excess interest earned on the monies held in trust to be used to pay service charges levied by the financial institution in which the money was deposited.

Hearing not Required - s. 88(9)

88(9) The Director is not required to hold a hearing in exercising any power under the Act.

Subsection 88(9) provides that the Director is not required to hold hearings when exercising powers under the ESA 2000. Because the Director's statutory powers are such that a person's rights can be affected, (e.g., approving severance payments by instalment and approving the extension of a temporary lay-off) there is a possibility that principles of natural justice may require the Director to hold a hearing if not for this provision.

This provision is consistent with s. 89(3), which states that employment standards officers are not required to hold hearings when exercising any power or making any decision under the ESA 2000.

ESA Part XXI Section 88.1 - Director May Reassign an Investigation

88.1 (1) The Director may terminate the assignment of an employment standards officer to the investigation of a complaint and may assign the investigation to another employment standards officer.

(2) If the Director terminates the assignment of an employment standards officer to the investigation of a complaint,

a) **the officer whose assignment is terminated shall no longer have any powers or duties with respect to the investigation of the complaint or the discovery during the investigation of any similar potential entitlement of another employee of the**

b) **the new employment standards officer assigned to the investigation may rely on evidence collected by the first officer and any findings of fact made by that officer.**

(3) This section applies with necessary modifications to inspections of employers by employment standards officers.

Section 88.1 was added to the *Employment Standards Act, 2000* by the *Good Government Act, 2006,* SO 2006, c 19, effective June 22, 2006. The section permits the Director of Employment Standards to transfer the investigation of a complaint or inspection from an employment standards officer to another employment standards officer.

The Director's authority to reassign a file is discretionary. An example of when the Director might consider exercising his or her discretion is if the original investigating officer was indisposed and could not be expected to complete the investigation in a timely way.

If the Director did reassign a file under this section, the new officer would able to rely, but would not have to rely, on any findings of fact and the evidence collected by the first officer. The new officer would also be able to collect new evidence and make new findings.

ESA Part XXI Section 88.2 – Recognition of Employers

Recognition of Employers – s. 88.2(1)

88.2(1) The Director may give recognition to an employer, upon the employer's application, if the employer satisfies the Director that it meets the prescribed criteria.

This subsection enables the Director of Employment Standards to give recognition to an employer, for example, for a high rate of compliance with the *Employment Standards Act, 2000*, or exceptional performance measured in accordance with prescribed criteria. Currently, no criteria are prescribed.

Classes of Employers – s. 88.2(2)

88.2(2) For greater certainty, the criteria under subsection (1) may be prescribed for different classes of employers.

This subsection establishes that the criteria or system of recognition may be divided into different classes of employer with different criteria for each.

Information re Recognitions – s. 88.2(3)

88.2(3) The Director may require any employer who is seeking recognition under subsection (1), or who is the subject of a recognition, to provide the Director with whatever information, records or accounts he or she may require pertaining to the recognition and the Director may make such inquiries and examinations as he or she considers necessary.

This subsection empowers the Director to require any information related to the recognition, for the purposes of granting, reviewing or revoking a recognition from either an applicant for same or an employer who is has already received a recognition.

Publication – s. 88.2(4)

88.2(4) The Director may publish or otherwise make available to the public information relating to employers given recognition under subsection (1), including the names of employers.

This subsection permits the Director to publish general information, such as the number of recognitions granted within a particular time period and the names of employers that have received recognitions.

Validity of Recognition – s. 88.2(5)

88.2(5) A recognition given under subsection (1) is valid for the period that the Director specifies in the recognition.

A recognition granted by the Director may specify a time period within which it will remain valid. It will cease to be valid after that point.

Revocation, etc. of Recognitions – s. 88.2(6)

88.2(6) The Director may revoke or amend a recognition.

The Director has the power to revoke or amend a recognition. For example, if an employer no longer fulfills the criteria that support a recognition the Director would be able to revoke it.

ESA Part XXI Section 88.3 – Delegation of Powers Under s. 88.2

Delegation of Powers Under s. 88.2 – s. 88.3(1)

88.3(1) The Director may authorize an individual employed in the Ministry to exercise a power conferred on the Director under section 88.2, either orally or in writing.

This subsection empowers the Director to authorize or delegate all of the powers of granting, revoking or amending recognition to an employer as well as requiring an employer to provide information.

Residual Powers – s. 88.3(2)

88.3(2) The Director may exercise a power conferred on the Director under s. 88.2 even if he or she has delegated it to an individual under subsection (1).

Although the Director may delegate powers established by s. 88.2, the Director retains the ability to exercise any power under s. 88.2 simultaneously.

Duty re Policies – s. 88.3(3)

88.3(3) An individual authorized by the Director under subsection (1) shall follow any policies established by the Director under subsection 88(2).

Under s. 88.3(3), an individual who has been authorized by the Director of Employment Standards to grant, amend or revoke an employer recognition under s. 88.3(1), is required to follow any policies established by the Director under s. 88(2) related to the exercise of that authority. Subsection 88(2) empowers the Director to establish policies "respecting the interpretation, administration and enforcement of this Act". If the Director does so in relation to employer recognition per s. 88.2, any person authorized by the Director to exercise a power under s. 88.2 is required to follow those policies.

ESA Part XXI Section 89 - Powers and Duties of Officers

Powers and Duties of Officers - s. 89(1)

89(1) An employment standards officer may exercise the powers conferred upon employment standards officers under this Act and shall perform the duties imposed upon employment standards officers under this Act.

Section 89(1) parallels s. 88(1), concerning, in this case, the powers and duties of an employment standards officer. As in s. 88(1), this section emphasizes the distinction between what the officer **may** do and what the officer **must** do.

For example, "the powers of an employment standards officer" would include:

- Section 91(1) - the power to enter and inspect any place without a warrant
- Section 102 - the power to hold a "decision-making" meeting

The "duties of an employment standards officer" would include:

- Section 89(2) - the duty to follow any policies established by the director under s. 88
- Section 110 - the duty to advise a complainant of the decision to refuse to issue an order by letter served in accordance with s. 95

Officers to Follow Policies - s. 89(2)

89(2) An employment standards officer shall follow any policies established by the Director under subsection 88(2).

This provision was introduced by the *Employment Standards Act, 2000*. Section 89(2) imposes an obligation on employment standards officers to follow the policies established by the Director under s. 88(2) respecting the interpretation, administration and enforcement of the Act.

Hearing not Required - s. 89(3)

89(3) An employment standards officer is not required to hold a hearing in exercising any power or making any decision under this Act.

This provision was introduced by the ESA 2000. Section 89(3) clarifies that an employment standards officer may exercise any power under the Act, e.g., to conduct inspections, investigate complaints, require attendance at meetings under s. 102 or make any decision under the Act, without holding a hearing. Section 89(3) makes it clear that the officer is not required to hold a hearing when exercising those powers or making a decision under the Act. In the absence of this section, it might be argued that principles of natural justice may impose an obligation on the officer to hold a hearing. See also the discussion of the Director's power in s. 88(2) of the Act to establish policies at ESA Part XXI, s. 88(2).

ESA Part XXI Section 90 - Officers not Compellable

Officer not Compellable - s. 90(1)

90(1) An employment standards officer is not a competent or compellable witness in a civil proceeding respecting any information given or obtained, statements made or received, or records or other things produced or received under this Act except for the purpose of carrying out his or her duties under it.

Generally speaking, the effect of this provision is that an employment standards officer cannot testify in a civil proceeding. Not only is an officer not "compellable" (meaning that an officer cannot be required to give testimony); an officer is also not "competent" to give testimony (meaning that he or she cannot give testimony even on a voluntary basis).

The term "civil proceeding" obviously includes a court proceeding, but it also includes a proceeding before a tribunal, such as the Ontario Labour Relations Board, or an arbitrator. See *Ontario Nurses' Assn. v. Extendicare (Canada) Inc., (Kirkland Lake) (Burke Grievance)*. However, it does not include a criminal proceeding.

Note that there is an exception to the "not competent, not compellable" rule-an officer is both a competent and compellable witness where his or her testimony would be given for the purpose of carrying out his or her duties under the *Employment Standards Act, 2000*. Program policy is that this includes the giving of testimony in hearings under ss. 116, 121 and 122 of the Act.

Records - s. 90(2)

90(2) An employment standards officer shall not be compelled in a civil proceeding to produce any record or other thing he or she has made or received under this Act except for the purpose of carrying out his or her duties under this Act.

Generally speaking the effect of this provision is that an employment standards officer cannot be required in a civil proceeding to produce anything (such as a record) that he or she acquired while performing an inspection or investigation under the Act.

The term "civil proceeding" obviously includes a court proceeding, but it also includes a proceeding before a tribunal, such as the Ontario Labour Relations Board, or an arbitrator. See *Ontario Nurses' Assn. v. Extendicare (Canada) Inc., (Kirkland Lake) (Burke Grievance)*. However, it does not include a criminal proceeding.

Note that an officer could be required to produce something acquired while performing an inspection or investigation where it is for the purpose of carrying out his or her duties under the Act. Further, a record or part of a record acquired by an officer may be accessible under the *Freedom of Information and Protection of Privacy Act,* RSO 1990, c F.31.

ESA Part XXI Section 91 - Investigation and Inspection Powers

Investigation and Inspection Powers - s. 91(1)

91(1) An employment standards officer may, without a warrant, enter and inspect any place in order to investigate a possible contravention of this Act or to perform an inspection to ensure that this Act is being complied with.

Section 91(1) provides that the officer may enter and inspect any place for the purposes of investigating a possible contravention or to perform an inspection to ensure the *Employment Standards Act, 2000* is being complied with. "Any place" indicates that the officer may enter not only the premises of the employer, but any premises belonging to any person who may have records or knowledge relevant to the investigation. Furthermore, there is nothing in the section that would limit the officer to a single visit to accomplish the investigative tasks. There are limitations on this right of entry in ss. 91(2), (3) and (4) discussed below.

Time of Entry - s. 91(2)

91(2) The power to enter and inspect a place without a warrant may be exercised only during the place's regular business hours or, if it does not have regular business hours, during daylight hours.

The corresponding section (63(1)(a)) in the former *Employment Standards Act* limited entry, in the absence of a warrant, to "any reasonable time or times." Section 91(2) allows the employment standards officer to enter and inspect a place only during its regular business hours and if it has no regular business hours, during daylight hours. This provision is intended to provide the officer with a right of entry. If the employer had no regular business hours but offered or agreed to allow the officer to enter and inspect the premises at night, this section would not prevent the officer from accepting the employer's offer or agreement to do so.

Dwellings - s. 91(3)

91(3) The power to enter and inspect a place without a warrant shall not be exercised to enter and inspect a part of the place that is used as a dwelling unless the occupier of the dwelling consents or a warrant has been issued under section 92.

This provision is substantially unchanged from the corresponding provision (s. 63(2)) in the former *Employment Standards Act*. Section 91(3) is a limitation on the power of the employment standards officer to enter into premises. If the premises are used as a dwelling or living quarters, then the officer must have the consent of the person occupying the premises or must obtain a search warrant under s. 92.

If the workplace is a nuclear facility, to which provincial employment standards legislation applies as of April 1, 1998, the search warrant is to be obtained under s. 487 of the *Criminal Code*. See the discussion at ESA Part XXI, s. 94 regarding provincial jurisdiction in nuclear operations as well as ESA Part III, s. 3(2) for general information regarding federal/provincial jurisdiction. Given that nuclear facilities are unlikely to be used as dwellings, this last point is likely of intellectual interest only.

For situations where a search warrant may be required, the officer should consult Legal Services Branch.

Use of Force - s. 91(4)

91(4) An employment standards officer is not entitled to use force to enter and inspect a place.

This provision was introduced by the *Employment Standards Act, 2000*, although it merely codifies Program practice under the former *Employment Standards Act*. Section 91(4) makes it clear that an officer is not entitled to use force to enter and inspect a place.

Identification - s. 91(5)

91(5) An employment standards officer shall produce on request, evidence of his or her appointment.

This provision is essentially unchanged from s. 62(2) of the former *Employment Standards Act*. Section 91(5) provides that the card issued by the Deputy Minister as evidence of an employment standards officer's appointment - see ESA Part XXI, s. 86(2) - must be produced on request. The card is evidence of the authority under the Act for the powers exercised or duties performed by the officer.

Powers of Officer - s. 91(6)

91(6) An employment standards officer conducting an investigation or inspection may,

- **a) examine a record or other thing that the officer thinks may be relevant to the investigation or inspection;**
- **b) require the production of a record or other thing that the officer thinks may be relevant to the investigation or inspection;**
- **c) remove for review and copying a record or other thing that the officer thinks may be relevant to the investigation or inspection;**
- **d) in order to produce a record in readable form, use data storage, information processing or retrieval devices or systems that are normally used in carrying on business in the place; and**
- **e) question any person on matters the officer thinks may be relevant to the investigation or inspection.**

Section 91(6) is similar to the corresponding provision (s. 63(1)) in the former *Employment Standards Act*. Section 91 (6) sets out the officer's powers to examine, require for production, remove for review and copy records and other things that are relevant or the officer considers relevant to an investigation or inspection. Section 91(6)(a) was amended by the *Good Government Act, 2006,* SO 2006, c 19, effective June 22, 2006. It previously stated that the officer could "examine a record other thing that is relevant to the investigation or inspection." The amendment clarified that records etc. could be examined so long as the officer thinks they may be relevant.

Section 91(6) also allows the officer to order records to be produced in a readable form and to question any person on any matter the officer thinks may be relevant to the investigation or inspection. The broad language of the section with respect to a "record or other thing" was intended to ensure that all things relevant to the investigation or inspection would be made available to the officer. However, in the performance of all his or her duties under the Act, the officer would be expected to act reasonably. Such a restriction would also apply to the officer's determination that a record, thing or matter was relevant to the investigation.

1. Examine a record or other thing that is relevant to the investigation or inspection - s. 91(6)(a)

Clause 6(a) allows the officer to examine records or things relevant to the investigation or inspection. The term "record or other thing" is very broad and could include books of account, ledgers, vouchers, letters patent, by-laws, minutes of directors' meetings as well as other documents or things.

2. Require the production of a record or other thing that the officer thinks may be relevant to the investigation or inspection - s. 91(6)(b)

Clause 6(b) allows the officer to require production of records or other things he or she thinks are relevant to the investigation. If the records or other things are not produced upon request the officer may require production through a demand in writing under s. 91(7). See discussion under ss. 91(7) and (8) below.

Note: Officers may also compel production of records or other things at a meeting scheduled under s. 102. Note also that the Director's separate power to require production of records in s. 74(1) of the former *Employment Standards Act* has been eliminated.

3. Remove for review and copying a record or other thing that the officer thinks may be relevant to the investigation or inspection - s. 91(6)(c)

Clause 6(c) allows an employment standards officer to remove records or other things for review and copying. This clause must be read in conjunction with s. 91(9), which requires the officer to provide a receipt and to return the records or other things within a reasonable time.

4. In order to produce a record in readable form, use data storage, information processing or retrieval devices or systems that are normally used in carrying on business in the place - s. 91(6)(d)

Clause 6(d) allows an employment standards officer, for the purpose of ensuring that the Act and regulations are complied with, to copy any records such as electronic records or documents into a

readable form using devices or systems normally used in carrying on business in the place. For example, an officer could copy electronic payroll records onto a computer disk.

5. Question any person on matters the officer thinks may be relevant to the investigation or inspection - s. 91(6)(e)

Clause 6(e) allows an employment standards officer to question any person on any matter the officer thinks may be relevant to the investigation or inspection. The officer may interview such persons separately by virtue of s. 91(13) (see discussion of s. 91(13) below). See also the discussion under s. 91(12) regarding the positive duty to answer questions that the officer thinks may be relevant to the investigation or inspection.

Written Demand - s. 91(7)

91(7) A demand that a record or other thing be produced must be in writing and must include a statement of the nature of the record or thing required.

Employment standards officers have the power to require production of records or other things thought to be relevant to an inspection or investigation under s. 91 (6)(b). Where an officer's verbal request for production is not complied with, he or she may demand production. This demand must be in writing and must specify the nature of what is being requested. A demand for "all records relevant to this claim" is probably too vague to meet the requirements of this section, while a demand for "all paper and electronic timesheets or payroll records for the period . . . to . . ." would likely be sufficient. Under s. 91(8) the person who has custody of such records or other things must comply with the demand.

Obligation to Produce and Assist - s. 91(8)

91(8) If an employment standards officer demands that a record or other thing be produced, the person who has custody of the record or thing shall produce it and, in the case of a record, shall on request provide any assistance that is reasonably necessary to interpret the record or to produce it in a readable form.

This provision is similar to the corresponding provision in the former *Employment Standards Act* in ss. 64(2) and (3). It means that an employment standards officer may, for the purpose of ensuring that the Act and regulations are complied with, demand (in writing as per s. 91(7)) the person who has custody of a record or thing to produce it and to provide any assistance reasonably necessary to interpret it or to produce it in a readable form. This could include printing out and explaining the employer's payroll records as well as transferring electronic records onto a disk for the officer. The scope of the language is broad enough that anything less than full cooperation may be viewed as a violation. Note that the officer may require any "person" to provide assistance under this section given that there may be persons other than (for example) the employer who have custody of records or documents relevant to the investigation. See the discussion concerning the definition of "person" in ESA Part I, s. 1.

Records and Things Removed from Place - s. 91(9)

91(9) An employment standards officer who removes a record or other thing under clause 6(c) shall provide a receipt and return the record or thing to the person within a reasonable time.

This provision is similar to s. 63(1)(c) of the former *Employment Standards Act*. Section 91(9) allows an officer to take records or other things in order to facilitate an inspection or investigation. The officer is required however to return such records or things within a reasonable time. The receipt for records ensures that the owner of the records has a simple way of reclaiming the records, and the officer's investigation file will indicate when and where these records were borrowed and subsequently returned.

Copy Admissible in Evidence - s. 91(10)

91(10) A copy of a record that purports to be certified by an employment standards officer as being a true copy of the original is admissible in evidence to the same extent as the original, and has the same evidentiary value.

Section 91(10) provides that a copy of any record certified by an employment standards officer as a true copy is evidence of the record in the same way the original would be.

Obstruction - ss. 91(11) and (12)

91(11) No person shall hinder, obstruct or interfere with or attempt to hinder, obstruct or interfere with an employment standards officer conducting an investigation or inspection.

91(12) No person shall,

- **a) refuse to answer questions on matters that an employment standards officer thinks may be relevant to an investigation or inspection; or**
- **b) provide an employment standards officer with information on matters the officer thinks may be relevant to an investigation or inspection that the person knows to be false or misleading.**

These provisions are similar to those in s. 64 of the former *Employment Standards Act*. Sections 91(11) and (12) set out the level of compliance expected from people involved in an investigation or inspection by an employment standards officer. Note that the prohibition in this section may apply to any "person" who may be in a position to hinder, obstruct or interfere with an investigation or inspection. See the discussion concerning the definition of "person" in ESA Part I, s. 1.

The terms "hinder, obstruct or interfere with" in subsection (11) are intended to ensure that any person required to cooperate with the officer in his or her investigation or inspection does so. Section 91(12)(a) imposes a positive duty to answer questions. Section 91(12)(b) prohibits a person required to produce records or other things under s. 91 (8) or to answer questions under s. 91(12)(a) from providing information that the person knows to be false or misleading.

Separate Inquiries - s. 91(13)

91(13) No person shall prevent or attempt to prevent an employment standards officer from making inquiries of any person separate and apart from another person under clause 6(e).

Section 91(13) ensures that an officer may interview separately any parties the officer thinks may have information relevant to the investigation or inspection; this helps to prevent "tailoring" of evidence.

ESA Part XXI Section 91.1 - Self-audit

Self-audit - s. 91.1(1)

91.1(1) An employment standards officer may, by giving written notice, require an employer to conduct an examination of the employer's records, practices or both to determine whether the employer is in compliance with one or more provisions of this Act or the regulations.

This provision was introduced by the *Stronger Workplaces for a Stronger Economy Act, 2014,* SO 2014, c 10 ("SWSEA"), effective May 20, 2015. Under subsection (1), an employment standards officer may, by providing written notice to an employer, require the employer to conduct an examination of the employer's records, practices or both for the purpose of determining whether or not it is in compliance with the Act or regulations.

Examination and Report - s. 91.1(2)

91.1(2) If an employer is required to conduct an examination under subsection (1), the employer shall conduct the examination and report the results of the examination to the employment standards officer in accordance with the notice and the requirements of this section.

This provision was introduced by the SWSEA, effective May 20, 2015. Subsection (2) provides that if an employer is required to conduct an audit as per subsection (1) the employer is required to report the results of the audit to the officer. The employer's report must contain certain information, in accordance with the notice that they received from the officer instructing them to complete the self-audit.

Notice - s. 91.1(3)

91.1(3) A notice given under subsection (1) shall specify,

- **a) the period to be covered by the examination;**
- **b) the provision or provisions of this Act or the regulations to be covered by the examination; and**
- **c) the date by which the employer must provide a report of the results of the examination to the employment standards officer.**

This provision was introduced by the SWSEA, effective May 20, 2015. Subsection (3) sets out the details of what must be included in the written notice given to an employer under subsection (1), which requires the employer to conduct a self-audit.

Same - s. 91.1(4)

91.1(4) A notice given under subsection (1) shall specify,

- **a) the method to be used in carrying out the examination;**
- **b) the format of the report; and**
- **c) such information to be included in the employer's report as the employment standards officer considers appropriate.**

This provision was introduced by the SWSEA, effective May 20, 2015. Subsection (4) states that the officer's notice to the employer may specify the method the employer is to use in carrying out the audit, the format of the employer's report and may also require the employer to include any other information in the report that the officer considers appropriate.

Same - s. 91.1(5)

91.1(5) A notice given under subsection (1) may,

a) require the employer to include in the report to the employment standards officer an assessment of whether the employer has complied with this Act or the regulations;

b) require the employer to include in the report to the employment standards officer an assessment of whether one or more employees are owed wages if, pursuant to clause (a), the employer has included an assessment that the employer has not complied with this Act or the regulations; and

c) require the employer to pay wages owed if, pursuant to clause (b), the employer assesses that one or more employees are owed wages.

This provision was introduced by the SWSEA, effective May 20, 2015. Subsection (5) provides that the notice given by the employment standards officer requiring the employer to conduct the self-audit may also require that:

- The employer include within the report an assessment as to whether the employer has complied with the ESA or regulations and whether wages are owing;
- The employer pay outstanding wages if the assessment shows that wages are indeed owed.

Report - Unpaid Wages - s. 91.1(6)

91.1(6) If the employer's report includes an assessment that one or more employees are owed wages, the employer shall include the following in the report to the employment standards officer:

1. **The name of every employee who is owed wages and the amount of wages owed to the employee.**
2. **An explanation of how the amount of wages owed to the employee was determined.**
3. **If the notice under subsection (1) requires payment, proof of payment of the amount owed to the employee.**

This provision was introduced by the SWSEA effective May 20, 2015. Under subsection (6), if the employer's report included an assessment that an employee or employees are owed wages, the employer will be required to include the names of the employees owed wages and the amounts owed, an explanation of how the amounts owing were calculated and if the officer's notice to the employer had included direction to pay outstanding wages, proof of payment.

Same - Other Non-compliance - s. 91.1(7)

91.1(7) If the employer's report includes an assessment that the employer has not complied with this Act or the regulations but no employees are owed wages as a result of the failure to comply,

the employer shall include in the report a description of the measures that the employer has taken or will take to ensure that this Act or the regulations will be complied with.

This provision was introduced by the SWSEA, effective May 20, 2015. Under subsection (7), if the employer's report includes an assessment that reveals non-monetary contraventions, the employer will be required to provide a description of measures taken or that will be taken to bring itself into compliance.

Orders - s. 91.1(8)

91.1(8) If an employer's report includes an assessment that the employer owes wages to one or more employees, or that the employer has otherwise not complied with this Act or the regulations, and the employment standards officer determines that the employer's assessment is correct, the officer may issue an order under section 103 or 108, as the officer determines is appropriate.

This provision was introduced by the SWSEA, effective May 20, 2015. Subsection (8) provides that if an employer's report under this section includes an assessment that it has contravened the Act or the regulations, an employment standards officer may issue an order to pay under s. 103 or a compliance order under s. 108, if the officer determines that the employer's assessment is correct.

Inspection, Investigation, Enforcement not Precluded - s. 91.1(9)

91.1(9) Nothing in this section precludes an employment standards officer from conducting an investigation or inspection, and from taking such enforcement action under this Act as the officer considers appropriate.

This provision was introduced by the SWSEA, effective May 20, 2015. Subsection (9) effectively provides that regardless of any direction given to an employer to complete a self-audit under s. 91.1 and regardless of any response to such direction, employment standards officers retain the ability to investigate or conduct an inspection and take whatever enforcement action the officer considers to be appropriate.

Same - s. 91.1(10)

91.1(10) Without restricting the generality of subsection (9), an employment standards officer may,

- **a) conduct an investigation or inspection that covers a period or part of a period specified in the notice under subsection (1); and**
- **b) take such enforcement action under this Act as the officer considers appropriate, including issuing an order under section 103 or 108, if, despite the employer's report indicating that the employer did comply, the officer determines that the employer did not comply with this Act or the regulations during a period or part of a period specified in the notice under subsection (1).**

This provision was introduced by the SWSEA, effective May 20, 2015. Subsection (10) specifically provides that without restricting the generality of the subsection (9) an employment standards officer is able to conduct an investigation or inspection that covers part or all of the period of the self-audit as specified in the notice given under subsection (1) and the officer is empowered to take any enforcement action he or she considers appropriate, including issuing an order to pay wages or a compliance order if

the officer determines that the employer did not comply with the Act or the regulations during the period or part of a period of the self-audit as specified in the notice given under subsection (1).

False Information - s. 91.1(11)

91.1(11) No employer shall provide a report required under this section that contains information that the employer knows to be false or misleading.

This provision was introduced by the SWSEA, effective May 20, 2015. This provision makes it an offence for an employer to provide false or misleading information in a report required under s. 91.1.

ESA Part XXI Section 92 - Warrant

Warrant - s. 92(1)

92(1) A justice of the peace may issue a warrant authorizing an employment standards officer named in the warrant to enter premises specified in the warrant and to exercise any of the powers mentioned in subsection 91(6), if the justice of the peace is satisfied on information under oath that,

- **a) the officer has been prevented from exercising a right of entry to the premises under subsection 91(1) or has been prevented from exercising a power under subsection 91(6);**
- **b) there are reasonable grounds to believe that the officer will be prevented from exercising a right of entry to the premises under subsection 91(1) or will be prevented from exercising a power under subsection 91(6); or**
- **c) there are reasonable grounds to believe that an offence under this Act or the regulations has been or is being committed and that information or other evidence will be obtained through the exercise of a power mentioned in subsection 91(6).**

This provision was introduced by the *Employment Standards Act, 2000*. It allows an employment standards officer to obtain a warrant for entry into premises which may include a business or dwelling, because the officer was unable or has reasonable grounds to believe he or she will be unable to enter the premises during regular business hours (or in the absence of regular business hours, during daylight hours) or to enter a dwelling without the consent of the occupier.

It also allows the officer to obtain warrants to examine, require for production, remove and copy or use data storage, information processing or retrieval systems normally used in the workplace to produce in readable form, records or other things the officer thinks may be relevant to the inspection or investigation. Lastly, it allows the officer to obtain a warrant in order to question any person on matters the officer thinks may be relevant to the inspection or investigation. (The only reference to warrants in the former *Employment Standards Act* was in s. 63(2) which required an officer to obtain a search warrant under section 158 of the *Provincial Offences Act,* RSO 1990, c P.33, in order to enter a dwelling without the consent of the occupier.)

Clause (c) was added by the *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others), 2009,* SO 2009, c 32 ("EPFNA") effective March 22, 2010 (EPFNA was amended and renamed the *Employment Protection for Foreign Nationals Act, 2009,* effective November 20, 2015) to extend the circumstances under which a justice of the peace may issue a warrant for entry to include those situations

where there are reasonable grounds to believe that an offence was committed or is being committed and that information or other evidence will be obtained by the officer through the production, examination or removal of records or other documents or by questioning a person.

Generally, this clause ensures that where an employment standards officer is investigating or inspecting at a site and comes to have reasonable grounds to believe that an offence has been committed, he or she will be able to obtain a warrant before continuing work at the site.

This subsection requires information under oath to satisfy a justice of the peace that the officer has been prevented or that there are reasonable grounds to believe that the officer will be prevented from exercising a right of entry under s. 91(1) or a power under s. 91(6) or that there are reasonable grounds to believe that an offence was or is being committed and information or other evidence will be obtained by the exercise of the officer's powers under s. 91(6).

Expiry of Warrant - s. 92(2)

92(2) A warrant issued under this section shall name a date on which it expires, which date shall not be later than 30 days after the warrant is issued.

This provision limits the effective period of a warrant issued under s. 92(1). Section 92(2) requires that a warrant issued under this section have an expiry date no later than 30 days after the warrant was issued. This 30-day period is subject to an extension under s. 92(3).

Extension of Time - s. 92(3)

92(3) Upon application without notice by the employment standards officer named in a warrant issued under this section, a justice of the peace may extend the date on which the warrant expires for an additional period of no more than 30 days.

This section allows the warrant issued under s. 92(1) which must have an expiry date no more than 30 days after the warrant was issued (pursuant to s. 92(2)), to be extended for up to 30 days, on application of the officer named in the warrant and without notice to the persons subject to the warrant.

Use of Force - s. 92(4)

92(4) An employment standards officer named in a warrant issued under this section may call upon a police officer for assistance in executing the warrant.

This provision will allow an officer to call the police for assistance to execute a warrant. For example, where an officer with a warrant issued under this section was denied entry to a workplace, he or she may call upon the police to assist the officer to enter the premises in order to conduct an investigation or inspection under the ESA 2000.

Time of Execution - s. 92(5)

92(5) A warrant issued under this section may be executed only between 8 a.m. and 8 p.m., unless the warrant specifies otherwise.

An officer who has obtained a warrant under this section may use it to gain entry under s. 91(1) or exercise any power under s. 91(6) only between the hours of 8 a.m. and 8 p.m. This restriction also

applies to a police officer called to assist in the execution of the warrant. The only exception to this limitation is made where the warrant itself specifies otherwise. See, however, the discussion of s. 92(6) below that deals with the execution of a warrant obtained under this section.

Other Matters - s. 92(6)

92(6) Subsections 91(4) to (13) apply with necessary modifications to an officer executing a warrant issued under this section.

This subsection was amended by the *Government Efficiency Act, 2002,* SO 2001, c 9, effective November 26, 2002, by the deletion of a reference to s. 91(2). Because s. 92(6) deals with warrants issued under s. 92(5) and that subsection provides that a warrant may be executed between 8 a.m. and 8 p.m., there was a possible conflict in the reference to s. 91(2), which provides that an investigation and inspection can only be conducted during regular business hours, or where there are no regular business hours during daylight hours.

Subsection 92(6) provides that ss. 91(4) to (13) will apply to an officer executing a warrant issued under s. 92(1). See the discussion of these subsections above.

Same - s. 92(7)

92(7) Without restricting the generality of subsection (6), if a warrant is issued under this section, the matters on which an officer executing the warrant may question a person under clause 91(6)(e) are not limited to those that aid in the effective execution of the warrant but extend to any matters that the officer thinks may be relevant to the investigation or inspection.

This subsection was added by EPFNA to ensure that where a warrant has been issued by a justice of the peace under s. 92(1) authorizing an employment standards officer to enter premises so that he or she may exercise his or her powers under s. 91(6), the officer is not limited to asking questions of witnesses related to the execution of the warrant. Specifically, it provides that in exercising his or her powers under s. 91(6)(e), the officer may question any person on any matter the officer thinks may be relevant to an investigation or inspection.

ESA Part XXI Section 93 - Posting of Notices

93 An employment standards officer may require an employer to post and to keep posted in or upon the employer's premises in a conspicuous place or places where it is likely to come to the attention of the employer's employees,

- **a) any notice relating to the administration or enforcement of this Act or the regulations that the officer considers appropriate; or**
- **b) a copy of a report or part of a report made by the officer concerning the results of an investigation or inspection**

This provision is similar to s. 75 of the former *Employment Standards Act* but with an additional provision that allows officers to require the posting of reports or copies of a report. In addition, the authority to require posting under this section rests with the employment standards officer rather than the Director.

The notice referred to in clause (a) may consist of a general outline of all of the basic provisions of the *Employment Standards Act, 2000* or, on the other hand, may focus on one or more standards or

provisions of particular relevance to the workplace involved. The report or part of a report referred to in clause (b) may be a copy of the actual officer's report (or excerpts of it) prepared upon the conclusion of the investigation or inspection.

See also the discussion of the general posting requirement in s. 2 in ESA Part II, s. 2.

ESA Part XXI Section 94 - Powers under the Canada Labour Code

94 If a regulation is made under the Canada Labour Code incorporating by reference all or part of this Act or a regulation under it, the Board and any person having powers under this Act may exercise the powers conferred under the Canada Labour Code regulation.

This provision is substantially unchanged from its corresponding provision in the former *Employment Standards Act* (s. 75.2). Federal regulations made under the *Canada Labour Code,* RSC 1985, c L-2, make the federal *Code* provisions concerning employment standards (and labour relations and occupational health and safety) inapplicable to the nuclear operations of Ontario Power Generation and provide that Ontario law in these areas applies instead. The same regulations that "incorporate by reference" the Ontario statutes and regulations also provide that they may be enforced by the same bodies and persons who enforce the law provincially. Section 94 is intended to support this in the employment standards context by making it clear that the Ontario Labour Relations Board and other persons having powers under the *Employment Standards Act, 2000* (such as employment standards officers and the Director of Employment Standards) have jurisdiction with respect to the federal regulation which incorporates the ESA 2000 and its regulations.

ESA Part XXI Section 95 – Service of Documents

Service of Documents – s. 95(1)

95(1) Except as otherwise provided in section 8, where service of a document on a person is required or permitted under this Act, it may be served,

(a) in the case of service on an individual, personally, by leaving a copy of the document with the individual;

(b) in the case of service on a corporation, personally, by leaving a copy of the document with an officer, director or agent of the corporation, or with an individual at any place of business of the corporation who appears to be in control or management of the place of business;

(c) by mail addressed to the person's last known business or residential address using any method of mail delivery that permits the delivery to be verified;

(d) by fax or email if the person is equipped to receive the fax or email;

(e) by a courier service;

(f) by leaving the document, in a sealed envelope addressed to the person, with an individual who appears to be at least 16 years of age at the person's last known business or residential address; or

(g) in a manner ordered by the Board under subsection (8).

Section 95 was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009,* SO 2009, c 9, effective November 6, 2009. The new section expanded the methods by which most documents can be served under the ESA 2000.

Please note that the methods of service set out in this section do not apply to notices of civil proceeding served on the Director (s. 8). For more information on the service provisions specific to notices of civil proceedings, please see subsections 8(3)–8(5).

With the above exception, the methods of service set out in s. 95(1) apply to the service of any orders, notices or other documents that must be served in accordance with this provision under the ESA 2000.

Clause (a) applies when serving a document on an individual, clause (b) applies when a document is to be served on a corporation, and clauses (c) to (f) apply to the service of a document on any "person" including an individual or a corporation. For interpretation of the term "person", please see ESA Part I, s. 1. Service effected per clause (g) must follow the Board's specifications.

1. Service on an Individual – s. 95(1)(a)

In the case of service on an individual, service of a document can be effected by personally leaving a copy of the document with the individual.

2. Service on a Corporation – s. 95(1)(b)

In the case of service on a corporation, the service of a document can be effected by:

1. Personally leaving a copy of the document with an officer, director or agent of the corporation or
2. By leaving a copy of the document with an individual who appears to be in control or management of the place of business.

Whether a person is an officer or director of a corporation can generally be verified by consulting the most recent version of the relevant Corporation Profile Report.

This provision also allows a document to be served on, for example, a manager of one of the corporation's business outlets. Since service can be effected on a "person who appears to be in control or management", it follows that the person need not be manager so long as the person appears to be in control of the operation at the location. For example, service might be effected on the single employee who is in charge of a kiosk operated by the corporation (assuming there was no off-site supervisor and the employee was considered to be in control of the operations at the kiosk).

3. Service by Verifiable Mail – s. 95(1)(c)

Service can be effected on any person by verifiable mail where the document is sent to the person's "last known business or residential address". The specific reference to the residential address clarifies that the document can be sent to an employee's last known home address and where the employer is a sole proprietor who, for example, and has gone out of business, the order can be served at the individual's residence.

It is Program policy that three Canada Post services fall within the meaning of verifiable mail. These are Registered Mail, Xpresspost and Priority Courier. However, it is important to note that Xpresspost and Priority Courier will comply with the requirements of this provision only if the "signature upon delivery" option is selected.

4. Service by Fax or Electronic Mail – s. 95(1)(d)

A document may be served on any person by fax or electronic mail if the intended recipient has the necessary equipment to receive the fax transmission or electronic mail.

5. Service by Courier Service – s. 95(1)(e)

A document may be served on a person using a courier service.

6. Service at Person's Last Known Business or Residential Address – s. 95(1)(f)

Service may be effected by leaving the document, in a sealed envelope addressed to the person, with an individual who appears to be at least 16 years of age at the person's last known business or residential address.

As noted under "Service by Verifiable Mail – s. 95(1)(c)" above, the specific reference to the residential address clarifies that where the employer is a sole proprietor, for example, and has gone out of business, the order can be served at the individual's residence.

7. Service in a Manner Ordered by the Board – s. 95(1)(g)

Finally, a document may be served in a manner ordered by the Board under subsection (8). Subsection 95(8) allows the Ontario Labour Relations Board to order that service be effected in a manner that it considers to be appropriate in the circumstances.

The following types of documents must be served in accordance with this section:

- Section74.14 order to recover fees – s. 74.14(4)
- Letter advising of order under s. 74.14 – s. 74.14(4)
- Section74.16 order for compensation, temporary help agency – s. 74.16(4)
- Letter advising of order under s. 74.16 – s. 74.16(4)
- Section74.17 order re: client reprisal – s. 74.17(3)
- Letter advising of order under 74.17 – s. 74.17(3)
- Notice of s. 102 meeting – s. 102(3)
- Section 103 order for wages – s. 103(6)
- Letter advising of order under s. 103 – s. 103(7)
- Section 104 order for compensation – s. 104(4)
- Letter advising of order under s. 104 – s. 104(4)
- Section 106 order against a director – s. 106(1), (3)
- Section 107 further order against directors – s. 107(1)
- Section 108 compliance order – s. 108(4)

- Letter advising of order under s. 108 – s. 108(4)
- Letter advising of refusal to issue order under s. 110 – ss. 74.14, 74.16, 74.17, 103, 104 and 108
- Section 113 notice of contravention – s. 113(3)
- Third party demand – s. 125(3)
- Letter advising order has been filed in court – s. 126(2)
- Written notice of termination – s. 4(1) of O Reg 288/01

Same – s. 95(2)

95(2) Service of a document by means described in clause (1) (a), (b) or (f) is effective when it is left with the individual.

This provision was introduced by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009* which came into force on November 6, 2009.

This subsection must be read in conjunction with s. 95(1) which establishes the different methods by which most documents may be served. This provision states that where a document is served either:

- On an individual by personally leaving a copy of the document with the individual;
- On a corporation by personally leaving a copy of the document with an officer, director or agent of the corporation, or with an individual at any place of business of the corporation who appears to be in control or management of the place of business; or
- By leaving the document, in a sealed envelope addressed to the person, with an individual who appears to be at least 16 years of age at the person's last known business or residential address;

The service is deemed to be effective at the time the document is left with the individual.

Same – s. 95(3)

95(3) Subject to subsection (6), service of a document by mail is effective five days after the document is mailed.

This provision was introduced by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009* which came into force on November 6, 2009.

Where a document is served in accordance with s. 95(1)(c) via mail addressed to the person's last known business or residential address using a method of mail delivery that permits the delivery to be verified, the service of the document is deemed to be effective on the fifth day after the document is mailed unless the person to whom the mail is sent establishes, per s. 95(6), that the service was not, in fact, effective at that time due to an absence, accident, illness or cause beyond the person's control.

Reference can be made to the *Legislation Act, 2006,* SO 2006, c 21, Sch F when interpreting the timing portion of this subsection. Section 89(3) of that Act states:

A reference to a number of days between two events excludes the day on which the first event happens and includes the day on which the second event happens, even if the reference is to "at least" or "not less than" a number of days.

This means that when determining the deemed service date, the day the document is mailed will not be counted, but the following calendar days are counted. For example, a letter mailed on a Wednesday is deemed to be served the next Monday. It is possible that the deemed service date could fall on a weekend or public holiday even if there is no mail service on that day. For example, if a document is mailed on a Tuesday, the service would be deemed to have taken place on the following Sunday.

Subject to s. 95(6), the deemed service date applies regardless of when the mail actually arrived at the recipient's address.

Same – s. 95(4)

95(4) Subject to subsection (6), service of a document by a fax or email sent on a Saturday, Sunday or a public holiday or on any other day after 5 p.m. is effective on the next day that is not a Saturday, Sunday or public holiday.

This provision was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009*, which came into force on November 6, 2009 and is similar to the previous subsection 95(2) of the ESA 2000.

Where a document is served by fax or email in accordance with s. 95(1)(d), the service occurs on the day the fax or email is sent unless the transmission occurs after 5:00 p.m. or on a Saturday, Sunday or a public holiday. If the document is faxed or sent via email after 5:00 p.m. or on a Saturday, Sunday or public holiday, the service is deemed to be effective on the next day that is not a Saturday, Sunday, or public holiday. Subsection 95(6) indicates that this deemed service date does not apply if the person to whom the documents were faxed or emailed establishes that the service was not effective at the time set out above due to an absence, accident, illness or cause beyond the person's control.

For example, assume a document is served via email attachment and the email is transmitted at 5:10 p.m. on a Wednesday evening. The document will be deemed to have been served the following day, Thursday, unless that day happens to be a public holiday or if the recipient establishes the service was not effective due to one of the reasons set out in s. 95(6).

Same – s. 95(5)

95(5) Subject to subsection (6), service of a document by courier is effective two days after the courier takes the document.

This provision was introduced by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009* which came into force on November 6, 2009.

Where a document is served in accordance with s. 95(1)(e) via courier, the service of the document is deemed effective two days after courier takes the document unless the person to whom the document is sent establishes that the service was not, in fact, effective at that time due to an absence, accident or illness or cause beyond the person's control.

Reference can be made to the *Legislation Act, 2006* when interpreting the timing portion of this subsection. Section 89(3) of that Act states:

A reference to a number of days between two events excludes the day on which the first event happens and includes the day on which the second event happens, even if the reference is to "at least" or "not less than" a number of days.

This means that when determining the deemed service date, the day the document is provided to the courier will not be counted, but the following calendar days are counted. For example, assume a document is given to the courier on a Monday. The service would be effective on the following Wednesday. It is possible that a deemed service date could fall on a weekend or public holiday.

Subject to s. 95(6), the deemed service date applies regardless of when the document actually arrived by courier.

Same – s. 95(6)

95(6) Subsections (3), (4) and (5) do not apply if the person establishes that the service was not effective at the time specified in those subsections because of an absence, accident, illness or cause beyond the person's control.

This provision was introduced by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009*.

If service under s. 95(1) is attempted or effected by verifiable mail, fax, email, or courier, the deemed service provisions in subsections (3), (4) and (5) do not apply if the person on whom the document is being served establishes that she or he did not, in fact, receive the document in the time period specified in the subsection due to an absence, accident, illness or cause beyond the person's control. The onus of proving the absence, accident, illness or cause beyond the person's control lies with the person refuting the service.

Same – s. 95(7)

95(7) If the Director considers that a manner of service other than one described in clauses (1) (a) to (f) is appropriate in the circumstances, the Director may direct the Board to consider the manner of service.

This provision was introduced into s. 95 by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009*.

If the Director considers another method of service that is not addressed in ss. 95(1) (a) to (f) to be appropriate in the circumstances, the Director may direct the Ontario Labour Relations Board to consider that alternate manner of service.

Same – s. 95(8)

95(8) If the Board is directed to consider the manner of service, it may order that service be effected in the manner that the Board considers appropriate in the circumstances.

This provision came into force on November 6, 2009. If the Ontario Labour Relations Board is directed by the Director of Employment Standards to consider a manner of service that is different from those outlined in s. 95(1) clauses (a) to (f), the Board must consider the manner of service put forward and may order that the service be effected in any manner it considers appropriate in the circumstances.

Same – s. 95(9)

95(9) In an order for service, the Board shall specify when service in accordance with the order is effective.

Where the Ontario Labour Relations Board makes an order under s. 95(8) that service be effected in the manner the Board considers appropriate, it must indicate when the service is deemed to be effective.

Same – s. 95(10)

95(10) A certificate of service made by the employment standards officer who issued an order or notice under this Act is evidence of the issuance of the order or notice, the service of the order or notice on the person and its receipt by the person if, in the certificate, the officer,

(a) certifies that the copy of the order or notice is a true copy of it;

(b) certifies that the order or notice was served on the person; and

(c) sets out in it the method of service used

This provision was introduced by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009* and is substantively similar to what were previously ss. 103(7) and 113(4) of the ESA 2000.

Section 95(10) states that there is evidence of the proper issuance, service and receipt of an order or notice where the employment standards officer who issued the order or notice certifies, in a document, that the order or notice was served on the person and states the method of service used. The certificate must be accompanied by a copy of the order or notice that is certified by the officer to be a true copy. The officer is the only person who needs to certify the accuracy of the copy.

Such a certificate is not irrefutable proof of the proper issuance, service and receipt of the order or notice. However, the certificate is acceptable as evidence before a judge or other decision-maker of the proper issuance, service, and receipt of the notice or order, subject to being proven as any other issue of fact before that decision-maker.

Note that s. 95(11) addresses certificates of service relating to documents other than orders or notices.

Same – s. 95(11)

95(11) A certificate of service made by the person who served a document under this Act is evidence of the service of the document on the person served and its receipt by that person if, in the certificate, the person who served the document,

(a) certifies that the copy of the document is a true copy of it;

(b) certifies that the document was served on the person; and

(c) sets out in it the method of service used.

This provision was introduced by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009* which came into force on November 6, 2009.

Section 95(11) states that there is evidence of the proper service and receipt of document under this Act if a certificate is issued by the person who served the document certifying that the document was served

and stating the method of service used. The certificate must be accompanied by a copy of the document that is certified by the person who served the document, to be a true copy.

This subsection applies to any "person" who serves a document under this Act. For interpretation of the term "person", please see ESA Part I, s. 1.

Any certificate created per this subsection is not irrefutable proof of service of the document, but is acceptable as evidence before a judge or other decision-maker of service and receipt, subject to a decision-maker making a different finding of fact.

ESA Part XXII - Complaints and Enforcement

The intent of the provisions in Part XXII of the *Employment Standards Act, 2000* is to establish rules for enforcement. Part XXII sets out the rules regarding the filing of complaints, enforcement by employment standards officers through orders for wages and compensation, as well as the new orders for compliance and notices of contravention introduced in the ESA 2000 and enforcement by arbitrators where there is a collective agreement.

Part XXII also establishes restrictions on the recovery of wages under the Act, settlement procedures and limitation periods on issuing, rescinding and amending orders and notices of contravention.

ESA Part XXII Section 96 - Complaints

Complaints - s. 96(1)

96(1) A person alleging that this Act has been or is being contravened may file a complaint with the Ministry in a written or electronic form approved by the Director.

This provision means that a person filing a complaint with the Ministry of Labour, alleging a violation of the *Employment Standards Act, 2000*, must file the complaint in a written or electronic form approved by the Director of Employment Standards.

"Person" means not only an individual but also includes a trade union as per ESA Part I, s. 1. It also includes a corporation, by virtue of the definition of person in the *Legislation Act, 2006,* SO 2006, c 21, Sch F. As a result, a corporation (e.g., a company seeking information under ESA Part XIX, s. 77(1) as a possible, new building services provider) could file a complaint if the owner/manager of the building failed to provide the prescribed information.

The mandatory use of either of the approved forms is reinforced by s. 96(2), which states that complaints that are not in the approved form are deemed not to have been filed. One purpose behind requiring a complaint to be filed on an approved form is to avoid employees filing a complaint in letter form, and thereby unintentionally giving up their rights to sue the employer civilly, pursuant to the election under s. 97 - see ESA Part XXII, s. 97 for a further discussion. Requiring the complaint to be filed on the approved form assists in alerting the employee to the consequences of their election, and eliminates the unintentional loss of civil rights that could arise if the complaint was filed in letter form.

Another purpose of requiring a complaint to be filed on an approved form is to ensure that the limitation period in ss. 114 and 139 will not begin running where the employee visits or writes to the Ministry to inquire about their rights in a particular situation.

Effect of Failure to Use Form - s. 96(2)

96(2) A complaint that is not filed in a form approved by the Director shall be deemed not to have been filed.

Section 96(2) states that if the complaint is not filed in the approved form, then the complaint shall be deemed not to have been filed. There are two main reasons for this:

1. So that the election in s. 97 will not be triggered; and
2. The complaint will not be considered to have been filed and thereby start the two-year limitation period in ss. 114 and 139 running,

except when the employee has filed a complaint on the approved form and has had an opportunity to be made aware of the consequences of filing a complaint with the Ministry.

Limitation - s. 96(3)

96(3) A complaint regarding a contravention that occurred more than two years before the day on which the complaint was filed shall be deemed not to have been filed.

Section 96(3) imposes a two-year limitation period on filing a complaint under the ESA 2000 by stating that a complaint filed more than two years after a contravention has occurred is deemed not to have been filed.

It should be noted that the Program's position is that the two-year limitation on recovery of monies in ESA Part XXII, s. 111 does not apply to an order for compensation or reinstatement. Program policy continues to be that as the monies owing under a compensation order come due on the date the officer issues the order, they were due after the complaint was filed and the s. 111 limitation would therefore never serve to restrict recovery. In addition, the limitation on recovery set out in s. 111 could have no application to an order for reinstatement because the subject of the order was not monies that came due under the Act. Note that despite the two-year limitation period set out in s. 96(3), it may be possible for the two-year time limit to be extended in exceptional cases. The Court of Appeal decision in *Halloran v Sargeant,* 2002 CanLII 45029 (ON CA) held that in the appropriate circumstances, the equitable doctrine of fraudulent concealment applies to relieve against statutory time limits on recovery. See ESA Part XXII, s. 111(8) for a discussion of the *Halloran v Sargeant* decision.

The question has arisen as to whether the *Limitations Act, 2002,* SO 2002, c 24 applies to the ESA 2000. The *Limitations Act, 2002* limits the period of time during which a person may initiate court proceedings in Ontario in respect of a claim. In *Rand v Kashruth Council of Canada/Le Conseil Cacherout du Canada,* 2016 CanLII 17259 (ON LRB), the claimant sought to bring a claim for reprisal two and half years after the alleged reprisal took place. The claimant argued that ss. 5(1), 5(2) and 16(1) of the *Limitations Act, 2002* effectively bi-passes s. 96(3) of the ESA 2000, therefore he was not bound by the two-year limitation period. Section 5(2) of the *Limitations Act, 2002* establishes the principle that an individual is presumed to have known of the act(s) or omission(s), that caused damage, on the day they actually occurred, unless the contrary is proved. Section 5(1) sets up the rules applicable to the issue of discoverability. Section 16(1)(a) provides that there is no limitation period if the proceeding is for a declaration if no consequential relief is sought. Here, the claimant argued that the two-year time limit should commence on the date he learned about the alleged reprisal, which was 18 months after the reprisal incident occurred. Furthermore, the claimant argued that no limitation period applied to his claim

because he wanted only a declaration that the employer breached the ESA by reprising against him and not any financial remedy (i.e., no consequential relief).

The Board disagreed with the claimant's arguments and held that the *Limitations Act, 2002* is not applicable to the ESA 2000. The Board considered s. 2(1) of the *Limitations Act, 2002,* which states that the Act applies to claims pursued in court proceedings, and held that proceedings before the Board and an ESO cannot be characterized as a court proceeding. The Board also noted that it does not possess statutory authority to alleviate against the two-year time limit in s. 96(3) by reading in the principles the claimant extracted from the *Limitations Act, 2002.*

ESA Part XXII Section 96.1 - Steps Required Before Complaint Assigned – REPEALED

ESA Part XXII Section 97 - When Civil Proceeding Not Permitted

When Civil Proceeding Not Permitted - s. 97(1)

97(1) An employee who files a complaint under this Act with respect to an alleged failure to pay wages or comply with Part XIII (Benefit Plans) may not commence a civil proceeding with respect to the same matter.

Section 97(1) provides that an employee who files a complaint for unpaid wages or a failure to comply with Part XIII (Benefit Plans) may not launch a civil action in respect of the same matter. This is intended to prevent duplicative proceedings.

Note that it is s. 98 of the *Employment Standards Act, 2000* that addresses the situation where an employee who has commenced a civil proceeding subsequently files a complaint. Section 97 addresses the converse situation, i.e., where an employee who has filed a complaint subsequently commences a civil proceeding.

Accordingly, while s. 98(1) provides that an employee who commences a civil proceeding and then files a complaint "may not. . . have such a complaint investigated", s. 98 only applies where the civil proceeding is started before the complaint is filed. Where the complaint is filed first, it is s. 97 that applies, and there is nothing in s. 97 that says that the employee cannot have that complaint investigated. (It may be that in light of s. 97 a court would not allow the civil proceeding to continue, but that is a matter for the court, not the Program.)

1. Wages

Section 97(1) refers to complaints about unpaid "wages". Note that "wages" does not include "compensation" for losses stemming from a contravention of Parts XIV (Leaves of Absence), XVI (Lie Detectors), XVII (Retail Business Establishments) or XVIII (Reprisal) of the Act. (That "wages" and "compensation" are two different things is clear from ss. 103 and 104; an order for the payment of wages is made under s. 103, while an order for the payment of "compensation" is made under s. 104.) Consequently, an employee who files a complaint alleging a violation of Part XIV, XVI, XVII or XVIII is not precluded from pursuing a civil action with respect to the violation.

2. Same Matter

Subsection 97(1) precludes an employee who has filed an unpaid wages or Part XIII complaint from commencing a civil action for the "same matter". As a result, if an employee was owed both overtime and vacation pay, he or she could not file a complaint with the Ministry for overtime pay and also commence a civil action for vacation pay, as the civil proceedings would be for the "same matter", i.e., unpaid wages.

However, an employee may file a complaint about unpaid wages, e.g., overtime pay, and then commence a civil action for wrongful dismissal, since these proceedings do not involve "the same matter".

3. Cooling Off Period

Note that the prohibition in s. 97(1) is subject to s. 97(4), which provides for a two-week "cooling off" period in which the employee may withdraw the employment standards complaint and thus avoid losing the right to commence a civil action. See the discussion of s. 97(4) below.

Same, Wrongful Dismissal - s. 97(2)

97(2) An employee who files a complaint under this Act alleging an entitlement to termination pay or severance pay may not commence a civil proceeding for wrongful dismissal if the complaint and the proceeding would relate to the same termination or severance of employment.

Subsection 97(2) provides that an employee who files a complaint for termination pay or severance pay is not entitled to commence a civil action for wrongful dismissal relating to the same termination or severance of employment as that on which the claim for termination or severance pay was based.

As noted in the discussion of s. 97(1), if the complaint is filed before a civil proceeding is commenced, s. 98 has no application and so there will be no bar to the complaint being investigated by the Ministry.

Note that employees who have filed a claim alleging a violation of Part XIV (Leaves of Absence), XVI (Lie Detectors), XVII (Retail Business Establishments) or XVIII (Reprisal) for a termination or failure to reinstate are not precluded from commencing a civil action for wrongful dismissal, because a complaint respecting those Parts of the Act is not a complaint alleging an entitlement to termination or severance pay, but rather a complaint asking for reinstatement or compensation or both.

1. Wrongful Dismissal

In an action for wrongful dismissal, an employee is seeking damages for the employer's failure to give notice of termination in accordance with the employment contract. The contractual notice may be based on an express term in the employment contract that spells out how much notice the employee is to receive; however, in the absence of such an express term, the courts imply a term for "reasonable notice" into the contract. What is considered "reasonable notice" is generally much longer than the notice periods under the Act, and awards of damages for wrongful dismissal can be correspondingly greater, in some cases exceeding two years' salary. Note, however, that under the common law employees are said to have a "duty to mitigate", meaning that generally they must attempt to reduce their losses, say by finding or trying to find new employment or other sources of income during the period in which notice, had it been given, would have been running. This duty to mitigate does not apply to notice of termination, termination pay or severance pay under the Act (although in some cases a refusal of alternative employment with the employer will disentitle an employee to notice, termination pay or severance pay). Note also that employees covered by a collective agreement may not sue for wrongful dismissal, since they are generally limited to whatever remedies may be available under the collective agreement.

2. Termination Pay

The purpose of s. 97(2) is the same as the purpose of s. 97(1), that is, to avoid duplicative proceedings. Although termination pay under the Act and damages for wrongful dismissal are based on different wrongs (failure to give notice as required by the Act versus failure to give notice as required by the employment contract), they are overlapping in that they both stem from the employer's termination of the employment relationship and are based on the employer's failure to give notice of termination, they often involve similar issues and statutory notice or termination pay that was provided by the employer will reduce the damages that would otherwise be awarded for wrongful dismissal.

3. Severance Pay

Insofar as severance pay is concerned, the purpose of this provision is again the same as the purpose of s. 97(1), that is, to avoid duplicative proceedings. While severance pay under the Act and damages for wrongful dismissal are based on different wrongs (failure to pay severance pay as required by the Act versus failure to give notice as required by the employment contract), they are overlapping to some extent in that they both stem from the employer's ending of the employment relationship, they often involve similar issues and in at least some circumstances the courts will reduce the damages that would otherwise be awarded for wrongful dismissal by the amount of the employee's severance pay entitlement - see *Stevens v The Globe and Mail,* 1996 CanLII 10215 (ON CA).

4. The Same Termination or Severance of Employment

An example of a situation in which a civil action for wrongful dismissal may not be considered to relate to the same termination of employment as a termination pay complaint under the Act would be where the employee was dismissed after a year of employment, rehired one month after the dismissal and then laid off two weeks later for more than 13 weeks in circumstances where neither clause 56(2)(b) or (c) were applicable. In that situation, the employee should be able to claim termination pay under the Act in regards to the deemed termination due to a lay-off lasting longer than a temporary lay-off, and also sue the employer civilly for wrongful dismissal based on the earlier dismissal. The two terminations are clearly not the same termination. Note, however, that because the employee's last period of employment is separated by not more than 13 weeks from the preceding period, the employee's entitlement to termination pay would be calculated by adding together both the period of employment that ended in the dismissal and the period that ended as a result of the lay-off.

Amount in Excess of Order - s. 97(3) - Repealed

Withdrawal of Complaint - s. 97(4)

97(4) Despite subsections (1) and (2), an employee who has filed a complaint may commence a civil proceeding with respect to a matter described in those subsections if he or she withdraws the complaint within two weeks after it is filed.

This provision provides a two-week "cooling off" period in which the employee can withdraw a complaint and thereby restore the ability to commence a civil action. This two-week period could be used by a complainant employee to consult a lawyer for advice on whether a civil action might be his or her better option in the circumstances. Note that s. 97(4) does not require that the withdrawal be in writing; however, putting it in writing it may lessen the likelihood of dispute.

Although there is nothing in the ESA 2000 that provides for an extension of the two-week time limit, courts have inherent jurisdiction to extend limitation periods. For an example of a case where the two-week period in s. 97(4) was extended, see *Scarlett v Wolfe Transmission Ltd*., 2002 CanLII 53229 (ON SC).

ESA Part XXII Section 98 - When Complaint Not Permitted

When Complaint Not Permitted - s. 98(1)

98(1) An employee who commences a civil proceeding with respect to an alleged failure to pay wages or to comply with Part XIII (Benefit Plans) may not file a complaint with respect to the same matter or have such a complaint investigated.

This provision prohibits an employee from filing a complaint about unpaid wages or a failure to comply with Part XIII where the employee has commenced a civil proceeding seeking a remedy for the same matter. This section mirrors the wording of s. 97(1), which deals with the converse prohibition, i.e., the barring of an employee from commencing a civil action where the employee has filed a complaint with the Ministry under the *Employment Standards Act, 2000*.

At the Small Claims Court level, a proceeding is commenced by filing a claim (with two copies for each defendant) with the clerk of the Small Claims Court. After obtaining payment of the court fees, the clerk dates, signs and seals the claim and assigns it a court file number. It is only once this has happened that the action is considered to have been commenced.

At the Superior Court of Justice (formerly General Division) level, a proceeding is commenced by the court Registrar's act of dating, signing, sealing and assigning a court file number to an "originating process" prepared by the plaintiff. Examples of an originating process include a Statement of Claim and a Notice of Action.

At the Superior Court of Justice in Toronto, lawyers can also commence proceedings electronically where necessary arrangements have been made with court officials.

Under the *Rules of Civil Procedure*, RRO 1990, Reg 194, civil proceedings may also be commenced by a counterclaim, cross claim, third-party claim or judicial review application.

Note that s. 97 of the Act addresses the situation where an employee who has filed a complaint subsequently commences a civil proceeding, whereas s. 98 addresses the converse situation, i.e., where an employee who has commenced a civil proceeding subsequently files a complaint.

Accordingly, while s. 98(1) provides that an employee who commences a civil proceeding "may not. . .have such a complaint investigated", this does not prevent or terminate an investigation of a complaint where the employee commences a civil proceeding after filing a complaint; s. 98 applies only to prohibit a complaint from being filed or investigated if a civil proceeding was commenced before the complaint was filed.

Same, Wrongful Dismissal - s. 98(2)

98(2) An employee who commences a civil proceeding for wrongful dismissal may not file a complaint alleging an entitlement to termination pay or severance pay or have such a complaint investigated if the proceeding and the complaint relate to the same termination or severance of employment.

This provision prohibits an employee from filing a complaint for termination or severance pay where the employee has commenced a civil proceeding for wrongful dismissal relating to the same termination or severance of employment. This section mirrors the wording of s. 97(2), which deals with the converse proposition, i.e., the barring of an employee from commencing a civil proceeding for wrongful dismissal where the employee has filed a complaint under the Act with the Ministry.

Note that s. 97 of the Act addresses the situation where an employee who has filed a complaint subsequently commences a civil proceeding, whereas s. 98 addresses the converse situation, i.e., where an employee who has commenced a civil proceeding subsequently files a complaint. Thus it is s. 97, not s. 98, that applies where the complaint is filed first.

Accordingly, while s. 98(2) provides that an employee who commences a civil proceeding "may not. . .have such a complaint investigated", this does not prevent or terminate an investigation of a complaint where the employee commences a civil proceeding after filing a complaint.

Issue Estoppel

The election of remedies provisions in ss. 97 and 98 eliminate the possibility of issue estoppel arising as in *Rasanen v Rosemount Instruments Ltd*., 1994 CanLII 608 (ON CA), where the employee lost on an issue before a referee under the Act and was later estopped from relitigating that issue in court in a wrongful dismissal action involving much more money than the employment standards matter.

ESA Part XXII Section 99 - When Collective Agreement Applies

When Collective Agreement Applies - s. 99(1)

99(1) If an employer is or has been bound by a collective agreement, this Act is enforceable against the employer as if it were part of the collective agreement with respect to an alleged contravention of this Act that occurs,

(a) when the collective agreement is or was in force;

(b) when its operation is or was continued under subsection 58(2) of the *Labour Relations Act, 1995*; or

(c) during the period that the parties to the collective agreement are or were prohibited by subsection 86(1) of the *Labour Relations Act, 1995* from unilaterally changing the terms and conditions of employment.

This provision effectively deems the *Employment Standards Act, 2000* to be part of the collective agreement, and makes it enforceable against the employer, as if it were part of the collective agreement, if the contravention of or failure to comply with the Act occurs:

1. When the collective agreement is or was in force;
2. When its operation is or was continued as described under s. 58(2) of the *Labour Relations Act, 1995,* SO 1995, c 1, Sch A ("LRA 1995"), sometimes referred to as the "bridging period" between collective agreements; or
3. During the period that the parties to the collective agreement are or were prohibited by s. 86(1) of the LRA 1995 from unilaterally changing the terms and conditions of employment.

- This is the period after the collective agreement and any bridging periods have expired and before the employer and the union are in a legal strike/lock-out position, in which period the parties are prohibited from changing terms and conditions of employment without each other's consent, sometimes referred to as the "statutory freeze".

It is obligatory for the arbitrator or board of arbitration to apply the ESA 2000 as if it were actually part of the collective agreement, if the alleged contravention of the Act occurs during one of the following three periods:

When Collective Agreement Is or Was In Force

A collective agreement is normally in force during its term, which may be as long as several years, but which may not be shorter than one year in length. If the alleged contravention of or failure to comply with the Act occurs while the collective agreement was or is in force, the ESA 2000 is deemed to be part of the agreement and is enforceable against the employer as if it were part of the agreement, i.e., through the grievance procedure. Ultimately, if the grievance is not resolved, it would be heard by an arbitrator or a board of arbitration, which would then release a decision which is enforceable in the same manner as an order or judgment of the court.

The collective agreement may cease to be in force prior to the end of its term under some circumstances, such as where the employer and the union jointly agree to terminate it and the Ontario Labour Relations Board consents, or if the union is decertified (i.e., if the Board declares that the union no longer represents the employees in the bargaining unit). In that event, the employee may file an employment standards complaint with the Ministry for investigation and enforcement.

During the Bridging Period

Section 58(2) of the LRA 1995 provides that the collective agreement may be extended by the parties for a period of up to one year while the parties are bargaining. Section 58(2) of the LRA 1995 states:

58(2) Despite subsection (1), the parties may, in a collective agreement or otherwise and before or after the collective agreement has ceased to operate, agree to continue the operation of the collective agreement or any of its provisions for a period of less than one year while they are bargaining for its renewal with or without modifications or for a new agreement, but such continued operation does not bar an application for certification or for a declaration that the trade union no longer represents the employees in the bargaining unit and the continuation of the collective agreement may be terminated by either party upon 30 days' notice to the other party.

If the alleged contravention of the ESA 2000 occurs or occurred during this bridging period in which the operation of the collective agreement is extended for up to one year, the Act would effectively be deemed to form part of the collective agreement and would be enforceable against the employer as if it were actually part of the collective agreement, i.e., through the grievance procedure and subsequently through arbitration, if that becomes necessary.

During the Statutory Freeze

Section 86(1) of the LRA 1995 provides that where the employer or the union has given notice to the other party of its desire to bargain for a collective agreement, and no collective agreement is in operation, the employer and the union are prohibited from changing the terms and conditions of employment, except

with the consent of both parties. The period of this prohibition, sometimes referred to as the statutory freeze, continues until the earlier of two dates:

- Seven days after the Minister releases to the parties the report of the conciliation board or mediator or 14 days after the Minister releases to the parties a notice that they do not consider it advisable to appoint a conciliation board, as the case may be; and
- When the right of the trade union to represent the employees is terminated.

If an employer is or has been bound by a collective agreement, the Act is enforceable against the employer as if it were part of the collective agreement in respect of an alleged contravention of the ESA 2000 that occurs or occurred during the statutory freeze period, using the grievance procedure. Note, however, that where the union representing an employee has not yet made a first collective agreement with the employer, the matter would not fall within s. 99(1), which only applies where "an employer is or has been bound by a collective agreement". Thus, even though the statutory freeze provided for in s. 86(1) of the LRA 1995 may be in effect, if there has never been a collective agreement between the union and the employer, an employee represented by the union could file a complaint with the Ministry as of right, i.e., the employee does not need to obtain the permission of the Director under s. 99(6).

Complaint Not Permitted - s. 99(2)

99(2) An employee who is represented by a trade union that is or was a party to a collective agreement may not file a complaint alleging a contravention of this Act that is enforceable under subsection (1) or have such a complaint investigated.

Section 99(2) means that an employee who is covered by a collective agreement will not be able to file a complaint with the Ministry under the Act. In this regard, see the Board's decision in *Johnston v Brian Cullen Motors*, 2004 CanLII 25855 (ON LRB) where the Board confirmed that it had no jurisdiction to hear the appeal of the claimant on the basis that he was prohibited by s. 99(2) from filing a complaint alleging a contravention of the Act because he was represented by a union, which was party to a collective agreement. See also *Tender Choice Foods Inc. v Bolivong*, 2004 CanLII 22611 (ON LRB) in which the Board held that the claimant was precluded from filing a complaint under the Act despite her understanding when she filed her claim that she was not in a bargaining unit position or represented by the union. The employer's evidence, which was not contradicted, was that the claimant had in fact been represented by a trade union bound to a collective agreement at the time of the alleged contravention. The Board noted that the employment standards officer was therefore also precluded from issuing a Notice of Contravention in connection with the complaint.

Section 99(2) should be read together with s. 99(4), which states that s. 99(2) applies even if the employee is not a member of the trade union. It will also apply to probationary employees as they are covered by collective agreements although admittedly they may have fewer protections under the agreement than permanent employees. Section 99(2) is also subject to s. 99(6), which says that the Director may, if they consider it appropriate in the circumstances, allow an employee to file a complaint with the Ministry even though the employee is represented by a trade union that was a party to a collective agreement.

A question that arises is whether the employee is permitted to file a claim for a violation that occurs in two situations: after the statutory freeze period in s. 86(1) of the LRA 1995 has expired but no legal strike or lock-out has begun; or during a legal strike or lock-out.

After the statutory freeze period has expired but the parties have not engaged in either a legal strike or lock-out, the collective agreement is not in force and its operation has not been continued under s. 58(2) of the LRA 1995.

During a legal strike or lock-out, the collective agreement is not in force, its operation has not been continued under s. 58(2) of the LRA 1995 and the statutory freeze period in s. 86(1) of the LRA 1995 has expired.

Consequently, in both situations the provisions of s. 99(1), which make the Act enforceable against the employer as if it were part of the collective agreement in certain situations, do not apply, i.e., employees who are on lawful strike or are being lawfully locked-out cannot have their ESA 2000 rights enforced through the grievance and arbitration procedure.

Therefore, it is Program policy that in these circumstances bargaining unit employees are entitled to file a claim under the ESA 2000 for contraventions or failures to comply with the ESA 2000 that occurred during the lawful strike or lock-out. This is also the case if a legal strike or lock-out ends and the workplace is shut down without the parties entering into a new collective agreement. Note, however, that employees' eligibility to termination and severance pay may be affected if the termination occurs during or as a result of a strike or lock-out. See O Reg 288/01 for further discussion of the impact of a strike or lock-out on rights to termination and severance pay.

A further issue involves the building services sector and situations where the employees of the previous employer were unionized and there was a collective agreement in place. If the successor does not employ the employees of the previous employer and is not exempted from its Part XIX (Building Services Providers) obligations by O Reg 287/01, the employees are entitled to file a complaint against the successor. This is because the collective agreement does not follow through to bind the successor employer under the LRA 1995 and so cannot be used by employees to enforce their ESA 2000 rights against the successor. Note, however, that the claim against the successor must be for something that the successor - not the previous employer - is liable for, for example, termination and severance pay. If the complaint relates to something owed by the previous employer, the claim can be enforced against the previous employer through the grievance procedure even though the employees are now employed by the successor.

Another question that has arisen is whether bargaining unit employees are entitled to file a complaint with the Ministry where the expiry date of the collective agreement has not passed, but the workplace has shut down and the union and company agreed prior to the closing to terminate the collective agreement upon the closing.

It is Program policy that the bargaining unit employees in this situation are prohibited under s. 99(2) from filing a complaint or having such a complaint investigated by the Ministry. This is because unions and employers cannot simply agree between themselves to terminate a collective agreement upon a plant closing. Section 58(3) of the LRA 1995 requires the union and employer to jointly apply for and receive the consent of the Ontario Labour Relations Board before a collective agreement can be terminated early. If an application for an early termination of the agreement has not been made and granted by the Board, the collective agreement remains in existence, and the union continues to have a duty to represent employees despite the plant closure. See s. 99(6) below for more on this issue.

Have Such a Complaint Investigated

Another point to note is that s. 99(2) indicates that the employee is prohibited from filing or having such a complaint investigated by the Ministry under the ESA 2000. It is clear what the prohibition against filing a claim under the Act involves. The reference to such a complaint is a reference to a complaint enforceable against the employer as if the Act were part of the collective agreement under s. 99(1). In order for a complaint to be enforceable under s. 99(1), the employer must be bound by the agreement and the alleged contravention must occur when the collective agreement was or is in force; when its operation is continued under s. 58(2) of the LRA 1995; or during a statutory freeze period under s. 86(1) of the LRA 1995. As a result, an employee who filed a complaint prior to a collective agreement coming into force would be able to have such a complaint investigated by an employment standards officer.

If an employee alleged that a contravention of the Act occurred prior to when the agreement came into effect, they would be allowed to file a complaint under the Act. However, if it subsequently came to light that the contravention occurred after the agreement came into effect, the Ministry would not investigate or would cease investigating the complaint.

Another example could occur where an employee's position was not subject to a collective agreement because their position was not considered to be in the bargaining unit at the time they filed the complaint. If the Ontario Labour Relations Board subsequently ruled that the employee's position actually was in the bargaining unit, the Ministry would not investigate or would cease investigating the complaint.

Employee Bound - s. 99(3)

99(3) An employee who is represented by a trade union that is or was a party to a collective agreement is bound by any decision of the trade union with respect to the enforcement of this Act under the collective agreement, including a decision not to seek that enforcement.

Section 99(3) provides that an employee to whom a collective agreement applies is bound by the decision of the union on the issue of whether or not to proceed with the employee's grievance, or any other decision of the union with regards to the issue of the enforcement of the Act under the collective agreement, such as what remedies to seek in the grievance, or what arguments to make or evidence to adduce during an arbitration if the grievance reaches that stage. It should be read together with s. 99(4), which states that s. 99(2) applies even if the employee is not a member of the trade union.

This section should also be read together with s. 99(5), which indicates that an employee retains the right to make an unfair representation complaint against the union under s. 74 of the LRA 1995.

Membership Status Irrelevant - s. 99(4)

99(4) Subsections (2) and (3) apply even if the employee is not a member of the trade union.

Section 99(4) provides that an employee cannot file a complaint with the Ministry or have such a complaint investigated as per s. 99(2) and is bound by the decision of the trade union as per s. 99(3) even if the employee is not a member of the trade union.

For example, employees in workplaces that have an agency shop arrangement between the union and employer do not have to be union members in order to work there (although they do pay union dues), but they will be represented by the union. Consequently they cannot file a complaint with the Ministry nor can they have the complaint investigated, and are bound by the union's decision with respect to the enforcement of the ESA 2000 under the collective agreement. Other examples of employees who are not members of the trade union may include a probationary employee who is not required to pay union dues

and an employee who has exercised their right under the LRA 1995 to make a charitable donation instead of paying union dues or decline to be a member of the union for religious reasons. Although such employees are not paying dues to the union and may not be a member of the union, they are covered under the collective agreement and would be represented by the trade union with regard to a violation of the collective agreement, and likewise the ESA 2000.

Unfair Representation - s. 99(5)

99(5) Nothing in subsection (3) or (4) prevents an employee from filing a complaint with the Board alleging that a decision of the trade union with respect to the enforcement of this Act contravenes section 74 of the *Labour Relations Act, 1995*.

Section 99(5) means that, although an employee is bound under s. 99(3) by the decision of the union with regards to the employee's grievance (whether they are a member of the trade union as per s. 99(4)), including the decision not to proceed with it, the employee still has the right to file a complaint against the union for unfair representation under s. 74 of the LRA 1995. That section states:

74 A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

Exception - s. 99(6)

99(6) Despite subsection (2), the Director may permit an employee to file a complaint and may direct an employment standards officer to investigate it if the Director considers it appropriate in the circumstances.

Section 99(6) provides the Director of Employment Standards with the discretion to allow an employee who is otherwise caught by the prohibition under s. 99(2) to file a complaint or have such a complaint investigated under the Act. Please see Delegation of Powers for information regarding the persons to whom this power has been delegated.

Although the discretion of the Director and delegates is absolute in this area, the following are some examples of situations in which it might be appropriate to exercise the discretion in s. 99(6) to allow an employee to file or have such a complaint investigated by the Ministry under the Act:

An employee's union refuses to proceed with the employee's grievance.

The employee makes an unfair representation complaint against the union under s. 74 of the LRA 1995. The employee wins the unfair representation case against the union, but in the meantime, the union has become defunct and is unable to proceed with the grievance.

There is a dispute between the employer and the union as to whether a certain employee is in the bargaining unit or not.

The union believes that the employee is in the bargaining unit, but the employer does not. The matter is referred to the Labour Relations Board, but it will not be able to render a decision before the two-year recovery period for wages owing under the ESA 2000 expires. In such a case, even if the Employment Standards Program is of the preliminary view (pending the Board's decision) that the employee is a

member of the bargaining unit, it may be appropriate to exercise the discretion in s. 99(6) to allow the employee to file a claim under the Act. Otherwise, if it is later determined by the Board that the employee is not in the bargaining unit, the employee would be left without any remedy under either the Act or the collective agreement.

ESA Part XXII Section 100 - If Arbitrator Finds Contravention

If Arbitrator Finds Contravention - s. 100(1); Same, Part XIII - s. 100(2)

100(1) If an arbitrator finds that an employer has contravened this Act, the arbitrator may make any order against the employer that an employment standards officer could have made with respect to that contravention but the arbitrator may not issue a notice of contravention.

(2) If an arbitrator finds that an employer has contravened Part XIII (Benefit Plans), the arbitrator may make any order that the Board could make under section 121.

Section 100(1) indicates that if the employee's grievance reaches the arbitration stage, the arbitrator can make the same orders that an employment standards officer could make under the *Employment Standards Act, 2000* with the exception of a notice of contravention. “Arbitrator” is defined in ESA Part I, s. 1 to include a board of arbitration, or the Ontario Labour Relations Board acting as an arbitrator of a construction industry grievance under s. 133 of the *Labour Relations Act, 1995*, SO 1995, c 1, Sch A.

Under s. 100(1) the orders an arbitrator can make are:

1. An order for wages under s. 103;
2. An order for compensation or reinstatement under s. 104;
3. An order against a director under ss. 106 and 107;
4. A compliance order under s. 108.

Subsection 100(2) states that where the arbitrator finds that the employer has contravened Part XIII Benefit Plans, the arbitrator may make an order that the Board can make under ESA Part XXIII, s. 121. In other words, where the arbitrator determines that the employer, organization or person acting directly on behalf of an employer or organization has contravened Part XIII (i.e., differentiated on the basis of age, sex, marital status or same-sex partnership status in an employee benefit plan) the arbitrator may:

- Order the employer, organization or person to cease contravening Part XIII; or
- Compensate any person(s) who may have suffered a loss or been disadvantaged as result of the contravention.

Please see ESA Part XXII, s. 113(3) for a discussion of the Board's order making powers where it finds a contravention of ESA Part XIII Benefit Plans.

Directors and Collective Agreement - s. 100(3)

100(3) An arbitrator shall not require a director to pay an amount, take an action or refrain from taking an action under a collective agreement that the director could not be ordered to pay, take or refrain from taking in the absence of the collective agreement.

Subsection 100(3) states that an order made by an arbitrator against a corporate director shall not require the director to pay any amount or to take or refrain from taking any action that the director could not be ordered to pay or to take or refrain from taking under the ESA 2000 without reference to the collective agreement.

The ability of an arbitrator to impose liability on a director was intended to enable the director's liability provisions of the ESA 2000 to be used to assist in the enforcement of rights under the Act, not rights under the collective agreement.

Conditions Respecting Orders under this Section - s. 100(4)

100(4) The following conditions apply with respect to an arbitrator's order under this section:

1. In an order requiring the payment of wages or compensation, the arbitrator may require that the amount of the wages or compensation be paid,

- **i. to the trade union that represents the employee or employees concerned, or**
- **ii. directly to the employee or employees.**

2. [REPEALED]

3. The order is not subject to review under section 116.

Paragraph 1 of s. 100(4) explicitly provides that the arbitrator's order for wages or compensation may require payment to be made directly to the trade union representing the employees or directly to the employees. Because the payment is not made to the Director, the arbitrator's order will not incorporate the 10% administrative costs surcharge, because the surcharge on orders to pay attaches only to payments made to the Director of Employment Standards in trust.

Paragraph 3 indicates that the arbitrator's decision under s. 100 is not subject to review by the Ontario Labour Relations Board under ESA Part XXIII, s. 116. The remedy of a party dissatisfied with the decision of the arbitrator would be to seek judicial review. Normally, a decision of an arbitrator that interprets the Act would be subject to the strict correctness test on judicial review, on the basis that the arbitrator was construing a statute outside of their area of special expertise; see *McLeod v Egan,* [1975] 1 SCR 517, 1974 CanLII 12 (SCC). However, because ESA Part XXII, s. 99(1) deems the ESA 2000 to form part of the collective agreement, it is at least arguable that the decision of an arbitrator interpreting the ESA 2000 is thus now in effect merely a construction of the collective agreement itself, rather than an interpretation of a statute outside the collective agreement, and therefore the more deferential reasonableness test should apply on judicial review. It remains, though, to be seen how the courts will rule on this issue.

Copy of Decision to Director - s. 100(5)

100(5) When an arbitrator makes a decision with respect to an alleged contravention of this Act, the arbitrator shall provide a copy of it to the Director.

Section 100(5) requires the arbitrator to give a copy of the arbitration decision to the Director of Employment Standards. One reason for this is so that the Employment Practices Branch can monitor the decisions for purposes of determining what impact, if any, they might have on Program policy.

ESA Part XXII Section 101 - Arbitration and s. 4

Arbitration and s. 4 – s. 101(1)

101(1) This section applies if, during a proceeding before an arbitrator, other than the Board, concerning an alleged contravention of this Act, an issue is raised concerning whether the employer to whom the collective agreement applies or applied and another person are to be treated as one employer under section 4.

Section 101(1) states that s. 101 of the *Employment Standards Act, 2000* applies if, during an arbitration concerning enforcement of the ESA 2000 under ESA Part XXII, s. 100 (other than an arbitration that is conducted by the Ontario Labour Relations Board), an issue arises as to whether the employer that is the subject of the grievance and another entity are one employer under ESA Part III, s. 4. Section 101 will apply if the related employer issue under s. 4 arises during the arbitration, regardless of whether it was raised in the initial grievance that led to the arbitration.

ESA Part III, s. 4 states:

4(1) Subsection (2) applies if associated or related activities or businesses are or were carried on by or through an employer and one or more other persons.

(2) The employer and the other person or persons described in subsection (1) shall all be treated as one employer for the purposes of this Act.

(3) Subsection (2) applies even if the activities or businesses are not carried on at the same time.

(4) Subsection (2) does not apply with respect to a corporation and an individual who is a shareholder of the corporation unless the individual is a member of a partnership and the shares are held for the purposes of the partnership.

(4.1) Subsection (2) does not apply to the Crown, a Crown agency or an authority, board, commission or corporation all of whose members are appointed by the Crown.

(5) Persons who are treated as one employer under this section are jointly and severally liable for any contravention of this Act and the regulations under it and for any wages owing to an employee of any of them.

Section 4 means that two entities shall be treated as one employer for purposes of the ESA Part III, s. 4 if they meet the requirements set out in that section.

Restriction - s. 101(2)

101(2) The arbitrator shall not decide the question of whether the employer and the other person are to be treated as one employer under section 4.

Section 101(2) states that the arbitrator shall not make any decision regarding the issue of whether the employer against whom the grievance was filed and the other entity are one employer under ESA Part III, s. 4. Instead, that decision is to be made by the Ontario Labour Relations Board.

Reference to Board - s. 101(3)

101(3) If the arbitrator finds it necessary to make a finding concerning the application of section 4, the arbitrator shall refer that question to the Board by giving written notice to the Board.

Section 101(3) requires the arbitrator to notify the Ontario Labour Relations Board that an issue under ESA Part III, s. 4 has arisen during the arbitration, unless the arbitrator determines that there was no violation of the ESA 20000 in any event. In other words, if, for example, the arbitrator determines that there is no money owing to the employees under the ESA 2000, the arbitrator would not notify the Board of the related employer issue under s. 4, since that issue would be an academic point.

One question that arises is whether this provision means that the arbitrator should first make a determination as to what amount, if any, is owing to the employees under the ESA 2000, before notifying the Board of the related employer issue. Since s. 101(3) does not specify that the arbitrator must notify the Board immediately, it would, if no determination as to amount had been made before the related employer issue under s. 4 first arose, seem to be within the discretion of the arbitrator either to notify the Board immediately of the related employer issue under s. 4, or to wait until it is clear that some monies are owing to the employees under the Act. In some instances it may be impossible to determine whether any monies are owing to the employee under the Act until the related employer issue under s. 4 has first been decided. For example, because ESA Part XV, s. 64(1)(b) states that severance pay is only payable in individual terminations where the employer has an annual payroll of $2.5 million or more, the issue of whether two employers, A and B, each with a payroll of $2 million, are one employer under s. 4 must be determined before a finding that severance pay is owing can be made. In this type of situation, one route the arbitrator could take would be to make a conditional finding of the amounts owing to the employees (i.e., conditional on s. 4 being applicable) and to notify the Board of the related employer issue under s. 4 either before or after such a conditional finding is made.

Content of Notice - s. 101(4)

101(4) The notice to the Board shall,

(a) state that an issue has arisen in an arbitration proceeding with respect to whether the employer and another person are to be treated as one employer under section 4; and

(b) set out the decisions made by the arbitrator on the other matters in dispute.

Section 101(4) states that the arbitrator's notice to the Board shall state that a related employer issue under ESA Part III, s. 4 has arisen and shall advise the Board of any decisions concerning the other matters in dispute, e.g., whether the employees are owed money under the ESA 2000. However, as stated in the discussion of s. 101(3), the arbitrator has the discretion to notify the Board of the s. 4 issue before it reaches a decision on the non-s. 4 issues.

Decision by Board - s. 101(5)

101(5) The Board shall decide whether the employer and the other person are one employer under section 4, but shall not vary any decision of the arbitrator concerning the other matters in dispute.

Section 101(5) states that the Board shall make a determination with respect to whether the employer and the other person are related under ESA Part III, s. 4, but may not vary any decision of the arbitrator concerning the other matters in dispute. This section must be read together with ss. 101(6), (7) and (8), which set out the rules regarding the Board's ability to issue an order against both the employer and any other person it has determined to be related to the employer.

Order - s. 101(6)

101(6) Subject to subsection (7), the Board may make an order against the employer and, if it finds that the employer and the other person are one employer under section 4, it may make an order against the other person.

Section 101(6) provides that the where there has been a ESA Part III, s. 4 reference to the Board, the Board can make an order against the employer as well as any person that is found to be a related employer under s. 4. This section should be read in conjunction with ss. 101(7) and (8), which qualify the Board's power to make the order.

Exception - s. 101(7)

101(7) The Board shall not require the other person to pay an amount or take or refrain from taking an action under a collective agreement that the other person could not be ordered to pay, take or refrain from taking in the absence of the collective agreement.

Section 101(7) means that where an arbitrator has referred a related employer issue under ESA Part III, s. 4 to the Board, the Board's order against any person found to be related pursuant to s. 4 to the unionized employer is limited to amounts or actions (including refraining from such actions) that could be ordered under the ESA 2000 in the absence of the collective agreement. The ability of an arbitrator to rely on the Act's related employer provision via a reference to the Board was intended to enable that provision to be used to assist in the enforcement of rights under the ESA 2000, not rights under the collective agreement.

Application - s. 101(8)

101(8) Section 100 applies, with necessary modifications, with respect to an order under this section.

Section 101(8) provides that ESA Part XXII, s. 100 applies with necessary modifications to an order made by the Board when an ESA Part III, s. 4 issue has been referred to the Board by an arbitrator under s. 101(3). Section 100 deals with the order making powers of arbitrators who are determining a grievance alleging a contravention of the ESA 2000.

ESA Part XXII Section 101.1 - Settlement by Employment Standards Officer

Settlement by Employment Standards Officer - s. 101.1(1)

101.1(1) An employment standards officer assigned to investigate a complaint may attempt to effect a settlement.

Subsection 101.1(1) allows an employment standards officer who has been assigned to investigate an employment standards complaint to attempt to effect a settlement between an employer and an employee as the parties to the complaint. While the officer may attempt to effect a settlement, this provision does not require the employee and employer to enter into settlement discussions; the settlement process is voluntary.

Note that s. 101.1 as well as s. 112 (and unlike ss. 120 and 129) apply only to settlements between an employer and an employee and so cannot be used to settle a complaint that relates to the liability of a corporate director or a director's order issued under s. 106 or s. 107.

However, it should be noted that for the purposes of both s. 101.1 and s. 112 settlements in respect of Part XVIII.1, that a reference to an employer includes a reference to a client of a temporary help agency and a reference to an employee includes a reference to an assignment employee or prospective assignment employee. (See s. 112(9) and s. 101.1(3) of the *Employment Standards Act, 2000* and of this Manual.)

Note as well that a settlement agreement may be made by an agent acting on behalf of the employer (e.g., a director of a corporate employer) or the employee. As a result, a director of the employer could, if acting as agent for the employer, enter into a settlement under s. 101.1 of a complaint against, or corporate order issued to, an employer. In that case, any proceedings against both the employer and the corporate director (other than a prosecution) would be terminated under s. 101.1(2)(d). (And see section 7.6.1 of this Manual for a discussion of the binding effect of an agreement or authorization made by an agent of the employee.)

The other provisions of the *Employment Standards Act, 2000* that allow for settlement agreements between the parties to an employment standards complaint are as follows:

- Section 112 provides the authority for an employee and an employer to enter into a settlement respecting a contravention or alleged contravention of the Act.
- Section 120 provides that the Ontario Labour Relations Board may authorize a labour relations officer to attempt to effect a settlement of matters raised in an application for review under s. 116 of the Act.
- Section 129 provides that a collector appointed by the Director of Employment Standards may effect a settlement of the amount owing under the Act if the creditor (generally the employee) agrees in writing to the settlement.

However, s. 101.1 is distinguished from the above provisions in that it provides the employment standards officer who has been assigned to investigate a complaint with the authority to attempt to effect a settlement of that complaint.

Effect of Settlement - s. 101.1(2)

101.1(2) If the employer and employee agree to a settlement under this section and do what they agreed to do under it,

(a) the settlement is binding on them;

(b) the complaint is deemed to have been withdrawn;

(c) the investigation is terminated; and

(d) any proceeding respecting the contravention alleged in the complaint, other than a prosecution, is terminated.

If the employer and employee agree to enter into a settlement under s. 101.1, the agreement becomes binding on the parties, any complaint filed with the ministry is deemed to have been withdrawn, any

investigation into the complaint that may have been underway is terminated, and any proceeding other than a prosecution is terminated. (Note that such an agreement must be in writing pursuant to s. 1(3) of the Act.)

Section 101.1(2) must be read subject to subsection (4), which provides that where an employee or employer enters into a settlement as a result of fraud or coercion, the settlement is void.

It should also be noted that the binding effect of the settlement and its impact on a complaint, an order, or a proceeding is dependent on the parties to the settlement doing what they have agreed to do under it. For example, if the employer and employee have settled the matter with the agreement that a specific sum of money will be paid to the employee and such monies are not paid, this section will not apply and the matter will proceed as if there had been no settlement.

While s. 101.1 does not impose any specific restrictions with respect to when an employment standards officer may facilitate an agreement, the fact that this section provides for termination of the officer's investigation, rather than the voiding of an officer's orders as in s. 112, implies that any settlement by an officer under s. 101.1 must occur before the officer makes a determination. A "post-order" settlement could be made without the officer's involvement under s. 112, and such a settlement would, in accordance with s. 112(c), void the officer's order.

Application of s. 112 (4), (5), (7) and (9), s. 101.1(3)

101.1(3) Subsections 112 (4), (5), (7) and (9) apply, with necessary modifications, in respect of a settlement under this section.

This provision provides that subsections (4), (5), (7), and (9) of section 112 apply, with necessary modifications, in respect of settlements effected by employment standards officers under s. 101.1.

In this context, the application of s. 112(4) means that monies received by an employment standards officer pursuant to a settlement under s. 101.1 must be paid either directly to the employee or to the Director of Employment Standards in trust for the employee.

The application of s. 112(5) means that where monies received by an employment standards officer pursuant to a s. 101.1 settlement are paid to the Director in trust for an employee, the Director is required in turn to pay the monies to the employee.

The application of s. 112(7) means that the parties are prohibited from entering into a settlement that would allow future contraventions of the Act. For example, although an employee could agree to accept a payment equivalent to straight pay for overtime hours worked in the past, the employee would be prohibited from agreeing to work overtime in the future at straight time.

The application of s. 112(9) means that for the purposes of applying s. 101.1 with respect to Part XVIII.1 of the Act (Temporary Help Agencies), any reference to an "employer" includes a reference to a client of a temporary help agency and any reference to an "employee" includes a reference to an assignment employee or a prospective assignment employee.

Application to Void Settlement - s. 101.1(4)

101.1(4) If, upon application to the Board, the employee or employer demonstrates that he, she or it entered into a settlement under this section as a result of fraud or coercion,

(a) the settlement is void;

(b) the complaint is deemed never to have been withdrawn;

(c) the investigation of the complaint is resumed; and

(d) any proceeding respecting the contravention alleged in the complaint that was terminated is resumed.

Subsection 101.1(4) provides that a settlement may be set aside where the employee or employer can demonstrate to the Ontario Labour Relations Board that he or she or it entered into the settlement as a result of fraud or coercion. If the Board makes such a finding, the settlement is void, the employee's complaint is deemed never to have been withdrawn, the investigation of the complaint is resumed, and any proceeding relating to the alleged contravention that was terminated is resumed.

ESA Part XXII Section 102 - Meeting May Be Required

Meeting May Be Required - s. 102(1)

102(1) An employment standards officer may, after giving at least 15 days written notice, require any of the persons referred to in subsection (2) to attend a meeting with the officer in the following circumstances:

1. The officer is investigating a complaint against an employer.

2. The officer, while inspecting a place under section 91 or 92, comes to have reasonable grounds to believe that an employer has contravened this Act or the regulations with respect to an employee.

3. The officer acquires information that suggests to him or her the possibility that an employer may have contravened this Act or the regulations with respect to an employee.

4. The officer wishes to determine whether the employer of an employee who resides in the employer's residence is complying with this Act.

This provision gives an employment standards officer the authority to require listed persons to attend a meeting where the officer is investigating a complaint against an employer or where the officer, while conducting an inspection under s. 91 or 92, comes to have reasonable grounds to believe that an employer contravened the legislation with respect to an employee.

Section 102 was amended by the *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others), 2009,* SO 2009, c 32 (amended and renamed the *Employment Protection for Foreign Nationals Act, 2009* effective November 20, 2015) with the addition of paragraphs 3 and 4. Pursuant to paragraph 3, an employment standards officer may compel parties to attend a meeting in the event information is acquired that suggests the possibility of a violation of the *Employment Standards Act, 2000*. In other words, it is no longer necessary for the officer to be investigating a complaint or to have reasonable grounds to believe an employer has contravened the Act or regulations in order to schedule a meeting under s. 102; information acquired by the officer that merely suggests the possibility of a contravention will be sufficient.

Pursuant to paragraph 4, an employment standards officer may also compel parties to attend a meeting where the officer wishes to determine whether an employer of a live-in employee is complying with the ESA 2000. In effect, this enables an officer to do a "pro-active" inspection in the case of live-in employees by requiring the parties to attend a meeting so that the officer may determine whether the employer of a "live-in" employee is complying with the Act. The officer may schedule such a meeting even if no complaint is being investigated and even if there is no information to suggest or reasonable grounds to believe that the employer (of a live-in employee) is contravening the Act or regulations.

This subsection provides that the officer must give at least 15 days written notice of the meeting.

Please note that s. 74.13 of the Act modifies s. 102 when it is applied with respect to Part XVIII.1 (Temporary Help Agencies) of the Act. That section expands the circumstances under which attendance at a meeting may be required, to include: an officer is investigating a complaint against a client of a temporary help agency or, is conducting an inspection and has reasonable grounds to believe that a client has contravened the Act or regulations with respect to an assignment employee. See section ESA Part XVIII.1, s. 74.13 for more information.

The language of s. 102 is permissive as far as the employment standards officer is concerned. The officer may require that the following persons attend the meeting:

- The employer;
- A director or employee of a corporate employer;
- The employee;
- A client of a temporary help agency (where s. 74.13 applies);
- A director or employee of a client that is a corporation (where s. 74.13 applies); and/or
- An assignment employee or prospective assignment employee of a temporary help agency (where s. 74.13 applies).

This puts s. 102 on the same footing as the other powers of the officer to investigate under s. 91 and to issue orders and notices of contravention under ss. 74.14, 74.16, 74.17, 103, 104, 106, 107, 108 and 113. The officer is not required by the legislation to hold s. 102 meetings in preference to other methods of resolving claims or conducting an inspection.

The *Statutory Powers Procedure Act,* RSO 1990, c S.22 does not apply to meetings convened under s. 102, although the rules of natural justice do apply (as they do to any other aspect of the investigation process).

Attendees - s. 102(2)

102(2) Any of the following persons may be required to attend the meeting:

1. The employee

2. The employer

3. If the employer is a corporation, a director or employee of the corporation.

This section describes those persons that may be required to attend a meeting held under s. 102. The attendees listed in s. 102(2) are the same as those described in s. 64.2(1) of the former *Employment*

Standards Act. Note that an officer of the corporation is no longer itemized, as the definition of employee in the ESA 2000 includes officers (who perform work for an employer for wages).

Please note that where s. 102 is applied in respect of Part XVIII.1 (Temporary Help Agencies), s. 71.13 expands the list of persons that may be required to attend a meeting. Please see ESA Part XVIII.1, s. 74.13 for more information.

Notice - s. 102(3)

102(3) The notice referred to in subsection (1) shall specify the time and place at which the person is to attend and shall be served on the person in accordance with section 95.

This provision was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009*, SO 2009, c 32, which came into force on November 6, 2009 and is similar to the previous s. 102(4) of the Act.

Section 102(3) establishes that the written notice provided by an employment standards officer requiring attendance at a decision-making meeting must set out the time and place of the meeting and must be served in accordance with s. 95 of the Act. Please see ESA Part XXI, s. 95 for a discussion of the service provisions under s. 95.

Documents - s. 102(4)

102(4) The employment standards officer may require the person to bring to the meeting or make available for the meeting any records or other documents specified in the notice.

This provision was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009* which came into force on November 6, 2009 and is similar to the previous s. 102(3) of the Act.

Section 102(4) allows an employment standards officer to require that a meeting attendee bring to the meeting, or make available for the meeting, any records or other documents specified in the notice of the meeting. This provision must be read in conjunction with s. 102(5) that indicates an officer may give directions on how the documents are to be made available for the meeting.

Same - s. 102(5)

102(5) The employment standards officer may give directions on how to make records or other documents available for the meeting.

This provision was introduced by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009*. It indicates that an employment standards officer may give direction to meeting attendees on specific ways in which documents or records are to be made available for the meeting. The officer may require that documents be sent by fax, email, courier, etc. to all parties and to the officer in advance of the meeting.

For example, if an employment standards officer directs that a decision-making meeting is to take place via teleconference, he or she could require that relevant documents be sent via email to the parties in advance of the meeting for their reference during the meeting.

Compliance - s. 102(6)

102(6) A person who receives a notice under this section shall comply with it.

This provision is substantially the same as the corresponding section (s. 64.2(5)) of the former *Employment Standards Act*.

Section 102(6) requires a person who receives a notice of meeting to comply with the notice. This includes attending the meeting at the specified time and place and bringing or making available for the meeting any records or other documents specified in the notice, in accordance with any direction from the officer with respect to how the records or documents are to be made available.

Use of Technology - s. 102(7)

102(7) The employment standards officer may direct that a meeting under this section be held using technology, including but not limited to teleconference and videoconference technology, that allows the persons participating in the meeting to participate concurrently.

This provision was introduced by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009* which came into force on November 6, 2009. It allows for the use of technology to facilitate s. 102 meetings. An employment standards officer may direct a meeting to be held using technology that allows attendees to participate in the meeting concurrently. This may include, but is not limited to, holding the meeting via teleconference or videoconference.

Same - s. 102(8)

102(8) Where an employment standards officer gives directions under subsection (7) respecting a meeting, he or she shall include in the notice referred to in subsection (1) such information additional to that required by subsection (3) as the officer considers appropriate.

This provision was introduced by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009*, which came into force on November 6, 2009. When an employment standards officer directs that a meeting be held using a technology (such as a teleconference or videoconference), he or she must include in the written notice of the meeting any information, in addition to the time and place at which the person is to attend, that he or she considers appropriate.

For example, if a decision-making meeting is to be held via videoconference, the employment standards officer may consider it appropriate to provide information about the type of technology that will be used, how the person will be set-up with the technology, any call-in numbers or codes that may be necessary, etc.

Same - s. 102(9)

102(9) Participation in a meeting by means described in subsection (7) is attendance at the meeting for the purposes of this section.

This provision was introduced by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009* which came into force on November 6, 2009. Where an employment standards officer directs that a meeting be held using technology, such as teleconferencing or videoconferencing, and the person participates in the meeting using that technology, the person will have attended the meeting for the purposes of s. 102.

Determination if Person Fails to Attend, etc. - s. 102(10)

102(10) If a person served with a notice under this section fails to attend the meeting or fails to bring or make available any records or other documents as required by the notice, the officer may determine whether an employer has contravened or is contravening this Act on the basis of the following factors:

1. If the employer failed to comply with the notice,

- **i. any evidence or submissions provided by or on behalf of the employer before the meeting, and**
- **ii. any evidence or submissions provided by or on behalf of the employee before or during the meeting.**

2. If the employee failed to comply with the notice,

- **i. any evidence or submissions provided by or on behalf of the employee before the meeting, and**
- **ii. any evidence or submissions provided by or on behalf of the employer before or during the meeting.**

3. Any other factors that the officer considers relevant.

Subsection 102(10) was added by the *Open for Business Act, 2010*, SO 2010, c 16, effective November 29, 2010. It provides that where a person who has been served with a notice under s. 102 requiring him or her to attend a meeting or to attend a meeting and bring or make available certain documents does not attend the meeting or does not bring or make available the documents, the employment standards officer can make a determination about the employer's compliance with the ESA without entertaining any further evidence or submissions from that person.

If it is the employer who failed to comply with the notice, the officer may make a determination based on any evidence or submissions provided by or on behalf of the employer before the meeting, any evidence or submissions provided by or on behalf of the employee before or during the meeting, and any other factors the officer considers relevant.

If it is the employee who failed to comply with the notice, the officer may make a determination based on any evidence or submissions provided by or on behalf of the employee before the meeting, any evidence or submissions provided by or on behalf of the employer before or during the meeting, and any other factors the officer considers relevant.

Note that section 74.13 of the Act modifies the application of s. 102 when it is applied in respect to Part XVIII.1 of the Act (Temporary Help Agencies). See ESA Part XVIII.1, s. 74.13 for more information.

Employer Includes Representative - s. 102(11)

102(11) For the purposes of subsection (10), if the employer is a corporation, a reference to an employer includes a director or employee who was served with a notice requiring him or her to attend the meeting or to bring or make available any records or other documents.

Subsection 102(11) was added by the *Open for Business Act, 2010*, effective November 29, 2010. This provision provides that where the employer is a corporation, the reference to an employer in s. 102(10) includes an employee or a director of the corporation who was served with a notice under s. 102 requiring him or her to attend a meeting or to bring or make certain documents available to the employment standards officer.

In other words, a director or an employee of a corporation who is served with a notice under s. 102 requiring attendance at a meeting or requiring the provision of certain documents must abide by the notice. If he or she fails to comply with the notice, an employment standards officer may make a determination as to whether the employer corporation has contravened or is contravening the Act in accordance with s. 102(10).

ESA Part XXII Section 102.1 - Time for Response

Time for Response - s. 102.1(1)

102.1(1) An employment standards officer may, in any of the following circumstances and after giving notice, require an employee or an employer to provide evidence or submissions to the officer within the time that he or she specifies in the notice:

1. The officer is investigating a complaint against an employer.

2. The officer, while inspecting a place under section 91 or 92, comes to have reasonable grounds to believe that an employer has contravened this Act or the regulations with respect to an employee.

3. The officer acquires information that suggests to him or her the possibility that an employer may have contravened this Act or the regulations with respect to an employee.

4. The officer wishes to determine whether the employer of an employee who resides in the employer's residence is complying with this Act.

Section 102.1 is a new section added by the *Open for Business Act, 2010,* SO 2010, c 16, effective November 29, 2010. This provision gives an employment standards officer authority to issue a notice requiring an employee or employer to provide evidence or submissions within a time period specified in the notice.

The circumstances, in which such a notice can be issued are:

- Where an officer is investigating a complaint against an employer;
- Where an officer conducting an inspection comes to have reasonable grounds to believe that an employer contravened the legislation with respect to an employee;
- Where an officer receives information suggesting that a contravention may have occurred; or
- Where, in the case of an employee who resides in his or her employer's residence, an officer wishes to determine whether the employer is in compliance.

Note that s. 102.1 applies with certain modifications in the context of temporary help agencies and their assignment employees. See ESA Part XVIII.1, s. 74.13 for more information.

Service of Notice - s. 102.1(2)

102.1(2) The notice shall be served on the employer or employee in accordance with section 95.

This provision requires that the notice to provide evidence or submissions be served on the employer or employee, as the case may be, in accordance with s. 95 of the *Employment Standards Act, 2000*. Please see ESA Part XXI, s. 95 for a discussion of the service provisions under s. 95.

Determination if Person Fails to Respond - s. 102.1(3)

102.1(3) If a person served with a notice under this section fails to provide evidence or submissions as required by the notice, the officer may determine whether the employer has contravened or is contravening this Act on the basis of the following factors:

1. Any evidence or submissions provided by or on behalf of the employer or the employee before the notice was served.

2. Any evidence or submissions provided by or on behalf of the employer or the employee in response to and within the time specified in the notice.

3. Any other factors that the officer considers relevant.

Section 102.1(3) provides that where an employment standards officer gives notice to provide evidence or submissions within a specified time period and a party fails to comply with the notice, the officer may make a decision on the basis of:

- Any evidence or submissions provided by that party before the notice was served;
- Any evidence or submissions provided by the other party before or in response to and within the time specified in the notice; and
- Any other factors the officers considers relevant.

In other words, if one of the parties fails to comply with the notice, the officer may make his or her determination without entertaining any further evidence or submissions from that party.

ESA Part XXII Section 103 - Order to Pay Wages

Order to Pay Wages - s. 103(1)

103(1) If an employment standards officer finds that an employer owes wages to an employee, the officer may,

(a) arrange with the employer that the employer pay the wages directly to the employee;

(a.1) order the employer to pay wages to the employee; or

(b) order the employer to pay the amount of wages to the Director in trust.

Sections 103(1) to (10) deal exclusively with orders for wages under the *Employment Standards Act, 2000*.

Section 103(1)(a) states that where the officer finds wages are owing, they may arrange for the employer to pay the employee(s) directly, without an order being issued.

Section 103(1)(a.1) states that where the officer finds wages owing, the officer may issue an order requiring the employer to pay wages to the employee directly. Note that an order to pay wages issued under clause (a.1) does not include administrative costs.

Section 103(1)(b) states that where the officer finds wages are owing, the officer may issue an order to the employer to pay the wages owing to the employee to the Director of Employment Standards in trust. Note that an order to pay wages issued under clause (b) will include administrative costs. See s.103(2) below.

Administrative Costs - s. 103(2)

103(2) An order issued under clause 1(b) shall also require the employer to pay to the Director in trust an amount for administrative costs equal to the greater of $100 and 10 per cent of the wages owing.

Section 103(2) provides that the order issued under s. 103(1)(b) shall, in addition, contain an amount for administrative costs equal to 10 per cent of the amount of the wages, or $100, whichever is greater. Thus, for example, if the gross amount of the wages owing (before deductions for income tax, Employment Insurance and Canada Pension Plan) is $600, the administrative costs fee added to the order would be $100.

Note that there are similar provisions regarding administrative costs associated with orders issued under ss. 74.14, 74.16, 74.17 and 104.

The administrative costs are not intended to be a penalty and the Program does not use them as such.

If More than One Employee - s. 103(3)

103(3) A single order may be issued with respect to wages owing to more than one employee.

This provision empowers an officer to order wages on behalf of other employees who are entitled under the Act besides the claimant. See *Clevelands House Limited v Hay et al* (April 30, 1981), ESC 985 (Howe), *Unique Media Incorporate v Castello* (September 8, 1988), ESC 2372 (Haefling), and *Marcello Tranatino Manufacturing Inc. v Scarlett* (October 21, 1988), ESC 2404 (Haefling).

Transitional Provisions

Subsection 103(4) was amended by the *Stronger Workplaces for a Stronger Economy Act, 2014* effective February 20, 2015. This section imposed a cap of $10,000 on the amount of wages an employment standards officer could order for a single employee with respect to wages that came due prior to February 20, 2015. Subsection 103(4.1), which was also added to s.103 by the *Stronger Workplaces for a Stronger Economy Act, 2014* effective February 20, 2015, eliminated the $10,000 cap with respect to orders for unpaid wages that come due on or after that date. Subsections 103(4) and 103(4.1) were transitional provisions and both were repealed on February 20, 2017.

Although these subsections are now repealed, it is Program policy that the $10,000 cap on orders to pay wages continues to apply to wages that became due before February 20, 2015, even if any associated orders are issued after February 20, 2017. This is to preserve the vested legal rights of the parties at the

time the contravention occurred. This is relevant in situations where a period of time lapses between the time a claim is filed and the time a claim is investigated.

Maximum Amount - s. 103(4) (REPEALED)

103(4) An employment standards officer shall not issue an order under this section for more than $10,000 in wages with respect to any one employee for wages that become due to the employee before the date subsection 7(1) of Schedule 2 to the *Stronger Workplaces for a Stronger Economy Act, 2014* comes into force.

Note that s. 103(4) was a transitional provision that was repealed on February 20, 2017 in accordance with ss. 7(2) and 10(5) of Schedule 2 to the *Stronger Workplaces for a Stronger Economy Act*, *2014*.

Prior to its repeal, this section put a cap of $10,000 on the amount of wages an employment standards officer could order for a single employee with respect to wages that came due prior to February 20, 2015. However, it is Program policy that the $10,000 cap imposed by s. 103(4) continues to apply to wages that became due before February 20, 2015, even if any associated orders are issued after February 20, 2017.

Note that there is no cap on orders for compensation issued under ss. 74.16, 74.17 or 104, on orders for the recovery of fees under s. 74.14 or on orders against directors under s. 106 and s. 107.

Note that the cap in s. 103(4) applied to the amount of wages that came due prior to February 20, 2015 and not to the amount of the order to pay wages itself. Thus, an order to pay wages for a single employee could be for an amount greater than $10,000. That is, the order could be made out up to a maximum of $10,000 for the gross amount of the assessment, but would also include $1,000 for the 10% administrative fee, for a total of $11,000. In addition, an order could include any amount of wages that come due on or after February 20, 2015. For example, if an employee was owed $12,000 in respect of wages that came due prior to February 20, 2015 but is also owed wages (e.g., $5000) that came due on or after February 20, 2015, the order could be issued in the amount of $15,000 plus $1,500 for the 10% administrative fee as the $10,000 cap does not apply in respect of any wages that came due on or after February 20, 2015.

Questions may arise as to whether an employee who is owed more than $10,000 in wages (e.g., $15,000) that came due prior to February 20, 2015 could have filed a claim with the Ministry for $10,000, have an order issued for that amount and then filed another claim for the excess amount and had a second order issued for $5,000. The answer is no. Such a procedure would have been contrary to the intent of s. 103(4). However, if the employee was owed $10,000 in wages that came due prior to February 20, 2015, filed a claim for that amount, an order was issued, and subsequently a new and separate amount of $5,000 in wages became owing to the employee (again pre-February 20, 2015), it would not be contrary to the intent of s. 103(4) for a second order to be issued under s. 103(1) for the new amount owing.

With respect to wages that came due prior to February 20, 2015, the question may arise as to whether the $10,000 cap applied to limit recovery under the Act even where there was no order issued by an employment standards officer. This issue was considered by the Divisional Court in *Ontario (Director of Employment Standards) v Brown,* [2004] OLRB Rep 467 in an appeal from a decision of the Ontario Labour Relations Board in *Brown v North York Chevrolet Oldsmobile Ltd.*, 2003 CanLII 19379 (ON LRB). In that case, the employee was terminated without notice by the employer and sought termination pay in lieu of notice, severance pay and vacation pay totalling $37,277.02. The officer advised the employer that

an order under the Act would be limited to $10,000 and the employer agreed to pay that amount directly to the employee under s. 103(1)(a).

The employee then filed an appeal to the Board seeking the balance of the monies that had been assessed as owing. The Board found that the arrangement to pay the $10,000 directly to the employee was not a true agreement pursuant to s. 103(1)(a) because the employer had not paid the full amount assessed as owing by the employment standards officer. The Board also found that as no order had been issued under s. 103(1)(b) that the employee was entitled to view the circumstances as a refusal to issue an order. He could therefore appeal the refusal and ask the Board to issue an order with respect to his unpaid entitlements. As the Board also concluded that there was no s. 112 settlement in this case, it concluded that it was empowered to issue an Order to Pay in the amount of $10,000, the maximum amount allowed under the Act at the time.

The employer judicially reviewed the decision at Divisional Court, which overturned the Board's decision. The Divisional Court held that arrangements made under s. 103(1)(a) for direct payment as well as orders issued under s. 103(1)(b) were subject to a limit of $10,000 by virtue of s. 103(4). The Court concluded that if the employee wished to recover more than $10,000 he was obliged to bring a civil action in the courts.

Same - s. 103(4.1) (REPEALED)

103(4.1) There is no limit on the amount of an order issued under this section for wages that become due to an employee on or after the day subsection 7(1) of Schedule 2 to the *Stronger Workplaces for a Stronger Economy Act, 2014* comes into force.

Note that s. 103(4.1) was a transitional provision that was repealed on February 20, 2017 in accordance with ss. 7(2) and 10(5) of Schedule 2 to the *Stronger Workplaces for a Stronger Economy Act*, *2014*.

This provision was added to the Act by the *Stronger Workplaces for a Stronger Economy Act, 2014,* effective February 20, 2015. It eliminated the $10,000 cap with respect to orders for unpaid wages that come due on or after this provision came into force.

Contents of Order - s. 103(5)

103(5) The order shall contain information setting out the nature of the amount found to be owing to the employee or be accompanied by that information.

Section 103(5) is the source of the requirement for the various inclusions to an order to pay wages, such as the covering letter, Officer's Narrative and Worksheet, which must set out enough information that the employer will know the amount to be paid and the nature of the violation of the Act that gives rise to the entitlement ordered to be paid. The language of the section is specific: the order to pay must contain or have attached to it the information required. The fact that the employer had knowledge previously of the nature of the violation and the amount owing does not relieve the officer of the onus of setting out this information as part of the order to pay wages.

Service of Order - s. 103(6)

103(6) The order shall be served on the employer in accordance with section 95.

The provision requires that an order to pay wages be served on the employer in accordance with ESA Part XXI, s. 95.

Notice to Employee - s. 103(7)

103(7) An employment standards officer who issues an order with respect to an employee under this section shall advise the employee of its issuance by serving a letter, in accordance with section 95, on the employee.

Section 103(7) provides that an employee who is the subject of an order to pay (whether or not they were a complainant) is entitled to notice that the order was issued. Such notice is to be served in accordance with ESA Part XXI, s. 95.

This provision should be read together with s. 116(2), which establishes a right of review for such employees, and s. 116(4), which states that the time period for applying for such a review is 30 days after the date on which the letter advising of the order is served. See ESA Part XXIII, s. 116 for a further discussion.

Compliance - s. 103(8)

103(8) Every employer against whom an order is issued under this section shall comply with it according to its terms.

This provision states that an employer against whom an order to pay is issued must comply with the terms of the order. If the employer wishes to have the order reviewed, the procedure for filing for a review of the order is set out in ESA Part XXIII, s. 116. Section 116 is incorporated by reference into the terms of an order to pay wages; therefore filing for a review of the order is considered compliance with the terms of the order. Paying the full amount of the order or filing for review are the employer's only options with respect to complying with the terms of the order.

Effect of Order - s. 103(9); Same - s. 103(10)

103(9) If an employer fails to apply under section 116 for a review of an order issued under this section within the time allowed for applying for that review, the order becomes final and binding against the employer.

103(10) Subsection 9 applies even if a review hearing is held under this Act to determine another person's liability for the wages that are the subject of the order.

Section 103(9) states that if an employer has not applied for a review of an order issued under s. 103 within the time period set out in s. 116, the order becomes final and binding on the employer. Section 103(10) clarifies that if an employer failed to apply for a review of an order for wages, the order becomes final and binding against that employer, even if, for example, a director of that employer obtained a review of an order issued against the director with respect to the same unpaid wages. See ESA Part XXIII, s. 116 for a discussion of the time periods for applying for review.

Likewise, even though a director of the employer reviewed a director's order issued under ss. 106 or 107 and it was held that the employee was not owed monies under the Act, the employer could not rely on that decision in resisting collection efforts with respect to the order issued against it under s. 103, because the employer neither paid nor appealed the s. 103 order.

Similarly, if, for example, employer A fails to pay or apply to review the order issued against it, the order becomes final and binding against it even though company B, allegedly related to A under s. 4 of the Act, applies for a review of a separate order against B. If the result of the hearing concerning B is that B is not liable because A did not owe the employee any wages, A could not rely on that decision in resisting collection efforts against it, since A did not apply to review the order against it.

ESA Part XXII Section 104 – Orders for Compensation or Reinstatement

Orders for Compensation or Reinstatement - s. 104(1); Order to Hire - s. 104(2)

104(1) If an employment standards officer finds a contravention of any of the following Parts with respect to an employee, the officer may order that the employee be compensated for any loss he or she incurred as a result of the contravention or that he or she be reinstated or that he or she be both compensated and reinstated:

1. Part XIV (Leaves of Absence)

2. Part XVI (Lie Detectors)

3. Part XVII (Retail Business Establishments)

4. Part XVIII (Reprisal)

(2) An employment standards officer who finds a contravention of Part XVI may order that an applicant for employment or an applicant to be a police officer be hired by an employer as defined in that Part or may order that he or she be compensated by an employer as defined in that Part or that he or she be both hired and compensated.

This provision creates a single order making power for most of the provisions in the *Employment Standards Act, 2000* for which the remedy for a contravention is an order for compensation or reinstatement. These are Part XIV Leaves of Absence, Part XVI Lie Detector Tests, Part XVII Retail Business Establishments and Part XVIII Reprisals. Note that the Part XVIII.1 Temporary Help Agencies provisions also provide for compensation orders issued under s. 74.16 and s. 74.17 for certain contraventions under that part.

Most orders issued under s. 104 are issued for a contravention of ESA Part XVIII, s. 74(1) which states:

74(1) No employer or person acting on behalf of an employer shall intimidate, dismiss or otherwise penalize an employee or threaten to do so,

(a) because the employee,

i. asks the employer to comply with this Act and the regulations,

ii. makes inquiries about his or her rights under this Act,

iii. files a complaint with the Ministry under this Act,

iv. exercises or attempts to exercise a right under this Act,

v. gives information to an employment standards officer,

vi. testifies or is required to testify or otherwise participates or is going to participate in a proceeding under this Act,

vii. participates in proceedings respecting a by-law or proposed by-law under section 4 of the Retail Business Holidays Act,

viii. is or will become eligible to take a leave, intends to take a leave or takes a leave under Part XIV; or

(b) because the employer is or may be required, because of a court order or garnishment, to pay to a third party an amount owing by the employer to the employee.

Section 104(1) was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009,* SO 2009, c 9, effective November 6, 2009 to allow an order to be issued against any person (rather than just an employer) who contravenes a provision in one of the listed Parts of the ESA 2000 with respect to an employee. Where a contravention can be committed by a person other than an employer, such as under Part XVI Lie Detectors and Part XVIII Reprisal, an order issued under s. 104 can be issued against the person who violates the provision.

Employees seeking an order for compensation and/or reinstatement are subject to the two-year limitation period for filing a complaint established under ESA Part XXII, s. 96(3). That section provides that a complaint filed more than two years after the contravention has occurred will be deemed not to have been filed. Damages awards made under s. 104 are not subject to the two year limitation on recovery of wages imposed by ESA Part XXII, s. 111. Section 111 states that an employee cannot recover money that came due more than two years preceding the date the complaint was filed. Because the damages awarded in s. 104 orders do not come due until the officer issues the order, s. 111 does not restrict recovery of damages.

However, if some part of the s. 104 order includes an assessment for wages that had come due under the Act, e.g., earned wages, overtime pay, vacation pay, public holiday pay, termination pay or severance pay, that amount would be subject to the limitations on recovery set out in s. 111.

Lastly, s. 104(2) clarifies that an order for compensation and/or hiring (as opposed to reinstatement) may be issued against an employer, as defined in ESA Part XVI, s. 68, with respect to persons who are not hired because they have refused to take a lie detector test, including applicants for the position of a police officer. The section is unique in that it clearly establishes a remedy that includes an order to hire for persons who are not employees under the ESA 2000.

Terms of Orders - s. 104(3)

104(3) If an order made under this section requires a person to compensate an employee, it shall also require the person to,

(a) pay to the Director in trust,

(i) the amount of the compensation, and

(ii) an amount for administration costs equal to the greater of $100 and 10 per cent of the amount of compensation; or

(b) pay the amount of the compensation to the employee.

Where an order is issued for compensation under s. 104, s. 104(3) provides that the order must also require the person to pay the amount of the compensation to either the Director in trust pursuant to s.104(3)(a) or to the employee pursuant to s.104(3)(b). If the terms of the order require the person to pay the amount of the compensation to the Director in trust, the person will also be required to pay an amount for administration costs equal to the greater of 10 per cent of the compensation or $100 to the amount of a compensation order issued under this section to the Director in trust. Note that the required terms in s. 104(3)(b) do not include administrative costs.

How Orders Apply - s. 104(4)

104(4) Subsections 103(3) and (5) to (9) apply, with necessary modifications, with respect to orders issued under this section.

Subsection 104(4) provides that the following subsections of ESA Part XXII, s. 103 regarding orders to pay wages also apply, with necessary modifications, to orders for compensation:

- Section 103(3): a single order may be issued with respect to compensation owing to more than one employee.
- Section 103(5): the order shall contain or be accompanied by information setting out the nature of the amount ordered to be paid.
- Section 103(6): provides for service of the order on the employer.
- Section 103(7): provides for service of a letter on employees affected by the order.
- Section 103(8): requires the employer against whom an order is issued to comply with its terms.
- Section 103(9): provides that where the employer fails to apply for a review of the order within the time period for applying for such a review, the order becomes final and binding on the employer.

ESA Part XXII Section 105 - Employee Cannot be Found

Employee Cannot be Found - s. 105(1); Settlements - s. 105(2)

105(1) If an employment standards officer has arranged with an employer or ordered an employer to pay wages under clause 103 (1) (a) or (a.1) to the employee and the employer is unable to locate the employee despite having made reasonable efforts to do so, the employer shall pay the wages to the Director in trust.

105(2) If an employment standards officer has received money for an employee under a settlement but the employee cannot be located, the money shall be paid to the Director in trust.

Under s. 105(1), if the officer and employer have arranged for the employer to pay monies owing directly to the employee(s)or the officer has issued an order under ESA Part XXII, s. 103(1)(a.1), but the employer is unable to find the employee(s) after having made a reasonable effort to do so, the employer must pay the amount of the wages owing to the employee(s) to the Director of Employment Standards in trust.

Similarly, under s. 105(2), if an officer receives money on behalf of an employee in a settlement under ESA Part XXII, s. 112 and the employee cannot be located, the money shall be paid to the Director in trust. A trust is imposed upon the Director in the name of the Ministry of Labour to preserve the employee's right to the funds collected.

See Delegation of Powers for information regarding to whom the Director has delegated the non-discretionary power to receive monies into trust under ss. 105(1) and 105(2).

When Money Vests in Crown - s. 105(3)

105(3) Money paid to or held by the Director in trust under this section vests in the Crown but may, without interest, be paid out to the employee, the employee's estate or such other person as the Director considers is entitled to it.

Section 105(3) states that where there has been a payment into trust on behalf of an employee and the employee cannot be located, the funds vest in the crown. These funds effectively become part of the government's general revenues, and since there is no interest payable on such funds, the section specifically states that the funds referred to do not earn interest.

The language of this section is permissive; that is the Director is given the discretion to pay out the funds collected to another person in the stead of the employee or to the employee themselves if they are subsequently located. The Director **may** do this; there is no requirement in the section that the Director do so.

ESA Part XXII Section 106 - Order Against Director, Part XX

Order Against Director - Part XX, s. 106(1)

106(1) If an employment standards officer makes an order against an employer that wages be paid, he or she may make an order to pay wages for which directors are liable under Part XX against some or all of the directors of the employer and may serve a copy of the order in accordance with section 95 on them together with a copy of the order to pay against the employer.

Section 106(1) was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009,* SO 2009, c 9, which came into force on November 6, 2009 to make reference to the service provisions in s. 95 as amended by that Act.

Section 106(1) indicates that if an employment standards officer issues an order to pay to an employer for wages under s. 103 of the *Employment Standards Act, 2000*, the officer may also issue an order to pay wages against some or all of the directors of the employer, subject of course to the limits on directors' liability in s. 81(7). Note that directors are not liable for compensation ordered under s. 104. See ESA Part I, s. 1 for a discussion of the definition of wages and also see ESA Part XX (Liability of Directors) for further discussion of directors' liability.

Section 106(1) also indicates that if the officer decides to issue an order against some or all of the directors, the officer should attach to the director's order a copy of the order to pay that was issued against the employer; both the director's order and the attached employer order to pay are to be served together on the director in accordance with s. 95. See ESA Part XXI, s. 95 for a discussion of service under s. 95.

The question arises as to whether the order to pay against the director should be issued at the same time as the order against the company, or whether it should be issued some time later. See the *Administration Manual for Employment Standards* for guidelines with respect to orders against directors.

Effect of Order - s. 106(2)

106(2) If the directors do not comply with the order or do not apply to have it reviewed, the order becomes final and binding against those directors even though a review hearing is held to determine another person's liability under this Act.

Section 106(2) indicates that if a director does not comply with the order to pay against him or her, and does not apply to have it reviewed, then the order against that director becomes final and binding against him or her, even though a review hearing is held to determine the liability of that person's co-directors, or the liability of the employer.

For example, if director A does not apply to have the order to pay against him or her reviewed and does not comply with it, then the employment standards officer may attempt to collect the amount of the order from that director, (e.g., through third party demands under s. 125 or certificates under s. 126), even though that person's co-directors, B, and C, or the employer, have applied to have the order reviewed. This applies even in cases where B and C are disputing the order against them on the grounds that the employees are not owed wages or vacation pay by the employer. If the result of the hearing concerning the liability of B and C is that they are found not liable on the grounds that the employer did not owe the employees wages or vacation pay, then A may not raise this as a defence in connection with the order against A, since A did not apply to review the order or comply with it voluntarily. Furthermore, where amounts owing under the order against A have been paid through collection efforts under ss. 125 or 126, or otherwise, A could not demand repayment of those monies on the grounds that the Ontario Labour Relations Board had subsequently found, after the hearing concerning B and C, that the employer did not owe the employees wages or vacation pay.

Orders, Insolvent Employer - s. 106(3)

106(3) If an employer is insolvent and the employee has caused a claim for unpaid wages to be filed with the receiver appointed by a court with respect to the employer or with the employer's trustee in bankruptcy, and the claim has not been paid, the employment standards officer may issue an order to pay wages for which directors are liable under Part XX against some or all of the directors and shall serve it on them in accordance with section 95.

Section 106(3) was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009* effective November 6, 2009 to make reference to the service provisions in s. 95 as amended by that Act.

If there is a trustee in bankruptcy or a court-appointed receiver, the employment standards officer, because of contempt of court principles, is precluded from issuing an order to pay to the employer, but would instead file a proof of claim on behalf of the employees with the receiver or the trustee, as the case may be. If this is done, and the claim is not paid and the 30-day period to apply for a review has expired, the officer may at that point issue an order to pay against some or all of the directors for the wages and vacation pay that are owed to the employees by the employer. Therefore, even though s. 106(1) states that an order to pay against the employer is required before an order can be issued against the directors, an order against the directors is permitted in situations where a proof of claim is issued instead of an order against the employer, because there is a bankruptcy or court-appointed receivership.

An order to pay wages issued against a director under this section must be served in accordance with s. 95 of the Act. See ESA Part XXI, s. 95 for a discussion of the service provisions.

The Ontario Court of Appeal in *Rizzo & Rizzo Shoes Ltd*. *(Re),* 1995 CanLII 1225 (ON CA) held that the Ministry of Labour does have the authority to file proofs of claim on behalf of the employees, without the express written authorization of each individual employee. This decision supports Program policy on that particular point.

Procedure - s. 106(4)

106(4) Subsection (2) applies with necessary modifications to an order made under subsection (3).

Section 106(4) indicates that just like an order against a director of a solvent employer, an order issued against a director of an insolvent employer will become final and binding on the director if it is not complied with or if no application for review is made, even though a review hearing is held to determine another person's liability, e.g., a review hearing of a co-director's liability, under the Act.

Maximum Liability - s. 106(5)

106(5) Nothing in this section increases the maximum liability of a director beyond the amounts set out in section 81.

Section 106(5) confirms that the maximum liability of a director with respect to an order issued under s. 106 is as set out in s. 81 of the Act. Under s. 81(7), the maximum liability for directors with respect to wages is a joint and several liability to the employees of the corporation for all debts not exceeding six month's wages (per employee) that became due while the person was a director and 12 months accrued vacation pay (per employee) that accrued while the person was a director. Note that there is no liability for compensation as ordered under s. 104 because such monies are not considered wages under the Act. See ESA Part I, s. 1 for a discussion of the definition of wages.

Under s. 81(8) directors are also liable for interest on the outstanding wages for which they are liable. For further discussion of directors' liability, see ESA Part XX, s. 81.

Interest is to be calculated in a manner to be determined by the Director under ESA Part XXI, s. 88(5).

Payment to Director - s. 106(6)

106(6) At the discretion of the Director, a director who is subject to an order under this section may be ordered to pay the wages in trust to the Director.

This section states that the Director of Employment Standards has the power to require a director who is served with an order under s. 106 to pay the wages and vacation pay covered by the order to the Director of Employment Standards in trust, instead of to the employees directly. For information regarding the persons to whom this power has been delegated, please see Delegation of Powers.

The main purpose of this discretion is to facilitate the refunding mechanism where, due to joint and several liability, more than the amount of the order is received from the directors. For example, if A, B and C are jointly and severally liable for $10,000 in wages and vacation pay, the officer can issue an order to each of A, B and C for $10,000. If A pays $10,000, B pays $5,000 and C pays $5,000, then $10,000 would have to be refunded to the directors. If the monies are paid to the Director of Employment Standards in trust, the refunding is easier than if the monies had been paid directly to the employees.

ESA Part XXII Section 107 - Further Order, Part XX

Further Order, Part XX - s. 107(1)

107(1) An employment standards officer may make an order to pay wages for which directors are liable under Part XX against some or all of the directors of an employer who were not the subject of an order under section 106, and may serve it on them in accordance with section 95,

(a) after an employment standards officer has made an order against the employer under section 103 that wages be paid and they have not been paid and the employer has not applied to have the order reviewed;

(b) after an employment standards officer has made an order against directors under subsection 106(1) or (3) and the amount has not been paid and the employer or the directors have not applied to have it reviewed;

(c) after the Board has issued, amended or affirmed an order under section 119 if the order, as issued, amended or affirmed, requires the employer or the directors to pay wages and the amount set out in the order has not been paid.

Section 107(1) was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009,* SO 2009, c 9, which came into force on November 6, 2009 to make reference to the service provisions in s. 95 as amended by that Act.

Section 107(1) sets out three situations in which an employment standards officer may make an order against directors who did not receive orders pursuant to s. 106:

1. After an employment standards officer has issued an order to pay under s. 103 against the employer, but the order has not been paid and is not the subject of an application for review – s. 107(1)(a)

Whereas s. 106(1) provides that the employment standards officer who issued a s. 103 order may issue a director's order, s. 107(1)(a) enables an employment standards officer who did not issue the order under s. 103 to issue a director's order to pay. This is because it provides that ***an*** employment standards officer may issue if ***an*** employment standards officer has made a s. 103 order against the employer that is unpaid and has not been appealed.

2. After an employment standards officer has made an order against some or all of the directors under s. 106, and the order has not been paid and the directors or the employer have not applied for a review of the order – s. 107(1)(b)

If an employment standards officer has issued s. 106 orders against some of the directors of a corporate employer and the directors (or the employer acting on their behalf) have not paid or appealed such orders, an employment standards officer may issue an order against any other directors under s. 107. Again, because of the reference to ***an*** employment standards officer, s. 107(1)(b) enables an employment standards officer who did not issue the s. 106 order(s) to subsequently issue a director's order.

3. After the Ontario Labour Relations Board has issued, amended or affirmed an order under s. 119 (with respect to an application for review under s. 116) that requires the employer or directors to pay wages, and the money has not been paid – s. 107(1)(c)

If on appeal under s. 116, the Board issues, amends or affirms an order to pay against a corporate employer or director, an employment standards officer may make an order against the directors under s. 107. There is no requirement that the employment standards officer issuing a director's order to pay under this section be the same officer that made the determination that the corporate employer or director appealed to the Board.

Note that in a hearing involving an employer's application for review, the monies owing pursuant to the order to pay will have been paid by the employer to the Director of Employment Standards in trust. Consequently, an order to pay would not be issued against the directors under s. 107 unless there were insufficient funds in trust to satisfy the amount of the order because the Board raised the amount of the order, or because, when the application for review was filed, the Director accepted an irrevocable letter of credit for less than the amount ordered.

In a hearing involving a director's application for review of an order issued under s. 106, the officer could issue an order against additional directors under s. 107 if the Board affirmed or amended the order issued under s. 106.

Any orders issued under this section must be serviced in accordance with ESA Part XXI, s. 95.

Payment to Director - s. 107(2)

107(2) At the discretion of the Director, a director who is subject to an order under this section may be ordered to pay the wages in trust to the Director.

This provision is identical to s. 106(6).

This section states that the Director of Employment Standards has the power to require a director who is served with an order under s. 107, to pay the wages and vacation pay covered by the order, to the Director of Employment Standards in trust, instead of to the employees directly. For information regarding the persons to whom this power has been delegated, please see Delegation of Powers.

The main purpose of this power is to facilitate the refunding mechanism where, due to joint and several liability, more than the amount of the order is received from the directors. For example, if A, B and C are jointly and severally liable for $10,000 in wages and vacation pay, the officer can issue an order to each of A, B and C for $10,000. If A pays $10,000, B pays $5,000 and C pays $5,000, then $10,000 would have to be refunded to the directors. If the monies are paid to the Director of Employment Standards in trust, the refunding is easier than if the monies had been paid directly to the employees.

ESA Part XXII Section 108 - Compliance Order

Compliance Order - s. 108(1)

108(1) If an employment standards officer finds that a person has contravened a provision of this Act or the regulations, the officer may,

(a) order that the person cease contravening the provision;

(b) order what action the person shall take or refrain from taking in order to comply with the provision; and

(c) specify a date by which the person must do so.

Section 108, which was introduced by the *Employment Standards Act, 2000*, created a new enforcement tool for employment standards officers. Where the officer finds a contravention of the ESA 2000 or regulations, the officer may issue an order requiring the person who has contravened the ESA 2000 to, by a date specified in the order:

1. Cease contravening the provision; and
2. Take or refrain from taking action in order to comply with the provision.

Because s. 108 is applicable to any violation under the ESA 2000 it allows an officer to issue a compliance order for violations that could not be the subject of an order under ESA Part XVIII.1, ss. 74.14, 74.16, 74.17, or ESA Part XXII, ss. 103 or 104. Compliance orders can therefore be issued for non-monetary violations, although they are not limited to that purpose. For example, there would be a non-monetary violation if the employer contravened s. 20 by not providing employees with a 30-minute meal break or contravened s. 12 by not providing employees with a statement of wages.

Note that the officer may issue a compliance order to any person that has contravened the ESA 2000. The word "person" indicates that the order may be issued against persons other than an employer. For example, a compliance order could be issued against a person such as an owner or manager of a building who fails to provide information requested by a new provider of services as per ESA Part XIX, s. 77(2). See the definition of person in ESA Part I, s. 1.

Payment May Not Be Required - s. 108(2)

108(2) No order under this section shall require the payment of wages, fees or compensation.

This provision was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009,* SO 2009, c 9, effective November 6, 2009 to include a reference to orders to recover fees under ESA Part XVIII.1, s. 74.14.

Section 108(2) states that a compliance order itself shall not require the payment of wages, fees or compensation. The compliance order will therefore not be used to require payment of unpaid wages, fees or compensation. It is limited to directing a person who has or is contravening the ESA 2000 to cease doing so or to take action to bring itself into compliance. Note that this provision does not restrict the officer's ability to issue a notice of contravention under ESA Part XXII, s. 113 (which carries with it a financial penalty) with respect to the same violation that triggered the issuance of the compliance order. See the discussion in ESA Part XXII, s. 113(7).

Other Means Not a Bar - s. 108(3)

108(3) Nothing in subsection (2) precludes an employment standards officer from issuing an order under section 74.14, 74.16, 74.17, 103, 104, 106 or 107 and an order under this section in respect of the same contravention.

This subsection was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009* to reference orders under ESA Part XVIII.1.

Although s. 108(2) precludes the compliance order from requiring payment of wages, fees or compensation, s. 108(3) specifically allows the officer to issue a separate order to recover fees under ESA Part XVIII.1, s. 74.14, order for compensation against a temporary help agency under ESA Part XVIII.1, s. 74.16, compensation/reinstatement order relating to a client reprisal under ESA Part XVIII.1, s.

74.17, order to pay wages under ESA Part XXII, s. 103, a compensation/reinstatement order under ESA Part XXII, s. 104, or a director's order under ESA Part XXII, s. 106 or 107 with respect to the same contravention for which they issue the compliance order. It follows therefore that the issuance of a compliance order is not limited to situations involving non-monetary contraventions. For example, if an employer is found to have violated ESA Part VIII, s. 22(1), which requires the payment of overtime pay for hours worked in excess of 44 per week, the employment standards officer may issue an order under ESA Part XXII, s. 103 for the overtime pay owing to the employees as well as a compliance order under s. 108 that requires the employer to comply with s. 22(1).

Application of s. 103(6) to (9) – s. 108(4)

108(4) Subsections 103 (6) to (9) apply with respect to orders issued under this section with necessary modifications, including but not limited to the following:

1. A reference to an employer includes a reference to a client of a temporary help agency.

2. A reference to an employee includes a reference to an assignment employee or prospective assignment employee.

This subsection was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009*, which came into force November 6, 2009, to include references to clients and assignment employees and prospective assignment employees.

Section 108(4) provides that the rules as set out under ESA Part XXII, s. 103 regarding service, notice to employees, compliance, and the binding effect of an order for which no timely application for review is made apply to compliance orders issued under s. 108.

As a result, a compliance order must be served in accordance with ESA Part XXI, s. 95. Additionally, when an employment standards officer issues a compliance order with respect to an employee, he or she must advise that person of the issuance of the order through a letter served in accordance with s. 95.

The person against whom the compliance order is issued shall comply with it according to its terms and if the person against whom the order is issued does not apply to the Board for a review within the time set out in ESA Part XXIII, s. 116, the order becomes final and binding.

See the discussion at ESA Part XXII, ss. 103(6) to (9). When cross-referencing these provisions, any modifications necessary for ss. 103(6) to (9) to make sense in the context of a compliance order will apply. When an officer issues a compliance order with respect to Part XVIII.1, such modifications include reading the term employer to also mean client of a temporary help agency and reading the term employee to also mean an assignment employee or prospective assignment employee.

Injunction Proceeding - s. 108(5); Same - s. 108(6)

108(5) At the instance of the Director, the contravention of an order made under subsection (1) may be restrained upon an application, made without notice, to a judge of the Superior Court of Justice.

108(6) Subsection (5) applies with respect to a contravention of an order in addition to any other remedy or penalty for its contravention.

Section 108(5) enables the Director to apply to the court, without notice to the person to whom a compliance order was issued, for an order of the court requiring that person to cease contravening the terms of the compliance order. Such a court order is referred to as an injunction.

In effect, this provision provides the Director with a mechanism to obtain a court order requiring compliance with the ESA 2000, without the necessity of initiating a prosecution. Section 108(6) makes it clear that the injunction order under s. 108(5) is available in addition to any other remedy or penalty for the contravention of the order. In other words, it would not preclude a prosecution for a contravention of the order or imposition of the penalties and remedies under ESA Part XXV, ss. 132 to 137, inclusive.

See Delegation of Powers for information on how this power has been delegated.

ESA Part XXII Section 109 - Money Paid When No Review

Money Paid When No Review - s. 109(1)

109(1) Money paid to the Director under an order under section 74.14, 74.16, 74.17, 103, 104, 106 or 107 shall be paid to the person with respect to whom the order was issued unless an application for review is made under section 116 within the period required under that section.

Section 109(1) was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009,* SO 2009, c 9, effective November 6, 2009 to broaden its application to monies paid pursuant to orders issued under Part XVIII.1 of the *Employment Standards Act, 2000*.

Section 109(1) indicates that where there has been payment of wages, fees or compensation that were the subject of an order, and the person against whom the order was issued has not applied for review under s. 116, the money paid into trust will be paid out to the person named in the order. The Trust Funds Unit of the Employment Practices Branch (acting for the Director) will pay out after waiting the 30 days (or longer, if there has been an extension granted in the case) for any application for review by the employer or, in the case of an order issued under ss. 106 or 107, the director.

Note that this section makes no provision for the payment of any interest that may have accrued on the monies paid to the Director in trust. Although s. 88(7) states that where money has been paid to the Director in trust it shall be paid out to the person entitled to receive it together with interest at the rate calculated and manner determined by the Director in ss. 88(5), s. 88(7) only applies where no provision is made elsewhere in the Act for paying out the monies held in trust.

Money Distributed Rateably - s. 109(2)

109(2) If the money paid to the Director under one of those orders is not enough to pay all of the persons entitled to it under the order the full amount to which they are entitled, the Director shall distribute that money, including money received with respect to administrative costs, to the persons in proportion to their entitlement.

Section 109(2) states what happens when the amount received is less than the full amount of the order (including administrative costs).

In this situation, the Director of Employment Standards distributes the money received to each person who is the beneficiary of the order in proportion to the amount they are owed. The Director does not retain any of the money for the administrative costs unless those beneficiaries are paid in full. (This is the case

even if the employer specifically submitted some of money for the purpose of paying the administrative costs portion of the order.)

Please see ESA Part I, s.1 for a discussion of the term "person" under the Act.

No Proceeding Against Director - s. 109(3)

109(3) No proceeding shall be instituted against the Director for acting in compliance with this section.

This provision is substantially the same as the corresponding section (s. 72(5)) in the former *Employment Standards Act*. Section 109(3) simply states that the distribution of money received in compliance with this section does not leave the Director open to any civil or criminal liability. Though the word "proceeding" is not defined in the Act, it seems clear that its plain meaning is intended by this section. The protection afforded to the Director under this section would extend to the Director's delegate acting under this section. See Delegation of Powers for information.

ESA Part XXII Section 110 - Refusal to Issue Order

Refusal to Issue Order - s. 110(1)

110(1) If, after a person files a complaint alleging a contravention of this Act in respect of which an order could be issued under section 74.14, 74.16, 74.17, 103, 104 or 108, an employment standards officer assigned to investigate the complaint refuses to issue such an order, the officer shall, in accordance with section 95, serve a letter on the person advising the person of the refusal.

Section 110(1) was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009*, SO 2009, c 9, which came into force on November 6, 2009 to include references to refusals to issues orders under Part XVIII.1.

Section 110(1) imposes an obligation on an employment standard officer assigned to investigate a complaint to notify a complainant by letter of his or her decision not to issue any of the following orders:

- Order to recover fees (s. 74.14)
- Compensation order against a temporary help agency (s. 74.16)
- Compensation/reinstatement order relating to client reprisal (s. 74.17)
- Order to pay wages (s. 103)
- Compensation/reinstatement order (s. 104); and/or
- Compliance order (s. 108).

The letter advising the complainant of the refusal to issue an order must be served in accordance with s. 95 - see ESA Part XXI, s. 95 for more information.

Note: this section does not impose any obligation to notify a complainant of a refusal to issue a director's order under ss. 106 or 107, as employees do not have the right to apply to review a refusal to issue an order against a director. It should also be noted that there is no obligation to notify non-complainants of the refusal to issue any of the listed orders.

The rationale for the notice and service provisions in s. 110 may be found in s. 116(4) of the *Employment Standards Act, 2000*. Section 110 effectively establishes the start date of the 30-day period set out in s. 116(4) within which a complainant must apply for a review of the officer's decision not to issue an order under ss. 74.14, 74.16, 74.17, 103, 104 and 108.

Deemed Refusal - s. 110(2)

110(2) If no order is issued with respect to a complaint described in subsection (1) within two years after it was filed, an employment standards officer shall be deemed to have refused to issue an order and to have served on the person a letter advising the person of the refusal on the last day of the second year.

This provision was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009*, which came into force on November 6, 2009 to reference a "person" rather than an "employee".

This section is similar to the corresponding section (s. 67(2)) of the former *Employment Standards Act*. Section 110(2) indicates that if no order is issued within two years after the complaint was filed, then the employment standards officer shall be deemed to have refused to issue an order on the day before the two-year limitation period expires. Therefore, for example, if during the two years after the person files his or her claim, the officer neither issues an order, nor refuses to issue an order, then the officer will be deemed to have refused to issue an order on the day before the two-year period expires.

One reason for this provision is so that, in the unfortunate and rare event that the Ministry has neither issued an order nor refused to do so during the two-year limitation period set out in s. 114(1)(a) of the Act, the person can still apply for a review by the Ontario Labour Relations Board under s. 116. The person would have 30 days from the day before the two-year period expires in which to apply for a review of the officer's deemed "refusal".

ESA Part XXII Section 111 - Time Limit on Recovery, Employee's Complaint

Time Limit on Recovery, Employee's Complaint - s. 111(1)

111(1) If an employee files a complaint alleging a contravention of this Act or the regulations, the employment standards officer investigating the complaint may not issue an order for wages that became due to the employee under the provision that was the subject of the complaint or any other provision of this Act or the regulations if the wages became due more than two years before the complaint was filed.

Section 111(1) as amended by the *Stronger Workplaces for a Stronger Economy Act, 2014*, SO 2014, c 10, effective February 20, 2015 provides that, if an employee has filed a complaint under the *Employment Standards Act, 2000*, the order for wages that became due to the employee either in respect of the contravention alleged in the complaint or any contravention discovered during the course of the investigation is limited to those wages that became due to the employee within the two-year period preceding the date the complaint was filed.

It must be noted however that s. 111(1) applies only with respect to wages that became due on or after February 20, 2015. See the discussion under Transitional Provisions below on the limitation periods for wages that became due before February 20, 2015.

In order for an employee to recover wages that came due on or after February 20, 2015 in accordance with s. 111(1), such wages must have come due in the two-year period preceding the date the claim was filed.

The following is intended to assist officers in determining when various types of wages become due under the Act:

Type of Entitlement and Due Date

Regular Wages

Come due on the regular pay day as established by employer practice. Following termination, on the later of seven days after termination or the day that would have been the employee's next regular pay day.

Termination and Severance Pay

On the later of seven days after termination or the day that would have been the employee's next regular pay day, unless the severance pay is to be paid out in instalments in accordance with ESA Part XV, s. 66. Note also that where an employee elects to retain recall rights or makes no election, termination and/or severance pay is due when the recall rights expire or are renounced. See the discussion at ESA Part XV, ss. 66 and 67.

Vacation Pay

Vacation pay comes due generally before the employee takes vacation, but in some cases will come due on or before the pay day for the period in which the vacation falls, which must be taken within 10 months following the vacation year or within such shorter period as established by contract. Or, the parties may agree in writing that the vacation pay will come due on each pay day as it accrues. It may also come due at such other time as agreed in writing by the parties. Finally, following termination, vacation pay comes due on the later of seven days after termination or the day that would have been the employee's next regular pay day.

Because vacation pay can be paid in a number of ways under the Act and may therefore come due at different times, the application of s. 111 to vacation pay is quite complex.

Practical Application of s. 111 to Vacation Pay Provisions - When Does Vacation Pay Come Due?

Any vacation pay will be recoverable if it came due in the two year period preceding the date the claim was filed. Note that this applies only to vacation pay that became due on or after February 20, 2015. See s. 111(3.2) for a discussion of the limitation periods for vacation pay due before February 20, 2015.

However, it is important to note that vacation pay may come due at different times in accordance with ESA Part XI, s. 36:

Vacation pay is paid in accordance with s. 36(1):

Pursuant to ESA Part XI, ss. 35 and 35.1, vacation pay is due prior to the commencement of the vacation and vacation time must be taken within 10 months following the end of the period for which it was earned. In the case of the vacation pay accrued over a vacation entitlement year, the latest the vacation pay will be due before the end of the 10-month period following the completion of the vacation entitlement year (assuming that no vacation time has been taken in respect of that vacation entitlement year) would therefore be:

- Two weeks for employees whose period of employment is less than five years when the vacation entitlement year ends, or
- Three weeks for employees whose period of employment is five years or more when the vacation entitlement year ends.

In the case of vacation pay accrued over a stub period, the latest the vacation pay will be due (assuming that no vacation time has been taken in respect of that stub period) would be 10 months following the completion of the stub period less the vacation time earned over the stub period.

Vacation pay is paid in accordance with s. 36(2):

If vacation pay is paid in accordance with s. 36(2), i.e., wages are paid by direct deposit or the employee does not take vacation in complete weeks, the vacation pay is due on or before the pay day for the period in which the vacation falls. Again, the latest the vacation may be taken is within 10 months following the completion of the period for which it was earned. With respect to any completed vacation entitlement year then, the latest the vacation pay accrued in that year would be due (assuming that no vacation time has been taken in respect of that vacation entitlement year) would be the pay day for the last pay period that ended within the 10 months following the completion of the vacation entitlement year. In the case of vacation pay accrued over a stub period, the latest the vacation pay would be due (assuming that no vacation time has been taken in respect of that stub period) would be the pay day for the last pay period within the 10 months following the completion of the stub period.

Vacation pay is paid in accordance with s. 36(3):

If vacation pay is paid in accordance with s. 36(3), i.e., the employer pays vacation pay that accrues in each pay period on the pay day for that period, the vacation pay is therefore due on the pay day for each pay period, regardless of when the vacation time is taken.

Vacation pay is paid in accordance with s. 36(4):

If vacation pay is paid in accordance with s. 36(4), i.e., where the employer and employee may agree to the payment of vacation pay at any time, the vacation pay is due on the date so agreed by the parties regardless of when the vacation time is taken.

Compensation/Reinstatement

Damages owing under a compensation order only come due on the date the officer issues the order. As a result, when an officer is issuing a compensation order under ESA Part XXII, s. 104 for a violation of Part XIV Leaves of Absence, Part XVI Lie Detectors, Part XVII Retail Business Establishments or Part XVIII Reprisal, the limitation on recovery in s. 111 will not apply to the damages awarded pursuant to the order. An order for reinstatement is also not limited by s. 111 because the subject of the order in that case is not wages that come due under the Act. But see the discussion regarding the two-year limitation period on filing claims in ESA Part XXII, s. 96(3).

However, if a compensation or reinstatement order also includes an assessment for wages that were due under the Act, for example, where wages or vacation pay were earned prior to a termination contrary to the reprisal provisions in Part XVIII, those wages will be subject to the s. 111 limitations on recovery based on the date such monies came due under the Act.

Same, Another Employee's Complaint - s. 111(2)

111(2) If, in the course of investigating a complaint, an employment standards officer finds that an employer has contravened this Act or the regulations with respect to an employee who did not file a complaint, the officer may not issue an order for wages that became due to that employee as a result of that contravention if the wages became due more than two years before the complaint was filed.

In accordance with s. 111(2), if an officer is investigating a complaint filed by employee A and during the course of that investigation discovers that monies are also owing to employees B, C and D, the officer may issue an order with respect to employees B, C and D only for those wages including vacation pay that became due within the two-year period preceding the date A filed their complaint. In other words, with respect to any wages, employees A (the complainant) and B, C and D are all able to recover those wages including vacation pay that became due not more than two years prior to the date of A's complaint.

Note that this applies only to wages that became due on or after February 20, 2015. See the discussion under Transitional Provisions below on the limitation periods for wages that became due before February 20, 2015.

Same, Inspection - s. 111(3)

111(3) If an employment standards officer finds during an inspection that an employer has contravened this Act or the regulations with respect to an employee, the officer may not issue an order for wages that became due to the employee more than two years before the officer commenced the inspection.

In accordance with s. 111(3), where an officer is conducting an inspection, the limitation on recovery for all unpaid wages discovered during the inspection will be the two-year period preceding the date the inspection was commenced. In other words, with respect to any unpaid wages, the officer may issue an order for those wages if they came due within the two-year period preceding the date the inspection commenced.

Note that this applies only to wages that became due on or after February 20, 2015. See the discussion under Transitional Provisions below on the limitation periods for wages that became due before February 20, 2015.

Transitional Provisions

On February 20, 2015, the *Stronger Workplaces for a Stronger Economy Act* introduced a number of transitional provisions that imposed a six-month limitation period on unpaid wages that became due before February 20, 2015, and a 12-month limitation period for repeated contraventions and vacation pay that became due before February 20, 2015. Sections 111(3.1) to (8) were repealed on February 20, 2017 in accordance with ss. 8(6) and 10(6) of Schedule 2 to the *Stronger Workplaces for a Stronger Economy Act*, *2014*.

Although these sections are now repealed, it is Program policy that the limitation periods imposed by the transitional provisions continue to apply to wages, repeated contraventions and vacation pay that became due before February 20, 2015, even if any associated orders are issued after February 20, 2017. This is to preserve the vested legal rights of the parties at the time the contravention occurred. This is relevant in situations where a period of time lapses between the time a claim is filed and the time a claim is investigated.

Transition - Time Limits - s. 111(3.1) (REPEALED)

111(3.1) Despite subsection (1) to (3), and subject to subsections (3.2) to (8), if some or all of the wages became due to the employee before the day subsection 8(4) of Schedule 2 to the *Stronger Workplaces for a Stronger Economy Act*, 2014 came into force, the employment standards officer may not issue an order for the wages that became due before that day if they became due more than six months before the complaint was filed or the inspection was commenced, as the case may be.

Note that s. 111(3.1) was a transitional provision that was repealed on February 20, 2017 in accordance with ss. 8(6) and 10(6) of Schedule 2 to the *Stronger Workplaces for a Stronger Economy Act*, *2014*.

Prior to its repeal, s. 111(3.1) together with the repealed ss. 111(3.2), (4) and (6) and ss. 111(5), (7) and (8) operated to impose the six-month limitation period on unpaid wages or 12 month limitation for repeated contraventions and vacation pay that applied prior to February 20, 2015, the date s. 111 was amended by the *Stronger Workplaces for a Stronger Economy Act, 2014*. Under s. 111(3.1), the six-month limitation period on recovery of wages specifically applied only in respect of those wages that came due prior to February 20, 2015. However, it is Program policy that the six month limitation period imposed by s. 111(3.1) continues to apply to wages that became due before February 20, 2015, even if any associated orders are issued after February 20, 2017.

Note that s. 111(3.1) is also subject to the provisions that impose a 12-month recovery period for repeat contraventions and for vacation pay with respect to monies that came due prior to February 20, 2015.

An example of how s. 111(3.1) applied is as follows:

- Employee files a claim with Ministry on July 15, 2015.
- Employee is owed termination pay due on January 31, 2015.
- All of the unpaid termination pay came due on a single date (no repeat contraventions) prior to February 20, 2015 and there is no unpaid vacation pay. Consequently, the officer may issue an order only for those wages that became due during the six months prior to July 15, 2015, the date the claim was filed, In this case, the employee is able to recover the termination pay that was due on January 31, 2015.

Transition - Vacation Pay - s. 111(3.2) (REPEALED)

111(3.2) The time limit within which vacation pay must have become due under subsection (3.1) is 12 months, rather than six months.

Note that s. 111(3.1) was a transitional provision that was repealed on February 20, 2017 in accordance with ss. 8(6) and 10(6) of Schedule 2 to the *Stronger Workplaces for a Stronger Economy Act*, *2014*.

Prior to its repeal, s. 111(3.2) imposed a 12-month limitation on the recovery of unpaid vacation pay that applied prior to the amendments made by the *Stronger Workplaces for a Stronger Economy Act, 2014*. In accordance with the repealed s. 111(3.1) this 12-month limitation applied only with respect to vacation pay that came due prior to the February 20, 2015, the date the amendments to s. 111 made by the *Stronger Workplaces for a Stronger Economy Act, 2014* came into force. However, it is Program policy that the 12 month limitation period imposed by s. 111(3.2) continues to apply to vacation pay that became due before February 20, 2015, even if any associated orders are issued after February 20, 2017.

As a result, where an employment standards officer is investigating a complaint or conducting an inspection and finds during the course of that investigation or inspection that an employer has failed to pay any vacation pay that came due prior to February 20, 2015, the officer is limited to issuing an order for such vacation pay to that which came due within the 12-month period preceding the date the complaint was filed or the inspection was commenced.

Transition - Repeated Contraventions - s. 111(4) (REPEALED)

111(4) The time limit within which wages must have come due under subsection (3.1) is 12 months, rather than six months, if,

(a) the employment standards officer investigating the complaint or performing the inspection finds that the employer has contravened the same provision of this Act or the regulations more than once with respect to the employee;

(b) the contraventions were in each case with respect to wages to which the employee became entitled under the same provision of this Act or the regulations or under provisions of the employee's employment contract that are identical or are virtually identical; and

(c) at least one of the contraventions occurred within the six-month period referred to in that subsection.

Note that s. 111(4) was a transitional provision that was repealed on February 20, 2017 in accordance with ss. 8(6) and 10(6) of Schedule 2 to the *Stronger Workplaces for a Stronger Economy Act*, *2014*.

Prior to its repeal, s. 111(4) operated to impose a 12-month limitation period on the recovery of unpaid wages where there are repeated contraventions but only with respect to unpaid wages that came due prior to February 20, 2015, the date the changes to s. 111 made by the *Stronger Workplaces for a Stronger Economy Act, 2014* came into force. However, it is Program policy that the 12 month limitation period imposed by s. 111(4) continues to apply to repeated contraventions of the requirement to pay wages that became due before February 20, 2015, even if any associated orders are issued after February 20, 2017.

Subsection 111(4) therefore extended the limitation on recovery of wages (other than vacation pay) as set out in the repealed s. 111(3.1) from six months to 12 months when there has been a repeated contravention. Specifically, any unpaid wages (other than vacation pay) that came due prior to February 20, 2015, can be recovered if they became due in the 12-month period preceding the date a complaint was filed or inspection commenced and:

1. The employer has contravened the same provision of the Act or regulations more than once with respect to the employee; and
2. Each contravention is for wages that become due under the same provision of the Act or regulations or provisions of the employment contract that are the same or virtually identical; and
3. At least one of the contraventions occurred during the six-month period preceding the date the complaint was filed or inspection commenced.

For example, s. 111(4) would apply where there was a contravention of the requirement to pay overtime and such overtime pay was due more than six months prior to the date the complaint was filed or inspection commenced if there was also a contravention of that same provision on at least one occasion in the six-month period preceding the date the complaint was filed or the inspection commenced.

It is important to note that this section allows for a finding of a repeated violation only in regards to each employee. Thus, for example if the employer violates the public holiday provisions of s. 24 once with regard to employee A and then a second time with regards to employee B and a third time with regards to employee C, so that s. 24 is only violated once with regards to each employee, this is not a repeated violation of the Act with regards to any given employee and therefore s. 111(4) does not apply.

Example

The following example is an illustration of how the repealed repeated contravention provision applied where the investigation reveals multiple entitlements for more than one employee:

- Employee A files a complaint regarding overtime pay on December 1, 2014.
- During the investigation officer finds:
    - Employee A and B - overtime pay due but unpaid November 1, 2014.
    - Employee A - overtime pay due but unpaid July 15, 2014.
    - Employee A, B and C - overtime pay due but unpaid December 15, 2013.

In this case the officer could issue an order for the following:

1. The overtime pay due to employee A on November 1, 2014, July 15, 2014 and December 15, 2013.
    - A's overtime entitlements are repeat contraventions under s. 111(4), so the order may be issued for any overtime due in the 12-month period preceding the date the complaint was filed.
2. The overtime pay due to employee B on November 1, 2014 and December 15, 2013.
    - B's overtime entitlements are repeat contraventions under s. 111(4), so the order may be issued for any overtime due to B in the 12-month period preceding the date A filed their complaint.

The officer could not issue an order for the overtime pay due to employee C on December 15, 2013 because C's overtime entitlement was not a repeat contravention and would therefore have had to come due within six months of the date A filed their complaint in order to be recoverable under the Act.

Same - s. 111(5) (REPEALED)

111(5) Subsection (4) applies with respect to repeated contraventions of section 11 or 13 only if,

(a) none of those contraventions are also contraventions of another provision of this Act or the regulations; or

(b) all of those contraventions are also contraventions of the same provision of this Act or the regulations, other than section 11 or 13, or of provisions of the employee's employment contract that are identical or virtually identical.

Note that s. 111(5) was a transitional provision that was repealed on February 20, 2017 in accordance with ss. 8(6) and 10(6) of Schedule 2 to the *Stronger Workplaces for a Stronger Economy Act*, *2014*.

Prior to its repeal, its effect was to limit the application of the repeated contravention provision in s. 111(4) (also repealed) such that it applied in respect of wages that came due prior to February 20, 2015 in either of two ways:

1. A repeated contravention will only be found where the contraventions are violations only of the requirement in s. 11 to pay wages on the employee's regular pay day (s. 11) or the prohibition in s. 13 against deductions from wages and no other provisions in the Act; or
2. A repeated contravention will be found only if the contraventions are all for a violation of the same provision in the Act in addition to being a violation of s. 11 or 13.

However, it is Program policy that the limitations imposed by s. 111(5) continue to apply to repeated contraventions of the requirement to pay wages that became due before February 20, 2015, even if any associated orders are issued after February 20, 2017.

For example, s. 111(5)(a) applied so that a repeated contravention would be found where the employer had twice made prohibited deductions from the employee's pay at nine months and three months prior to the date the complaint was filed, because both are s. 13 contraventions but are not also contraventions of any other provision of the Act. Under s. 111(5)(b), a repeated contravention would be found where, on one occasion, the employer failed to pay overtime pay (a contravention of s. 11 and s. 22) and on a second occasion, again failed to pay overtime pay (as they are both contraventions of s. 11 and s. 22). However, a repeated contravention would not be found where the employer failed to pay overtime pay on one occasion and failed to pay minimum wage on another because while they are both s. 11 violations, they are contraventions of s. 22 and s. 23 respectively.

Transition - Complaints from Different Employees - s. 111(6) (REPEALED)

111(6) If two or more employees file complaints alleging contraventions of this Act or the regulations and at least one of the contraventions in each of the complaints arose under the same provision of this Act or the regulations or under identical or virtually identical provisions of their employment contracts, subsection (3.1) applies with respect to all of the complaints, as if all of them had been filed on the day the first complaint was filed.

Note that s. 111(6) was a transitional provision that was repealed on February 20, 2017 in accordance with ss. 8(6) and 10(6) of Schedule 2 to the *Stronger Workplaces for a Stronger Economy Act*, *2014*.

Prior to its repeal, subsection 111(6) was effectively limited in its application to situations where a complaint or a subsequent complaint had been filed with respect to wages which were subject to the limitations on recovery set out in the repealed s. 111(3.1), which is in turn was subject to ss. 111(3.2) to (8) (also repealed). However, it is Program policy that s. 111(6) continues to apply to complaints from different employees regarding wages that became due before February 20, 2015, even if any associated orders are issued after February 20, 2017.

In other words, if a complaint has been filed and subsequent complaints are filed by different employees against the same employer alleging at least one of the same contraventions alleged in the first complaint and there are wages that came due prior to February 20, 2015, s. 111(6) provides that those wages will be subject to a six month recovery period, or 12 months in the case of repeated contraventions or vacation pay, preceding the date the first complaint was filed.

Section 111(6) must be read subject to s. 111(8), which limits the application of s. 111(6) to situations where the subsequent complaints are filed before the officer has made a determination with respect to that first complaint.

Example

- Employee A files a claim July 1, 2015 for unpaid overtime pay due January 15, 2015.
- On August 15, 2015, during the investigation of A's claim, Employee B files a claim for unpaid overtime pay due January 15, 2015 and July 15, 2014.

Because B's complaint was filed before the officer had issued an order or letter of refusal with respect to A's complaint, B's complaint will be treated as if it had been filed July 1, 2015. As a result, the officer could issue an order for the overtime pay due to both A and B on January 15, 2015 as well as the overtime pay that was due to B on July 15, 2014 because it was a repeated contravention under s. 111(4).

Same - s. 111(7) (REPEALED)

111(7) Subsection (6) applies with respect to contraventions of section 11 or 13 with respect to different employees only if,

(a) none of those contraventions are also contraventions of another provision of this Act or the regulations; or

(b) all of those contraventions are also contraventions of the same provision of this Act or the regulations, other than section 11 or 13, or of provisions of the employees' employment contract that are identical or virtually identical.

Note that s. 111(7) was a transitional provision that was repealed on February 20, 2017 in accordance with ss. 8(6) and 10(6) of Schedule 2 to the *Stronger Workplaces for a Stronger Economy Act*, *2014*.

This provision is similar to the repealed s. 111(5), but it defined those situations in which the contraventions in different complaints (as compared to repeated contraventions with respect to a particular employee) would be considered to have arisen under the same provision of the Act (or identical or virtually identical provisions of the employees' contracts of employment) for the purpose of treating all the complaints as if they had been filed on the date the first complaint was filed as per s. 111(6) (also repealed). However, it is Program policy that s. 111(7) continues to apply to wages that became due before February 20, 2015, even if any associated orders are issued after February 20, 2017.

Like the repealed s. 111(5), this provision effectively applied only with respect to wages that came due prior to February 20, 2015.

The effect of s. 111(7) was to limit the application of s. 111(6) such that it applies in respect of wages that came due prior to February 20, 2015 in either of two ways:

1. If the contraventions are violations only of the requirement to pay wages on the employee's regular pay day (s. 11) or the prohibition against deductions from wages (s. 13) and no other provisions in the Act,; or

2. If the contraventions are also a violation of the same provision in the Act, in addition to being a s. 11 or 13 violation, or of provisions of the employees' employment contracts that are identical or virtually identical.

For example, if employee A filed a complaint claiming that they had not been paid regular wages and employee B subsequently filed a complaint also alleging non-payment of wages, employee B's complaint would be treated as if it had been filed on the date employee A's complaint was filed. However, the contraventions would not be considered the same if employee A's complaint alleged that the employer failed to pay overtime pay (a contravention of s. 11 and s. 22) and employee B's complaint alleged a failure to pay minimum wage (a contravention of s. 11 and s. 23).

Finally, if both employee A and B alleged a failure to pay overtime pay (a contravention of s. 11 and s. 22), they would be considered the same contravention and employee B's complaint would be treated as if it had been filed on the date A filed their complaint.

Same - s. 111(8) (REPEALED)

111(8) Subsection (6) does not apply with respect to a complaint filed after an employment standards officer has issued an order under subsection (6) with respect to an earlier complaint or advised an earlier complainant of his or her refusal to issue such an order.

Note that s. 111(8) was a transitional provision that was repealed on February 20, 2017 in accordance with ss. 8(6) and 10(6) of Schedule 2 to the *Stronger Workplaces for a Stronger Economy Act*, *2014*.

Prior to its repeal, this provision restricted the application of s. 111(6) to situations where the subsequent complaint(s) is filed before the officer has issued an order with respect to the original complaint or sent a letter advising that complainant of the decision not to issue an order. Because s. 111(6) only applied with respect to wages that came due prior to February 20, 2015, s. 111(8) similarly applied in situations where employees who have filed a subsequent complaint are owed wages that were due prior to February 20, 2015. However, it is Program policy that s. 111(8) continues to apply to wages that became due before February 20, 2015, even if any associated orders are issued after February 20, 2017.

In other words, s. 111(6), which provided that the six-month/one-year limits on recovery run from the date the first complaint has been filed (in the event there are multiple complaints for substantially the same contravention) does not apply if the subsequent complaint(s) are received after the employment standards officer has issued an order or sent a letter advising the earlier complainant that the officer will not be issuing an order.

Extending Time Limits

Despite the mandatory time limits on recovery set out in s. 111, it may be possible for the six/12-month time limits that apply with respect to wages that came due prior to February 20, 2015, as well as the two-year limitation on recovery that applies with respect to wages that came due on or after that date, to be extended in exceptional cases. The Court of Appeal in *Halloran v Sargeant*, 2002 CanLII 45029 (ON CA) held that in the appropriate circumstances, the equitable doctrine of fraudulent concealment applies to relieve against statutory time limits on recovery.

In *Halloran v Sargeant*, Mr. Halloran filed a claim for severance pay under the former ESA more than five years after his separation from his employer. The relevant provision of the former *Employment Standards Act* at that time, s. 82(2), had a two-year limitation on recovery; thus, the section, on its face, barred any recovery for Mr. Halloran as his severance pay would have become due more than five years before he

filed his claim. The Court of Appeal held that the Ontario Labour Relations Board should have applied the equitable doctrine of fraudulent concealment in order to relieve against the two-year time limit. The Court of Appeal held that this doctrine was applicable because the employer, on separation, had represented to Mr. Halloran that an unreduced early pension without severance pay exceeded what Mr. Halloran was entitled to under provincial law. The Court found that Mr. Halloran relied on this representation but changed his mind and decided to file a claim under the former *Employment Standards Act* some years later after reading in the newspaper about the Court decision affirming that certain other employees of the company who had pursued *Employment Standards Act* claims after their separation were in fact entitled to severance pay. Fraudulent concealment necessary to suspend the operation of the limitation period need not, according to the Court, amount to deceit or fraud in the ordinary sense. There is no suggestion in the case that the employer was fraudulent in the ordinary sense of that word. The Court held that employers have an obligation to provide accurate information to employees and it was not "right or reasonable" for the employer to take the benefit of s. 82(2) where it had made a misrepresentation to the employee concerning his statutory rights and where the employee relied on that misrepresentation to his detriment. The Court held that this was sufficient to engage the fraudulent concealment doctrine.

The principles set out in *Halloran v Sargeant* may apply to provide relief against the six-month/one-year and two-year limitation period in s. 111 to allow a claim that would otherwise be out of time where:

- An employee has been misled as their entitlements under the ESA 2000 by their employer and for that reason delayed in filing their claim; and
- The employee took prompt steps to file a claim after they found out that what the employer said about the ESA 2000 entitlement was inaccurate.

In determining whether the fraudulent concealment applies to allow recovery of a claim that on its face is time barred or which includes entitlements more than six/12 months or two years before the claim was filed, employment standards officers should inquire as to the reason for delay in filing:

- If the employer made no representation as to the employee's legal entitlements but simply refused to pay, then there would be no relief for the employee under the Halloran principles.
- If the employer tells the employee that the employer does not have to pay, there would be no relief from the time limits.
- If, on the other hand, the employer tells the employee that it has no obligation to pay under the law or under the ESA 2000, then the employee may be entitled to relief under the *Halloran v Sargeant* principles.

It does not matter whether the employer's misrepresentation is innocent, negligent or dishonest in order for the doctrine of fraudulent concealment to apply.

ESA Part XXII Section 112 – Settlement

Settlement – s. 112(1)

112(1) Subject to subsection (8), if an employee and an employer who have agreed to a settlement respecting a contravention or alleged contravention of this Act inform an employment standards officer in writing of the terms of the settlement and do what they agreed to do under it,

(a) the settlement is binding on the parties;

(b) any complaint filed by the employee respecting the contravention or alleged contravention is deemed to have been withdrawn;

(c) any order made in respect of the contravention or alleged contravention is void; and

(d) any proceeding, other than a prosecution, respecting the contravention or alleged contravention is terminated.

Subsection 112(1) of the ESA 2000 allows an employer and employee to enter into a settlement regarding a contravention or alleged contravention of the ESA 2000 by informing an employment standards officer in writing of the settlement and doing what they have agreed to do under it. Note that s. 112 as well as ESA Part XXII, s. 101.1 (and unlike ss. 120 and 129) apply only to settlements between an employer and employee and so cannot be used to settle a complaint that relates to a corporate director's liability or to settle a director's order to pay issued under ESA Part XXII, s. 106 or s. 107.

However, it should be noted that for the purposes of both s. 101.1 and s. 112 settlements in respect of Part XVIII.1, that a reference to an "employer" includes a reference to a client of a temporary help agency and a reference to an "employee" includes a reference to an assignment employee or prospective assignment employee.

Note as well that a settlement agreement may be made by an agent acting on behalf of the employer (e.g., a director of a corporate employer) or the employee. As a result, a director of the employer could, if acting as agent for the employer, enter into a settlement under s. 112 of a complaint against, or corporate order issued to, an employer. In that case, any proceedings other than a prosecution against both the employer and the corporate director would be terminated under s. 112(1)(d). See also ESA Part III, s. 7 for a discussion of the binding effect of an agreement or authorization made by an agent of the employee.

Other Settlement Provisions

The other provisions of the ESA 2000 that allow for settlement agreements between the parties to an employment standards complaint are as follows:

- ESA Part XXII, s. 101.1 provides the authority for an employment standards officer to facilitate a settlement between an employee and an employer respecting a contravention or alleged contravention of the ESA 2000
- ESA Part XXIII, s. 120 provides that the Ontario Labour Relations Board may authorize a labour relations officer to attempt to effect a settlement of matters raised in an application for review under ESA Part XXIII, s. 116
- ESA Part XXIV, s.129 provides that a collector appointed by the Director of Employment Standards may effect a settlement of the amount owing under the ESA 2000 if the creditor (generally the employee) agrees in writing to the settlement

However, s. 112 settlements are unique under the ESA 2000 in that they are not facilitated by a third party such as an employment standards officer or labour relations officer or a collector but are effected by the parties themselves, i.e., the employer and the employee.

When Parties May Enter into Settlement

The parties may enter into such an agreement **before or after**:

- A determination has been made, e.g., during or following an investigation or inspection;
- An employment standards officer issues an order under ss. 74.14, 74.16, 74.17, 103, 104, 106 or 107 – see ss. 112(2) and (3) regarding exceptions related to compliance orders and notices of contravention; or
- An application for review has been made or a review hearing is commenced.

This provision clearly contemplates that the parties may enter into a settlement under s. 112 even after initiating an application for review. This intent is also apparent in ESA Part XXIII, s. 117(3), which specifically provides that where an employer applies for a review and the matter is settled under s. 112 or s. 120, monies held in trust shall be paid out in accordance with the settlement, subject to s. 112(6) or s. 120(6). The parties are not restricted to a settlement effected by a labour relations officer under s. 120.

Effect of Entering into Settlement

Where a settlement has been entered into, any complaint filed by the employee respecting the contravention or alleged contravention is deemed to have been withdrawn, any order that may have been issued under ss. 74.14, 74.16, 74.17, 103, 104, 106 or 107 in respect of the contravention is voided and any application for review or a hearing under s. 116 that has been initiated respecting the contravention is terminated. However, a settlement under this section will have no impact on any prosecution that may have been commenced.

A settlement only settles the issues that the settlement document says it settles, and no more. For example, an employee filed a claim for vacation pay and termination pay. At no point - either in the claim form or afterwards, for example, during any discussion - was an issue of a minimum wage contravention raised. The employee and employer entered into a settlement whose terms specified that it was in settlement of the vacation pay and termination pay claims; it did not state that it was in settlement of all ESA issues that may have arisen during the course of the employment relationship up to the date of the settlement. The employee, after receiving the payment and wage statement from the employer due under the settlement, became aware that she hadn't been paid minimum wage. In this example, as the settlement did not cover the minimum wage issue, the claimant is able to pursue a minimum wage claim. The minimum wage issue would have been covered by the settlement only if:

- The settlement document specifically stated that it covered any claim to minimum wage, or
- The settlement document contained an all-encompassing statement that all ESA issues that arose out of the employment relationships up to the date of settlement are covered, or
- The settlement document contained a statement indicating that it is settling "the claim" or "claim #XXXXX" and the minimum wage issue had been raised - either in the claim form itself or afterwards, for example during discussions, such that both the employee and employer would have known that minimum wage was an issue in the claim and that they therefore intended the settlement to cover that issue.

Subsection 112(1) must be read subject to s. 112(8), which provides that where an employee demonstrates to the Ontario Labour Relations Board that they entered into the settlement as a result of fraud or coercion, the settlement is void.

It should also be noted that the binding effect of the settlement and its impact on a complaint, order or proceeding is dependent on the parties to the settlement doing what they have agreed to do under it. For example, if the employer and employee have settled the matter with the agreement that a specific sum of

money will be paid to the employee and such monies are not paid, this section will not apply and the matter will proceed as if there had been no settlement.

See also ESA Part XXIII, s. 120, which deals with settlements effected by a labour relations officer of matters raised in an application for review under ESA Part XXIII, s. 116.

Compliance Orders – s. 112(2)

112(2) Clause 1(c) does not apply with respect to an order issued under section 108.

Subsection 112(2) provides that clause 112(1)(c) which would otherwise void any order if the parties have made a settlement under s. 112(1) does not apply to a compliance order issued under ESA Part XXII, s. 108. In other words, if an employment standards officer has issued a compliance order, it will not be voided by a subsequent settlement.

This subsection precludes the parties from entering into a settlement that would allow the employer to effectively contract out of its obligations to comply with the ESA 2000 imposed by a compliance order. Subsection 112(2) is necessary because settlements under s. 112 may be made by the parties without the approval of the employment standards officer. Under s. 112(1) all that is required is that the parties inform the employment standards officer of the settlement.

Note that where a settlement is effected by a labour relations officer under ESA Part XXIII, s. 120, a compliance order may be voided. However, such settlements require the approval of the Director of Employment Standards as per s. 120(3).

This provision must be read in conjunction with s. 112(9), which provides that for the purposes of applying s. 112 with respect to ESA Part XVIII.1, any reference to an employer includes a reference to a client of a temporary help agency and any reference to an employee includes a reference to an assignment employee or a prospective assignment employee.

Notices of Contravention – s. 112(3)

112(3) This section does not apply with respect to a notice of contravention.

Subsection 112(3) provides that there is no settlement option where the officer has issued a notice of contravention under ESA Part XXII, s. 113. The notice of contravention allows an officer to assess a monetary penalty, as set out in O Reg 289/01, where the employer is found to have contravened the ESA 2000. The penalty imposed under the notice of contravention cannot be the subject of any settlement agreement because the parties to the notice of contravention are the Ministry and the employer, rather than the employee and the employer.

Payment by Officer – s. 112(4)

112(4) If an employment standards officer receives money for an employee under this section, the officer may pay it directly to the employee or to the Director in trust.

Subsection 112(4) allows the officer to pay the monies received on a settlement made under s. 112 directly to the employee or to the Director in trust.

This provision must be read in conjunction with s. 112(9) which provides that, for the purposes of applying s. 112 with respect to Part XVIII.1, any reference to an "employer" includes a reference to a client of a

temporary help agency and any reference to an "employee" includes a reference to an assignment employee or a prospective assignment employee.

Same – s. 112(5)

112(5) If money is paid in trust to the Director under subsection (4), the Director shall pay it to the employee.

Subsection 112(5) provides that money collected by the employment standards officer with respect to an employee under the terms of a settlement in s. 112(1) and paid to the Director in trust, is to be paid by the Director to the employee.

This provision must be read in conjunction with s. 112(9) which provides that for the purposes of applying s. 112 with respect to Part XVIII.1, any reference to an "employer" includes a reference to a client of a temporary help agency and any reference to an "employee" includes a reference to an assignment employee or a prospective assignment employee.

See Delegation of Powers for information regarding the persons to whom the power to receive monies in trust has been delegated.

Administrative Costs and Collector Fees – s. 112(6)

112(6) If the settlement concerns an order to pay, the Director is, despite clause (1) (c), entitled to be paid,

(a) that proportion of the administrative costs that were ordered to be paid that is the same as the proportion of the amount of wages, fees or compensation ordered to be paid that the employee is entitled to receive under the settlement; and

(b) that proportion of the collector's fees and disbursements that were added to the amount of the order under subsection 128 (2) that is the same as the proportion of the amount of wages, fees or compensation ordered to be paid that the employee is entitled to receive under the settlement.

The *Employment Standards Amendment Act (Temporary Help Agencies), 2009,* SO 2009, c 9 amended this provision effective November 6, 2009 to include a reference to fees paid pursuant to an order issued under s. 74.14. The *Fair Workplaces, Better Jobs Act, 2017*, SO 2017, c 22 further amended this provision to provide for the recovery of a proportion of a collector's fees and disbursements based on the amount the employee is entitled to receive under a settlement made under s. 112.

Note that while this provision states that it is the Director who is entitled to the collector's fees and disbursements, the Director may delegate collection activities to a collector and authorize the collector to collect the fees and disbursements under s. 127.

Clause 112(6)(a) establishes the Director's entitlement to a proportionate amount for administrative costs, despite the fact that the order has been voided as a result of a settlement. Where there is a settlement of an order, administrative costs payable to the Director of Employment Standards will be a proportion of the administrative costs assessed under the order. The proportion is calculated as the amount paid to the employee under the settlement, divided by the amount assessed as owing to the employee under the order. For example, consider an order issued for $1,000 in wages plus a $100 administrative fee. The employer and employee subsequently enter into a settlement under s. 112 providing for a $500 payment

to the employee. The proportion of wages paid under the settlement to the amount assessed under the order is one half. Therefore, the administrative fee payable to the Director would be one half of the $100 assessed under the order, or $50. See also the discussion of ESA Part XXIII, s. 117(3) and s. 120(6).

Clause 112(6)(b) establishes the Director's entitlement to a proportionate amount for the collector's fees and disbursements when a settlement is reached between an employer and employee after the order has been assigned to the collector and the collector has sought to collect the amount owing.

For example, consider an order issued for $1,000 in wages plus a $100 administrative fee that the collector is seeking to collect. Assuming the Director has authorized the collector to collect 20% of the order to pay in respect of the collector's fees in accordance with s. 127(3), a collection fee of $220 (($1000 + $100) x 20%) would be added to the order. If the employer and employee entered into a s. 112 settlement in the amount of $800 (80% of the amount owing to the employee), the collector would be entitled to a proportional amount of the fee in the amount of $176 ($220 x 80% = $176), based on the settlement reached.

Note that this provision must be read in conjunction with s. 112(9) which provides that for the purposes of applying s. 112 with respect to Part XVIII.1, any reference to an "employer" includes a reference to a client of a temporary help agency and any reference to an "employee" includes a reference to an assignment employee or a prospective assignment employee.

Restrictions on Settlements – s. 112(7)

112(7) No person shall enter into a settlement which would permit or require that person or any other person to engage in future contraventions of this Act.

Section 112(7) restricts the parties' ability to reach a settlement that would allow future contraventions of the ESA 2000. For example, although an employee may agree to accept a payment equivalent to straight pay for overtime hours worked in the past, the employee may not agree to work overtime in the future at straight time.

This provision must be read in conjunction s. 112(9) which provides that for the purposes of applying s. 112 with respect to Part XVIII.1, any reference to an "employer" includes a reference to a client of a temporary help agency and any reference to an "employee" includes a reference to an assignment employee or a prospective assignment employee.

Application to Void Settlement – s. 112(8)

112(8) If, upon application to the Board, the employee demonstrates that he or she entered into the settlement as a result of fraud or coercion,

(a) the settlement is void;

(b) the complaint is deemed never to have been withdrawn;

(c) any order made in respect of the contravention or alleged contravention is reinstated;

(d) any proceedings respecting the contravention or alleged contravention that were terminated shall be resumed.

Subsection 112(8) provides that a settlement entered into pursuant to s. 112 may be set aside where the employee can demonstrate to the Ontario Labour Relations Board that they entered into the settlement as a result of fraud or coercion. If the Board makes such a finding, the settlement is void, the employee's complaint is deemed never to have been withdrawn, any order made with respect to the contravention or alleged contravention is reinstated and any proceeding that was terminated is resumed.

Only the Ontario Labour Relations Board has the authority to determine that an employee entered into a settlement as a result of fraud or coercion; officers do not have the authority to make that determination.

Note that s. 112(9) provides that, for the purposes of applying s. 112 with respect to Part XVIII.1, any reference to an "employer" includes a reference to a client of a temporary help agency and any reference to an "employee" includes a reference to an assignment employee or a prospective assignment employee.

In *Dey v Majestic Marble Import Ltd.,* 2016 CanLII 49544 (ON LRB), the claimant sought to void a settlement agreement regarding an ESA 2000 complaint. He claimed he was tricked into signing it because the employer told him that it was an order from the employment standards officer when it was not. The officer did not issue any orders against the employer in favour of the claimant. The claimant also argued that the settlement agreement should be void because of the way the employer treats its employees.

The Board cited J & Z Holdings Inc., 2005 CanLII 23310 (ON LRB), a previous decision in which the Board found that fraud requires an intent to defraud, and coercion includes persuading an unwilling person, by force, to sign a document. The Board also noted that while duress could be the basis for rendering an agreement void that does not mean that any form of pressure would make a decision void – the pressure would need to be undue or improper in the circumstances. Following the reasoning in *J & Z Holdings Inc.* that the evidence required for establishing fraud or coercion for the purposes of s. 112(8) must be very compelling, otherwise the effectiveness of the settlement process would be seriously undermined, the Board did not find any evidence of fraud or coercion.

The Board noted that the officer did not issue any orders against the employer, and accepted the employer's evidence that they never misled the claimant regarding the nature of the settlement agreement. The Board also noted that an employer's general behavior in other matters unrelated to the settlement is not a reason to void an otherwise valid settlement agreement. The Board concluded that there was no basis upon which it could reasonably conclude that the employer fraudulently tricked or coerced the claimant into signing the settlement agreement.

Application to Part XVIII.1 – s. 112(9)

112(9) For the purposes of the application of this section in respect of Part XVIII.1, the following modifications apply:

1. A reference to an employer includes a reference to a client of a temporary help agency.

2. A reference to an employee includes a reference to an assignment employee or prospective assignment employee.

Section 112(9) specifies that for the purpose of applying s. 112 in respect of Part XVIII.1, any reference to an "employer" includes a reference to a client of a temporary help agency and any reference to the term "employee" includes a reference to an assignment employee or prospective assignment employee. For a discussion of the terms "assignment employee", "client" and "temporary help agency", see ESA Part I, s.

1(1). For a discussion of the definition of a "prospective assignment employee", see ESA Part XVIII.1, s. 74.8(4).

ESA Part XXII Section 113 – Notices of Contravention

Notice of Contravention – s. 113(1)

113(1) If an employment standards officer believes that a person has contravened a provision of this Act, the officer may issue a notice to the person setting out the officer's belief and specifying the amount of the penalty for the contravention.

Section 113(1) permits an employment standards officer to issue a notice requiring payment of a specified penalty to a person that the officer believes has contravened the ESA 2000.

The officer's power to issue a notice of contravention is discretionary.

Note that the officer may issue a notice of contravention to any person the officer believes has contravened the ESA 2000. ESA Part I, s. 1 defines the term person. The word "person" indicates that the notice may be issued against persons other than an employer. For example, a notice of contravention could be issued against someone who is not the employer but who has custody of records or documents relevant to an investigation and who refuses to make them available for inspection contrary to ESA Part XXI, s. 91(8).

Section 113(1) must be read in conjunction with ss. 113(8) and (9) which provide that a notice of contravention may not be issued where the contravention is with respect to an employee who is represented by a trade union or where the contravention is committed by a director or officer of a corporate employer.

Amount of Penalty – s. 113(1.1)

113(1.1) The amount of the penalty shall be determined in accordance with the regulations.

This subsection provides that the amount of the penalty is to be determined in accordance with the regulations. The penalty amounts are prescribed in O Reg 289/01 as follows:

For a contravention of ESA Part II, s. 2, ESA Part VI, ss. 15, 15.1 or 16:

- $250
- $500 for a second contravention of the same provision within a three-year period
- $1000 for a third or subsequent contravention of the same provision in a three-year period.

For a contravention of any other provision of the ESA 2000, the above listed penalty amounts apply, but the penalty amount is multiplied by the number of employees affected.

See the discussion at section 1 of O Reg 289/01 for more information about penalties, including when the penalty amount escalates and when the multiplier is applied.

Note: The penalty amounts prescribed in O Reg 289/01 were higher from January 1, 2018 to December 31, 2018. (Instead of $250/$500/1000, the amounts were $350/$700/$1500.) Pursuant to s. 52(5) of the *Legislation Act**, those higher amounts apply only if the contravention relating to the Notice of

Contravention occurred during the 2018 calendar year AND the Notice of Contravention was issued during the 2018 calendar year. Otherwise, the lower amounts set out in the current O Reg 289/01 apply.

**Subsection 52(5) of the Legislation Act provides that if an amendment lowers the amount of a penalty, the lower amount applies when a sanction is imposed (i.e. when the notice is issued) even if it is in respect of a contravention that happened before the amendment.*

Penalty Within Range – s. 113(1.2)

113(1.2) If a range has been prescribed as the penalty for a contravention, the employment standards officer shall determine the amount of the penalty in accordance with the prescribed criteria, if any.

This section states that if a range has been prescribed as the penalty, the employment standards officer shall determine the amount of the penalty from within that range in accordance with any prescribed criteria. At the time of writing, no range has been prescribed. Accordingly, the penalty amounts are as described in the discussion of s. 113(1.1).

Information – s. 113(2)

113(2) The notice shall contain or be accompanied by information setting out the nature of the contravention.

This provision requires the officer to provide information concerning the nature of the contravention together with the notice of contravention. This provision is similar to the obligation to provide information regarding the amount owing under ESA Part XXII, s. 103(5), regarding an order to pay wages.

The notice of contravention and accompanying documents (such as a copy of any order issued with respect to the contravention, a covering letter, officer's narrative and worksheet) must set out enough information that the person to whom the notice is issued will know the nature of the violation of the ESA 2000 and the information that gave rise to the officer's belief that there is or was a contravention of the ESA 2000.

The language of the section is specific: the notice of contravention must contain or have attached to it the information required. The fact that the person to whom the notice is issued had knowledge previously of the nature of the violation does not relieve the officer of the onus of setting out this information as part of the notice of contravention.

Service – s. 113(3)

113(3) A notice issued under this section shall be served on the person in accordance with section 95.

Subsection 113(3) requires that a notice of contravention be served on the person against whom it is issued in accordance with ESA Part XXI, s. 95.

The service requirements set out under s. 113(3) for a notice of contravention are identical to those for all orders issued under the ESA 2000.

REPEALED – s. 113(4)

Deemed Contravention – s. 113(5)

113(5) The person shall be deemed to have contravened the provision set out in the notice if,

(a) the person fails to apply to the Board for a review of the notice within the period set out in subsection 122(1); or

(b) the person applies to the Board for a review of the notice and the Board finds that the person contravened the provision set out in the notice.

Section 113(5) provides that although the officer has issued a notice of contravention under s. 113(1), the contravention is deemed to have occurred only if the person to whom it was issued fails to make an application for a review of the notice of contravention within 30 days after the date of service of the notice, or, on a review of the notice, the Ontario Labour Relations Board finds that the person contravened the provision set out in the notice. In the latter case, this may occur whether the Board affirms the notice or amends it.

Penalty – s. 113(6)

113(6) A person who is deemed to have contravened this Act shall pay to the Minister of Finance the penalty for the deemed contravention and the amount of any collector's fees and disbursements added to the amount under subsection 128(2).

Section 113(6) creates an obligation to pay the penalty set out in the notice of contravention – to the Minister of Finance – once the contravention is deemed to have occurred under s. 113(5).

It also requires payment of any collector's fees and disbursements added to the amount of the penalty under ESA Part XXIV, s. 128(2). In other words, once the notice of contravention has been sent for collection, e.g., following the expiration of the period to apply for a review in ESA Part XXIII, s. 122(1), any authorized collector's fees and disbursements are deemed to have been added to the amount set out in the notice of contravention.

Same – s. 113(6.1)

113(6.1) The payment under subsection (6) shall be made within 30 days after the day the notice of contravention was issued or, if the notice of contravention is appealed, within 30 days after the Board finds that there was a contravention.

Section 113(6.1) establishes the time period within which the payment of the penalty to the Minister of Finance for the deemed contravention must be made. In the event that the notice is not appealed, the payment is due 30 days after the notice was issued. In the event the notice is appealed, the payment is due 30 days after the Board has found that there was a contravention.

Publication re Notice of Contraventions – s. 113(6.2)

113(6.2) If a person, including an individual, is deemed under subsection (5) to have contravened this Act after being issued a notice of contravention, the Director may publish or otherwise make available to the general public the name of the person, a description of the deemed contravention, the date of the deemed contravention and the penalty for the deemed contravention.

This section permits the Director of Employment Standards to publish the name of the person or business that a notice of contravention has been issued against, as well as a description of the contravention, the date of the contravention, and the penalty for the contravention.

Note that the publishing of this information is restricted to situations where a person is deemed to have contravened the ESA 2000 in accordance with s. 113(5). Such contraventions only occur when the recipient fails to file for a review of the Notice with the Ontario Labour Relations Board within the period set out in ESA Part XXIII, s. 122(1). Or, where the person has filed for a review and the Board finds that they did in fact contravene the provision set out in the notice. As a result, the publishing of this information cannot simply occur once the notice was issued, but only after the Board has determined on an application for review that the provision set out in the notice was contravened, or the period for applying for a review in s. 122(1) has expired.

Internet Publication – s. 113(6.3)

113(6.3) Authority to publish under subsection (6.2) includes authority to publish on the Internet.

This subsection clarifies that the authority to publish the information set out in s. 113(6.2) includes authority to publish on the Internet.

Disclosure – s. 113(6.4)

113(6.4) Any disclosure made under subsection (6.2) shall be deemed to be in compliance with clause 42 (1) (e) of the *Freedom of Information and Protection of Privacy Act*.

This subsection states that where the Director has published information under s. 113(6.2) that such publication is deemed to be in compliance with clause 42(1)(e) of the *Freedom of Information and Protection of Privacy Act,* RSO 1990, c F.31.

Other Means Not a Bar – s. 113(7)

113(7) An employment standards officer may issue a notice to a person under this section even though an order has been or may be issued against the person under section 74.14, 74.16, 74.17, 103, 104 or 108 or the person has been or may be prosecuted for or convicted of an offence with respect to the same contravention.

Section 113(7) provides that an officer may issue a notice of contravention even though an order has been issued under the following provisions:

- ESA Part XVIII.1, s. 74.14: Order to recover fees charged by a temporary help agency
- ESA Part XVIII.1, s. 74.16: Order for compensation relating to certain prohibited activities of temporary help agencies
- ESA Part XVIII.1, s. 74.17: Order for compensation or reinstatement relating to a reprisal by the client of a temporary help agency
- ESA Part XXII, s. 103: Order to pay wages
- ESA Part XXII, s. 104: Order for compensation or reinstatement issued for contraventions of Part XIV Leaves of Absence, Part XVI Lie Detectors, Part XVII Retail Business Establishments and Part XVIII Reprisal

- ESA Part XXII, s. 108: Compliance order.

An officer may also issue a notice of contravention if the person is or may be prosecuted for or convicted of an offence with respect to the contravention.

Trade Union – s. 113(8)

113(8) This section does not applyac with respect to a contravention of this Act with respect to an employee who is represented by a trade union.

Section 113(8) provides that a notice of contravention may not be issued with respect to an employee who is represented by a trade union. In other words, an arbitrator (or the Board on a related employer issue) enforcing the ESA 2000 under ESA Part XXII, ss. 99 through 101, or an employment standards officer, enforcing the ESA 2000 in a case where the Director has exercised the discretion under ESA Part XXII, s. 99(6), would not be able to issue a notice of contravention.

Director – s. 113(9)

113(9) This section does not apply with respect to a contravention of this Act by a director or officer of an employer that is a corporation.

Section 113(9) provides that this section does not apply with respect to a contravention of the ESA 2000 by a director or officer of an employer that is a corporation. In other words, neither an employment standards officer nor the Board could issue a notice of contravention for a violation of the ESA 2000 by a director or officer of a corporate employer.

ESA Part XXII Section 114 - Limitation Period Re Orders and Notices

Limitation Period Re Orders and Notices - s. 114(1)

114(1) An employment standards officer shall not issue an order to pay wages, fees or compensation or a notice of contravention with respect to a contravention of this Act concerning an employee,

(a) if the employee filed a complaint about the contravention, more than two years after the complaint was filed;

(b) if the employee did not file a complaint but another employee of the same employer did file a complaint, more than two years after the other employee filed his or her complaint if the officer discovered the contravention with respect to the employee while investigating the complaint; or

(c) if the employee did not file a complaint and clause (b) does not apply, more than two years after an employment standards officer commenced an inspection with respect to the employee's employer for the purpose of determining whether a contravention occurred.

This subsection was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009,* SO 2009, c 9, effective November 6, 2009 to include a reference to orders to recover fees under s. 74.14.

Section 114(1) establishes a two-year limitation period on the Ministry of Labour's ability to issue an order for wages, fees or compensation or a notice of contravention. As no limitation is imposed with respect to an employment standards officer's ability to issue an order for reinstatement, an officer may exercise their discretion to issue an order for reinstatement more than two years after a complaint was filed or an inspection commenced. However, it is Program policy that officers should generally not issue an order for reinstatement beyond the two years, to avoid putting employees who would be beneficiaries of such an order in a better position than employees who would be beneficiaries of an order for compensation, fees or wages.

Because this is a discretionary matter, however, officers should be prepared to consider any arguments that an order for reinstatement should be issued that might be put forward notwithstanding the passage of two years. It may be that in exceptional cases, there are good reasons for issuing a reinstatement order after two years have passed.

It should also be noted that there is no limitation period with respect to the officer's ability to issue an order for compliance. As a result, an officer may exercise their discretion to issue an order for compliance more than two years after a complaint was filed or an inspection commenced. Because this is a discretionary matter, officers should be prepared to consider any arguments that an order for compliance should be issued notwithstanding the passage of two years. However, it is Program policy that officers should generally not issue an order for compliance where the employer is currently operating in compliance with the *Employment Standards Act, 2000*.

The two-year period for issuing an order for wages, fees or compensation or a notice of contravention commences with the following:

1. If employee A filed on a complaint, on the date the complaint was filed; or
2. If employee B had not filed a complaint but B's entitlement was discovered in the course of an investigation into the complaint filed by A, on the date on which A's complaint was filed; or
3. If C did not file a complaint but C's entitlement was discovered during an inspection (rather than an investigation into another employee's complaint), on the date the inspection was commenced.

This provision must be read in conjunction with s. 114(6) which provides that, for the purposes of applying s. 114 with respect to ESA Part XVIII.1, any reference to an employer includes a reference to a client of a temporary help agency and any reference to an employee includes a reference to an assignment employee or a prospective assignment employee.

Example 1:

- Employee A filed a complaint January 1, 2002
- Officer must issue order for wages, fees or compensation or notice of contravention on or before December 31, 2003

Example 2:

- Employee A filed a complaint January 1, 2002
- Employee B's entitlement discovered during course of investigation into A's complaint
- Officer must issue order for wages, fees or compensation or notice of contravention with respect to either or both A and B on or before December 31, 2003

Example 3:

- No complaint filed
- Officer commenced an inspection of workplace January 1, 2002
- During course of inspection, employee A, B and C entitlements are discovered
- Officer must issue order for wages, fees or compensation or a notice of contravention with respect to any or all of A, B and C on or before December 31, 2003

Complaints from Different Employees - s. 114(2)

114(2) If an employee files a complaint about a contravention of this Act by his or her employer and another employee of the same employer has previously filed a complaint about substantially the same contravention, subsection (1) shall be applied as if the employee who filed the subsequent complaint did not file a complaint.

Section 114(2) creates an exception to the rule in s. 114(1)(a) which provides that the two-year limitation period commences on the date the employee filed their complaint. Under s. 114(2), if two or more employees file complaints with respect to substantially the same contravention as defined in ESA Part XXII, s. 115, the date that the first employee filed their complaint will be the start date for the two-year limitation period, subject to s. 114(3).

For example, if employee A filed a complaint regarding overtime pay on December 31, 2001 and employee B subsequently filed a complaint for overtime pay on January 15, 2002, the employment standards officer will be required to issue an order to pay wages or notice of contravention with respect to either or both employee A and B on or before December 30, 2003.

This provision must be read in conjunction with s. 114(6) which came into force on November 6, 2009. Section 114(6) provides that, for the purposes of applying s. 114 with respect to ESA Part XVIII.1, any reference to an employer includes a reference to a client of a temporary help agency and any reference to an employee includes a reference to an assignment employee or a prospective assignment employee.

Exception - s. 114(3)

114(3) Subsection (2) does not apply if, prior to the day on which the subsequent complaint was filed, an employment standards officer had, with respect to the earlier complaint, already issued an order or advised the complainant that he or she was refusing to issue an order.

Section 114(3) creates an exception to the rule in s. 114(2), which provides that if two or more employees file complaints with respect to substantially the same contravention as defined in ESA Part XXII s. 115, the date that the first employee filed their complaint will be the start date for the two-year limitation period for issuing, amending or rescinding an order to pay wages, fees or compensation or notice of contravention in respect of not only the first complaint but the subsequent complaint as well.

Under s. 114(3), if the employment standards officer had already issued an order or advised the first complainant that they were refusing to issue an order before the subsequent complaint was filed, an order for wages, fees or compensation or a notice of contravention may be issued with respect to the subsequent complaint (even though it concerns substantially the same contravention as the first complaint) within two years of the date the subsequent complaint was filed.

Note that this provision must be read in conjunction with s. 114(6) which provides that, for the purposes of applying s. 114 with respect to ESA Part XVIII.1, any reference to an employer includes a reference to a client of a temporary help agency and any reference to an employee includes a reference to an assignment employee or a prospective assignment employee.

Example 1:

- Employee A filed a complaint for overtime pay against employer Z on December 31, 2009
- Employment standards officer issues an order to pay overtime wages to employer Z on March 15, 2010
- Employee B files a complaint for overtime pay against employer Z on April 1, 2010
- Employment standards officer has until March 31, 2012, to issue an order to pay wages or a notice of contravention with respect to B's complaint

It should be noted that s. 114(3) does not apply if the officer has issued only a notice of contravention (i.e., has not issued an order) with respect to A's complaint, prior to B filing a complaint for substantially the same contravention. Therefore, although the officer has issued a notice of contravention with respect to A's complaint before B's complaint was filed, the limitation period on the officer's ability to issue an order to pay wages, fees or compensation with respect to B's complaint is still the two-year period running from the date A's complaint was filed.

Example 2:

- Employee A filed a complaint for overtime pay against employer Z on December 31, 2009
- Employment standards officer issues a notice of contravention (but no order to pay overtime wages) to employer Z on March 15, 2010
- Employee B files a complaint for overtime pay against employer Z on March 31, 2010
- Employment standards officer has only two years from the date A filed their complaint (i.e., until December 30, 2011) to issue an order or a notice of contravention with respect to B's complain

Restriction on Rescission or Amendment - s. 114(4)

114(4) An employment standards officer shall not amend or rescind an order to pay wages, fees or compensation after the last day on which he or she could have issued that order under subsection (1) unless the employer against whom the order was issued and the employee with respect to whom it was issued consent to the rescission or amendment.

This subsection was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009*, which came into force on November 6, 2009, to include a reference to orders to recover fees under ESA Part XVIII.1, s. 74.14.

This provision must be read in conjunction with s. 114(6) which provides that, for the purposes of applying s. 114 with respect to ESA Part XVIII.1, any reference to an employer includes a reference to a client of a temporary help agency and any reference to an employee includes a reference to an assignment employee or a prospective assignment employee.

Section 114(4) states that the officer shall not amend or rescind their order to pay wages, fees or compensation after the two-year limitation period in s. 114(1) unless the consent of the employer to whom it was issued and the affected employee(s) is first obtained.

Note that s. 114(4) does not provide for the extension of the two-year limitation for amending or rescinding an order issued against anyone other than an employer or a client of a temporary help agency per s. 114(6). As a result, an order against a corporate director issued under ESA Part XXII, s. 106 or s. 107 could not be amended or rescinded after the two-year limitation period.

The authority for the officer to amend or rescind an order prior to the expiry of the limitation period springs from the *Legislation Act, 2006*, SO 2006, c 21, Sch F, which states:

54(1) Power to make regulations includes power to amend, revoke or replace them from time to time.

17. "regulation" means a regulation, rule, order or by-law of a legislative nature made or approved under an Act of the Legislature by the Lieutenant Governor in Council, a minister of the Crown, an official of the government or a board or commission all the members of which are appointed by the Lieutenant Governor in Council, but does not include,

(a) a by-law of a municipality or local board as defined in the Municipal Affairs Act, or

(b) an order of the Ontario Municipal Board.

An example of where this section might be applicable is where, in a large and complex case, the employer, the officer, and the employees all agree that the quality of the investigation would be better if the officer carried it on past the two-year time limit. In such a case, with the agreement of the parties, an order could be issued for the amount that was already determined and then amended (in accordance with the subsequent portion of the investigation) after the two-year limit expired. Of course, in such a case, it would be advisable for the officer to obtain the necessary consents before the two-year period expired.

Same - s. 114(5)

114(5) An employment standards officer shall not amend or rescind a notice of contravention after the last day on which he or she could have issued that notice under subsection (1) unless the employer against whom the notice was issued consents to the rescission or amendment.

This section is similar to s. 114(4). It imposes a two-year time limit on the amendment or rescission of a notice of contravention issued under ESA Part XXII, s. 113 except where the officer has the consent of the employer against whom the notice was issued.

This provision must be read in conjunction with s. 114(6) which came into force on November 6, 2009. Section 114(6) provides that, for the purposes of applying s. 114 with respect to ESA Part XVIII.1, any reference to an employer includes a reference to a client of a temporary help agency and any reference to an employee includes a reference to an assignment employee or a prospective assignment employee.

Application to Part XVIII.1 - s. 114(6)

114(6) For the purposes of the application of this section in respect of Part XVIII.1, the following modifications apply:

1. A reference to an employer includes a reference to a client of a temporary help agency.

2. A reference to an employee includes a reference to an assignment employee or prospective assignment employee.

This provision was introduced by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009* which came into force on November 6, 2009.

Section 114(6) specifies that when s. 114 is applied with respect to ESA Part XVIII.1, any reference to an employer includes a reference to a client of a temporary help agency and any reference to the term employee includes a reference to an assignment employee or prospective assignment employee. For a discussion of the terms assignment employee, client and temporary help agency, see ESA Part I, s. 1(1). For a discussion of the definition of prospective assignment employee see ESA Part XVIII.1, s. 74.8(4).

ESA Part XXII Section 115 - Meaning of "Substantially the Same"

Meaning of "Substantially the Same" - s. 115(1)

115(1) For the purposes of section 114, contraventions with respect to two employees are substantially the same if both employees became entitled to recover money under this Act as a result of the employer's failure to comply with the same provision of this Act or the regulations or with identical or virtually identical provisions of their employment contracts.

Section 115(1) defines the term "substantially the same" as it is used in ESA Part XXII, s. 114(2). Section 114(2) provides that where more than one employee has filed a complaint about substantially the same contravention, the two-year limitation period on issuing, amending and rescinding an order for wages, fees or compensation begins to run on the date the first complaint was filed, subject to ESA Part XXII, s. 114(3).

Section 115(1) provides that contraventions will be considered to be substantially the same where the employees are entitled to recover money for contraventions that are violations of the same provision of the *Employment Standards Act, 2000* or the regulations or identical or virtually identical provisions of the employees' employment contracts. However, this subsection must be read subject to s. 115(2).

This provision must also be read in conjunction with s. 115(1.1) which came into force on November 6, 2009. Section 115(1.1) provides that, when s. 115(1) is applied with respect to ESA Part XVIII.1, any reference to an employer includes a reference to a client of a temporary help agency and any reference to an employee includes a reference to an assignment employee or a prospective assignment employee.

Application to Part XVIII.1 - s. 115(1.1)

115(1.1) For the purposes of the application of subsection (1) in respect of Part XVIII.1, the following modifications apply:

1. A reference to an employer includes a reference to a client of a temporary help agency.

2. A reference to an employee includes a reference to an assignment employee or prospective assignment employee.

This provision was introduced by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009,* SO 2009, c 9, which came into force on November 6, 2009.

Section 115(1.1) provides that when s. 115(1) is applied with respect to a provision under ESA Part XVIII.1, any reference to an employer includes a reference to a client of a temporary help agency and any reference to an employee includes a reference to an assignment employee or a prospective assignment employee. For a discussion of the terms assignment employee, client and temporary help agency, see ESA Part I, s. 1(1). For a discussion of the definition of prospective assignment employee, see ESA Part XVIII.1, s. 74.8(4).

Exception, Payment of Wages, Deductions - s. 115(2)

115(2) Despite subsection (1), contraventions with respect to two employees are not substantially the same merely because both employees became entitled to recover money under this Act as a result of a contravention of section 11 or 13 if the contravention of the section was with respect to wages due under different provisions of this Act or the regulations or under provisions of their employment contracts which are not identical or virtually identical.

Section 115(2) provides that where the contraventions are the same only in that they are a contravention of the payment of wages provision in ESA Part V, s. 11 or the prohibition against deductions from wages in ESA Part V, s. 13, they will not be treated as substantially the same.

As a result, s. 114(2), which allows the limitation period on issuing, amending or rescinding an order for wages, fees or compensation, or a notice of contravention with respect to more than one complaint, to run from the date the first complaint is filed (if subsequent complaints are for substantially the same contraventions) does not apply if the contraventions are substantially the same only because they are all contraventions of ESA Part V, ss. 11 and 13.

Example:

- Employee A files a complaint for unpaid overtime pay on November 1, 2009 (a contravention of s. 22 and s. 11)
- Employee B files a complaint for unpaid public holiday pay on December 1, 2009 (a contravention of s. 26 and s. 11)

In this example, employee A's complaint and employee B's complaint would not be treated as substantially the same. Therefore, the limitation period for issuing, amending or rescinding an order or notice of contravention would end on October 31, 2011, with respect to employee A's complaint and on November 30, 2011, with respect to employee B's complaint.

ESA Part XXIII - Reviews by the Board

Part XXIII of the *Employment Standards Act, 2000* is subdivided into four sections. The first section consists of sections 116 to 120 and sets out the review process for orders for wages, compensation or reinstatement, orders against directors and compliance orders, as well as the review process for a refusal to issue an order for wages, compensation or reinstatement or compliance. It also provides for the settlement of matters referred to the Ontario Labour Relations Board ("OLRB" or the "Board") by labour relations officers. The second section consist of s. 121, which sets out the process for referrals to the Board by the Director of Employment Standards for a hearing to determine whether there has been a contravention of ESA Part XIII Benefit Plans. The third section consists of s. 122, which sets out the review process for Notices of Contravention. The fourth section consists of ss. 123 and 124, which set out general provisions respecting the Board, including the non-compellability of Board members, the registrar

and Board employees to give evidence in civil and administrative proceedings, and the termination and re-institution of proceedings before the Board.

ESA Part XXIII Section 115.1 – Interpretation

115.1 In this Part, a reference to an employee includes a reference to an assignment employee or a prospective assignment employee.

This provision was introduced by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009*, SO 2009, c 9, which came into force on November 6, 2009.

Section 115.1 establishes that any reference to an employee in Part XXIII of the *Employment Standards Act, 2000* (i.e., ss. 116 to 124) includes a reference to an assignment employee or a prospective assignment employee. For a discussion of the definition of "assignment employee", see ESA Part I, s. 1(1). For a discussion of the meaning of "prospective assignment employee", see ESA Part VXIII.1, s. 74.8(4).

This provision was necessary to make Part XXIII compatible with ESA Part XVIII.1.

ESA Part XXIII Section 116 - Review

Review - s. 116(1)

116(1) A person against whom an order has been issued under section 74.14, 74.16, 74.17, 103, 104, 106, 107 or 108 is entitled to a review of the order by the Board if, within the period set out in subsection (4), the person,

(a) applies to the Board in writing for a review;

(b) in the case of an order under section 74.14 or 103, pays the amount owing under the order to the Director in trust or provides the Director with an irrevocable letter of credit acceptable to the Director in that amount; and

(c) in the case of an order under section 74.16, 74.17 or 104, pays the lesser of the amount owing under the order and $10,000 to the Director in trust or provides the Director with an irrevocable letter of credit acceptable to the Director in that amount.

Subsection 116(1) sets out the entitlement to a review of an order issued under the following sections:

- ESA Part XVIII.1, s. 74.14: Order to recover fees relating to fees charged by a temporary help agency
- ESA Part XVIII.1, s. 74.16: Order for compensation relating to certain prohibited activities of temporary help agencies
- ESA Part XVIII.1, s. 74.17: Order for compensation or reinstatement relating to a reprisal by the client of a temporary help agency
- ESA Part XXII, s. 103: Order to pay wages
- ESA Part XXII, s. 104: Order for compensation or reinstatement issued for contraventions of Part XIV Leaves of Absence, Part XVI Lie Detectors, Part XVII Retail Business Establishments and Part XVIII Reprisal

- ESA Part XXII, s. 106: Order against director(s)
- ESA Part XXII, s. 107: Further order against director(s), and
- ESA Part XXII, s. 108: Compliance order.

This subsection provides to a person against whom an order has been issued a right to a review of the order if the person applies in writing for a review and:

- If the order is an order to recover fees under ESA Part XVIII.1, s. 74.14 or an order to pay wages issued under ESA Part XXII, s. 103, the person against whom the order was issued has paid the full amount of the order to the Director of Employment Standards in trust or provided the Director with an irrevocable letter of credit in that amount that is acceptable to the Director; or
- If the order is an order against a temporary help agency to pay compensation under ESA Part XVIII.2, s. 74.16, an order against a temporary help agency client to pay compensation under s. 74.17 or an order against an employer to pay compensation under ESA Part XXII, s. 104, the person against whom the order was issued has paid the lesser of:
    - the full amount of the order and (2) $10,000 to the Director in trust, **or**
    - provided the Director with an irrevocable letter of credit in that amount that is acceptable to the Director.

Note that while orders to pay compensation, like orders to pay wages or recover fees, may cover more than one employee, the amount that must be paid into trust or covered by an irrevocable letter of credit in the case of a compensation order remains at $10,000 regardless of whether the order covers one or several employees.

Note that under s. 116(4), there is a 30-day time limit for applying for a review. Under s. 116(5), the Ontario Labour Relations Board may extend this time limit.

If an applicant for review wishes to provide an irrevocable letter of credit in favour of the Director of Employment Standards rather than paying an amount to the Director in trust in accordance with s. 116(1)(b) or (c), the letter of credit must be acceptable to the Director. While the Director may consider other factors, generally speaking the Director will find a letter of credit to be acceptable if:

- It is irrevocable
- It contains a condition providing for its automatic renewal following the expiry date of the letter of credit
- It contains no other conditions, i.e., conditions other than the automatic renewal condition
- It permits partial drawings, i.e., the Director can demand and receive payment of less than the entire amount specified in the letter of credit - this is in case the application for review of the order is partially successful and the Ontario Labour Relations Board reduces the amount of the order, and
- It is issued by a bank or similar financial institution having an office in Ontario.

An information sheet about letters of credit and a template letter of credit that employers may wish to use are available on the Ministry's website.

If an employer believes there are good reasons why the Director should consider a letter of credit to be acceptable despite it not meeting the above criteria, those reasons should be provided to the Director in

writing and the Director will consider them. Note that s. 116(1) indicates that a letter of credit must be irrevocable - the Director has no authority to accept a letter of credit that is not irrevocable.

While a director of a corporate employer against whom an order to pay has been issued under ESA Part XXII, s. 106 or s. 107 may apply to have the order reviewed by the Board, there is no requirement that the amount of such an order be paid to the Director in trust or that a letter of credit be provided to the Director. Note also that in the case of a compliance order issued under ESA Part XXII, s. 108, because such an order does not require any payment, the person against whom the order was issued may apply to have the order reviewed by the Board without paying any amount to the Director in trust or providing a letter of credit.

Employee Seeks Review of Order - s. 116(2)

116(2) If an order has been issued under section 74.14, 74.16, 74.17, 103 or 104 with respect to an employee, the employee is entitled to a review of the order by the Board if, within the period set out in subsection (4), the employee applies to the Board in writing for a review.

Section 116(2) was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009,* SO 2009, c 9, effective November 6, 2009 to include references to orders issued under Part XVIII.1.

Section 116(2) establishes the right of an employee to request a review an order in respect of themselves that was issued under:

- ESA Part XVIII.1, s. 74.14: Order to recover fees relating to fees charged by a temporary help agency
- ESA Part XVIII.1, s. 74.16: Order for compensation relating to certain prohibited activities of temporary help agencies
- ESA Part XVIII.1, s. 74.17: Order for compensation or reinstatement relating to a reprisal by the client of a temporary help agency
- ESA Part XXII, s. 103: Order to pay wages
- ESA Part XXII, s. 104: Order for compensation or reinstatement issued for contraventions of Part XIV Leaves of Absence, Part XVI Lie Detectors, Part XVII Retail Business Establishments and Part XVIII Reprisal

See s. 116(3) for the right of an employee to review an employment standards officer's refusal to issue certain orders. Such employees include both complainants and non-complainants who are entitled to monies in accordance with the order.

The application for review must be made in writing and must be made within the 30-day period set out in s. 116(4). The requirement that the application for review be in writing is identical to that requirement in s. 116(1). This section should also be read in conjunction with s. 116(5), which allows the Board to extend the time for applying for a review if it considers it appropriate to do so. If an application is made after the 30-day time limit and if an extension is either not requested or not granted, the Board will dismiss the application.

Employees have no entitlement to a review of an order issued against a director under ESA Part XXII, s. 106 or s. 107. Likewise, employees have no entitlement to a review of a compliance order issued under ESA Part XXII, s. 108.

Note that on November 6, 2009, ESA Part XXIII, s. 115.1 came into force. It provides that any reference to an employee in Part XXIII, including s. 116, includes a reference to an assignment employee or a prospective assignment employee.

Employee Seeks Review of Refusal - s. 116(3)

116(3) If an employee has filed a complaint alleging a contravention of this Act or the regulations and an order could be issued under section 74.14, 74.16, 74.17, 103, 104 or 108 with respect to such a contravention, the employee is entitled to a review of an employment standards officer's refusal to issue such an order if, within the period set out in subsection (4), the employee applies to the Board in writing for such a review.

Section 116(3) was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009,* SO 2009, c 9, effective November 6, 2009 to include references to orders issued under Part XVIII.1.

Subsection 116(3) provides employees who have filed a complaint alleging a contravention of the Act to review the employment standards officer's decision not to issue an order under:

- ESA Part XVIII.1, s. 74.14: Order to recover fees relating to fees charged by a temporary help agency
- ESA Part XVIII.1, s. 74.16: Order for compensation relating to certain prohibited activities of temporary help agencies
- ESA Part XVIII.1, s. 74.17: Order for compensation or reinstatement relating to a reprisal by the client of a temporary help agency
- ESA Part XXII, s. 103: Order to pay wages
- ESA Part XXII, s. 104: Order for compensation or reinstatement issued for contraventions of Part XIV Leaves of Absence, Part XVI Lie Detectors, Part XVII Retail Business Establishments and Part XVIII Reprisal
- ESA Part XXII, s. 108: Compliance order.

See s. 116(2) for the right of an employee to review certain orders that have been issued. The application for a review must be made in writing within the 30-day period set out in s. 116(4). The 30-day time period applies where an employment standards officer refuses to issue an order, as well as where there is a deemed refusal to issue an order under ESA Part XXII, s. 110(2).

The obligation to serve a letter advising a person of a refusal to issue an order is set out in ESA Part XXII, s. 110. Where there is a deemed refusal to issue an order under s. 110(2) because no order or refusal to issue an order is made within the two-year period from the date the complaint was filed, the letter advising the person of the refusal is deemed to have been served on the last day of the second year. This provision exists so that in the rare and unfortunate circumstance where the officer has neither issued an order nor refused to issue an order within the two-year period, the employee will still have the right to apply to have the matter put before the Board.

A refusal to issue an order has been held to include a situation where the officer rescinded an order previously made.

This subsection should also be read in conjunction with s. 116(5), which allows the Board to extend the time for applying for a review if it considers it appropriate to do so. If an application is made after the 30-day time limit and if an extension is either not requested or not granted, the Board will dismiss the application.

Non-complainants have no right of a review under this section. They do, however, have the right to file a complaint for investigation by an employment standards officer and may apply for a review of that officer's determination.

An employee, whether a complainant or non-complainant, has no right to a review of an officer's refusal to issue an order under ESA Part XXII, s. 106 or s. 107 against a director of a corporate employer. This is consistent with s. 116(2), which precludes an employee from seeking a review of an order against a director issued under s. 106 or s. 107.

Note that on November 6, 2009, ESA Part XXIII, s. 115.1 came into force. It provides that any reference to an employee in Part XXIII, including s. 116, includes a reference to an assignment employee or a prospective assignment employee.

Period for Applying for Review - s. 116(4)

116(4) An application for a review under subsection (1), (2) or (3) shall be made within 30 days after the day on which the order, letter advising of the order or letter advising of the refusal to issue an order, as the case may be, is served.

All orders issued under the Act must be served in accordance with ESA Part XXI, s. 95. Likewise, where the Act requires an officer to notify a person that an order has been issued, the requisite letter must also be served in accordance with s. 95. Lastly, a letter advising of the refusal to issue an order under ESA Part XVIII.1, ss. 74.14, 74.16, 74.17 or ESA Part XXII, ss. 103, 104, and 108 must also be served in accordance with s. 95. The following sections establish that service must comply with s. 95:

- Section 74.14 order to recover fees - s. 74.14(4)
- Letter advising of order under s. 74.14 - s. 74.14(4)
- Section 74.16 order for compensation, temporary help agency - s. 74.16(6)
- Letter advising of order under s. 74.16 - s. 74.16(4)
- Section 74.17 order re: client reprisal - s. 74.17(3)
- Letter advising of order under s. 74.17 - s. 74.17(3)
- Section 103 order for wages - s. 103(6)
- Letter advising of order under s. 103 - s. 103(7)
- Section 104 order for compensation - s. 104(4)
- Letter advising of order under s. 104 - s. 104(4)
- Section 106 order against a director - s. 106(1)
- Section 107 further order against directors - s. 107(1)
- Section 108 compliance order - s. 108(4)

- Letter advising of order under s. 108 - s. 108(4)
- Letter advising of refusal to issue order under ss. 74.14, 74.16, 74.17, 103, 104 and 108, including deemed refusal - s. 110

Extension of Time - s. 116(5)

116(5) The Board may extend the time for applying for a review under this section if it considers it appropriate in the circumstances to do so and, in the case of an application under subsection (1),

(a) the Board has enquired of the Director whether the Director has paid to the employee the wages, fees or compensation that were the subject of the order and is satisfied that the Director has not done so; and

(b) the Board has enquired of the Director whether a collector's fees or disbursements have been added to the amount of the order under subsection 128(2) and, if so, the Board is satisfied that fees and disbursements were paid by the person against whom the order was issued.

Section 116(5) was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009* effective November 6, 2009 to include references to orders to recover fees issued under ESA Part XVIII.1, s. 74.14.

Section 116(5) provides that the Board may extend the 30-day time limit for applying for a review set out in s. 116(4) if it considers it appropriate to do so. This discretion is subject to two conditions:

1. The Board has enquired whether the Director of Employment Standards has already distributed to the employee the wages, fees or compensation assessed in the order and is satisfied that the Director has not; and
2. The Board has enquired whether collector's fees or disbursements were added to the amount of the order under ESA Part XXIV, s. 128(2) and, if so, is satisfied that they have been paid by the person against whom the order was issued.

The first condition ensures that the Board does not extend the time for applying for a review if, after the monies assessed as owing under the order had been paid into trust, the Director of Employment Standards had already paid those monies out to the employee(s). The second condition is new under the ESA 2000. It ensures that where the monies were not paid into trust within the 30-day time period for applying for a review and the Ministry has subsequently sent the file out for collection, a late application for review is not granted unless the collector's fees and disbursements have been added to the amount of the order and have been paid.

The Board has ruled that it will not consider a request for an extension by an employer or director unless they have paid into trust the monies directed by the order to pay, or provided the Director of Employment Standards with an acceptable, irrevocable letter of credit - see for example *Nebenaigoching Heritage Inc v Jackson,* 2014 CanLII 8971 (ON LRB). Because ESA Part XXIV, s. 128(2) deems collector's fees and disbursements (if any) to be included in the amount of the order, it is anticipated that the Board would likewise not consider a request for an extension unless the amount of any collector's fees or disbursement have also been paid into trust, or are reflected in an irrevocable letter of credit.

Requests for extension that were not granted:

- Where the employer filed the application 19 days late and could not provide a substantive reason for the delay – see *Dynatec Corp. v Mondoux,* 2004 CanLII 24179 (ON LRB)
- Where the employer filed the application more than three months late due to financial difficulties, legal issues and stress – *1714543 Ontario Inc. (Airport Strip Club) v Degroot,* 2008 CanLII 56582 (ON LRB)
- Where the employer filed the applications more than two months late due to inadvertence because the employer was dealing with fifteen other matters involving the Ministry of Labour, all of which the employer managed to file on time – *Unique Plus Associates Inc. v Owusu,* 2005 CanLII 12700 (ON LRB)
- Where the employee did not receive the officer's reasons for decision because he was out of the country and upon receiving the documents waited a further six weeks before filing an application for review – *Pozas v Sokolov (Rainbow Stucco Systems),* 2009 CanLII 43034 (ON LRB)
- Where the employer did not pay the necessary funds into trust because of financial hardship. Note the ESA 2000 does not give any weight to the inconvenience that may be caused to an applicant by virtue of the requirement to pay a specific amount when filing its application for review – see *2030308 Ontario Inc. v Wherry,* 2007 CanLII 5951 (ON LRB)
- Where the employer was aware of a potential calculation error days after the order to pay was issued and also aware of how to remedy the potential error, yet waited more than three months to file for review once it was contacted by a collection agency – *627148 Ontario Limited (Daily Care Health Services) v Langtiwan,* 2008 CanLII 29404 (ON LRB)
- Where the Director of Employment Standards returned the employer's cheque for funds to be held in trust due to clerical error – *1869461 Ontario Inc (Regency Family Fitness) v Kirpal,* 2015 CanLII 61368 (ON LRB)

Requests for extension that were granted:

- Where the employee's application was filed three weeks late because she was waiting to see if the employer sought a review and the employer delayed providing its email address – see *Peters v Cypriot Homes Association,* 2016 CanLII 45338 (ON LRB)
- Where the employer filed its application for review filed ten days late but had announced its intention to file an application for review and had paid the monies into trust in advance of the filing deadline – see *Halley's Camps Inc. v Penner,* 2016 CanLII 60452 (ON LRB)
- Where the employee did not receive the officer's decision because it was incorrectly delivered to his neighbour's house but made reasonable enquiries to determine what happened to it, obtained a copy of the decision and filed his application shortly thereafter – see *Feng v Ping Li,* 2015 CanLII 54406 (ON LRB)
- Where the employer sought the reduction of the amounts ordered by wage overpayments that were not discovered until the employment had ended. The Board granted the extension even though the application was filed several months late because the employer was not challenging the underlying orders, therefore the proceedings were not prejudicial to the parties – see *Cristiano v 1509212 Ontario Limited operating as Oakridge Heating,* 2016 CanLII 43411 (ON LRB)

Note that on November 6, 2009, ESA Part XXIII, s. 115.1 came into force. It provides that any reference to an employee in Part XXIII, including s. 116, includes a reference to an assignment employee or a prospective assignment employee.

Hearing - s. 116(6)

116(6) Subject to subsection 118(2), the Board shall hold a hearing for the purposes of the review.

Section 116(6) requires the Board to hold a hearing for the purposes of the s. 116 review, subject only to ESA Part XXIII, s. 118(2). Section 118(2) allows the chair of the Board to make rules that allow the Board not to hold a hearing to expedite decisions about the Board's jurisdiction. At the time of writing, no such rule had been made. Aside from this exception, the language of the section is mandatory: the Board **shall** hold a hearing. This means that the Board must hold a hearing into a s. 116 review application as long as the conditions of application are met, i.e., the 30-day time limit and payment of the amount ordered into trust or guaranteed by an irrevocable letter of credit.

In *Jannock Limited and Armtec Inc. o/a Jannock Steel Fabricating Company et al v United Steelworkers of America et al* (November 27, 1995), ESC 3506A (Randall), a case under the former *Employment Standards Act*, an employer argued that the powers exercised by the referees under the old s. 68 employer-review section were judicial and appellate in nature and offended s. 96 of the *Constitution Act, 1867*, and were therefore ultra vires or void. The employer's argument was rejected by the referee on the basis that although the referees were performing judicial or quasi-judicial functions, they did so as a necessarily incidental aspect of the broader policy goal of providing minimum standards of protection. The referee also held that the hearing under s. 68 was in the nature of a review, rather than an appeal. It continues to be the Ministry's view that the hearings under s. 116 are in the nature of a review rather than an appeal.

Parties - s. 116(7)

116(7) The following are parties to the review:

1. The applicant for the review of an order.

2. If the person against whom an order was issued applies for the review, the employee with respect to whom the order was issued.

3. If the employee applies for the review of an order, the person against whom the order was issued.

4. If the employee applies for a review of a refusal to issue an order under section 74.14, 74.16, 74.17, 103, 104 or 108, the person against whom such an order could be issued.

5. If a director of a corporation applies for the review, the applicant and each director, other than the applicant, on whom the order was served.

6. The Director.

7. Any other persons specified by the Board.

Section 116(7) was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009* effective November 6, 2009 to include references to orders under Part XVIII.1.

Section 116(7) identifies those who are considered to be parties to the s. 116 review, and empowers the Board to add relevant persons as parties to the review. Having the status of a party to a hearing means that one is bound by the decision of the Board. Also, only parties to the hearing can apply for judicial review of the Board's decision.

The fact that the Director of Employment Standards is automatically made a party to the hearing may impact on the relevance of the doctrine of issue estoppel in applications for review. Issue estoppel is a doctrine that parties sometimes use to prevent issues that have already been determined in a prior proceeding from being re-litigated. For example, an employer may try to raise the doctrine if an employee files an ESA 2000 complaint under the pregnancy leave provisions after she has already received an unfavourable decision on her application to the Human Rights Tribunal of Ontario.

It may be that, because of s. 116(7), the doctrine of issue estoppel may never apply to applications for review. This is because in order for issue estoppel to apply, the issues and the parties to the prior proceeding must be the same as the issues and the parties to the proceedings in which the issue estoppel is raised. By virtue of s. 116(7), the parties to an application for review include the Director of Employment Standards. Because it is unlikely that the Director will have been a party to any prior proceedings (for example, a human rights complaint), the doctrine of issue estoppel could not apply - see *Garner Travel International Inc. #744797 o/a Goliger's Travel v Parsonage* (December 11, 1998), 3422-97-ES (ON LRB), which was a case under the former *Employment Standards Act*.

Note that this provision must be read in conjunction with ESA Part XXIII, s. 115.1 which provides that any reference to an employee in s. 116 includes a reference to an assignment employee or a prospective assignment employee.

Parties Given Full Opportunity - s. 116(8)

116(8) The Board shall give the parties full opportunity to present their evidence and make their submissions.

Section 116(8) states that the Board must give the parties to the hearing a full opportunity to present their evidence and submissions.

This section should be read subject to ESA Part XXIII, s. 118(2), which allows the chair of the Board to make rules regarding certain matters that may limit the extent of the Board's obligation to give full opportunity to the parties to present their evidence and submissions.

Practice and Procedure for Review - s. 116(9)

116(9) The Board shall determine its own practice and procedure with respect to a review under this section.

Section 116(9) states that Board shall determine its own practice and procedure with respect to a review under this section.

This section should be read in conjunction with ss. 116(6), (7) and (8), which require the Board to hold a hearing, permit parties to be added and, subject to ESA Part XXIII, s. 118(2), give parties full opportunity to present their evidence and make submissions.

ESA Part XXIII Section 117 - Money Held in Trust Pending Review

Money Held in Trust Pending Review - s. 117(1)

117(1) This section applies if money with respect to an order to pay wages, fees or compensation is paid to the Director in trust and the person against whom the order was issued applies to the Board for a review of the order.

This provision was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009,* SO 2009, c 9, effective November 6, 2009 to include a reference to orders to recover fees issued under s. 74.14.

Subsection 117(1) indicates that s. 117 applies where money has been paid to the Director in trust with respect to an application for review of an order issued under s. 74.14 (for fees), s. 75.16 (for compensation (temporary help agency)), s. 75.17 (order re client reprisal), s. 103 (for wages) or s. 104 (for compensation).

Interest-Bearing Account - s. 117(2)

117(2) The money held in trust shall be held in an interest-bearing account while the application for review is pending.

This provision is similar in part to the corresponding section (s. 70(1)) of the former *Employment Standards Act*. Section 117(2) requires that any money paid to the Director in trust in the context of a s. 116 application for review of an order for wages, fees or compensation be put into an interest-bearing account pending the review. This includes the money paid in respect of wages, fees and compensation, as well as the administrative costs.

For information regarding the delegation of the Director's non- discretionary power to receive monies into trust under this section, see Delegation of Powers in the Manual for further information.

If Settlement - s. 117(3)

117(3) If the matter is settled under section 112 or 120, the amount held in trust shall, subject to subsection 112(6) or 120(6), be paid out in accordance with the settlement, with interest, calculated at the rate and in the manner determined by the Director under subsection 88(5).

This provision is similar in part to the corresponding sections (s. 69.1(6), 70(3) and s. 70(4)) of the former *Employment Standards Act*. Section 117(3) requires the Director of Employment Standards to distribute, in accordance with the terms of a settlement of a s. 116 (application for review) proceeding at the Ontario Labour Relations Board, any money that is held in trust subject to provisions regarding the payment of administrative costs as set out in ss. 112(6) and 120(6). Section 117(3) applies whether the settlement is facilitated by an employment standards officer under s. 112 or by a labour relations officer under s. 120.

The distribution of administrative costs on a settlement under s. 117(3) is subject to s. 112(6) and s. 120 (6). These sections provide that where there is a settlement of an order, the Director is still entitled to be paid a proportion of the administrative costs assessed under the order. That proportion is calculated as the amount paid to the employee under the settlement, divided by the amount assessed as owing to the employee under the order. For further discussion of s. 112(6) and s. 120(6) see ESA Part XXII and ESA Part XXIII.

Section 117(3) also requires the Director to pay interest on the monies paid out under the settlement that were held in trust (wages, compensation and administrative costs), at the rate and calculated in the manner determined by the Director under s. 88(5).

If No Settlement - s. 117(4)

117(4) If the matter is not settled under section 112 or 120, the amount paid into trust shall be paid out in accordance with the Board's decision together with interest calculated at the rate and in the manner determined by the Director under subsection 88(5).

This section is similar in part to the corresponding section (s. 70(1)) of the former *Employment Standards Act*. Section 117(4) sets out the Director's obligation to pay out the funds in trust once the Board renders its decision. The Director must distribute the funds as the Board's decision specifies. Subject to an order from the Board to the contrary, it is the general policy of the Trust Funds Unit of the Employment Practices Branch to hold the monies in trust for 30 days following the date of receipt of the decision, in case there is a judicial review and stay application by one of the parties.

The section further requires that the money be paid out according to the Board's decision, along with interest on the money at the rate and calculated in the manner determined by the Director under s. 88(5).

ESA Part XXIII Section 118 - Rules of Practice

Rules of Practice - s. 118(1)

118(1) The chair of the Board may make rules,

(a) governing the Board's practice and procedure and the exercise of its powers; and

(b) providing for forms and their use.

This provision is similar to the corresponding section (s. 68(11)) of the former *Employment Standards Act.*

Section 118(1) allows the chair of the Board to make rules governing the Ontario Labour Relations Board's practice and procedure in s. 116 cases, and to provide for forms to be used.

The Board published new Rules of Procedure governing all matters that arise before it, including the former *Employment Standards Act* cases, in August 1999. The rules were subsequently amended and were also made applicable to cases under the *Employment Standards Act, 2000*.

Among other things, rules made pursuant to this section:

- Require applications for review to be made on the Board's Form A-103;
- Require the Director of Employment Standards to provide the following documents or information to the Board within twenty (20) days after the date of the letter or notice from the Board informing the Director that an application has been filed:
    - The name and address of every affected employee, employer and director;
    - A copy of the employment standards officer's narrative report;

- A copy of the Order to Pay and officer's Worksheets, or the letter advising the employee of the Order, or the letter advising of the refusal to issue an Order or a copy of the Notice of Contravention, if applicable;
- Proof of payment to the Director in trust or a statement that an irrevocable letter of credit acceptable to the Director has been provided, if applicable;
- Verification (including the certificate of the employment standards officer made under s. 103(7) and/or s. 95(10) (at the time of writing, the Board's Rules referred to s. 113(4) of the ESA which is substantively the same as s. 95(11), but was repealed on November 6, 2009) that the Order or Notice of Contravention or the letter advising the employee of the Order, as applicable, as referred to in paragraph iii, have been served, together with precise information about how, when and where the documents were delivered;
- Verification that the letter referred to in paragraph iii, advising of the refusal under section 110 to issue an order has been served, together with precise information about how, when and where the documents were delivered; and
- In the case of an application under section 116(1) of the ESA, precise information as to whether the Director has paid the wages or compensation to the employee and whether a collector's fee or disbursements have been added to the amount of the Order under section 128(2) of the ESA, and if so, whether the fees and disbursements were paid by the persons to whom the Order was issued.

Where the Director fails to provide the information required under paragraph vii, in the way required by these Rules, the Board may be satisfied that the Director has not paid to the employees the wages or compensation that were the subject of the Order and the Board may be satisfied that any collector's fees or disbursements that may have been added to the amount of an Order under s. 128(2) of the ESA 2000 were paid by the person to whom the Order was issued.

- A responding party that files a response or other document with the Board must, at the same time, deliver copies to all other parties and must verify in writing that it has done so. For greater certainty, this Rule applies to the documents provided by the Director of Employment Standards.
- The Director of Employment Standards must file a response to an application to review a Compliance Order issued under s. 108 of the ESA 2000, and must file a response to an application to review a Notice of Contravention issued under s. 113 of the ESA. The response must comply with the Board rules and must be filed with the Board not later than twenty (20) days after the date of the Confirmation of Filing sent by the Board.
- Allow parties in applications for review to request the Board to reconsider its decision in their case. The request must be made in writing, including everything the party is relying on in support of the request, and be filed with the Board no more than 20 business days after the date of the Board's decision (except with permission of the Board). Generally, the Board will not reconsider its decision unless the requesting party has new evidence that would be practically conclusive of the case and that it could not have reasonably obtained earlier, or the party has new objections or arguments that it had no opportunity to raise earlier. The Board does not treat its reconsideration power as either a tool for a party to repair the deficiency of its case nor an opportunity to reargue it. If the requesting party relies on matter that could reasonably have been raised at the original hearing, the Board will not normally reconsider its decision.

Expedited Decisions - s. 118(2)

118(2) The chair of the Board may make rules to expedite decisions about the Board's jurisdiction, and those rules,

(a) may provide that the Board is not required to hold a hearing; and

(b) despite subsection 116(8), may limit the extent to which the Board is required to give full opportunity to the parties to present their evidence and make their submissions.

This provision is essentially unchanged from the corresponding section (s. 68(12)) of the former *Employment Standards Act*.

This section qualifies the requirements of ss. 116(6) and (8) for the Board to hold a hearing and give full opportunity to the parties to present their evidence and make submissions in a s. 116 review application. It provides that the chair of the Board can make rules to expedite decisions about the Board's jurisdiction that exempt those requirements. At the time of writing, no such rules had been made.

Effective Date of Rules - s. 118(3)

118(3) A rule made under subsection (2) comes into force on the day determined by order of the Lieutenant Governor in Council.

This provision is similar to s. 68(13) of the former *Employment Standards Act*. It was amended by the *Good Government Act, 2006,* SO 2006, c 19, effective June 22, 2006 to provide that only those rules made to expedite decisions about the Board's jurisdiction require an order of the Lieutenant Governor in Council to come into force.

Previously s. 118(3) required that all rules made by the chair of the Board under s. 118, including rules made under s. 118(1) regarding the Board's practice, procedure and exercise of its powers and providing for forms and their use, came into force on a date determined by the Lieutenant Governor in Council.

Conflict with Statutory Powers Procedure Act - s. 118(4)

118(4) If there is a conflict between the rules made under this section and the Statutory Powers Procedure Act, the rules under this section prevail.

This section is essentially the same as the corresponding section (s. 68(14)) of the former *Employment Standards Act*.

This section states that rules made by the chair of the Board under s. 118 apply, notwithstanding the requirements of the *Statutory Powers Procedure Act*, RSO 1990, c S.22 ("SPPA").

The SPPA (as amended) Part 1 "Minimum Rules for Proceedings of Certain Tribunals", s. 3(1) states that, subject to s. 3(2), Part I applies to proceedings "by a tribunal in the exercise of a statutory power of decision conferred by or under an Act of the Legislature, where the tribunal is required by or under such Act or otherwise by law to hold or to afford to the parties to the proceeding an opportunity for a hearing before making a decision." In effect, the Part I SPPA rules for holding and conducting a hearing, do not apply if they conflict with the Board's rules.

Rules not Regulations - s. 118(5)

118(5) Rules made under this section are not regulations within the meaning of Part III (Regulations) of the Legislation Act, 2006.

This provision is essentially the same as the corresponding section (s. 68(15)) of the former *Employment Standards Act*.

Section 118(5) simply states that rules made by the chair of the Board under s. 118 are not regulations within the meaning of Part III (Regulations) of the *Legislation Act, 2006*, SO 2006, c 21, Sch F.

ESA Part XXIII Section 119 - Powers of Board

Powers of Board - s. 119(1)

119(1) This section sets out the Board's powers in a review under section 116.

Section 119(1) states that s. 119 sets out the Ontario Labour Relations Board's powers with respect to a review under ESA Part XXIII, s. 116.

Persons to Represent Groups - s. 119(2)

119(2) If a group of parties have the same interest or substantially the same interest, the Board may designate one or more of the parties in the group to represent the group.

Section 119(2) provides that when there are multiple parties with the same or substantially the same interest in a hearing, the Board may designate one or more of the parties as representatives for the entire group.

Quorum - s. 119(3)

119(3) The chair or a vice-chair of the Board constitutes a quorum for the purposes of this section and is sufficient for the exercise of the jurisdiction and powers of the Board under it.

This section indicates that the chair or a vice-chair of the Board constitutes a quorum and is sufficient for the exercise of all the jurisdiction and powers of the Board under ESA Part XXIII, s. 116.

Posting of Notices - s. 119(4)

119(4) The Board may require a person to post and to keep posted any notices that the Board considers appropriate even if the person is not a party to the review.

Section 119(4) empowers the Board to order a person (which could include a trade union) to post notices that the Board considers appropriate, even if the person is not a party to the review. See the discussion of the definition of person in ESA Part I, s. 1. For example, where a director appeals an order issued under ESA Part XXII, s. 106, the Board could require the employer to post a notice even if the employer was not a party to the review hearing.

Same - s. 119(5)

119(5) If the Board requires a person to post and keep posted notices, the person shall post the notices and keep them posted in a conspicuous place or places in or upon the person's premises where it is likely to come to the attention of other persons having an interest in the review.

Section 119(5) provides that where a person has been required to post a notice under s. 119(4), it must be posted and kept posted in a conspicuous place or places in or upon the premises of that person where it is likely to come to the attention of other persons having an interest in, or who are affected by, the review.

Powers of Board - s. 119(6)

119(6) The Board may, with necessary modifications, exercise the powers conferred on an employment standards officer under this Act and may substitute its findings for those of the officer who issued the order or refused to issue the order.

Together with s. 119(7), this section sets out the Board's powers to arrive at a particular decision respecting an application for review.

The Board has all of the powers of an employment standards officer: it can make any order that an officer can make, and can order the production of records or documents that the officer could have ordered produced for inspection. In applications to review an order, the Board can amend, rescind or affirm the order, or issue a new order. Because the Board has all the powers of an officer, it is the Program's position that the Board can amend an order by increasing or decreasing the amount of the order. In applications to review the refusal to issue an order, the Board can issue an order or affirm the refusal.

The Board may also reconsider one of its own decisions - see the discussion at ESA Part XXIII, s. 118(1).

Dealing with Order - s. 119(7)

119(7) Without restricting the generality of subsection (6),

(a) on a review of an order, the Board may amend, rescind or affirm the order or issue a new order; and

(b) on a review of a refusal to issue an order, the Board may issue an order or affirm the refusal.

Section 119(7) more particularly spells out the Board's powers to issue a decision on a review as set out in s. 119(6).

Labour Relations Officers - s. 119(8)

119(8) Any time after an application for review is made, the Board may direct a labour relations officer to examine any records or other documents and make any inquiries it considers appropriate, but it shall not direct an employment standards officer to do so.

This section allows the Board to, during a review, direct one of its labour relations officers to examine records or conduct any other inquiries that the Board feels are necessary for the review. The Board is explicitly prohibited from directing an employment standards officer to do any of those things.

This section should be read in conjunction with s. 119(9), which states that ESA Part XXI, ss. 91 and 92, whichset out the powers of an employment standards officer as well as the compliance required of people

involved in an investigation by an employment standards officer,apply with respect to labour relations officers directed under s. 119(8).

Powers of Labour Relations Officers - s. 119(9)

119(9) Sections 91 and 92 apply with necessary modifications with respect to a labour relations officer acting under subsection (8).

Section 119(9) states that ESA Part XXI, ss. 91 and 92, which set out the powers of employment standards officers and the compliance required of people involved in an investigation by an employment standards officer, apply to labour relations officers who are directed to examine records or conduct other inquiries under s. 119(8).

Wages or Compensation Owing - s. 119(10)

119(10) Subsection (11) applies if, during a review of an order requiring the payment of wages, fees or compensation or a review of a refusal to issue such an order,

(a) the Board finds that a specified amount of wages, fees or compensation is owing; or

(b) there is no dispute that a specified amount of wages, fees or compensation is owing.

Section 119(10) was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009,* SO 2009, c 9, effective November 6, 2009 to include a reference to orders to recover fees issued under s. 74.14.

Section 119(10) states that s. 119(11) applies if, during a review under ESA Part XXIII, s. 116, the Board finds any portion of the wages, fees or compensation is owing to the employee, or the parties agree such a portion is owing to the employee.

Note that on November 6, 2009, ESA Part XXIII, s.115.1 came into force. It provides that any reference to an employee in Part XXIII, including s. 119, includes a reference to an assignment employee or a prospective assignment employee.

Interim Order - s. 119(11)

119(11) The Board shall affirm the order to the extent of the specified amount or issue an order to the extent of that amount, even though the review is not yet completed.

Section 119(11) provides that where, under s. 119(10), the Board finds that a specified amount of wages, fees or compensation is owing to the employee, or the parties agree such an amount is owing to the employee, the order shall be affirmed to that extent or an order issued to that extent. As a result, that specified amount of wages, fees or compensation may be paid out before the hearing ends, or even before it begins.

Note that on November 6, 2009, ESA Part XXIII, s. 115.1 came into force. It provides that any reference to an employee in Part XXIII, including s. 119, includes a reference to an assignment employee or a prospective assignment employee.

This section is designed to enable moneys to be paid out to an employee who is entitled to it as soon as possible. Note that the language of this section is mandatory: the Board is obliged to issue or affirm the

order to a certain extent without delay. See *Northern Air Systems v MacLean*, 1999 CanLII 19493 (ON LRB), where the Board observed that none of the issues raised in the employer's written application would disentitle the employee to termination pay and, before a hearing was convened, directed that the monies held in trust be released to the employee in accordance with s. 68(23) of the former *Employment Standards Act*.

Interest - s. 119(12)

119(12) If the Board issues, amends or affirms an order or issues a new order requiring the payment of wages, fees or compensation, the Board may order the person against whom the order was issued to pay interest at the rate and calculated in the manner determined by the Director under subsection 88(5).

Section 119(12) was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009* effective November 6, 2009 to include a reference to orders to recover fees issued under ESA Part XVIII.1, s. 74.14.

Section 119(12) allows the Board to order employers, clients of temporary help agencies or directors to pay interest on any money they are ordered to pay in respect of an order for wages, fees or compensation at the rate and calculated in the manner determined by the Director under ESA Part XXI, s. 88(5).

Decision Final - s. 119(13)

119(13) A decision of the Board is final and binding upon the parties to the review and any other parties as the Board may specify.

Section 119(13) provides that the results of an application for review under ESA Part XXIII, s. 116 are final and binding. However this section must be read subject to the right to apply to the Board for reconsideration of that decision or to a judicial review of the decision in accordance with s. 119(14). See the discussion regarding reconsideration requests at ESA Part XXIII, s. 118(1).

Section 116(7) specifies upon whom the results of a review application are binding: the parties to the hearing, including parties whom the Board specified as such. Decisions under ESA Part XXIII, s. 116 have technically, then, no binding effect on anyone who was not a party. Furthermore, where the Board hears subsequent cases with different parties than those in the original hearing, the Board is not bound by the original decision, although it may have some persuasive value.

Judicial Review - s. 119(14)

119(14) Nothing in subsection (13) prevents a court from reviewing a decision of the Board under this section, but a decision of the Board concerning the interpretation of this Act shall not be overturned unless the decision is unreasonable.

This provision codifies the right to apply for a judicial review and establishes the standard of review. It provides that s. 119(13), which provides that the Board's decisions are final and binding, does not limit a court's ability to review a decision of the Board but also provides that the Board's decision with respect to the interpretation of the Act cannot be overturned unless it was unreasonable.

Standard of Review

In *Halloran v Sargeant*, 2002 CanLII 45029 (ON CA), the Ontario Court of Appeal held that a referee's decision should not be overturned unless it is unreasonable. The unreasonable standard is a somewhat less deferential standard, however, , the decision in question does not have to be correct in law.

In s. 119(4), the Legislature has expressly stated that a decision of the Ontario Labour Relations Board concerning the interpretation of the Act should not be overturned unless it is unreasonable. Interestingly, the Ontario Court of Appeal in the *National Automobile, Aerospace Transportation and General Workers Union of Canada (C.A.W. - Canada) Local No. 27 v London Machinery Inc.*, 2006 CanLII 8711 (ON CA) ruled that the decision of an arbitrator concerning the interpretation of the Act should not be overturned unless it is patently unreasonable. In so ruling, the Court did not discuss s. 119(4).

Prematurity

Several court decisions have addressed the issue of premature judicial review applications; that is, when a party has gone directly to judicial review after the officer's decision, rather than first applying for a review of the decision under the former *Employment Standards Act*. All of the following decisions dealt with the former *Employment Standards Act* and before jurisdiction over reviews was transferred to the Ontario Labour Relations Board, but it is anticipated that these principles will apply to the ESA 2000 as well.

The courts have said that employers could not circumvent the former s. 68 review process (now ESA Part XXIII, s. 116), except in rare circumstances. Instead, employers were required to rely on the adjudication provisions of the former ESA before seeking judicial review. In *Susan Shoe Industries Ltd. v Ricchiardi*, 1994 CanLII 1313 (ON CA) the employer took the employment standards officer's order directly to the Divisional Court on judicial review, and the order was quashed. The officer appealed to the Court of Appeal, which restored the order and said that given the existence of specialized referees appointed under the former *Employment Standards Act*, "Except in exceptional circumstances . . . the courts ought not to interfere before the procedures under the Act have been exhausted." The court found that in this case there was no compelling reason to go outside of the normal processes provided for by the former *Employment Standards Act* and therefore the employer should have gone before a referee under the Act prior to seeking judicial review.

This issue was also considered in *Stelco Inc. v. Nelson* (October 21, 1994) (ON SC). The Divisional Court in *Stelco* followed the rule in *Susan Shoe Industries Ltd. v Ricchiardi* and said that the administrative processes under the former *Employment Standards Act* were not to be circumvented; that is, matters were not to be brought to judicial review prematurely. In *949198 Ontario Inc. v Koskie* (March 4, 1993) (ON SC) the courts considered the issue of what would constitute exceptional circumstances such that parties could seek judicial review without first following the course contemplated by the former *Employment Standards Act*. Such exceptional circumstances included the applicant's being unable because of financial hardship to put money into trust in application for a s. 68 (now ESA Part XXIII, s. 116) appeal; personal liability at issue for an individual employer; or a case where there was a severe breach of the principles of natural justice.

None of these exceptional circumstances was present in either the *Stelco* case or *Susan Shoe* case.

In the *550551 Ontario Ltd. v Framingham,* 1991 CanLII 7388 (ON SC) case, however, one of these exceptional circumstances existed: that is, personal liability of an individual with regard to an order to pay of several million dollars. In that case, the court allowed judicial review of the employment standards officer's order, even without a referee's decision.

ESA Part XXIII Section 120 – Settlement Through Labour Relations Officer

Settlement Through Labour Relations Officer – s. 120(1)

120(1) The Board may authorize a labour relations officer to attempt to effect a settlement of the matters raised in an application for review under section 116.

Subsection 120(1) provides that the Ontario Labour Relations Board may authorize a labour relations officer to try to settle any cases that are before the Board under ESA Part XXIII, s. 116.

Certain Matters not Bar to Settlement – s. 120(2)

120(2) A settlement may be effected under this section even if,

(a) the employment standards officer who issued the order or refused to issue the order does not participate in the settlement discussions or is not advised of the discussions or settlement; or

(b) the review under section 116 has started.

Subsection 120(2) confirms that a settlement of an application for review proceeding at the Ontario Labour Relations Board is valid and binding even in the two circumstances that are set out:

1. The employment standards officer whose decision is the subject of the proceeding does not participate or is not advised of the settlement; or
2. The proceeding has already started.

Compliance Orders - s. 120(3)

120(3) A settlement respecting a compliance order shall not be made if the Director has not approved the terms of the settlement.

This provision precludes the settlement by a labour relations officer of a compliance order issued by an employment standards officer under ESA Part XXII, s. 108 in the absence of the approval of the Director of Employment Standards.

Note that where a settlement is effected under ESA Part XXII, s. 112, that settlement will not void a compliance order. This is because such settlements are made without the approval of the officer - the parties are only required to inform the officer of the settlement.

Effect of Settlement – s. 120(4)

120(4) If the parties to a settlement under this section do what they agreed to do under the settlement,

(a) the settlement is binding on the parties;

(b) if the review concerns an order, the order is void; and

(c) the review is terminated.

This subsection sets out the effect of settling a matter raised in an application for review under ESA Part XXIII, s. 116. Any settlement entered into by the parties to the proceeding is binding, if the parties to the settlement do what they have agreed to do under the settlement. Such a settlement is binding despite the prohibition against contracting out of the ESA Part III, s. 5. Note that the persons that may enter into such a settlement include an agent acting on behalf of the employee. Subsection 120(4) also provides that where the settlement concerns the review of an order, that order is void and the review is terminated.

Subsection 120(4) must be read subject to s. 120(5), which allows a settlement to be voided if an employee can demonstrate to the Board that they entered into the settlement as a result of fraud or coercion.

Note that on November 6, 2009, ESA Part XXIII, s. 115.1 came into force. It provides that any reference to an employee in Part XXIII, including s. 116 and s. 120, includes a reference to an assignment employee or a prospective assignment employee.

Application to Void Settlement – s. 120(5)

120(5) If, upon application to the Board, the employee demonstrates that he or she entered into the settlement as a result of fraud or coercion,

(a) the settlement is void;

(b) if the review concerned an order, the order is reinstated; and

(c) the review shall be resumed.

Subsection 120(5) sets out the situation in which a settlement of an application for review under ESA Part XXIII, s. 116 proceeding at the Ontario Labour Relations Board can be set aside. It provides that if upon an application to the Board, the employee can demonstrate that they entered into the settlement as a result of fraud or coercion, the settlement will be voided, the employment standards officer's order (if any) is restored, and the proceeding that was terminated shall be resumed.

Note that on November 6, 2009, ESA Part XXIII, s. 115.1 came into force. It provides that any reference to an employee in Part XXIII, including ss. 116 and 120, includes a reference to an assignment employee or a prospective assignment employee.

In *George v 1008810 Ontario Ltd.*, 2004 CanLII 33763 (ON LRB), an employee sought to have a settlement agreement made pursuant to s. 120 regarding her claim for termination and vacation pay treated as null and void on the basis that the employer refused to pay the agreed-to amount. The Board concluded that as there had been no fraud or coercion, but rather non-compliance by one party, the settlement could not be voided under s. 120(5). Instead, the Board reasoned that the appropriate remedy was to require the employer to pay the claimant the money she was owed pursuant to the settlement and held that if the employer did not comply, the Board could issue an order to pay under ESA Part XXIII, s. 119(6) together with an administrative fee. Failure to pay that order would result in collection proceedings. The Board also noted that the employee was free to pursue any other claims against the employer including the human rights complaint she had discontinued in accordance with the settlement. (Note: the Program does not agree with the OLRB's view that the remedy for non-compliance with a settlement term is to enforce the settlement. It is the Program's position that the wording of s. 120(4) provides that where a party does not do what they agreed to do under the terms of the settlement, the settlement fails and the review application picks up where it left off.)

In *Dufresne v InnVest Hotels GP Ltd. operating as Comfort Inn – Innvest Hotels Group,* 2017 CanLII 4460 (ON LRB), the claimant sought to void a settlement agreement on the basis of coercion by the labour relations officer. The Board noted that coercion is the use of force to persuade an unwilling person to do something. The Board set out a number of principles, including: advising a party about the risks and likelihoods of a case does not amount to coercion; the fact that an offer is time-limited does not make it coercive; and where a party understands that they have a choice of accepting a settlement or proceeding to a hearing, the Board is not likely to find that the party was coerced into settling. The Board found that the LRO's explanation of the potential risks of not signing a settlement did not constitute coercion, and that the claimant had already agreed to the settlement in principle before even speaking to the LRO. Therefore, the Board upheld the settlement agreement.

Distribution – s. 120(6)

120(6) If the order that was the subject of the application required the payment of money to the Director in trust, the Director,

(a) shall distribute the amount held in trust with respect to wages, fees or compensation in accordance with the settlement; and

(b) despite clause 4(b), is entitled to be paid,

i) that proportion of the administrative costs that were ordered to be paid that is the same as the proportion of the amount of wages, fees or compensation ordered to be paid that the employee is entitled to receive under the settlement, and

ii) that proportion of the collector's fees and disbursements that were added to the amount of the order under subsection 128 (2) that is the same as the proportion of the amount of wages, fees or compensation ordered to be paid that the employee is entitled to receive under the settlement.

Subsection 120(6) was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009,* SO 2009, c 9, effective November 6, 2009 to include a reference to orders to recover fees issued under ESA Part XVIII.1, s. 74.14. The *Fair Workplaces, Better Jobs Act, 2017*, SO 2017, c 22 further amended this provision to provide for the recovery of a proportion of a collector's fees and disbursements based on the amount an employee is entitled to receive under a settlement made under s. 116.

Clause 120(6)(b)(i) allows the Director of Employment Standards to distribute, in accordance with the terms of a settlement of an application for review proceeding at the Ontario Labour Relations Board pursuant to ESA Part XXIII, s. 116, any money respecting wages, fees or compensation that is held in trust and all or part of the administrative costs that were paid. Out of the money held in trust that is attributable to administration costs, the Director is entitled to be paid an amount that is proportionate to the amount of wages, fees or compensation ordered to be paid and the amount the employee is entitled to receive under the settlement, despite the fact that the order is voided by the settlement under s. 120(4)(b).

Clause 120 (6)(b)(ii) establishes the director's entitlement to be paid a proportionate amount of the collectors' fees and disbursements when a settlement is reached under an application for review proceeding under ESA Part XXIII, s. 116 between an employer and an employee if the order has been assigned to a collector. Out of the money that is attributable to the collection fees, the Director is entitled

to be paid an amount that is proportionate to the amount of wages, fees, or compensation ordered to be paid to the employee and the amount the employee is entitled to receive under the settlement.

While this provision states that it is the Director who is entitled to the collector's fees and disbursements, the Director may authorize the collector to exercise the powers specified in an authorization and collect the fees and disbursements under ESA Part XXIV, s. 127.

For example, consider an order issued for $1,000 in wages plus a $100 administrative fee. Assuming the director has authorized the collector to collect 20% of the order to pay in respect of the collector's fees, in accordance with ESA Part XXIV, s. 127(3), a collection fee of $220 (($1,000 + $100) x 20%) would be added to the order. If the employer and the employee enter into a settlement under s. 120 of $800 (80% of the amount owing to the employee), the collector would be entitled to a proportional amount of the fee in the amount of $176 ($220 x 80%=$176), based on the settlement reached.

Note that on November 6, 2009, ESA Part XXIII, s. 115.1 came into force. It provides that any reference to an employee in ESA Part XXIII, including ss. 116 and 120, includes a reference to an assignment employee or a prospective assignment employee.

See also the discussion of ESA Part XXII, s. 112(6) regarding the payment of administrative costs and recovery of collector's fees and disbursements, where a settlement is reached between the parties

Subsection 120(6) should be read in conjunction with ESA Part XXIII, s. 117(3), which requires the Director to pay interest on any money, which will include any administrative costs, they are required to hold in trust and that is subsequently paid out under a settlement, at the rate and calculated in the manner determined by the Director under ESA Part XXI, s. 88(5).

ESA Part XXIII Section 121 - Referral

Referral - s. 121(1)

121(1) If, as a result of a complaint or otherwise, the Director comes to believe that an employer, an organization of employers, an organization of employees or a person acting directly on behalf of any of them may have contravened Part XIII (Benefit Plans), the Director may refer the matter to the Board.

This provision is similar to the corresponding section (s. 33(4) and s. 69) of the former *Employment Standards Act*, although the authority for the Director of Employment Standards to refer matters to the Ontario Labour Relations Board extended to potential contraventions of any provision of the *Employment Standards Act, 2000*, not just those involving Part XIII (Benefit Plans) provisions.

Section 121(1) gives the Director discretionary power to refer an issue to the Ontario Labour Relations Board where the Director believes that an employer, an organization of employers or employees, or a person acting directly on their behalf, may have contravened Part XIII. Part XIII prohibits discrimination in the provision of employment related benefit plans (pension, life insurance, disability insurance, health insurance or a health benefit plan) on the basis of age, sex, marital status or same-sex partnership status of an employee.

The section allows a referral to the Board whether the Director's belief arose as the result of a complaint or not. For example, the referral could be made on the basis of information discovered in the course of an

inspection. Since this is not an application for review, but rather a reference by the Director, the power to set it into motion has not been delegated to the Board. The Director retains that power.

Hearing - s. 121(2)

121(2) If a matter is referred to the Board under subsection (1), the Board shall hold a hearing and determine whether the employer, organization or person contravened Part XIII.

This section is similar to the general reference provisions in s. 69 of the former *Employment Standards Act*, that it makes it mandatory for the Board to hold a hearing if a matter regarding a contravention of Part XIII (Benefit Plans) has been referred (under s. 121(1)) to it by the Director.

Under the former *Employment Standards Act*, the s. 69 hearing was compared to a "reference" by at least one referee, *Ritchie and Associates v Flemming et al* (January 2, 1980), ESC 676 (Franks): that is, to a procedural hearing at common law, where a judge decides, at the request of one of the parties involved, a point of law or issue of fact that has been the subject of dispute. One case said that a hearing under s. 69 was more a fact-finding exercise than an adversarial proceeding: *John Patrick Sheridan et al v United Steelworkers of America, Local 4440* (May 6, 1994), ESC 94-97 (Novick).

Generally, the employer in a s. 69 hearing did not bear the same degree of onus as it did in a s. 68 employer review hearing under the former *Employment Standards Act*.

Powers of Board - s. 121(3)

121(3) If the Board determines that the employer, organization or person acting directly on behalf of an employer or organization contravened Part XIII, the Board may order the employer, organization or person,

(a) to cease contravening that Part and to take whatever action the Board considers necessary to that end; and

(b) to compensate any person or persons who may have suffered loss or been disadvantaged as a result of the contravention.

This provision is similar to the corresponding sections (s. 69(5) and (6)) of the general reference provisions in the former *Employment Standards Act*.

Under this section, the Board may determine that there has been a contravention of Part XIII (Benefit Plans) of the Act and may direct that person to cease contravening Part XIII and take whatever action is necessary to do so. For example, the Board's order making power could extend to a corporate director acting on behalf of the employer. However, the order compensating the employee(s) for any loss or disadvantage in that case would be subject to the provisions regarding director's liability in Part XX of the Act.

The Board may also order the person to compensate any person or persons who may have suffered a loss or been disadvantaged because of the contravention.

Certain Review Provisions Applicable - s. 121(4)

121(4) Subsections 116(8) and (9), 118(1) and (3) to (5), 119(1) to (5), (8), (9), (13) and (14) and 120(1), (4) and (5) apply, with necessary modifications, with respect to a proceeding under this section.

This section provides that certain sections of s. 116 (applications for review), s. 118 (the Board's rules of practice), s. 119 (the powers of the Board) and s. 120 (settlements through labour relations officers) apply, with necessary modifications, with respect to the s. 121 reference. Those sections are:

- Section 116(8): Board's obligation to give parties full opportunity to present evidence and make submissions,
- Section 116(9): Board's power to determine its own practice and procedure
- Section 118(1): power of the chair of the Board to make rules governing the Board's practice and procedure and providing for forms
- Section 118(3): rules made under s. 118 come into force on a day determined by an order of the Lieutenant Governor in Council
- Section 118(4): rules made under s. 118 apply despite a conflict with the *Statutory Powers Procedure Act,* RSO 1990, c S.22
- Section 118(5): rules made under s. 118 are not regulations within the meaning of Part III (Regulations) of the *Legislation Act, 2006,* SO 2006, c 21, Sch F
- Section 119(1): provides that s. 119 applies to a review under s. 116 (and as modified by s. 121(4), to a reference under s. 121)
- Section 119(2): power of the Board to designate one or more parties who have substantially the same interest in a proceeding to be a representative of the entire group
- Section 119(3): stipulates what constitutes a quorum of the Board
- Section 119(4): power of the Board to require the posting of notices
- Section 119(5): power of the Board to require notices be posted and kept posted in a conspicuous place
- Section 119(8): Board may direct a labour relations officer to examine records and conduct other inquiries
- Section 119(9): states that ss. 91 and 92 (powers of employment standards officer's and compliance required of people involved in an investigation by an employment standards officer) apply to labour relations officers directed under s. 119(8)
- Section 119(13): provides that the decision of the Board is final and binding
- Section 119(14): allows for the Board's decision to be reviewed by the courts and decision not to be overturned unless it is unreasonable
- Section 120(1): allows the Board to authorize a labour relations officer to effect a settlement
- Section 120(4): settlement effected by labour relations officer is binding and the order is void and review is terminated if parties do what they have agreed to do

- Section 120(5): settlement effected by labour relations officer may be voided, the order (if any) reinstated and the review resumed, if the employee demonstrates it was entered into as a result of fraud or coercion

ESA Part XXIII Section 122 - Review of Notice of Contravention

Review of Notice of Contravention - s. 122(1)

122(1) A person against whom a notice of contravention has been issued under section 113 may dispute the notice if the person makes a written application to the Board for a review,

(a) within 30 days after the date of service of the notice; or

(b) if the Board considers it appropriate in the circumstances to extend the time for applying, within the period specified by the Board.

This provision was introduced in the *Employment Standards Act, 2000*. It establishes a right of review of a notice of contravention issued under ESA Part XXII, s. 113. It limits the right of review to a person against whom the notice was issued. As a result, an employee has no right to apply for a review of a notice of contravention issued against their employer or a client of a temporary help agency.

ESA Part XXIII, s. 121(1) requires that the application be made within 30 days after the date the notice is served. See the discussions of the service requirements for a notice of contravention in ESA Part XXII, s. 113(3) and ESA Part XXI, s. 95.

In contrast to an employer's application for review of an order issued under ESA Part XXII, s. 103 or s.104, there is no requirement to pay the amount of the notice into trust.

The Ontario Labour Relations Board may extend the time for applying for a review, as it considers appropriate.

Note that ESA Part XXIII, s. 115.1 provides that any reference to an employee in Part XXIII includes a reference to an assignment employee or a prospective assignment employee.

Hearing - s. 122(2)

122(2) The Board shall hold a hearing for the purposes of the review.

This section imposes a mandatory obligation on the Board to hold a hearing for a review of a notice of contravention if the application has been made within 30 days of the date of the service of the notice or within the extended period allowed by the Board under s. 122(1).

Parties - s. 122(3)

122(3) The parties to the review are the person against whom the notice was issued and the Director.

Section 122(3) identifies the parties to a review of a notice of contravention as the person against whom the notice was issued, and the Director of Employment Standards.

Onus - s. 122(4)

122(4) On a review under this section, the onus is on the Director to establish, on a balance of probabilities, that the person against whom the notice of contravention was issued contravened the provision of this Act indicated in the notice.

Section 122(4) places the onus on the Director of Employment Standards to show, on a balance of probabilities, that the person against whom the notice of contravention was issued has contravened the provision of the ESA 2000 that was the subject of the notice.

The balance of probabilities standard of proof is consistent with the standard applied in proceedings before an administrative tribunal and in civil proceedings. It requires the Director to convince the Board that the evidence shows it is more likely than not that the person against whom the notice was issued committed the contravention. This standard is less onerous than that applied in criminal proceedings where it must be proved beyond a reasonable doubt that the crime was committed.

Decision - s. 122(5)

122(5) The Board may,

(a) find that the person did not contravene the provision and rescind the notice;

(b) find that the person did contravene the provision and affirm the notice; or

(c) find that the person did contravene the provision but amend the notice by reducing the penalty.

This section lists the findings that the Board may make on a review of a notice of contravention. The Board has three options:

1. It may find that the person did not commit the contravention and so rescind the notice;
2. It may find that the person did commit the contravention and affirm the notice; or
3. It may find that the person committed the contravention but amend the notice by reducing the penalty.

The third option may apply, for example, where the officer has imposed a higher penalty for the contravention on the basis that it was the second time the employer had contravened the same provision of the ESA 2000 (for a contravention of ss. 2, 15 or 16) or has multiplied the penalty by the number of employees affected (for a contravention of a provision other than ss. 2, 15 or 16). See O Reg 289/01 for the schedule of penalties. In either case, the Board could reduce the penalty if, for example, it determined that this was only the first time the employer contravened ss. 2, 15 or 16 of the ESA 2000 or, in the case of a contravention of a provision other than ss. 2, 15 or 16, that the number of employees affected was less than the number found by the employment standards officer.

The Board's options do not extend to amending the notice by increasing the penalty. For example, where the employer standards officer had assessed the penalty based on a finding that an employer had contravened ESA Part XI, s. 33 with respect to five employees and on review, the Board determines that, in fact, 10 employees were affected by the contravention of s. 33, the Board could not increase the penalty.

Collector's Fees and Disbursements - s. 122(6)

122(6) If the Board finds that the person contravened the provision and if it extended the time for applying for a review under clause (1) (b),

(a) before issuing its decision, it shall enquire of the Director whether a collector's fees and disbursements have been added to the amount set out in the notice under subsection 128(2); and

(b) if they have been added to that amount, the Board shall advise the person of that fact and of the total amount, including the collector's fees and disbursements, when it issues its decision.

This section provides that where the Board has extended the time for applying for a review and subsequently finds that the person applying for the review contravened the ESA 2000, it must enquire whether any collector's fees and disbursements were added to the notice under ESA Part XXIII, s. 128(2). If they were, the Board must advise the person to whom the notice was issued that such amounts are owing, when it issues its decision.

ESA Part XXIV, s. 128(2) provides that when a file is sent for collection, the collector's fees and disbursements are added to the amount of the order or notice of contravention.

Certain Provisions Applicable - s. 122(7)

122(7) Subsections 116(8) and (9), 118(1), (3), (4) and (5) and 119(3), (4), (5), (13) and (14) apply, with necessary modifications, to a review under this section.

This section provides that certain sections of ESA Part XXIII, s. 116 (applications for review), ESA Part XXIII, s. 118 (the Board's rules of practice) and ESA Part XXIII, s. 119 (the powers of the Board) apply, with necessary modifications, with respect to a review of a notice of contravention. Those sections are:

- Section 116(8) - Board's obligation to give parties full opportunity to present evidence and make submissions;
- Section 116(9) - Board's power to determine its own practice and procedure;
- Section 118(1) - power of the chair of the Board to make rules governing the Board's practice and procedure and providing for forms;
- Section 118(3) - rules made under s. 118 come into force on a day determined by an order of the Lieutenant Governor in Council;
- Section 118(4) - rules made under s. 118 apply despite a conflict with the *Statutory Powers Procedure Act,* RSO 1990, c S.22;
- Section 118(5) - rules made under s. 118 are not regulations within the meaning of Part III (Regulations) of the *Legislation Act, 2006,* SO 2006, c 21, Sch F;
- Section 119(3) - stipulates what constitutes a quorum of the Board;
- Section 119(4) - power of the Board to require the posting of notices;
- Section 119(5) - power of the Board to require notices be posted and kept posted in a conspicuous place;
- Section 119(13) - provides that the decision of the Board is final and binding;
- Section 119(14) - allows for the Board's decision to be reviewed by the courts and decision not to be overturned unless it is unreasonable.

ESA Part XXIII Section 123 - Persons from Board not Compellable

Persons from Board not Compellable - s. 123(1)

123(1) Except with the consent of the Board, none of the following persons may be compelled to give evidence in a civil proceeding or in a proceeding before the Board or another board or tribunal with respect to information obtained while exercising his or her powers or performing his or her duties under this Act:

1. A Board member.

2. The registrar of the Board.

3. An employee of the Board.

This provision is substantially the same as the corresponding section (s. 69.2(1)) of the former *Employment Standards Act*. Section 123(1) provides that the consent of the Board is required before an Ontario Labour Relations Board member, the Registrar, or any employee of the Board can be required to give testimony in any civil proceeding, Board proceeding, or proceeding before another tribunal respecting any information obtained in the exercise of his or her powers or the discharge of his or her duties under the *Employment Standards Act, 2000*.

Note that criminal proceedings are not covered by this provision.

Non-Disclosure - s. 123(2)

123(2) A labour relations officer who receives information or material under this Act shall not disclose it to any person or body other than the Board unless the Board authorizes the disclosure.

This provision is substantially the same as the corresponding section (s. 69.2(2)) of the former *Employment Standards Act*. Section 123(2) ensures the confidentiality of settlement discussions with the Ontario Labour Relations Board's labour relations officers by providing that information or material revealed during the course of dealing with a labour relations officer is not to be disclosed unless authorized by the Board. See for example a decision under the former *Employment Standards Act*, *Hammond v 748403 Ontario Limited o/a Happy Landing Truck Stop* (June 7, 1999), 3160-98-ES (ON LRB).

ESA Part XXIII Section 124 - When no Decision After Six Months

When No Decision After Six Months - s. 124(1)

124(1) This section applies if the Board has commenced a hearing to review an order, refusal to issue an order or notice of contravention, six months or more have passed since the last day of hearing and a decision has not been made.

Section 124(1) provides that s. 124 applies if the Ontario Labour Relations Board has not made a decision six months after the last day of a hearing on a review of an order issued under any the following sections:

- Section 74.14 order to recover fees

- Section 74.16 order for compensation, temporary help agency
- Section 74.17 order re client reprisal
- Section 103 order for wages
- Section 104 order for compensation or reinstatement
- Section 106 order against a director
- Section 107 further order against directors
- Section 108 compliance order

Section 124 also applies if the Board has not made a decision six months after the last day of a hearing on a review of a notice of contravention under s. 122 or on a review under s. 116 of a refusal to issue an order under the any of the following sections of the *Employment Standards Act, 2000*:

- Section 74.14 order to recover fees
- Section 74.16 order for compensation, temporary help agency
- Section 74.17 order re: client reprisal
- Section 103 order for wages
- Section 104 order for compensation or reinstatement
- Section 108 compliance order

This section provides the parties and the Board with a mechanism to ensure a timely decision on a review.

Termination of Proceeding - s. 124(2)

124(2) On the application of a party in the proceeding, the chair may terminate the proceeding.

Where the condition in s. 124(1) is present, s. 124(2) enables the chair to terminate the proceeding on the application of a party in the proceeding.

Re-institution of Proceeding - s. 124(3)

124(3) If a proceeding is terminated according to subsection (2), the chair shall re-institute the proceeding upon such terms and conditions as the chair considers appropriate.

Section 124(3) allows the chair to re-institute proceedings it has terminated under s. 124(2), on terms and conditions it considers appropriate. The re-institution of proceedings under this section will enable the chair to direct, for example, that a decision be made within a specified period of time.

ESA Part XXIV - Collection

The intent of this Part is to facilitate the collection of money owed under the *Employment Standards Act, 2000*.

ESA Part XXIV Section 125 - Third Party Demand

Third Party Demand – s. 125(1)

125(1) If an employer, director or other person is liable to make a payment under this Act and the Director believes or suspects that a person owes money to or is holding money for, or will within 365 days owe money to or hold money for the employer, director or other person, the Director may demand that the person pay all or part of the money that would otherwise be payable to the employer, director or other person to the Director in trust on account of the liability under this Act.

Subsection 125(1) was amended by the *Strengthening and Improving Government Act, 2015* effective December 3, 2015.

Section 125 is the source of the authority to issue third party demands to persons the Director of Employment Standards believes or suspects owe money to, or are holding money, or will within 365 days owe or hold money for an employer, corporate director, or another person who is liable to make a payment under the *Employment Standards Act, 2000*. This includes the power to issue third party demands to persons owing money to or holding money for an employer, corporate director, or another person who owes money in respect of a notice of contravention under ESA Part XXII, s. 113.

Subsection 125(1) sets out the conditions that must be met before a third party demand may be issued. The conditions are as follows:

1. The Director must believe or suspect that a person owes money to, or is holding money for, or will within 365 days owe money to or hold money for an employer, a corporate director or other person (such as a client of a temporary help agency); and
2. The employer, corporate director, or other person must be liable to make a payment under the ESA 2000.

Therefore, the Director has the discretion to issue a third party demand on the basis of a reasonable belief that a person owes money to or is holding money or will, within the next 365 days, owe or hold money for another person who is liable to make a payment under the ESA 2000.

An employer, corporate director, or other person is liable to make a payment under the ESA 2000 where:

1. An order to pay is issued to it under ss. 74.14, 74.16, 74.17, 103, 104, 106 or s. 107 as the case may be, or a notice of contravention is issued under s. 113.

Generally, no third party demand would be issued unless the employer, corporate director, or other person does not comply with the order or notice and does not apply for a review of the order or notice within 30 days of service, and no settlement of the order has been effected under s. 112, s. 120 or s. 129. However, in extraordinary circumstances and with the manager's approval a third party demand may also be issued after the order/notice has been issued but before the 30-day appeal period has expired. Because a review application may ultimately be filed in such cases, any money collected within 30 days

after the order/notice is issued is held in trust for a reasonable period of time after the expiry of the appeal period.

2. An order to pay is issued or amended by the Board under s. 119 or 121, or a notice of contravention is affirmed or amended under s. 122, **and** the employer, corporate director, or other person does not comply with the order or notice as required by the Board.

If the above criteria are met and a third party demand is issued, the demand will indicate that the money the third party owes to the employer, corporate director or other person is, in whole or in part, to be paid to the Director of Employment Standards, in trust, for payment of monies owed under the ESA 2000. For example, a third party demand may be issued to a bank where money is held in an account of a person who owes money under the ESA 2000.

The power to issue third party demands for payment has been delegated under ESA Part XXI, s. 88. For further information see Delegation of Powers. In addition, under ESA Part XXIV, s. 127, the Director of Employment Standards has given to the Ministry of Finance, the Ministry's authorized collector, authorization to exercise this power on the Director's behalf for purposes of those orders and notices assigned to them.

Same, Duration – s. 125(1.1)

125(1.1) A demand made under subsection (1) remains in force for 365 days from the date the notice of the demand is served.

This subsection provides that a demand issued under s. 125(1) remains in force for 365 days from the date the notice of the demand is served.

Client of Temporary Help Agency - s. 125(2)

125(2) Without limiting the generality of subsection (1), that subsection applies where a client of a temporary help agency owes money to or is holding money for a temporary help agency.

Subsection 125(2) indicates that s. 125(1) applies where a client of a temporary help agency owes money to, or is holding money for, a temporary help agency. For a discussion of the definition of the term "client" when used in relation to a temporary help agency, see ESA Part I, s. 1(1).

Service - s. 125(3)

125(3) The Director shall, in accordance with section 95, serve notice of the demand on the person to whom the demand is made.

This provision states that the Director must serve the notice of the third party demand on the person to whom the demand is being made, in accordance with ESA Part XXI, s. 95.

The power with respect to service of a third party demand has been delegated under ESA Part XXI, s. 88. For further information see Delegation of Powers. In addition, under ESA Part XXIV, s. 127, the Director of Employment Standards has authorized collectors to exercise this power, for the purposes of recovering monies owing in respect of those files assigned to them for collection.

Discharge - s. 125(4)

125(4) A person who pays money to the Director in accordance with a demand under this section is relieved from liability for the amount owed to or held for the employer, director or other person who is liable to make a payment under this Act, to the extent of the payment.

Subsection 125(4) was introduced by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009* effective November 6, 2009 to replace the former s. 125(3).

Subsection 125(4) provides that a third party is automatically relieved of liability, upon compliance with a demand under this provision, to the extent of the payment. (No receipt is required to discharge the liability.) The liability may relate to an amount owed to or held for an employer, director or other person who is liable to make a payment under the ESA 2000.

For example, if a bank owes $1,000 to an employer who is liable to pay the Ministry $700 on behalf of an employee entitled under the Act, the Ministry can serve a third party demand on the bank for the $700. Where the bank pays the Ministry the $700 pursuant to the demand, the bank is immediately relieved of its obligation to pay that amount to the employer. However, the bank would still be obliged to pay the employer the remaining $300.

Liability - s. 125(5)

125(5) If a person who receives a demand under this section makes a payment to the employer, director or other person with respect to whom the demand was made without complying with the demand, the person shall pay to the Director an amount equal to the lesser of,

(a) the amount paid to the employer, director or other person; and

(b) the amount of the demand.

This provision was introduced by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009* effective November 6, 2009 to replace the former s. 125(4).

Subsection 125(5) sets out the consequences of failure to comply with a third party demand. If a third party who has received a demand under s. 125 pays money to the employer, corporate director, or other person who is liable to make a payment under the ESA 2000 before complying with the demand, the third party will be required to pay to the Director the lesser of:

- The amount paid out to the employer or corporate director; or
- The amount originally demanded.

ESA Part XXIV Section 125.1 – Security for Amounts Owing

125.1 If the Director considers it advisable to do so, the Director may accept security for the payment of any amounts owing under this Act in any form that the Director considers satisfactory.

Section 125.1 is a new provision added by the *Fair Workplaces, Better Jobs Act, 2017,* SO 2017, c 22, effective January 1, 2018.

This new provision is an additional tool to assist in the collection of outstanding orders and penalties under the *Employment Standards Act, 2000*. Section 125.1 allows the Director to accept security in any form satisfactory to the Director for the payment of amounts owing under the ESA 2000. The Director of

Employment Standards, in accordance with ESA Part XXIV, s. 127, may authorize a collector to exercise this power.

ESA Part XXIV Section 125.2 – Warrant

125.2 If an order to pay money has been made under this Act, the Director may issue a warrant, directed to the sheriff for an area in which any property of the employer, director or other person liable to make a payment under this Act is located, to enforce payment of the following amounts, and the warrant has the same force and effect as a writ of execution issued out of the Superior Court of Justice:

1. **The amount the order requires the person to pay, including any applicable interest.**
2. **The costs and expenses of the sheriff.**

Section 125.2 is a new provision added by the *Fair Workplaces, Better Jobs Act, 2017,* SO 2017, c 22, effective January 1, 2018.

This new provision is an additional tool to assist in the collection of outstanding orders and penalties under the *Employment Standards Act, 2000*. It enables the Director to issue a warrant to a sheriff to enforce payment of an order to pay and the costs and expenses of the sheriff. A Director's warrant has the same force and effect as a Writ of Seizure and Sale issued by a Superior Court of Justice Registrar under rule 60 of RRO 1990, Reg 194 Rules of Civil Procedure and is filed with the relevant sheriff (enforcement office). The Director of Employment Standards, in accordance with ESA Part XXIV, s. 127, may authorize a collector to exercise this power.

ESA Part XXIV Section 125.3 – Lien on Real and Personal Property

125.3 (1) If an order to pay money has been made under this Act, the amount the order requires the person to pay, including any applicable interest is, upon registration by the Director in the proper land registry office of a notice claiming a lien and charge conferred by this section, a lien and charge on any interest the employer, director or other person has in the real property described in the notice.

125.3 (2) If an order to pay money has been made under this Act, the amount the order requires the person to pay, including any applicable interest is, upon registration by the Director with the registrar under the Personal Property Security Act of a notice claiming a lien and charge under this section, a lien and charge on any interest in personal property in Ontario owned or held at the time of registration or acquired afterwards by the employer, director or other person liable to make a payment.

125.3 (3) The lien and charge conferred by subsection (1) or (2) is in respect of all amounts the order requires the person to pay, including any applicable interest at the time of registration of the notice or any renewal of it and all amounts for which the person afterwards becomes liable while the notice remains registered and, upon registration of a notice of lien and charge, the lien and charge has priority over,

(a) any perfected security interest registered after the notice is registered;

(b) any security interest perfected by possession after the notice is registered; and

(c) any encumbrance or other claim that is registered against or that otherwise arises and affects the employer, director or other person's property after the notice is registered.

125.3 (4) For the purposes of subsection (3), a notice of lien and charge under subsection (2) does not have priority over a perfected purchase money security interest in collateral or its proceeds and is deemed to be a security interest perfected by registration for the purpose of the priority rules under section 30 of the *Personal Property Security Act*.

125.3 (5) A notice of lien and charge under subsection (2) is effective from the time assigned to its registration by the registrar and expires on the fifth anniversary of its registration unless a renewal notice of lien and charge is registered under this section before the end of the five-year period, in which case the lien and charge remains in effect for a further five-year period from the date the renewal notice is registered.

125.3 (6) If an amount payable under this Act remains outstanding and unpaid at the end of the period, or its renewal, referred to in subsection (5), the Director may register a renewal notice of lien and charge; the lien and charge remains in effect for a five-year period from the date the renewal notice is registered until the amount is fully paid, and is deemed to be continuously registered since the initial notice of lien and charge was registered under subsection (2).

125.3 (7) Where an employer, director or other person liable to make a payment has an interest in real property but is not shown as its registered owner in the proper land registry office,

(a) the notice to be registered under subsection (1) shall recite the interest of the employer, director or other person liable to make a payment in the real property; and

(b) a copy of the notice shall be sent to the registered owner at the owner's address to which the latest notice of assessment under the *Assessment Act* has been sent.

125.3 (8) In addition to any other rights and remedies, if amounts owed by an employer, director or other person liable to make a payment remain outstanding and unpaid, the Director has, in respect of a lien and charge under subsection (2),

(a) all the rights, remedies and duties of a secured party under sections 17, 59, 61, 62, 63 and 64, subsections 65 (4), (5), (6), (6.1) and (7) and section 66 of the *Personal Property Security Act*;

(b) a security interest in the collateral for the purpose of clause 63 (4) (c) of that Act; and

(c) a security interest in the personal property for the purposes of sections 15 and 16 of the *Repair and Storage Liens Act*, if it is an article as defined in that Act.

125.3 (9) A notice of lien and charge under subsection (2) or any renewal of it shall be in the form of a financing statement or a financing change statement as prescribed under the *Personal Property Security Act* and may be tendered for registration under Part IV of that Act, or by mail addressed to an address prescribed under that Act.

125.3 (10) A notice of lien and charge or any renewal thereof is not invalidated nor is its effect impaired by reason only of an error or omission in the notice or in its execution or registration, unless a reasonable person is likely to be materially misled by the error or omission.

125.3 (11) Subject to Crown rights provided under section 87 of that Act, nothing in this section affects or purports to affect the rights and obligations of any person under the *Bankruptcy and Insolvency Act* (Canada).

125.3 (12) In this section,

"real property" includes fixtures and any interest of a person as lessee of real property.

Section 125.3 is a new provision added by the *Fair Workplaces, Better Jobs Act, 2017*, SO 2017, c XX, effective January 1, 2018.

This new provision is an additional tool to assist in the collection of outstanding orders and penalties under the *Employment Standards Act, 2000*. It allows the Director to register a real property lien directly on title for identifiable real property. It also allows the Director to register a *Personal Property Security Act,* RSO 1990, c P.10 lien and charge on personal property for amounts owing on an order to pay and any applicable interest. The Director of Employment Standards, in accordance with ESA Part XXIV, s. 127, may authorize a collector to exercise these powers.

ESA Part XXIV Section 126 - Filing of Order

Filing of Order - s. 126(1)

126(1) If an order to pay money has been made under this Act, the Director may cause a copy of the order, certified by the Director to be a true copy, to be filed in a court of competent jurisdiction.

This provision permits the Director of Employment Standards to certify a copy of an order as a true copy and to file a certified true copy of an order to pay in court.

The effect of the section is to enable an order to pay money under the *Employment Standards Act, 2000* to be enforced through the Ontario courts. The provision grants to the Director a status comparable to that of a judgment creditor, thereby making available such creditors' remedies as writs of seizure and sale, garnishments, and directions to enforce by sheriffs or bailiffs.

This section is the basis of a large part of the collection process under the Act. Once the certified copy of the order to pay is filed, it can be enforced like a judgment of the court, which means that the Rules of Civil Procedure respecting the enforcement of judgments apply.

Section 126(1) states that the order to pay may be filed in a "court of competent jurisdiction". There are two aspects to the concept of competent jurisdiction. Courts are subject to both monetary and geographical limits. If the order is for $25,000 or less, the order to pay money may be filed with the Small Claims Court located in the geographic area or areas where the employer resides or carries on business. If the amount exceeds the Small Claims Court threshold, then the Superior Court of Justice is the proper level of court in which to file the certified copy of the order; the certified copy may be filed with the Superior Court in any geographical area of the province. A writ of seizure and sale must be filed with the office of the Sheriff or Small Claims Court bailiff in the jurisdiction where the employer or director has assets, in order that enforcement may be carried out.

The Director's power to certify a copy of an order as a true copy and to file a certified copy of an order to pay money has been delegated under s. 88 of the Act. See Delegation of Powers for further information. In addition, under s. 127, the Director of Employment Standards has authorized collectors to exercise this

power, for the purposes of recovering monies owing in respect of those files assigned to them for collection.

Advice to Person Against Whom Order was Made - s. 126(2)

126(2) If the Director files a copy of the order, he or she shall serve a letter in accordance with section 95 upon the person against whom the order was issued advising the person of the filing.

Under s. 126(2), where a certified true copy of an order to pay is filed, the Director of Employment Standards is required to serve a copy of the order on the employer or corporate director, so that the affected parties are notified of the collection action against them.

This non-discretionary power has been delegated under s. 88 of the Act. See Delegation of Powers for further information. In addition, under s. 127, the Director of Employment Standards has authorized collectors to exercise this power for the purposes of recovering monies owing in respect of those files assigned to them for collection.

Certificate Enforceable - s. 126(3)

126(3) The Director may enforce an order filed under subsection (1) in the same manner as a judgment or order of the court.

Section 126(3) states that once filed with a court of competent jurisdiction, a certified copy of an order to pay is enforceable in the same manner as a judgment or order of the court.

This authority has been delegated under s. 88 of the Act. See Delegation of Powers for further information. In addition, under s. 127, the Director of Employment Standards has authorized collectors to exercise this power for the purposes of recovering monies

Notices of Contravention - s. 126(4)

126(4) Subsections (1), (2) and (3) apply, with necessary modifications, to a notice of contravention.

Section 126(4) establishes that, as with orders to pay, the Director, or his or her delegate, may certify a copy of a notice of contravention as a true copy and file a certified true copy of a notice of contravention with a court of competent jurisdiction, in accordance with s. 126(1). Where this is done, an advisory letter must be served in accordance with s. 126(2). The notice of contravention, once filed, may be enforced as an order of the court in accordance with s. 126(3).

The Director's power to certify a copy of a notice of contravention as a true copy and to file a certified copy of the notice has been delegated under s. 88 of the Act. See Delegation of Powers for further information. In addition, under s. 127, the Director of Employment Standards has authorized collectors to exercise this power, for the purposes of recovering monies owing in respect of those files assigned to them for collection.

ESA Part XXIV Section 127 - Director May Authorize Collector

Director May Authorize Collector – s. 127(1)

127(1) The Director may authorize a collector to exercise those powers that the Director specifies in the authorization to collect amounts owing under this Act or under an order made by a reciprocating state to which section 130 applies.

Subsection 127(1) permits the Director to authorize collectors to collect amounts owing under the *Employment Standards Act, 2000*, whether for employees or for the Minister of Finance for amounts owed to the former Employee Wage Protection Program or with respect to a notice of contravention, or to the Director for administrative costs. The Director's authorization also extends to the collection, in Ontario, of amounts owed under legislation of reciprocating states to which ESA Part XXIV, s. 130 applies.

Subsection 127(1) must be read in conjunction with the definition of "collector" in ESA Part I, s. 1(1). Collector means a person (other than an employment standards officer) who is authorized by the Director of Employment Standards to collect amounts owing under the ESA 2000.

Same - s. 127(2)

127(2) The Director may specify his or her powers under sections 125, 125,1, 125.2, 125.3, 126, 130 and subsection 135(3) and the Board's powers under section 19 of the Statutory Powers Procedure Act in an authorization under subsection (1).

Subsection 127(2) identifies the powers that the Director of Employment Standards may authorize a collector to exercise. Any of the following powers, as the Director specifies in an authorization under s. 127(1), may be exercised in collecting amounts owing under the ESA 2000:

Powers of the Director of Employment Standards

- Section 125: Power to issue third party demands
- Section 125.1: Power to accept security for amounts owing under the ESA 2000
- Section 125.2: Power to issue a Warrant directed to the sheriff, to enforce payment of the following amounts:
    - The amount the order requires the person to pay, including any applicable interest
    - The costs and expenses of the sheriff
- Section 125.3: Powers to register a lien in the proper land registry office in an attempt to enforce an order and obtain outstanding amounts owing under the ESA 2000 and/or register a lien and charge on personal property under the *Personal Property Security Act,* RSO 1990, c P.10.
- Section 126: Power to file a certified copy of an order or notice of contravention in court
- Section 130: Power to file a certified copy of an order issued from a reciprocating jurisdiction and to recover costs of enforcing the order
- Subsection 135(3): Power to enforce an order of the court by filing a copy of it in a court of competent jurisdiction

Powers of the Ontario Labour Relations Board under the SPPA

- Section 19 of the *Statutory Powers Procedure Act,* RSO 1990, c S.22 (“SPPA”): Power to file a certified copy of the Board's decision in court

For reference, s. 19 of the SPPA states:

19(1) A certified copy of a tribunal's decision or order in a proceeding may be filed in the Ontario Court (General Division) by the tribunal or by a party and on filing shall be deemed to be an order of that court and is enforceable as such.

(2) A party who files an order under subsection (1) shall notify the tribunal within 10 days after the filing.

(3) On receiving a certified copy of a tribunal's order for the payment of money, the sheriff shall enforce the order as if it were an execution issued by the Ontario Court (General Division).

Therefore, if given this power by the Director of Employment Standards, the collector may file a certified copy of an order, notice of contravention or a decision of the Board in court and direct the sheriff or bailiff to take enforcement measures, such as seizure and sale of assets.

Costs of Collection – s. 127(3)

127(3) Despite clause 22 (a) of the Collection and Debt Settlement Services Act, the Director may also authorize the collector to collect a reasonable fee or reasonable disbursements or both from each person from whom the collector seeks to collect amounts owing under this Act.

Subsection 127(3) states that the Director of Employment Standards may authorize the collector to collect a reasonable fee or reasonable disbursements, or both, from the persons from whom the collector is seeking to collect amounts owing under the ESA 2000, despite clause 22(a) of the *Collection and Debt Settlement Services Act,* RSO 1990, c. C.14.

Clause 22(a) of the *Collection and Debt Settlement Services Act* states that no collection agency or collector shall "collect or attempt to collect, on its own behalf or for a person for whom it acts, any money in addition to the amount owing by the debtor.”

It is necessary for s. 127(3) to create an exception to the prohibition in s. 22(a) of the *Collection and Debt Settlement Services Act* for fees authorized under s. 127(3), since those fees are deemed, under s. 128 (2), to be added to the amount of the order, and must be collected from the person owing the money under the ESA 2000.

This provision must be read in conjunction with ESA Part XXII, s. 112(6)(b) and ESA Part XXIII, s. 120(6)(b)(ii) which limit the recovery of collector’s fees and disbursements to a proportion that is the same as the proportion of the amount of wages, fees or compensation ordered to be paid that the employee is entitled to receive as a result of a settlement under s. 112 or s. 120.

Same - s. 127(4)

127(4) The Director may impose conditions on an authorization under subsection (3) and may determine what constitutes a reasonable fee or reasonable disbursements for the purposes of that subsection.

Subsection 127(4) provides that the Director may impose conditions on the authorization of a collector and may determine what constitutes a reasonable fee or disbursements in the circumstances.

This provision must be read in conjunction with ESA Part XXII, s. 112(6)(b) and ESA Part XXIII, s. 120(6)(b)(ii) which limit the recovery of collector's fees and disbursements to a proportion that is the same as the proportion of the amount of wages, fees or compensation ordered to be paid that the employee is entitled to receive as a result of a settlement under s. 112 or s. 120.

Exception Re Disbursements - s. 127(5)

127(5) The Director shall not authorize a collector who is required to be registered under the *Collection and Debt Settlement Services Act* to collect disbursements.

Subsection 127(5) means that the Director of Employment Standards may not authorize a collector who is required to register under the *Collection and Debt Settlement Services Act* to collect disbursements, although the Director may authorize such a collector to collect fees. The difference between fees and disbursements is that the latter consist of expenses that the collector has incurred, (photocopying, gas, long distance charges), whereas the former represent the payment for the collector's services, whether a flat fee, a commission or some other consideration.

Subsection 4(1) of the *Collection and Debt Settlement Services Act* states:

No person shall carry on the business of a collection agency unless the person is registered by the Registrar under this Act.

In s. 1(1) of the *Collection and Debt Settlement Services Act*, "collection agency" and "collector" are defined as follows:

"collection agency" means,

(a) a person, other than a collector, who obtains or arranges for payment of money owing to another person or who holds oneself out to the public as providing such a service,

(b) any person who sells or offers to sell forms or letters represented to be a collection system or scheme,

(c) a person, other than a collector, who provides debt settlement services, or

(d) a person who purchases debts that are in arrears and collects them

"collector" means an individual employed, appointed or authorized by a collection agency to collect debts for the agency, to deal with or trace debtors for the agency or to provide debt settlement services to debtors on behalf of the agency

Generally, a collector working for a collection agency must be registered under the *Collection and Debt Settlement Services Act* and therefore, the Director of Employment Standards may not authorize such a collector to collect disbursements.

Note that s. 2 of the *Collection and Debt Settlement Services Act* states that, subject to the regulations, the Act (and hence the requirement for registration) does not apply to certain persons who might be involved in collections work, such as, for example, lawyers and banks; thus, if the collector falls within s. 2, the Director could authorize that collector to collect both fees and disbursements.

Disclosure – s. 127(6) and (7)

127(6) The Director may disclose or allow to be disclosed information collected under the authority of this Act or the regulations to a collector for the purpose of collecting an amount payable under this Act.

(7) Any disclosure of personal information made under subsection (6) shall be deemed to be in compliance with clause 42 (1) (d) of the *Freedom of Information and Protection of Privacy Act*.

Subsections 127(6) and (7) allow the Director to disclose information collected under the authority of the Act or the regulations to a collector for the purpose of collecting an amount payable under the ESA 2000.

Any disclosure of personal information made by the Director under s. 127(6) is deemed to be in compliance with clause 42(1)(d) of the *Freedom of Information and Protection and Privacy Act,* RSO 1990, c F.31 (“FIPPA”).

Clause 42(1)(d) of FIPPA states:

An institution shall not disclose personal information in its custody or under its control except,

(d) where disclosure is made to an officer, employee, consultant or agent of the institution who needs the record in the performance of their duties and where disclosure is necessary and proper in the discharge of the institution’s functions;

ESA Part XXIV Section 128 - Collector's Powers

Collector's Powers - s. 128(1)

128(1) A collector may exercise any of the powers specified in an authorization of the Director under section 127.

Subsection 128(1) permits the collector to exercise the powers specified by the Director of Employment Standards. It must be read in conjunction with ESA Part XXIV, s. 127(2), which enumerates the enforcement powers that the Director may delegate to a collector in an authorization provided under ESA Part XXIV, s. 127(1).

Fees and Disbursements Part of Order - s. 128(2)

128(2) If a collector is seeking to collect an amount owing under an order or notice of contravention, any fees and disbursements authorized under subsection 127(3) shall be deemed to be owing under and shall be deemed to be added to the amount of the order or notice of contravention.

Subsection 128(2) provides that the authorized fees and disbursements of the collector will be deemed to be part an order or notice of contravention that has been assigned to a collector. This means that the employer, corporate director or person who owes the money under the *Employment Standards Act, 2000* will be responsible for the costs of collection. It also means that the same mechanisms under the ESA 2000 used to enforce and collect an order for wages or compensation (including administrative costs) and penalties assessed under a notice of contravention, can also be used to enforce and collect the collector's authorized fees and disbursements.

Distribution of Money Collected Re Wages or Compensation - s. 128(3)

128(3) Subject to subsection (4) a collector,

(a) shall pay any amount collected with respect to wages, fees or compensation,

i. to the Director in trust, or

ii. with the written consent of the Director, to the person entitled to the wages, fees or compensation;

(b) shall pay any amount collected with respect to administrative costs to the Director;

(c) shall pay any amount collected with respect to a notice of contravention to the Minister of Finance; and

(d) may retain any amount collected with respect to the fees and disbursements.

Subsection 128(3) sets out how the collector must disburse the money collected. It only applies where the collector has collected the full amount owing to all persons under the order or notice of contravention, including the person in favour of whom the order was written, the Director (in regard to administrative costs), the collector (in regards to fees and disbursements) and the Minister of Finance (in regard to a notice of contravention). Interest on money collected will be allocated according to the corresponding principal amount, except for interest on the collection fees and disbursements collected, which will be allocated according to the terms of the contract or other agreement between the Director and the collector. Where less than the full amount is collected, the provisions of s. 128(4) apply instead.

The Director's power to provide a collector with written consent to pay directly to a person the wages or compensation they are entitled to has been delegated under ESA Part XXI, s. 88. See Delegation of Powers for further information.

Apportionment - s. 128(4)

128(4) If the money collected is less than the full amount owing to all persons including the Director and the collector, the money shall be apportioned among those to whom it is owing in the proportion each is owed and paid to them.

Subsection 128(4) states what happens when the amount collected is less than the full amount of the order including administrative costs and the collector's fee. In this situation, the money is to be distributed to each person including the Director of Employment Standards and the collector in proportion to the amount they are owed.

Disclosure by Collector – s. 128 (5) and (6)

128(5) A collector may disclose to the Director or allow to be disclosed to the Director any information that was collected under the authority of this Act or the regulations for the purpose of collecting an amount payable under this Act.

(6) Any disclosure of personal information made under subsection (5) shall be deemed to be in compliance with clause 42 (1) (d) of the *Freedom of Information and Protection of Privacy Act*.

Subsections 128(5) and (6) allow the collector to disclose information collected under the authority of the ESA 2000 or the regulations to the Director if the information was collected for the purposes of collecting an amount payable under the ESA 2000

Any disclosure of personal information made by the Director under s. 128(6) is deemed to be in compliance with clause 42(1)(d) of the *Freedom of Information and Protection and Privacy Act,* RSO 1990, c F.31 (“FIPPA”).

Clause 42(1)(d) of FIPPA states:

An institution shall not disclose personal information in its custody or under its control except,

(d) where disclosure is made to an officer, employee, consultant or agent of the institution who needs the record in the performance of their duties and where disclosure is necessary and proper in the discharge of the institution’s functions;

ESA Part XXIV Section 129 - Settlement by Collector

Settlement by Collector - s. 129(1)

129(1) A collector may agree to a settlement with the person from whom he or she seeks to collect money but only with the written agreement of,

(a) the person to whom the money is owed; or

(b) in the case of a notice of contravention, the Director.

Section 129(1) states that a collector appointed by the Director may effect a settlement of the amount owing under the *Employment Standards Act, 2000* if the creditor (generally the employee) agrees in writing to the settlement. The provision also states that in the case of a notice of contravention, the collector may effect a settlement of the amount owing under the Act if the Director agrees in writing to the settlement.

This provision should be read together with subsection 129(2), which restricts the authority of the collector to effect a settlement where the person to whom the money is owed would receive less than 75 per cent of the money to which he or she is entitled.

The Director's power to agree in writing to a settlement in the case of a notice of contravention has been delegated under s. 88 of the Act. See Delegation of Powers for further information.

Restriction - s. 129(2)

129(2) A collector shall not agree to a settlement under clause (1)(a) without the Director's written approval if the person to whom the money is owed would receive less than,

(a) 75 per cent of the money to which he or she was entitled; or

(b) if another percentage is prescribed, the prescribed percentage of the money to which he or she was entitled.

This provision is substantially the same as s. 73.0.3(2) of the former *Employment Standards Act*.

Section 129(2) states that the written approval of the Director is required if the collector is to effect a settlement under which the person to whom the money is owed would receive less than 75 per cent (or such other percentage as may be prescribed by regulation) of the money to which he or she is entitled. At the time of writing, no other percentage had been prescribed.

The Director's power under this provision has been delegated under s. 88 of the Act. See Delegation of Powers for further information.

Orders Void Where Settlement - s. 129(3)

129(3) If an order to pay has been made under section 74.14, 74.16, 74.17, 103, 104, 106 or 107 and a settlement respecting the money that was found to be owing is made under this section, the order is void and the settlement is binding if the person against whom the order was issued does what the person agreed to do under the settlement unless, on application to the Board, the individual to whom the money was ordered to be paid demonstrates that the settlement was entered into as a result of fraud or coercion.

Section 129(3) was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009,* SO 2009, c 9, effective November 6, 2009 to include a reference to orders issued under Part XVIII.1.

This provision was introduced by the *Employment Standards Act, 2000*. It is similar in part to s. 73.0.3(3) and s. 73.0.3(5) of the former *Employment Standards Act* and codifies the common law as well as Program policy under the former Act.

Section 129(3) states that the order, upon which the settlement is based, becomes void when the person against whom the order was made does what they have agreed to do in the settlement. Section 129(3) also incorporates the common law and Program policy by stating that a settlement that is entered into as a result of fraud or coercion will not be binding.

A question concerning the voiding of an order under this section may arise where the order pertains to the entitlements of several individuals, and a settlement is achieved respecting one or more but not all of the individuals. Program policy is that in these circumstances, only the portion of the order that relates to the individual covered by the settlement would be void.

Notice of Contravention - s. 129(4)

129(4) If a settlement respecting money that is owing under a notice of contravention is made under this section, the notice is void if the person against whom the notice was issued does what the person agreed to do under the settlement.

This provision was introduced by the ESA 2000.

Section 129(4) states that a notice of contravention, upon which a settlement (made with the agreement of the Director, s. 129(1)(b)) is based, becomes void when the person against whom the notice was made does what they have agreed to do in the settlement.

Payment - s. 129(5)

129(5) The person who owes money under a settlement shall pay the amount agreed upon to the collector, who shall pay it out in accordance with section 128.

This provision is similar to ss. 73.03(3) and (4) of the former *Employment Standards Act*.

Section 129(5) states that when a settlement is made, any money owing under the settlement must be paid to the collector and the collector must then pay the money out in accordance with s. 128(3) and s. 128(4).

ESA Part XXIV Section 130 - Definitions

Definitions - s. 130(1)

130(1) In this section,

"order" includes a judgment and, in the case of a state whose employment standards legislation contains a provision substantially similar to subsection 126(1), includes a certificate of an order for the payment of money owing under that legislation;

"state" includes another province or territory of Canada, a foreign state and a political subdivision of a state.

Section 130(1) defines the two key terms used in the reciprocal enforcement provisions. Both definitions are "inclusive". This means that they are not exhaustive, and other terms similar to those listed will also fit the definitions.

In this instance, the word "order" will include any order to pay money issued under employment standards legislation in another state. It may also include a judgment or certificate.

The term "state" is also given a broad meaning: it may be taken to include any jurisdiction outside of Ontario, since another province or territory of Canada or any foreign state or part of a foreign state would be included in the definition. The definition of "state" must be read in conjunction with s. 130(2) and s. 2 of O Reg 289/01, which lists those states that are reciprocating states for the purposes of reciprocal enforcement under the Act. This list in s. 2 of O Reg 289/01 was amended by O Reg 475/06 filed on October 6, 2006 to include Newfoundland and Labrador, and by O Reg 295/11, effective July 1, 2011, to include Quebec. All Canadian provinces and territories are now reciprocating states.

Reciprocating States - s. 130(2)

130(2) The prescribed states are reciprocating states for the purposes of this section and the prescribed authorities with respect to those states are the authorities who may make applications under this section.

Section 130(2) provides that those states prescribed by regulation may make use of the reciprocal enforcement of orders provisions in the Act.

Section 2 of O Reg 289/01 prescribes the reciprocating states as follows:

2(1) Each state listed in Column 1 of the Table to this section is prescribed as a reciprocating state for the purposes of section 130 of the Act.

(2) Each authority listed in Column 2 of the Table to this section is prescribed as the designated authority for the state listed opposite it in Column 1.

COLUMN 1	COLUMN 2
Alberta	Director of Employment Standards for Alberta
British Columbia	Director of Employment Standards for British Columbia
Manitoba	Director of Employment Standards for Manitoba
New Brunswick	Director of Employment Standards for New Brunswick
Newfoundland and Labrador	Director of Labour Standards for Newfoundland and Labrador
Northwest Territories	Labour Standards Board of the Northwest Territories
Nova Scotia	Director of Employment Standards for Nova Scotia
Nunavut	Nunavut Labour Standards Board
Prince Edward Island	Inspector of Labour Standards for Prince Edward Island
Quebec	Commission des norms du travail
Saskatchewan	Director of Labour Standards for Saskatchewan
Yukon	Director of Employment Standards for the Yukon

With the addition of Quebec, added to O Reg 289/01 by O Reg 295/11, all Canadian provinces and territories are now reciprocating states.

Application for Enforcement - s. 130(3)

130(3) The designated authority of a reciprocating state may apply to the Director for enforcement of an order for the payment of money issued under the employment standards legislation of that state.

Section 130(3) permits a reciprocating state to apply to the Director for enforcement in Ontario of an order issued by the reciprocating state.

Copy of Order - s. 130(4)

130(4) The application shall be accompanied by a copy of the order, certified as a true copy,

(a) by the court in which the order was filed, if the employment standards legislation of the reciprocating state provides for the filing of the order in a court; or

(b) by the designated authority, if the employment standard legislation of the reciprocating state does not provide for the filing of the order in a court.

This provision is virtually identical to s. 73.1(4) the former *Employment Standards Act*.

Section 130(4) states that an application for reciprocal enforcement must be accompanied by a certified true copy of the order. Clauses 130(4)(a) and (b) designate who may certify the copy of the order: either the court where the original was filed or the responsible authority (if the employment standards legislation of the other state does not have provision for filing an order with a court).

Enforcement - s. 130(5)

130(5) The Director may file a copy of the order in a court of competent jurisdiction and, upon its filing, the order is enforceable as a judgment or order of the court,

(a) at the instance and in favour of the Director; or

(b) at the instance and in favour of the designated authority.

This provision is virtually identical to subsection 73.1(5) of the former *Employment Standards Act*.

Section 130(5) is a parallel provision to ss. 126, which allows for the filing of an order with a court of competent jurisdiction for enforcement purposes.

Section 130(5) provides the power to enforce an order of a reciprocating state through the Ontario courts. Pursuant to s. 130(1), an "order" may include a judgement as well as an order issued under a provision similar to s. 126(1) of the *Employment Standards Act, 2000*. It permits the Director to file a certified copy of the order in a court of "competent jurisdiction". Once filed, the order is enforceable as a judgment or order of the court. The effect of this section is that an order of a reciprocating state will be enforceable in the same manner as an order issued under the ESA 2000.

The Director's power under this section has been delegated under s. 88 of the Act. See Delegation of Powers for further information.

Costs - s. 130(6)

130(6) The Director or the designated authority, as the case may be,

(a) is entitled to the costs of enforcing the order as if it were an order of the court in which the copy of it was filed; and

(b) may recover those costs in the same manner as sums payable under such an order may be recovered.

This provision is substantially the same as s. 73.1(6) of the former *Employment Standards Act*.

Section 130(6) permits the recovery of the costs of enforcing the order as if it were an order of the court in which it is filed.

The Director's power under this provision has been delegated under s. 88 of the Act. See Delegation of Powers for further information.

ESA Part XXV - Offences and Prosecutions

The purpose of the Offences and Prosecutions part of the *Employment Standards Act, 2000* is to set out the offences for which employers, including officers and directors of employers, and other individuals, such as claimants providing false information, can be prosecuted under the *Provincial Offences Act,* RSO 1990, c P.33.

ESA Part XXV Section 131 - Offence to Keep False Records

Offence to Keep False Records - s. 131(1)

131(1) No person shall make, keep or produce false records or other documents that are required to be kept under this Act or participate or acquiesce in the making, keeping or production of false records or other documents that are required to be kept under this Act.

This provision is substantially the same as the corresponding section (s. 77(1)) of the former *Employment Standards Act*. Section 131(1) prohibits any person from making, keeping or producing false or deceptive records, or other documents required to be kept under the *Employment Standards Act, 2000* and regulations. It also prohibits any person from having a hand in the making, keeping or production of such records, whether such participation is active (e.g., actually making the records) or passive (e.g., agreeing to such records or having knowledge of them but not doing anything to stop the practice).

This prohibition applies to all records or other documents required to be kept by the employer as set out in ss. 15 and 16 of the Act. These sections require specified information to be kept (including a register for homeworkers) and retained for specified periods of time and made available for inspection by an employment standards officer.

In the context of s. 131(1), "produced" does not mean "made", but rather "produced for inspection, audit or examination", i.e., given over to the employment standards officer, pursuant to a demand for records. Thus, if the employer gives the officer false or deceptive records (records that are required to be kept under the Act), pursuant to a demand under ss. 91 or 102, the employer would be guilty of an offence under s. 131(1).

What if the employer gives the information voluntarily, rather than pursuant to a demand? In that case, the employer would still be guilty of making or keeping the false records in the first place, which is also an offence under s. 131(1) if those are the types of records that the employer is required to make and keep under the Act. Also, the employer may be guilty of an offence under s. 131(2) for providing false or misleading information, regardless of whether the information was supplied voluntarily or not, and regardless of whether the employer is required to keep such information.

False or Misleading Information - s. 131(2)

131(2) No person shall provide false or misleading information under this Act.

This provision is identical to the corresponding section (s. 77(2)) of the former *Employment Standards Act*. Section 131(2) prohibits any person from providing false or misleading information under the Act. It has a general application in prohibiting any person, whether it be an employer (including a corporate

employer, since in law a corporation is considered a "person"), an employee, a director or officer or agent of an employer, or any other person, from providing false or misleading information under the *Employment Standards Act, 2000*. It covers situations where the information is provided voluntarily, as well as pursuant to a demand or a subpoena, and situations where the information is required to be kept by the Act, as well as those in which the information is not required to be kept.

ESA Part XXV Section 132 - General Offence

132 A person who contravenes this Act or the regulations or fails to comply with an order, direction or other requirement under this Act or the regulations is guilty of an offence and on conviction is liable,

(a) if the person is an individual, to a fine of not more than $50,000 or to imprisonment for a term of not more than 12 months or to both;

(b) subject to clause (c), if the person is a corporation, to a fine of not more than $100,000; and

(c) if the person is a corporation that has previously been convicted of an offence under this Act or a predecessor to it,

i. if the person has one previous conviction, to a fine of not more than $250,000, and

ii. if the person has more than one previous conviction, to a fine of not more than $500,000.

This provision is similar to s. 78(1) of the former *Employment Standards Act*. Section 132 applies to every person, which includes a corporation and trade union, who violates a provision of the *Employment Standards Act, 2000* or regulations, or disobeys a decision, requirement or order made under the Act.

Section 132 makes it an offence to violate a provision of the Act: for example, a failure to pay overtime pay, or a failure to reinstate an employee after a pregnancy or parental leave. It also makes it an offence to disobey an order, direction or requirement under the Act: for example, a failure to comply with an order to pay issued under s. 103(1)(b), a failure to comply with a compliance order under s. 108(1), or a failure to comply with a notice requiring attendance at a meeting with an officer under s. 102.

To obtain a conviction for an offence, the Crown has to prove its case beyond a reasonable doubt, which is the standard of proof in criminal and quasi-criminal cases.

Prosecutions for an offence under the ESA 2000 may be initiated under Part I or Part III of the *Provincial Offences Act,* RSO 1990, c P.33 ("POA"). A Part I prosecution can only be commenced by a person who has been appointed a provincial offences officer. Part I prosecutions are commenced by filing a certificate of offence with the Ontario Court of Justice and serving the accused with either an offence notice ("ticket") or summons. A ticket may only be used where a set fine for the offence in question has been established by the Chief Justice of the Ontario Court of Justice. Set fines have been established for many *Employment Standards Act, 2000* offences. As well, abbreviated descriptions of those offences for use on the tickets have been authorized by regulation under the POA. See Schedules 4.2, 4.3 and 4.4 to RRO 1990, Reg 950.

A provincial offences officer may also use the Part I summons procedure for ESA 2000 offences. The POA provides that where the summons procedure is used in respect of an offence under an Act, the provisions in the Act respecting maximum fines and terms of imprisonment do not apply; instead the POA

provides that the maximum fine that can be imposed on conviction is $1,000. A sentence of imprisonment cannot be imposed if the summons procedure is used.

If a prosecution is commenced under Part III of the POA, the section 132 provisions regarding maximum fines and (in the case of an individual) maximum terms of imprisonment would apply.

Under s. 132, an individual who is found guilty of an offence is liable to a fine of not more than $50,000 or 12 months in jail, or both. The maximum jail term is increased in the ESA 2000 from six months under the former Act to 12 months.

A corporation that is found guilty of an offence is liable to a fine of not more than $100,000 for a first conviction, $250,000 for a second conviction, and $500,000 for a third or subsequent conviction. These escalating monetary penalties for corporations are a new deterrence provision in the ESA 2000.

Appeals from decisions of a justice of the peace are to a judge of the Ontario Court of Justice, from which a further appeal to the Court of Appeal may be made with the leave of that Court. Appeals from the decision of a provincial judge are to the Superior Court of Justice, from which a further appeal to the Court of Appeal may be made with the leave of that Court.

ESA Part XXV Section 133 – Additional Orders

Additional Orders – s. 133(1)

133(1) If an employer is convicted under section 132 of contravening section 74 or paragraph 4, 6, 7 or 10 of subsection 74.8(1) or if a client, is convicted under section 132 of contravening section 74.12, the court shall, in addition to any fine or term of imprisonment that is imposed, order that the employer or client, as the case may be, take specific action or refrain from taking specific action to remedy the contravention.

This provision was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009,* SO 2009 c 9, effective November 6, 2009 to include references to contraventions under Part XVIII.1.

Section 133(1) applies if:

1. An employer is convicted of an offence under s. 132 for contravening the reprisal provisions in ESA Part XVIII, s. 74, or the prohibitions against temporary help agencies in paragraph 4, 6, 7 or 10 of ESA Part XVIII.1, s. 74.8(1); or
2. A client is convicted of an offence under s. 132 for contravening the prohibition against reprisal by clients in ESA Part XVIII.1, s. 74.12.

If either of the conditions above is met, the justice of the peace or the provincial judge making the conviction shall, in addition to the fine or term of imprisonment, order specific action that the convicted person must take or refrain from taking in order to remedy the contravention. This provision should be read in conjunction with s. 133(2) which discusses the types of orders that may be made by the court.

In *R v Hartro Office Systems* the employer was convicted under the predecessor to s. 132, since the only logical explanation of the reason for the employee's dismissal was that he filed a complaint under the *Employment Standards Act, 2000*. The employer was fined $8,000. However, in *R v Marconi*, the

defendant was acquitted on the grounds that the evidence showed the employee was dismissed prior to the defendant becoming aware that the employee had filed a complaint under the Act.

Same – s. 133(2)

133(2) Without restricting the generality of subsection (1), the order made by the court may require one or more of the following:

1. A person be paid any wages that are owing to him or her.

2. In the case of a conviction under section 132 of contravening section 74 or 74.12, a person be reinstated.

3. A person be compensated for any loss incurred by him or her as a result of the contravention.

Section 133(2) was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009* effective November 6, 2009 to include a reference to a contravention of ESA Part XVIII.1, s. 74.12.

In addition to the powers granted to the court under s. 133(1), if an employer is convicted of contravening ESA Part XVIII, s. 74 or paragraph 4, 6, 7 or 10 of ESA Part XVIII.1, s. 74.8(1), s. 133(2) authorizes, but does not require, the court to order that the employee be paid any wages that are owing to the employee and/or that the employee be compensated for any loss incurred as a result of the contravention. Where the employer has been convicted for violating s. 74, the court may also order that the person be reinstated.

Note that for convictions relating to contraventions of sections other than s. 74 or paragraphs 4, 6, 7, or 10 of s. 74.8(1), the court is required to order the employer to pay any amount owing to the employee with respect to the contravention pursuant to ESA Part XXV, s. 135(1).

In addition to the powers granted to the court under s. 133(1), if a client is convicted of contravening s. 74.12, s. 133(2) authorizes, but does not require, the court to order that the assignment employee be paid any wages that are owing, be compensated for any loss incurred by them, and/or be reinstated.

For a discussion of the meaning of the term "client" when used in relation to a temporary help agency, see ESA Part I, s. 1(1).

Part XVI – s. 133(3)

133(3) If the contravention of section 74 was in relation to Part XVI (Lie Detectors) and the contravention affected an applicant for employment or an applicant to be a police officer, the court may require that the employer hire the applicant or compensate him or her or both hire and compensate him or her.

Section 133(3) provides that if a conviction is obtained under ESA Part XXV, s. 132 in relation to a contravention of the lie detector provisions of the ESA 2000 and the contravention concerned an applicant for employment or an applicant to be a police officer, the court could order the employer to hire the applicant and or/compensate them for the violation.

ESA Part XXV Section 134 - Offence re Order for Reinstatement

134 A person who fails to comply with an order issued under section 133 is guilty of an offence and on conviction is liable,

(a) if the person is an individual, to a fine of not more than $2,000 for each day during which the failure to comply continues or to imprisonment for a term of not more than six months or to both; and

(b) if the person is a corporation, to a fine of not more than $4,000 for each day during which the failure to comply continues.

Section 134 was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009,* SO 2009, c 9, effective November 6, 2009.

Section 134 sets out the fine for a failure to comply with an order of a court made under ESA Part XXV, s. 133. For example, if the court, on conviction, orders an employer to reinstate an employee, with compensation for lost wages and benefits, and the employer fails to comply, the court may further order the employer, if an individual, to pay a fine of up to $2,000 for each day that the employer failed to comply with the order of the court. If the employer is a corporation, the court could order that the employer pay a fine of up to $4,000 for each day the employer failed to comply with the court's order.

For example, if the employer was ordered to reinstate the employee by March 1, 2002, and the employee did not do so until April 1, 2002, the employer could be fined up to $124,000, if a corporation, or $62,000, if an individual, for the failure to comply in a timely manner with the order of the court. This fine would also apply where the employer had not complied in a timely manner with an order of the court to pay compensation to the employee. The fine under s. 134 would be in addition to any fine and/or imprisonment imposed pursuant to ESA Part XXV, s. 132 with respect to the prohibited reprisal. This provision also applies with respect to clients, as defined in ESA Part I, s. 1(1) who fail to comply with an order issued under ESA Part XXV, s. 133.

ESA Part XXV Section 135 - Additional Orders Re Other Contraventions

Additional Orders Re Other Contraventions - s. 135(1)

135(1) If an employer is convicted under section 132 of contravening a provision of this Act other than section 74 or paragraph 4, 6, 7 or 10 of subsection 74.8(1), the court shall, in addition to any fine or term of imprisonment that is imposed, assess any amount owing to an employee affected by the contravention and order the employer to pay the amount assessed to the Director.

This provision was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009,* SO 2009, c 9, effective November 6, 2009 to specifically exclude convictions for contraventions of paragraphs 4, 6, 7 or 10 of s. 74.8(1). References to paragraphs 4, 6, 7 and 10 of s. 74.8.1 were added to s. 133(1) of the *Employment Standards Act, 2000*. For a discussion of s. 133, see ESA Part XXV, s. 133.

Section 135(1) indicates that where an employer is convicted of an offence under s. 132, other than a conviction for a violation of s. 74 (reprisal) or paragraph 4, 6, 7, or 10 of s. 74.8(1) (temporary help agency prohibitions), the court is required to assess the amount owing to the employees by the employer as a result of the employer's contravention of the Act, and to order the employer to pay the amount involved, in addition to any other penalty (i.e., fine and/or term of imprisonment) ordered. For example, where the employer had not paid an order to pay and accordingly committed an offence that resulted in a conviction

under s. 132, the court is required (in addition to any fine or jail sentence that may be ordered,) to assess the amount owing and to order the employer to pay the amount owing to the Director of Employment Standards in trust, who in turn then pays the amounts owing to the affected employee(s).

Under s. 135(1), the court could not order the employer to pay the 10 per cent administration costs portion of the order to pay, since the section refer specifically to an "amount owing to an employee". However, the court's assessment of the amount owed to the employee could include interest.

Collection by Director - s. 135(2)

135(2) The Director shall attempt to collect the amount ordered to be paid under subsection (1) and if he or she is successful shall distribute it to the employee.

Section 135(2) provides that the Director of Employment Standards must attempt to collect any money that is ordered to be paid under s. 135(1) and pay it to the employee.

Enforcement of Order, s. 135(3)

135(3) An order under subsection (1) may be filed by the Director in a court of competent jurisdiction and upon filing shall be deemed to be an order of that court for the purposes of enforcement.

This provision is substantially the same as the corresponding section (s. 78(3)) of the former *Employment Standards Act*. Section 135(3) provides that the Director, for enforcement purposes, may file an order issued by the court under s. 135(1) in a court of competent jurisdiction. The order then becomes enforceable as an order of the court for purposes of enforcement. This means, for example, that a writ of seizure and sale could be obtained so that the Director could seize the defaulting employer's assets and property and sell them in order to satisfy the amounts owing.

ESA Part XXV Section 136 - Offence Re Directors' Liability

Offence Re Directors' Liability - s. 136(1)

136(1) A director of a corporation is guilty of an offence if the director,

(a) fails to comply with an order of an employment standards officer under section 106 or 107 and has not applied for a review of that order; or

(b) fails to comply with an order issued under section 106 or 107 that has been amended or affirmed by the Board on a review of the order under section 116 or with a new order issued by the Board on such a review.

This provision was first introduced by the *Employment Standards Act, 2000*. It provides that a director of a corporation is guilty of an offence where he or she fails to comply with an order of an employment standards officer made under ss. 106 or 107, and has not applied for a review of the order, or fails to comply with such an order that has been affirmed by the Ontario Labour Relations Board or with a new order issued by the Board.

Penalty - s. 136(2)

136(2) A director convicted of an offence under subsection (1) is liable to a fine of not more than $50,000.

This provision was first introduced by the ESA 2000. It provides that a director convicted under s. 136(1) is liable to a fine of not more than $50,000. Note that directors convicted under s. 136(1) are not liable to imprisonment.

ESA Part XXV Section 137 - Offence re Permitting Offence by Corporation

Offence re Permitting Offence by Corporation - s. 137(1); Same - s. 137(2)

137(1) If a corporation contravenes this Act or the regulations, an officer, director or agent of the corporation or a person acting or claiming to act in that capacity who authorizes or permits the contravention or acquiesces in it is a party to and guilty of the offence and is liable on conviction to the fine or imprisonment provided for the offence.

(2) Subsection (1) applies whether or not the corporation has been prosecuted or convicted of the offence.

These provisions are substantially the same as the corresponding section (s. 79(1)) of the former *Employment Standards Act*. Section 137(1) provides that where a corporation contravenes any provision of the Act or the regulations, an officer, director or agent of the corporation, (or a person acting or claiming to act in such a role), who participates in such a contravention, is a party to, and guilty of, the offence, and is liable on conviction to the penalty provided for the offence, i.e., a maximum of $50,000 fine and/or 12 months' imprisonment. This applies whether such a person participates actively, e.g., by authorizing it, or passively by knowing of it, but failing to take steps to prevent it.

Section 137(2) indicates that the individual officer, director or agent may be convicted under this subsection, even though the corporate employer has not been prosecuted or convicted. Thus, a corporate director could be prosecuted under s. 137, even though a prosecution had not been commenced against the corporate employer under s. 132, or if it was, even though it did not result in a conviction.

The key to s. 137 is that the officer, director or agent of the corporation must be a person who "authorizes or permits. . . or acquiesces" in a contravention of the *Employment Standards Act, 2000* or regulations by the corporate employer.

The predecessor section to s. 137 was considered by the trial court in *R v Lark Manufacturing Inc.* and court's decision was upheld by the Ontario Court of Appeal. In that case, the trial court stated that the directors would not be liable under s. 79 of the former *Employment Standards Act* (now s. 137) if they proved, on a balance of probabilities, that they were duly diligent. In this regard, the trial court noted several points. Section 137 is a strict liability and not a full mens rea offence. The latter type of offence is one in which the accused must have had the intention to commit the act or omission that constitutes the offence or crime in question.

A strict liability offence, on the other hand, is one in which it is not necessary to show intent, but merely that the act or omission occurred, except that the accused can usually be acquitted by showing that he or she was duly diligent (i.e., took all reasonable precautions in the circumstances to prevent the violation

from taking place). An absolute liability offence is one in which it is not necessary to show intent, and the accused cannot be acquitted, even if he or she demonstrates due diligence. Therefore, a strict liability offence lies somewhere between a full mens rea offence and an absolute liability offence as far as the issue of due diligence is concerned.

The court in *R v Lark* also noted that corporate directors have the authority to run the company and the ultimate responsibilities for the actions of its employees unless the directors can show that in spite of all reasonable precautions being taken, the employees acted outside their instructions.

The court further noted that Supreme Court of Canada authority indicates that the reverse onus clause in the predecessor clause to s. 137(3) is not contrary to the Canadian Charter of Rights and Freedoms.

The trial judge in *R v Lark Manufacturing Inc.* found the directors guilty of an offence pursuant to s. 79 of the former *Employment Standards Act* (now s. 137) in that they did not prove, on a balance of probabilities, that they did not participate (actively or passively) in the corporation's failure to pay wages, vacation pay and termination pay to the employees. The court found that the directors foresaw or ought to have foreseen the closing of the business by the bank, and were aware of and contributed to the decision that was made to terminate the employees without proper notice as the business situation deteriorated. The trial court pointed to a number of pieces of evidence in this regard, including the fact that the defendants, in advance of the closure of Lark, were engaged in setting up a new business to perform the same work as Lark did.

On appeal, the Ontario Court (General Division) (now the Superior Court of Justice) reversed the conviction of the directors by the trial judge, finding that there was no evidence that the defendant directors knew in advance of the bank's intention to close the business, and no evidence that they knew in advance or concurrently that the bank would withhold the last payroll cheques. The Crown then appealed to the Ontario Court of Appeal, which restored the convictions imposed by the trial judge on the basis that the findings made by the trial judge were supported by evidence and should have been accepted by the judge on appeal, especially given the onus placed on the respondent directors by s. 137(3).

One of the issues that arose in the *Lark* case was whether or not the defendants were directors at the relevant times. The directors claimed to have resigned one week before the business closed and were therefore arguing that they were not responsible for the resulting failure of the employer to pay the employees. The trial court noted that s. 121(2) of the Ontario *Business Corporations Act,* RSO 1990, c B.16 requires that a notice of resignation by a director is not effective until such time as it is received by the corporation, and there was no evidence that the alleged notice of resignation was received by the corporation.

It is interesting to note that s. 137(2) states that an individual liable under the section may be an officer, director or agent of the corporation, or a person acting or claiming to act in such a capacity. This would cover individuals, for example, who were acting in the capacity of directors, and were holding themselves out as such, but who were technically, due to some defect in their appointment, not directors of the company. It would also cover situations such as where persons were not authorized to be agents of a company with regards to certain matters, but took it upon themselves to do so anyway, and in that unauthorized capacity participated in the contravention of the Act by the company.

Onus of Proof - s. 137(3)

137(3) In a trial of an individual who is prosecuted under subsection (1), the onus is on the individual to prove that he or she did not authorize, permit or acquiesce in the contravention.

This provision is similar to s. 79(2) of the former *Employment Standards Act*. Section 137(3) is a reverse onus provision. It states that in a prosecution under s. 137, the onus is on the director, officer or agent to prove that he or she did not participate, actively or passively, in the corporation's contravention of the Act and regulations. The individual does not have to prove this beyond a reasonable doubt. He or she need only prove it on a balance of probabilities. If he or she fails to prove this on a balance of probabilities, then a conviction would be entered by the Court provided that the Crown had proved beyond a reasonable doubt the other elements of the case, e.g., that the corporation violated the Act or regulations.

There is authority from the Supreme Court of Canada that such reverse onus clauses do not violate the Charter of Rights and Freedoms. See, for example, *R v Wholesale Travel Group Inc.*, [1991] 3 SCR 154, 1991 CanLII 39 (SCC).

Additional Penalty - s. 137(4); Collection by Director - s. 137(5)

137(4) If an individual is convicted under this section, the court may, in addition to any other fine or term of imprisonment that is imposed, assess any amount owing to an employee affected by the contravention and order the individual to pay the amount assessed to the Director.

(5) The Director shall attempt to collect the amount ordered to be paid under subsection (4) and if he or she is successful shall distribute it to the employee.

These provisions are similar in effect to the corresponding section (s. 79(3)) of the former *Employment Standards Act*. Sections 137(4) and (5) indicate that where an individual is convicted of an offence under s. 137, the court may, in addition to any other penalty, assess the amount owed by the corporation in regards to the employee(s), and may order the individual to pay the amount assessed to the Director of Employment Standards in trust, who would distribute to the employee(s) the amounts owed. Please note that unlike section 135(1) this section does not require the court to make an assessment and order the payment of wages to the Director upon the conviction of an individual.

Section 79(3) of the former *Employment Standards Act* was used by the Crown in the *R v Lark Manufacturing Inc.* case to obtain a court order for three directors of the company to pay approximately $500,000 in unpaid wages, vacation pay and termination pay to the Director of Employment Standards in trust for distribution to the employees. Note that the court's order against a director may exceed the maximum liability for wages and vacation pay in Part XX (Liability of Director) and may also include termination and severance pay. The limitations on directors' liabilities set out in Part XX do not apply where the director has been prosecuted and convicted of an office under s. 137.

It should be noted that under s. 79(3) of the former *Employment Standards Act* it was possible for the court to include in the order against the directors amounts for interest as well as the 10 per cent administration costs portion of the order to pay against the employer (although that was not done in *R v Lark Manufacturing Inc.*). Under s. 137 of the ESA 2000, the court could not order the employer to pay the 10 per cent administration costs portion of the order to pay, since s. 137(4) refers specifically to an "amount owing to an employee". However, the court's assessment of the amount owed to the employee could include interest.

Furthermore, no fine or imprisonment was ordered by the Court in *R v Lark Manufacturing Inc.*, presumably because the Court was of the view that the requirement for the directors personally to pay about $500,000 in employee entitlements was a sufficient deterrent on its own.

Finally, it should be noted that in s. 137 prosecutions (as in s. 79 prosecutions under the former *Employment Standards Act*) the court could put the convicted director on probation and make such probation conditional on payment of the monies ordered to be paid to the Director of Employment Standards in trust. In other words, if the convicted director does not pay as ordered by the court, that individual would have his or her probation revoked and would be liable to a jail sentence. However, such a conditional probation order, although asked for by the Crown in the Lark case, was not given by the trial Court, although a simple probation order was given, requiring the convicted individuals "to keep the peace and to be of good behaviour", meaning that the probation could be revoked if further violations of the law occurred.

No Prosecution Without Consent - s. 137(6)

137(6) No prosecution shall be commenced under this section without the consent of the Director.

This provision read together with s. 137(7) is substantially the same as the corresponding section (s. 79(4)) of the former *Employment Standards Act*. Section 137(6) provides that a prosecution under s. 137 of an officer, director or agent (or person acting or claiming to act in such a capacity) of a corporation that has contravened the Act or regulations can only be commenced with the consent of the Director of Employment Standards. This power has been delegated under s. 88 of the Act. See Delegation of Powers for further information.

Proof of Consent - s. 137(7)

137(7) The production of a document that appears to show that the Director has consented to a prosecution under this section is admissible as evidence of the Director's consent.

Section 137(7) provides that a document that appears to be the consent of the Director (or his delegate pursuant to s. 88 of the Act) to prosecute under s. 137 is admissible as evidence of the Director's consent.

ESA Part XXV Section 137.1 - Prosecution of Employment Standards Officer

Prosecution of Employment Standards Officer - s. 137.1(1)

137.1(1) No prosecution of an employment standards officer shall be commenced with respect to an alleged violation of subsection 89(2) without the consent of the Deputy Attorney General.

Section 137.1(1) provides that a prosecution of an employment standards officer for a failure to follow policy as established by the Director, as required by s. 89(2), may only be commenced if consented to by the Deputy Attorney General. For further discussion of s. 89(2) of the *Employment Standards Act, 2000*, see ESA Part XXI, s. 89(2).

Proof of Consent - s. 137.1(2)

137.1(2) The production of a document that appears to show that the Deputy Attorney General has consented to a prosecution of an employment standards officer is admissible as evidence of his or her consent.

Section 137.1(2) provides that a document that appears to be the consent of the Deputy Attorney General to prosecute an employment standards officer is admissible as evidence of his or her consent.
Prosecution of Employment Standards Officer, s. 137.1(1) Proof of Consent, s. 137.1(2)

ESA Part XXV Section 138 - Where Prosecution May be Heard

138(1) Despite section 29 of the *Provincial Offences Act*, the prosecution of an offence under this Act may be heard and determined by the Ontario Court of Justice sitting in the area where the accused is resident or carries on business, if the prosecutor so elects.

(2) The Attorney General or an agent for the Attorney General may by notice to the clerk of the court require that a judge of the court hear and determine the prosecution.

These provisions are similar to the corresponding section (s. 81) of the former *Employment Standards Act*. Section 138 provides that the prosecutor can choose, by giving notice to the clerk of the court, to have the prosecution of an offence conducted in the area where the accused resides or carried on business, rather than where the offence occurred. In addition, the Attorney General or his or her agent may request the matter to be heard by a judge rather than a justice of the peace.

For example, if the accused is a director of a corporation and resides in Toronto, the Crown may have the case heard by the Ontario Court of Justice in Toronto, even though the company carried on business in Hamilton.

ESA Part XXV Section 138.1 - Publication Re Convictions

138.1(1) If a person, including an individual, is convicted of an offence under this Act, the Director may publish or otherwise make available to the general public the name of the person, a description of the offence, the date of the conviction and the person's sentence.

(2) Authority to publish under subsection (1) includes authority to publish on the Internet.

(3) Any disclosure made under subsection (1) shall be deemed to be in compliance with clause 42(e) of the *Freedom of Information and Protection of Privacy Act*.

This provision was first introduced by the *Employment Standards Amendment Act (Hours of Work and Other Matters), 2004*, SO 2004, c 21, effective March 1, 2005.

Where a person has been convicted of an offence under the *Employment Standards Act, 2000*, this provision authorizes the Director to publish or otherwise make available to the public - including publication on the Internet - the name of the convicted person, a description of the offence, the date of the conviction, and the sentence received by the person.

Subsection (3) deems any disclosure made under subsection (1) to be in compliance with s. 42(e) of the *Freedom of Information and Protection of Privacy Act,* RSO 1990, c F.31. That section reads:

Where disclosure permitted

42. An institution shall not disclose personal information in its custody or under its control except,

(e) for the purpose of complying with an Act of the Legislature or an Act of Parliament or a treaty, agreement or arrangement thereunder;

ESA Part XXV Section 139 - Limitation Period

139 No prosecution shall be commenced under this Act more than two years after the date on which the offence was committed or alleged to have been committed.

This provision is similar in effect to the corresponding section (s. 82) of the former *Employment Standards Act*, except that the two-year period in the former *Employment Standards Act* commenced with the date on which the facts upon which the prosecution was based first came to the knowledge of the Director. Section 139 provides that no prosecution can be commenced under the Act more than two years after the date on which the offence was committed or alleged to have been committed.

The date on which an offence has been committed or is alleged to have been committed is determined by the nature of the offence. For example, a contravention of the *Employment Standards Act, 2000*'s requirements concerning the payment of wages (e.g., regular wages, overtime pay etc.) occurs on the date such wages were due under the Act. A contravention of s. 74 (Reprisal) may occur on the date the employer penalized the employee for exercising or attempting to exercise a right under the Act (e.g., the date the employee was suspended for having refused to agree to work excess hours). Finally, an offence may be committed when the employer (or other person) has failed to comply with an order, requirement or direction under this Act.

As an example, consider a case where an employer fails to pay overtime pay due on the employee's regular pay day on November 15, 2001 (for hours worked on November 1). The employee files a claim related to this contravention on February 1, 2002. An employment standards officer issues and serves an order to pay on May 1, 2002, and the employer neither pays the money required to be paid under the order nor files an appeal by May 31, 2002 (within 30 days of the order being served as required under s. 116(4)).

In this example, the Ministry at its discretion may prosecute the employer for failure to pay overtime, in which case prosecution must commence with two years of November 15, 2001, or the ministry may elect to prosecute for failure to comply with the order to pay, in which case the prosecution must commence within two years of the date the order was served, May 31, 2002.

Given that there is more time to commence a prosecution if the prosecution is for failure to comply with an order to pay, rather than where it is for failure to pay the wages on the regular pay day as required by the Act, why would the Crown ever be required to proceed within the latter period? The answer is that if the Crown wishes to prosecute the directors of the corporation under s. 137(1) of the Act for authorizing, permitting or acquiescing in the violation by the corporation, it may, in some situations, be more appropriate if the violation, which is the foundation of the prosecution, is considered to be the employer's failure to pay the wages on the regular pay day, rather than the subsequent failure to comply with the order to pay. This might be because the directors were no longer associated with the corporation at the time the order was served, but had been associated with the corporation at the time the wages first became owed to the employee.

See ESA Part XXII, s. 114 for further discussion of limitation periods for orders and notices.

A prosecution under Part III of the *Provincial Offences Act,* RSO 1990, c P.33 is generally considered to commence when a document called an "information" is laid under oath before a provincial judge or a justice of the peace.

ESA Part XXVI – Miscellaneous Evidentiary Provisions

The intent of Part XXVI of the *Employment Standards Act, 2000* is to establish certain evidentiary rules for prosecutions and proceedings under the Act.

ESA Part XXVI Section 140 - Copy Constitutes Evidence

Copy Constitutes Evidence - s. 140(1)

140(1) In a prosecution or other proceeding under this Act, a copy of an order or notice of contravention that appears to be made under this Act or the regulations and signed by an employment standards officer or the Board is evidence of the order or notice and of the facts appearing in it without proof of the signature or office of the person appearing to have signed the order or notice.

This provision is substantially the same as the corresponding section (s. 80(1)(a)) in the former *Employment Standards Act*. Section 140(1) means that in a prosecution or proceeding under the Act, a copy of an order or notice of contravention that appears to have been signed by an employment standards officer or the Board is evidence of the order or notice and the facts contained therein without proof of the signature or office of the person who appears to have signed it.

This section does not mean that the copy is irrefutable proof of the order or notice and the facts contained therein. It merely means that it is evidence that can be rebutted by contrary evidence.

Same - s. 140(2)

140(2) In a prosecution or other proceeding under this Act, a copy of a record or other document or an extract from a record or other document that appears to be certified as a true copy or accurate extract by an employment standards officer is evidence of the record or document or the extracted part of the record or document and of the facts appearing in the record, document or extract without proof of the signature or office of the person appearing to have certified the copy or extract or any other proof.

This provision is substantially the same as the corresponding section (s. 80(1)(b)) in the former *Employment Standards Act*. Section 140(2) means that in a prosecution or proceeding under the Act, a copy of a record or other document or a copy of an extract from a record or other document that appears to have been certified as a true copy or accurate extract by an employment standards officer is evidence of the record or document or extracted part of the record or document and the facts contained therein without proof of the signature or office of the person who appears to have certified it or any other proof.

This section does not mean that a certified copy or extract is irrefutable proof that it is a true copy or extract and that the facts contained therein are true. It merely means that it is evidence that can be rebutted by contrary evidence.

Same - s. 140(2.1)

140(2.1) In a prosecution or other proceeding under this Act, a copy of a record or other document or an extract from a record or other document that appears to be certified as a true copy or accurate extract by the Workplace Safety and Insurance Board is evidence of the record or document or the extracted part of the record or document and of the facts appearing in the record,

document or extract without proof of the signature or office of the person appearing to have certified the copy or extract or any other proof.

This provision was added to the ESA effective April 29, 2021 by the *COVID-19 Putting Workers First Act, 2021* which brought about paid infectious disease emergency leave and an associated reimbursement scheme for employers that is administered by the Workplace Safety and Insurance Board.

Subsection 140(2.1) means that in a prosecution or proceeding under the Act, a copy of a record or other document or a copy of an extract from a record or other document that appears to have been certified as a true copy or accurate extract by the Workplace Safety and Insurance Board is evidence of the record or document or extracted part of the record or document and the facts contained therein without proof of the signature or office of the person who appears to have certified it or any other proof.

This section does not mean that a certified copy or extract is irrefutable proof that it is a true copy or extract and that the facts contained therein are true. It merely means that it is evidence that can be rebutted by contrary evidence.

Certificate of Director Constitutes Evidence - s. 140 (3)

140(3) In a prosecution or other proceeding under this Act, a certificate that appears to be signed by the Director setting out that the records of the ministry indicate that a person has failed to make the payment required by an order or notice of contravention issued under this Act is evidence of the failure to make that payment without further proof.

This provision was amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009* effective November 6, 2009 to reflect the fact that orders and notices of contravention may be issued to a "person" (e.g. a client of a temporary help agency) and not just an employer.

Section 140(3) states that in a proceeding or prosecution under the Act, a certificate that appears to be signed by the Director setting out that a person has failed to make any payment under an order or notice of contravention issued under the Act is evidence of the failure to pay without any further proof.

The section does not mean that such a certificate is irrefutable proof of non-payment. It merely means that it constitutes evidence of the non-payment, which may be rebutted by contrary evidence.

The section refers to "an order or notice of contravention issued under this Act" and therefore would include orders issued by employment standards officers, as well as orders issued by an arbitrator (pursuant to s. 100) or by the Board.

The Director of Employment Standards has not delegated this power.

Same, Collector - s. 140(4)

140(4) In a prosecution or other proceeding under this Act, a certificate shown by a collector that appears to be signed by the Director setting out any of the following facts is evidence of the fact without further proof:

1. The Director has authorized the collector to collect amounts owing under this Act.

2. The Director has authorized the collector to collect a reasonable fee or reasonable disbursements or both.

3. The Director has, or has not, imposed conditions on an authorization described in paragraph 2 and has, or has not, determined what constitutes a reasonable fee or reasonable disbursements.

4. Any conditions imposed by the Director on an authorization described in paragraph 2.

5. The Director has approved a settlement under subsection 129(2).

This provision is substantially the same as the corresponding section (s. 80(3)) in the former *Employment Standards Act*.

Section 140(4) sets out various facts relating to the functioning of private collectors, which the Director of Employment Standards may certify. The section does not mean that the certificate of the Director is irrefutable proof of the facts set out therein. It merely means that it constitutes evidence of such facts, which may be rebutted by contrary evidence.

The Director of Employment Standards has not delegated this power.

Same, Date of Complaint - s. 140(5)

140(5) In a prosecution or proceeding under this Act, a certificate that appears to be signed by the Director setting out the date on which the records of the ministry indicate that a complaint was filed is evidence of that date without further proof.

This provision is substantially the same as the corresponding section (s. 80(4)) in the former *Employment Standards Act*.

Section 140(5) recognizes that the Director of Employment Standards can issue a certificate setting out the date on which the records of the ministry indicate that a complaint was filed. This date is important with regards to the limitation periods in the Act (e.g., ss. 96(3) and 114) and s. 111, which creates a limit on the recovery of monies under the Act. The certificate of the Director under this subsection is evidence of that date without further proof. The section does not mean, however, that the certificate of the Director is irrefutable proof of the date. It merely means that it constitutes evidence of such a fact, which may be rebutted by contrary evidence.

The Director of Employment Standards has not delegated this power.

ESA Part XXVII - Regulations

Statutes enacted by Ontario's Legislature often delegate the authority to make further laws to the Lieutenant Governor in Council (in effect the Cabinet). These additional laws, referred to as regulations, may, among other things, establish exemptions from the statute, set out detailed rules to complement what is in the statute, vary the rules or create additional rules to what is in the statute, provide definitions, etc.

Part XXVII of the *Employment Standards Act, 2000* contains s. 141, which sets out the type of regulations that the Legislature has authorized the Lieutenant Governor in Council to make. A number of regulations have been made using this authority. In interpreting these regulations, some general rules of interpretation should be remembered.

Firstly, the same rules of interpretation apply to regulations as to the statute itself.

Secondly, and probably most importantly, regulations are subordinate to the *Employment Standards Act, 2000*. If there is a conflict between a provision in the statute and a provision in a regulation, the statute prevails. (Note, however, that if the statute authorizes the making of regulations that create different rules than those set out in the Act, the regulation will, generally speaking, not be invalid.)

Thirdly, a regulation will not be considered to be valid, even if it is not in conflict with the Act if the Act does not authorize the making of the regulation.

Finally, it should be noted that the regulations made under the former *Employment Standards Act* would continue to apply (where relevant), with respect to matters governed by the former *Employment Standards Act*.

ESA Part XXVII Section 141 – Regulations

Regulations – s. 141(1)

141(1) The Lieutenant Governor in Council may make regulations for carrying out the purposes of this Act and, without restricting the generality of the foregoing, may make the following regulations:

1. **Prescribing anything for the purposes of any provision of this Act that makes reference to a thing that is prescribed.**

1.1 Prescribing a method of payment for the purposes of clause 11 (2) (d) and establishing any terms, conditions or limitations on its use.

2. Establishing rules respecting the application of the minimum wage provisions of this Act and the regulations.

2.0.1 Prescribing a class of employees that would otherwise be in the class described in subparagraph 1 iv of subsection 23.1 (1) and prescribing the minimum wage that applies to the class for the purposes of subsection 23.1 (2).

2.1 Establishing a maximum pay period, a maximum period within which payments made to an employee shall be reconciled with wages earned by the employee or both.

3. Exempting any class of employees or employers from the application of this Act or any Part, section or other provision of it.

4. Prescribing what constitutes the performance of work.

5. Prescribing what information concerning the terms of an employment contract should be provided to an employee in writing.

6. Defining an industry and prescribing for that industry one or more terms or conditions of employment that apply to employers and employees in the industry or one or more requirements or prohibitions that apply to employers and employees in the industry.

7. Providing that any term, condition, requirement or prohibition prescribed under paragraph 6 applies in place of or in addition to one or more provisions of this Act or the regulations.

8. Providing that a regulation made under paragraph 6 or 7 applies only in respect of workplaces in the defined industry that have characteristics specified in the regulation, including but not limited to characteristics related to location.

9. Providing that an agreement under subsection 17 (2) to work hours in excess of those referred to in clause 17 (1) (a) that was made at the time of the employee's hiring and that has been approved by the Director is, despite subsection 17 (6), irrevocable unless both the employer and the employee agree to its revocation.

10. Providing a formula for the determination of an employee's regular rate that applies instead of the formula that would otherwise be applicable under the definition of "regular rate" in section 1 in such circumstances as are set out in the regulation.

11. Providing for the establishment of committees to advise the Minister on any matters relating to the application or administration of this Act.

11.1 Providing, for the purposes of subsection 51 (4), that subsections 51 (1), (2) and (3) apply in respect of an employee during a leave under section 50.2.

11.2 Providing, for the purposes of subsection 51 (5), that subsections 51 (1), (2) and (3) do not apply in respect of an employee during a period of postponement under subsection 53 (1.1).

12. Prescribing the manner and form in which notice of termination must or may be given and the content of such notice.

13. Prescribing what constitutes a constructive dismissal.

14. Providing that the common law doctrine of frustration does not apply to an employment contract and that an employer is not relieved of any obligation under Part XV because of the occurrence of an event that would frustrate an employment contract at common law except as prescribed.

14.1 Providing that payments to an employee by way of pension benefits, insurance benefits, workplace safety and insurance benefits, bonus, employment insurance benefits, supplementary employment insurance benefits or similar arrangements shall or shall not be taken into account in determining the amount that an employer is required to pay to an employee under clause 60 (1) (b), section 61 or section 64.

15. Providing for and governing the consolidation of hearings under this Act.

16. Prescribing the minimum number of hours in a day or week for which an employee is entitled to be paid the minimum wage or a contractual wage rate and imposing conditions in respect of that entitlement.

16.1 Governing penalties for contraventions for the purposes of subsection 113 (1).

17. Defining any word or expression used in this Act that is not defined in it.

18. Prescribing the manner in which the information required by subsection 58 (2) shall be given to the Director.

19. Respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act.

Restricted Application – s. 141(1.1)

141(1.1) A regulation made under paragraph 11.1 or 11.2 of subsection (1) may be restricted in its application to one or more of the following:

1. Specified benefit plans.

2. Employees who are members of prescribed classes.

3. Employers who are members of prescribed classes.

4. Part of a leave under section 50.2

Regulations re Part XIII – s. 141(2)

141(2) The Lieutenant Governor in Council may make regulations respecting any matter or thing necessary or advisable to carry out the intent and purpose of Part XIII (Benefit Plans), and without restricting the generality of the foregoing, may make regulations,

(a) exempting a benefit plan, part of a benefit plan or the benefits under such a plan or part from the application of Part XIII;

(b) permitting a differentiation in a benefit plan between employees or their beneficiaries, survivors or dependants because of the age, sex or marital status of the employees;

(c) suspending the application of Part XIII to a benefit plan, part of a benefit plan or benefits under such a plan or part for the periods of time specified in the regulation;

(d) prohibiting a reduction in benefits to an employee in order to comply with Part XIII;

(e) providing the terms under which an employee may be entitled or disentitled to benefits under a benefit plan.

Regulations Re Organ Donor Leave – s. 141(2.0.1)

141(2.0.1) The Lieutenant Governor in Council may make regulations,

(a) prescribing other organs for the purpose of section 49.2;

(b) prescribing tissue for the purpose of section 49.2;

(c) prescribing one or more periods for the purpose of subsection 49.2 (5).

Same – s. 141(2.0.2)

141(2.0.2) A regulation made under clause (2.0.1) (c) may prescribe different periods with respect to the donation of different organs and prescribed tissue.

Transitional Regulations – s. 141(2.0.3)

141(2.0.3) The Lieutenant Governor in Council may make regulations providing for any transitional matter that the Lieutenant Governor in Council considers necessary or advisable in connection with the implementation of the amendments made by the *Fair Workplaces, Better Jobs Act, 2017*.

Same – s. 141(2.0.3.1)

141(2.0.3.1) The Lieutenant Governor in Council may make regulations providing for any transitional matter that the Lieutenant Governor in Council considers necessary or advisable in connection with the implementation of the amendments made by the *Making Ontario Open for Business Act, 2018*.

Transitional Regulations – s. 141(2.0.3.2)

141(2.0.3.2) The Lieutenant Governor in Council may make regulations providing for any transitional matter that the Lieutenant Governor in Council considers necessary or advisable in connection with the implementation of the amendments made by the *Restoring Ontario's Competitiveness Act, 2019*.

Transitional Regulations – s. 141(2.0.3.3)

141(2.0.3.3) The Lieutenant Governor in Council may make regulations providing for any transitional matter that the Lieutenant Governor in Council considers necessary or advisable in connection with the implementation of the amendments made by the *Employment Standards Amendment Act (Infectious Disease Emergencies), 2020*.

Transitional Regulations – s. 141(2.0.3.4)

The Lieutenant Governor in Council may make regulations providing for any transitional matter that the Lieutenant Governor in Council considers necessary or advisable in connection with the implementation of the amendments made by the *COVID-19 Putting Workers First Act, 2021*.

Transitional Regulations – s. 141(2.0.3.5)

The Lieutenant Governor in Council may make regulations providing for any transitional matter that the Lieutenant Governor in Council considers necessary or advisable in connection with the implementation of the amendments made by the *Working for Workers Act, 2021*.

Conflict With Transitional Regulations – s. 141(2.0.4)

141(2.0.4) In the event of a conflict between this Act or the regulations and a regulation made under subsection (2.0.3), (2.0.3.1), (2.0.3.2), (2.0.3.3), (2.0.3.4) or (2.0.3.5), the regulation made under subsection (2.0.3),(2.0.3.1), (2.0.3.2), (2.0.3.3), (2.0.3.4) or (2.0.3.5) prevails.

Regulations Re Infectious Disease Emergencies – s. 141(2.1)

141(2.1) The Lieutenant Governor in Council may make regulations,

(a) designating an infectious disease for the purposes of section 50.1;

(b) prescribing, for the purposes of subsection 50.1 (5.1), the date on which the entitlement to emergency leave under clause 50.1 (1.1) (b) starts or is deemed to have started;

(b.1) prescribing, for the purposes of subsection 50.1 (5.2), a later date on which the entitlement to paid leave under subsection 50.1 (1.2) ends;

(b.2) prescribing, for the purposes of subsection 50.1 (5.3), additional periods during which employees are entitled to paid leave under subsection 50.1 (1.2);

(c) providing that section 50.1 or any provision of it applies to police officers and prescribing one or more terms or conditions of employment or one or more requirements or prohibitions respecting emergency leave for infectious disease emergencies that shall apply to police officers and their employers;

(d) exempting a class of employees from the application of section 50.1 or any provision of it, and prescribing one or more terms or conditions of employment or one or more requirements or prohibitions respecting emergency leave for infectious disease emergencies that shall apply to employees in the class and their employers;

(d.1) exempting the Crown, a Crown agency, or an authority, board, commission or corporation, all of whose members are appointed by the Crown, from the application of section 50.1 or any provision of it;

(e) providing that a term, condition, requirement or prohibition prescribed under clause (c) or (d) applies in place of, or in addition to, a provision of section 50.1.

Same, Police Officers – s. 141(2.1.1)

141(2.1.1) A regulation made under clause (2.1) (c) may also provide that subsection 15 (7), sections 51, 51.1, 52 and 53, Part XVIII (Reprisal), section 74.12, Part XXI (Who Enforces this Act and What They Can Do), Part XXII (Complaints and Enforcement), Part XXIII (Reviews by the Board), Part XXIV (Collection), Part XXV (Offences and Prosecutions), Part XXVI (Miscellaneous Evidentiary Provisions) and Part XXVII (Regulations) apply to police officers and their employers for the purposes of section 50.1.

Regulations Re Emergency Leaves, Declared Emergencies, Infectious Disease Emergencies – s. 141(2.2)

141(2.2) A regulation made under subsection (2.0.3.3), (2.0.3.4) or (2.1), or a regulation prescribing a reason for the purposes of subclause 50.1 (1.1) (a) (iv) or (b) (vii) may,

(a) provide that it has effect as of the date specified in the regulation;

(b) provide that an employee who does not perform the duties of his or her position because of the declared emergency and the prescribed reason, or because of the prescribed reason related to a designated infectious disease, as defined in section 50.1, is deemed to have taken leave beginning on the first day the employee does not perform the duties of his or her position on or after the date specified in the regulation; or

(c) provide that clauses 74 (1) (a) and 74.12 (1) (a) apply, with necessary modifications, in relation to the deemed leave described in clause (b).

Retroactive Regulation – s. 141(2.2.1)

141(2.2.1) A regulation referred to in subsection (2.2) that specifies a date may specify a date that is earlier than the day on which the regulation is made.

Regulation Extending Leave – s. 141(2.3)

141(2.3) The Lieutenant Governor in Council may make a regulation providing that the entitlement of an employee to take leave under clause 50.1 (1.1) (a) is extended beyond the day on which the entitlement would otherwise end under subsection 50.1 (5) or (6), if the employee is still not performing the duties of his or her position because of the effects of the declared emergency and because of a reason referred to in subclause 50.1 (1.1) (a) (i), (ii), (iii) or (iv).

Same – s. 141(2.4)

141(2.4) A regulation made under subsection (2.3) may limit the duration of the extended leave and may set conditions that must be met in order for the employee to be entitled to the extended leave.

Regulations Re s. 50.1.1 – s. 141(2.5)

141(2.5) The Lieutenant Governor in Council may make regulations,

(a) prescribing the process for overpayment recovery under subsection 50.1.1 (18);

(b) prescribing the date by which the Board is required to repay the Ministry under subsection 50.1.1 (21);

(c) prescribing, for the purposes of subsection 50.1.1 (31), persons who may investigate possible contraventions of section 50.1.1;

(d) prescribing the powers under this Act that a person prescribed under clause (c) may exercise;

(e) specifying the parts of this Act that apply, with necessary modifications, if a person prescribed under clause (c) investigates a possible contravention of section 50.1.1;

(f) exempting the Crown, a Crown agency, or an authority, board, commission or corporation, all of whose members are appointed by the Crown, from the application of section 50.1.1 or any provision of it.

Regulations Re Part XIX – s. 141(3)

141(3) The Lieutenant Governor in Council may make regulations prescribing information for the purposes of section 77.

Regulations Re Part XXII – s. 141(3.1)

141(3.1) A regulation made under paragraph 16.1 of subsection (1) may,

(a) establish different penalties or ranges of penalties for different types of contraventions or the method of determining those penalties or ranges;

(b) specify that different penalties, ranges or methods of determining a penalty or range apply to contraveners who are individuals and to contraveners that are corporations; or

(c) prescribe criteria an employment standards officer is required or permitted to consider when imposing a penalty.

Regulations re Part XXV – s. 141(4)

141(4) If the Lieutenant Governor in Council is satisfied that laws are or will be in effect in the state for the enforcement of orders made under this Act on a basis substantially similar to that set out in section 126, the Lieutenant Governor in Council may by regulation,

(a) declare a state to be a reciprocating state for the purposes of section 130; and

(b) designate an authority of that state as the authority who may make applications under section 130.

Classes – s. 141(5)

141(5) A regulation made under this section may be restricted in its application to any class of employee or employer and may treat different classes of employee or employer in different ways.

Regulations May Be Conditional – s. 141(5.1)

141(5.1) A regulation made under this section may provide that it applies only if one or more conditions specified in it are met.

Terms and Conditions of Employment for an Industry – s. 141(6)

141(6) Without restricting the generality of paragraphs 6 and 7 of subsection (1), a regulation made under paragraph 6 or 7 may establish requirements for the industry respecting such matters as a minimum wage, the scheduling of work, maximum hours of work, eating periods and other breaks from work, posting of work schedules, conditions under which the maximum hours of work set out in the regulation may be exceeded, overtime thresholds and overtime pay, vacations, vacation pay, working on public holidays and public holiday pay and treating some public holidays differently than others for those purposes.

Repealed – s. 141(7)

Conditions, Revocability of Approval – s. 141(8)

141(8) A regulation made under paragraph 9 of subsection (1) may authorize the Director to impose conditions in granting an approval and may authorize the Director to rescind an approval.

Restriction Where Excess Hours Agreements Approved – s. 141(9)

141(9) An employer may not require an employee who has made an agreement approved by the Director under a regulation made under paragraph 9 of subsection (1) to work more than 10 hours in a day, except in the circumstances described in section 19.

Revocability of Part of Approved Excess Hours Agreement – s. 141(10)

141(10) If an employee has agreed to work hours in excess of those referred to in clause 17 (1) (a) and hours in excess of those referred to in clause 17(1)(b), the fact that the Director has approved the agreement in accordance with a regulation made under paragraph 9 of subsection (1) does not prevent the employee from revoking, in accordance with subsection 17(6), that part of the agreement dealing with the hours in excess of those referred to in clause 17(1)(b).

ESA Part XXVIII – Transition

Part XXVIII of the *Employment Standards Act, 2000* provides transitional provisions, amendments to the former *Employment Standards Act*, the repeal of five employment-related statutes, a provision for the Act to come into force on a date to be proclaimed by the Lieutenant Governor and the official short title of the Act.

ESA Part XXVIII Section 142 - Transition

Transition - s. 142(1)

142(1) Part XIV.1 of the *Employment Standards Act*, as it read immediately before its repeal by this Act, continues to apply only with respect to wages that became due and owing before the Employee Wage Protection Program was discontinued and only if the employee to whom the wages were owed provided a certificate of claim, on a form prepared by the Ministry, to the Program Administrator before the day on which this section comes into force.

Section 142(1) provides that Part XIV.1 of the *Employment Standards Act* will continue to apply, even though the former *Employment Standards Act* was repealed on September 4, 2001. See ESA Part XXVIII, s. 144 for further discussion.

Part XIV.1 of the former Act provides for employee eligibility for compensation for unpaid wages that were due and owing under the Employee Wage Protection Program, prior to the Program's discontinuance on October 29, 1997, by the *Public Sector Transition Stability Act, 1997*.

As of September 4, 2001, the application of Part XIV.1 of the former *Employment Standards Act* is limited to situations where:

1. The wages became due and owing before the discontinuance of the Employee Wage Protection Program on October 29, 1997; and
2. Prior to September 4, 2001, the employee to whom the wages were owed had submitted a certificate of claim to the Program Administrator of the Employee Wage Protection Program, on a form prepared by the Ministry of Labour.

For further information on the history and application of Part XIV.1 of the former *Employment Standards Act*, please see Legislative History.

ESA Part XXVIII - Section 143 OMITTED (Amends or repeals other Acts)

Amendment to *Employment Standards Act* - s. 143(1)

143(1) Section 38 of the *Employment Standards Act*, as amended by the Statutes of Ontario, 1993, chapter 27, Schedule and 1996, chapter 23, section 8, is further amended by adding the following subsection:

Birth, etc., after Dec. 30, 2000

(2.1) Despite subsection (2), an employee may, if the child in respect of which the employee wishes to take parental leave was born or came into the employee's custody, care and control for the first time on or after December 31, 2000, begin parental leave no more than 52 weeks after the day the child was born or came into the custody, care and control of the parent for the first time.

Section 38(1) of the former *Employment Standards Act* provided that an employee must commence parental leave no more than 35 weeks after the day in which the child was born or came into the employee's custody, care and control for the first time.

Section 143(1) of the *Employment Standards Act, 2000* amended s. 38 of the former *Employment Standards Act* by including s. 38(2.1). Section 38(2.1) extended the deadline for commencing parental leave to 52 weeks for any employee whose child was born or came into their custody, care and control for the first time on or after December 31, 2000.

Please see the discussion on pregnancy and parental leave in Legislative History for further information.

Amendment to Employment Standards Act - s. 143(2)

143(2) Section 40 of the Act is amended by adding the following subsection:

Birth, etc., after Dec. 30, 2000

(2) Despite subsection (1) and section 41, an employee may, if the child in respect of which the employee takes parental leave was born or came into the employee's custody, care and control for the first time on or after December 31,2000, extend the leave without notice to the employee's employer,

(a) if the employee took pregnancy leave, to the day that is 35 weeks after the parental leave began; or

(b) if the employee did not take pregnancy leave, to the day that is 37 weeks after the parental leave began.

Section 40 of the *Employment Standards Act* provided that an employee was entitled to 18 weeks of parental leave with regards to the birth or the coming into custody, care and control of a child.

Section 143(2) amended section 40 of the former *Employment Standards Act* by adding a new subsection (s. 40(2)). Section 40(2) increased the entitlement to parental leave for any employee whose child was born or came into their custody, care and control for the first time on or after December 31, 2000. Parental leave for such employees was extended from 18 weeks to 35 weeks, for an employee who took pregnancy leave. For employees who did not take pregnancy leave, parental leave was extended to 37 weeks.

Please see the discussion on pregnancy and parental leave in Legislative History for further information.

ESA Part XXVIII - Section 144 OMITTED (Amends or repeals other Acts)

Repeals - s. 144(1)

144(1) The *Employment Standards Act* and section 143 of this Act are repealed.

On September 4, 2001, the *Employment Standards Act, 2000* was proclaimed in force. It replaces the former *Employment Standards Act* as the legislation governing employment standards entitlements for the majority of Ontario workplaces.

With the coming into force of the *Employment Standards Act, 2000*, the former *Employment Standards Act* and s. 143 of the ESA 2000 were repealed. Please note, however, that the repeal of s. 143 of the ESA 2000 and the former *Employment Standards Act* does not affect any rights or entitlements that employees had under the former *Employment Standards Act* prior to September 4, 2001. The ESA 2000 cannot be retroactively applied. Instead, the ESA 2000 takes effect and only replaces the former *Employment Standards Act* as of September 4, 2001.

Application of the former *Employment Standards Act*

1. **The former Employment Standards Act will continue to be the source for employment standards and for investigation procedures and remedies for any alleged contraventions occurring prior to September 4, 2001.**

Example:

Wally files a complaint on December 3, 2001, that he has not been paid wages for 8 hours of work he performed on July 27, 2001. The amount should have appeared on his August 10, 2001, pay cheque, which covers the pay period July 15, 2001, to July 28, 2001.

Wally earned the wages for 8 hours of work on July 27, 2001, but the wages did not become due until August 10, 2001, the pay day for the pay period which covers July 27, 2001.

Even though the complaint was filed after the coming into force of the ESA 2000, both the date the wages were earned (July 27, 2001) and the date the alleged contravention of an employment standard (August 11, 2001 - one day after the pay cheque was due) occurred prior to September 4, 2001.

Therefore, the former *Employment Standards Act* would govern the investigation and available remedies for the alleged contravention. An order to pay for a contravention of s. 7(3) would be issued by an employment standards officer under s. 65(1.2) of the former *Employment Standards Act*.

2. **In addition, it is Program Policy that the former Employment Standards Act will also apply to the investigation and available remedies of an alleged contravention of an employment standard that occurred on or after September 4, 2001, but was based on an employment standard entitlement arising prior to September 4, 2001.**

Example:

Dana files a complaint on November 20, 2001, that her employer did not pay the premium rate for work she performed on Labour Day, 2001 (September 3, 2001). The amount was due on her September 15, 2001, pay cheque which covered the pay period August 26 to September 8, 2001.

The alleged contravention of an employment standard occurred when the employer failed to pay the premium rate on September 15, 2001. Although September 15 occurs after the coming into force date of the ESA 2000, the entitlement to the premium rate arose when it was earned on Labour Day, which was prior to the coming into force of the ESA 2000 on September 4, 2001.

The date of the entitlement to the premium rate (September 3, 2001) and not the date upon which it became due (September 15, 2001) is the determining date of which Act governs the investigation and available remedies for Dana's claim.

Therefore, an order to pay for a contravention of s. 7(3) would be issued by an employment standards officer under s. 65(1.2) of the former *Employment Standards Act*.

3. **Lastly, it is Program Policy that the former Employment Standards Act will also apply to the investigation and available remedies with respect to a contravention concerning a pregnancy leave or parental leave that commenced prior to September 4, 2001.**

Example 1:

April files a complaint on January 7, 2002, that her employer did not reinstate her to her position at the end of her parental leave on December 31, 2001.

The parental leave had commenced on May 1, 2001. Although the leave ended after the coming into force of the ESA 2000, the leave commenced prior to the coming into force of the ESA 2000 on September 4, 2001.

The date the leave commenced (and not the date the leave ended) is the determining date of which Act governs the investigation and available remedies for April's claim.

Therefore an order for compensation for a contravention of s. 43 of the former *Employment Standards Act* would be issued by an employment standards officer under s. 45 of the former *Employment Standards Act*.

Example 2:

Glenda files a complaint on May 29, 2002, that she was not reinstated to her position at the end of her parental leave on May 20, 2002.

Glenda had commenced a pregnancy leave on May 21, 2001, and that leave had ended on September 17, 2001. Her parental leave commenced on September 17, 2001, after the ESA 2000 came into force.

Because Glenda's complaint concerns her rights to reinstatement following her parental leave, the date the parental leave commenced is the determining date of which Act governs the investigation and available remedies for Glenda's claim.

Therefore an order for compensation and/or reinstatement for a contravention of s. 53 of the ESA 2000 would be issued by an employment standards officer under s. 104 of that Act.

Same - s. 144(2)

144(2) The One Day's Rest in Seven Act is repealed.

The *One Day's Rest in Seven Act,* RSO 1990, c O.7, provided that hospitality industry workers in towns with a population greater than 10,000 would have to receive at least one day off work in every seven-day period. The Act required that, if possible, the day off be a Sunday. Watchmen, janitors, supervisors, managers and certain part-time workers were excluded from the Act. A violation of the Act was subject to a maximum fine of $25,000. The *One Day's Rest in Seven Act* was repealed on September 4, 2001.

Section 18(4) of the ESA 2000 now provides a general entitlement for a period free from the performance of work of at least 24 consecutive hours in every work week or at least 48 consecutive hours in every two consecutive work weeks. The weekly and bi-weekly rest entitlements provided in s. 18(4) are applied to employees generally and are not limited to hospitality industry workers within towns with a population greater than 10,000.

For further information on the application of s. 18(4), please see ESA Part VII, s. 18(4).

Same - s. 144(3)

144(3) The Government Contracts Hours and Wages Act is repealed.

The *Government Contracts Hours and Wages Act,* RSO 1990, c G.8*,* was first enacted in 1936. It was enacted to establish a legislative foundation for a government fair wage policy for hours of work and wages for workers employed by private sector employers who were carrying out construction contracts for the provincial government.

The *Government Contracts Hours and Wages Act* was repealed on September 4, 2001. It should be noted, however, that in recent years, the government's fair wage policy has been established pursuant to an order-in-council independently of the *Government Contracts Hours and Wages Act*. The repeal of the *Government Contracts Hours and Wages Act*, therefore, has no impact on the current fair wage policy.

Same - s. 144(4)

144(4) The *Employment Agencies Act* is repealed.

The *Employment Agencies Act,* RSO 1990, c E.13, required that employment agencies, whether engaged in finding employees for employers or in finding employers for employees, be licensed. This Act was

repealed on March 31, 2001. As a result, employment agencies in Ontario are no longer required to obtain a licence to operate.

Same - s. 144(5)

144(5) The *Industrial Standards Act* is repealed.

The *Industrial Standards Act,* RSO 1990, c I.6*,* was first enacted in 1935. It provided a means for establishing minimum standards for hours, wages and other working conditions for specific industries that were different from the entitlements provided under the former *Employment Standards Act*. These entitlements were set out in schedules contained in regulations under the former *Employment Standards Act*.

By the time of the former *Employment Standards Act*'s repeal on September 4, 2001, only two industries were covered by active schedules: the women's coat and suit industry and the women's dress and sportswear industry. Entitlements for these two industries are now set out in O Reg 291/01 (Terms and Conditions of Employment in Defined Industries) under the ESA 2000.

ESA Part XXVIII - Section 145 OMITTED (Provides for coming into force of provisions of this Act)

145 This Act comes into force on a day to be named by proclamation of the Lieutenant Governor.

Section 143 of the *Employment Standards Act, 2000* was proclaimed into force as of December 30, 2000, amending the parental leave provisions of the former *Employment Standards Act*. Subsection 144(4) of the ESA 2000, providing for the repeal of the *Employment Agencies Act*, was proclaimed in force as of March 31, 2001. All remaining provisions of the ESA 2000 (including s. 144(1) which repealed s. 143) were proclaimed in force as of September 4, 2001.

ESA Part XXVIII - Section 146 OMITTED (Enacts short title of this Act)

146 The short title of this Act is the *Employment Standards Act, 2000*.

All bills introduced in the Legislative Assembly contain both a long title and a short title. However, once the bill receives Royal Assent, the statute created by the bill will for convenience usually be referred to only by its short title.

Employment Standards Act, 2000 – Regulations

Ontario Regulation 66/20 - Infectious Disease Emergency Leave REVOKED

O. Reg 66/20 was made on March 19, 2020 but pursuant to section 3 was deemed to have come into force on January 25, 2020. It prescribed certain matters related to infectious disease emergency leave.

On May 29, 2020, O. Reg 66/20 was revoked and replaced by O. Reg. 228/20. All of the substantive provisions of O. Reg 66/20 were maintained in O. Reg 228/20 - see O. Reg 228/20 for details

O Reg 125/16 Section 1 – Credit Card Charges

1. For the purposes of clause (f) of the definition of "tip or other gratuity" in subsection 1(1) of the Act, a tip or other gratuity does not include the portion of a service charge or similar charge imposed by a credit card company on an employer for processing a credit card payment made to the employer by a customer, as determined in accordance with the following:

1. **Multiply the total amount of the tip or other gratuity by the greater of,**
    i. **the per cent charged by the credit card company for processing the payment, and**
    ii. **1.5 per cent.**

O Reg 125/16 came into force on June 10, 2016. Clause (f) of the definition of "tip or other gratuity" in subsection 1(1) states that "tip or other gratuity" does not include such charges as may be prescribed relating to the method of payment used, or a prescribed portion of those charges. Accordingly, this regulation sets out what is not included for the purposes of clause (f) of the definition.

The regulation excludes some of the credit card processing fees from the definition of "tip or other gratuity". The amount that is excluded is determined by calculating the **greater of**: a) the amount of the tip or other gratuity multiplied by the per cent charged by the credit card company for processing the payment, or b) the amount of the tip or other gratuity multiplied by 1.5%.

By virtue of this exclusion, the amount that results from applying the formula in paragraph (1) is not governed by the rules in Part V.1 of the Act that prohibit employers from withholding tips or other gratuities from employees.

As such, where tips or other gratuities are paid by a customer on a credit card, an employer can deduct or withhold the amount that results from applying the formula in paragraph (1) from the amount of the tip or gratuity that was provided by the customer.

For example:

- a customer pays for a $100 restaurant bill on a credit card and adds a $10 tip onto the credit card that is intended for the waiter.
- the credit card processing fee is 1.5%.
- pursuant to this regulation, 15 cents ($10 x 1.5%) of the $10 tip is considered **not** to be a tip or other gratuity.
- therefore, the employer is not prohibited under Part V.1 from withholding 15 cents from the $10 tip.

This regulation addresses **credit card** processing fees only.eEmployers are not permitted to deduct or withhold from an employee’s tips or other gratuities any amounts representing **debit card** processing fees or any other type of processing fee..

Ontario Regulation 159/05 – Terms and Conditions of Employment in Defined Industries – Mineral Exploration and Mining

This regulation sets out special rules for certain employees engaged in the mineral exploration industry and the mining industry. Currently, the regulation's scope is limited to days free from work.

O Reg 159/05 Section 1 – Definitions

1. In this Regulation,

"defined industries" means the mineral exploration industry and the mining industry;

"mineral exploration" means prospecting, staking or exploration for minerals and any related activities, and includes,

(a) advanced exploration such as the excavation of an exploratory shaft, adit or decline, the extraction of minerals for the purpose of proving a mineral deposit, and the installation of a mill for test purposes, and

(b) site rehabilitation;

"mining" means the extraction, concentration and smelting of economic minerals from a mineral deposit for commercial purposes, and "mine" has a corresponding meaning.

O Reg 159/05 came into effect on March 31, 2005.

Defined Industry

Section 1(1) defines two industries to which O Reg 159/05 applies: the "mineral exploration" industry and the "mining" industry. (Note, however, that by virtue of s. 2, the regulation applies only to certain employees in the industry.)

Mineral Exploration

"Mineral exploration" is defined to mean prospecting, staking or exploration for minerals and related activities, and includes advanced exploration (such as the excavation of an exploratory shaft, adit or decline, the extraction of minerals for the purpose of proving a mineral deposit, and the installation of a mill for test purposes), and site rehabilitation. It should be noted that this is an inclusive definition rather than exhaustive. Other kinds of work might qualify as "related activities" to mineral exploration even though they are not listed in this s. 1 definition.

Mining

"Mining" is defined to mean the extraction, concentration and smelting of economic minerals from a mineral deposit for commercial purposes. "Mine" has a corresponding meaning.

O Reg 159/05 Section 2 – Scope

2(1) This Regulation is restricted in its application to,

(a) employees in the mineral exploration industry who work at sites of mineral exploration, subject to subsection (2);

(b) employees in the mining industry who,

i. work at mines, and

ii. during periods of consecutive days of work, do not live at their principal residences but instead live in bunkhouses, hotels or motels, or other temporary accommodation; and

(c) employers of the employees described in clauses (a) and (b).

(2) Clause (1) (a) does not apply to an employee whose employer's principal business is mining.

Section 2 narrows the scope of O Reg 159/05, by restricting its application in the following ways:

- To employees in the mineral exploration industry who work at sites of mineral exploration, subject to subsection (2). Subsection (2) states that an employee in the mineral exploration industry does not include an employee whose employer's principal business is mining. The effect is to restrict the scope of O Reg 159/05 so that it does not apply to employees engaged in mineral exploration if the principal business of their employer is mining.
- To employees in the mining industry who work at mines and who, during periods of consecutive days of work, do not live in their principal residences but instead are housed in temporary accommodation (e.g., bunkhouses, hotels, motels).
- To employers of the employees so defined.

The terms "mineral exploration" and "mining" are both defined in s. 1 of O Reg 159/05.

O Reg 159/05 Section 3 – Terms and Conditions of Employment

3. This Regulation sets out terms and conditions of employment that apply to employees and employers described in section 2.

Section 3 simply states that O Reg 159/05 sets out terms and conditions of employment that apply to those employees and employers in the defined industries of mineral exploration and mining described in s. 2.

O Reg 159/05 Section 4 – Days Free From Work

Application of ss. 4(2) & (3) – s. 4(1)

4(1) If the employer and the employee agree, subsections (2) and (3) apply instead of subsection 18 (4) of the Act.

Section 4(1) of O Reg 159/05 provides that, where the employer and employee in the defined industry agree, ss. 4(2) and 4(3) apply instead of s. 18(4) of the ESA 2000:

18(4) An employer shall give an employee a period free from the performance of work equal to,

(a) at least 24 consecutive hours in every work week; or

(b) at least 48 consecutive hours in every period of two consecutive work weeks.

There can be no substitution of ss. 4(2) and (3) of O Reg 159/05 for s. 18(4) of the ESA 2000 unless the employer and employee (or union) agree. Agreements to substitute the rest period requirement in s. 4 of O Reg 159/05 for the requirement in s. 18(4) of the ESA 2000 must be in writing in order to be valid. See ESA Part I, s. 1(3) and ESA Part 1, s. 1(3.1) for a full discussion of the requirements regarding written agreements.

Days Free From Work – s. 4(2)

4(2) The employer shall not require or permit the employee to perform work on more than 28 consecutive days.

Under s. 4(2) of O Reg 159/05, the requirement to provide a period of at least 24 consecutive hours free from performing work in every work week or at least 48 consecutive hours free from performing work in every period of two consecutive work weeks (under s. 18(4) of the ESA 2000), is replaced, if the employer and employee agree, by a provision that the employer not require or permit the employee to perform work on more than 28 consecutive days.

Determining Days Free From Work – s. 4(3)

4(3) The employer shall give the employee days free from work in accordance with the following:

1. The number of days free from work shall be equal to the number of consecutive days on which the employee worked before the period of days free from work, divided by three.

2. Despite paragraph 1, if dividing by three under that paragraph produces a mixed number, the number of days free from work shall be the next higher whole number.

3. If the employee is entitled to more than one day free from work, those days shall be consecutive, and all of them shall be given before the employee returns to work.

Subsection 4(3) of O Reg 159/05 then provides a formula for determining the days free from work that an employee is given following the work period of no more than 28 consecutive days, as follows:

1. The number of days free from work will be equal to the number of consecutive days the employee worked, divided by three. For example, if the employee worked 21 consecutive days, the employee would be given seven days free from work.
2. If the number of days off arrived at after dividing by three is a mixed number, then the result is "rounded up" to the next number. For example, if the employee worked 28 consecutive days under s. 4(2), applying the formula would give 9.33 days off, which would be rounded up to 10 days.
3. If the employee is entitled to more than one day off, the days free from work will be taken consecutively.

Like s. 18(4) of the ESA 2000 which it replaces, the maximum days of work permitted in s. 4(2) and the alternate rest period in s. 4(3) of O Reg 159/05 are employment standards as defined in s. 1(1) of the ESA 2000 and cannot be contracted out of or waived (s. 5(1) of the ESA 2000). An employer and an employee (or union) cannot, for example, agree that the employee will work more than twenty-eight days

in a row or take fewer consecutive days free from work than would be required under the s. 4(3) formula. Once an employer and employee (or union) in the defined industry have agreed to vary from the weekly/biweekly rest provisions in s. 18(4) of the ESA 2000 and to substitute the provisions in s. 4 of O Reg 159/05, the employer cannot require or permit more consecutive days of work than 28 days in a row and the employee cannot be given fewer consecutive days free from work than outlined in the s. 4(3) formula. There is no "switching back and forth" between the requirements of s. 18(4) and the alternate rest periods provided in s. 4(3) of the Regulation as the Regulation operates in lieu of s. 18(4).

Interaction with Other Hours of Work Provisions

The requirement in s. 4(2) that the employer not require or permit the employee to perform work on more than 28 consecutive days and the formula in s. 4(3) for determining the days free from work that an employee is given following the work period of no more than 28 consecutive days, operate simultaneously with the hours of work provisions in Part VII of the ESA 2000, as follows:

Maximum Daily Hours

Section 17(1) of the ESA 2000 provides for maximum daily hours of work of eight hours per day or, if there is an established workday that is longer than eight hours, the number of hours in that work day. However, under s. 17(2) of the ESA 2000, employers and employees can agree, in writing, that the employee will work up to a specified number of hours in excess of the daily limit. For such an agreement to be valid, s. 17(5) requires that non-unionized employees first be provided with a copy of the Ministry of Labour's information sheet on hours of work and overtime and that the agreement contains a statement by the employee acknowledging such receipt.

For further details about the maximum daily hours of work set out in s. 17(1); about agreements to vary from the maximum daily hours in s. 17(2); and about the requirement to provide the Ministry's information sheet as set out in s. 17(5), see ESA Part VII, s. 17.

Maximum Weekly Hours

Section 17(1) of the ESA 2000 provides for maximum weekly hours of work of 48 hours. However, under s. 17(3) of the ESA 2000, employers and employees can agree, in writing, that the employee will work up to a specified number of hours in excess of the weekly limit. For such an agreement to be valid, s. 17(5) requires that non-unionized employees first be provided with a copy of the Ministry of Labour's information sheet on hours of work and overtime and that the agreement contains a statement by the employee acknowledging such receipt.

For further details about the maximum weekly hours of work set out in s. 17(1); about agreements to vary from the maximum weekly hours in s. 17(3); and about the requirement to provide the Ministry's information sheet as set out in s. 17(5), see ESA Part VII, s. 17.

Daily Rest

Section 18(1) of the ESA 2000 requires that an employee be free from performing work for a particular employer for a period of at least 11 consecutive hours in each day. This requirement is subject to s. 18(2) (on-call employees) and s. 19 (exceptional circumstances).

For a discussion of the daily rest requirement in s. 18(1) of the ESA 2000, see ESA Part VII, s. 18.

On-Call Exception

Section 18(2) of the ESA 2000 sets out an "on-call exception" to s. 18(1) of the ESA 2000.

Under s. 18(2), the requirement that an employee have at least 11 hours free from performing work in each day (in accordance with s. 18(1) of the ESA 2000) does not apply to an employee who is on call and is called in during a period the employee would not otherwise have been expected to work. The on-call exception is an exception only to the requirement to provide 11 consecutive hours free from work each day as per s. 18(1); it does not operate as an exception to any other hours of work provisions.

For a discussion of the on-call exception in s. 18(2) of the ESA 2000, see ESA Part VII, s. 18 of the Manual.

Free From Work Between Shifts

Section 18(3) of the ESA 2000 requires employers to provide employees with a minimum period free from work of eight hours between successive shifts, with two exceptions. First, an employee may work successive shifts without the eight-hour free period if the total number of hours worked on the successive shifts is 13 or less. Second, the employer and employee can agree, in writing, to forego the eight-hour period entirely or to reduce its length. For a discussion of the interaction of s. 18(3) with the required daily rest in s. 18(1) of the ESA 2000, see ESA Part VII, s. 18 of the Manual.

Exceptional Circumstances

Section 19 of the ESA 2000 allows employers to require employees to work more daily or weekly hours than are permitted under s. 17 of the ESA 2000, or to work during a free period (daily, in between shifts and weekly or biweekly) as required by s. 18 of the ESA 2000 (and s. 4 of O Reg 159/05) in any of the specified circumstances, but only so far as is necessary to avoid serious interference with the ordinary working of the employer's establishment or operations.

For a discussion of the exceptional circumstances set out in s. 19 of the ESA 2000, see ESA Part VII, s. 19 of the Manual.

Eating Periods

Under s. 20 of the ESA 2000, an employer is required to provide an eating period of at least 30 minutes, timed so that no employee works longer than five consecutive hours without receiving an eating period, or, if the employer and employee agree (not necessarily in writing), two eating periods that together total at least 30 minutes within the same period of five consecutive hours.

For further details about eating periods in s. 20 of the ESA 2000, see ESA Part VII, s. 20.

Ontario Regulation 160/05 – Terms and Conditions of Employment in Defined Industries – Live Performances, Trade Shows and Conventions

This regulation sets out special rules for the terms and conditions of employment for employees engaged in the production of live performances (e.g., theatre, dance, comedy, etc.), trade shows and conventions. Currently, the regulation’s scope is limited to hours free from work.

O Reg 160/05 Section 1 – Definitions

O Reg 160/05 came into effect on March 31, 2005.

Defined Industry

1. In this Regulation,

"defined industry" means the industry of producing,

(a) live performances of theatre, dance, comedy, musical productions, concerts and opera, and

(b) trade shows and conventions;

Section 1 defines the industry to which O Reg 160/05 applies, to mean the industry of producing live performances of theatre, dance, comedy, musical productions, concerts and opera as well as trade shows and conventions.

Technical and Production Support

"technical and production support" includes stage and set construction, hair cutting and styling, preparation and fitting of wigs and costumes, preparation and application of make-up, preparation and operation of lighting, sound and stage equipment and props, and stage management.

Section 1 defines "technical and production support" to include the following activities: stage and set construction, hair cutting and styling, the preparation and fitting of wigs and costumes, the preparation and application of make-up, the preparation and operation of lighting, sound and stage equipment and props, and stage management.

It should be noted that this is an inclusive definition rather than exhaustive. Other kinds of work might qualify as "technical and production support" even though they are not listed in this s. 1 definition.

O Reg 160/05 Section 2 – Scope

2. This Regulation is restricted in its application to,

(a) employees in the defined industry who provide technical and production support; and

(b) employers of the employees described in clause (a).

Section 2 narrows the scope of O Reg 160/05 by restricting it in its application to employees in the defined industry who provide technical and production support and to their employers.

The terms “defined industry” and “technical and production support” are both defined in s. 1 of O Reg 160/05.

O Reg 160/05 Section 3 – Terms and Conditions of Employment

3. This Regulation sets out terms and conditions of employment that apply to employees and employers described in section 2.

Section 3 simply states that O Reg 160/05 sets out terms and conditions of employment that apply to employers and employees in the defined industry of live performances, trade shows and conventions.

O Reg 160/05 Section 4 – Hours Free From Work

Application of s. 4(1) – s. 4(1)

4(1) If the employer and the employee agree, subsection (2) applies instead of subsection 18(1) of the Act.

Section 4(1) of O Reg 160/05 provides that, where the employer and employee in the defined industry agree, s. 4(2) applies instead of s. 18(1) of the ESA 2000:

18(1) An employer shall give an employee a period of at least 11 consecutive hours free from performing work in each day.

Hours Free from Work – s. 4(2)

4(2) An employer shall give an employee a period of at least eight consecutive hours free from performing work in each day.

Under s. 4(2) of O Reg 160/05, the period of at least 11 consecutive hours free from performing work in each day (in s. 18(1) of the ESA 2000) is replaced by a period of at least eight consecutive hours free from performing work in each day. See ESA Part VII, s. 18(1) for a discussion of the meaning of "day".

There can be no substitution of s. 4(2) for s. 18(1) of the ESA 2000 unless the employer and employee (or union) agree. An agreement to substitute the eight-hour daily rest period in s. 4(2) for the eleven-hour daily rest period in s. 18(1) of the ESA 2000 must be in writing. See ESA Part I, s. 1(3) for a full discussion of the requirements regarding written agreements.

Like s. 18(1) of the ESA 2000 which it replaces, the daily rest in s. 4(2) of O Reg 160/05 is an employment standard as defined in s. 1(1) of the ESA 2000 and cannot be contracted out of or waived (s. 5(1)). An employer and employee (or union) in the defined industry could not, for example, agree to a six-hour daily rest period.

For a discussion of how the 11-hour daily rest operates, see s. 18(1) of the ESA 2000. (Substitute "eight hours" for "11 hours" each time it appears in order to understand the operation of the eight-hour daily rest period under s. 4(2) of O Reg 160/05.)

Interaction with Other Hours of Work Provisions

The requirement in s. 4(2) for at least eight consecutive hours off work in each day operates simultaneously with the hours of work provisions in Part VII of the ESA 2000, as follows:

On-Call Exception

Section 18(2) of the ESA 2000 sets out an "on-call exception" to s. 18(1) of the ESA 2000. This exception also applies if the daily rest period is eight consecutive hours as per s. 4(2) of O Reg 160/05, when it replaces the 11-hour daily rest requirement in s. 18(1) in the defined industry.

Under s. 18(2), the requirement that an employee have at least 11 hours free from performing work in each day (in accordance with s. 18(1) of the ESA 2000) or at least eight hours free from performing work in each day (in accordance with s. 4(2) of O Reg 160/05) does not apply to an employee who is on call and is called in during a period the employee would not otherwise have been expected to work. The on-call exception is an exception only to the requirement to provide 11 or eight consecutive hours free from work each day as per s. 18(1) of the ESA 2000 or s. 4(2) of O Reg 160/05. It does not operate as an exception to any other hours of work provisions.

For a discussion of the on-call exception, see s. 18(2) of the ESA 2000. Substitute s. 4(2) of O Reg 160/05 for s. 18(1) of the ESA 2000, and substitute eight hours for 11 hours, wherever the references appear.

Maximum Daily Hours

Section 17(1) of the ESA 2000 provides for maximum daily hours of work of eight hours per day or, if there is an established workday that is longer than eight hours, the number of hours in that work day. However, under s. 17(2) of the ESA 2000, employers and employees can agree, in writing, that the employee will work up to a specified number of hours in excess of the daily limit. For such an agreement to be valid, s. 17(5) requires that non-unionized employees first be provided with a copy of the Ministry of Labour's information sheet on hours of work and overtime and that the agreement contains a statement by the employee acknowledging such receipt.

For further details about the maximum daily hours of work, see ESA Part VII, s. 17(1); about agreements to vary from the maximum daily hours, see ESA Part VII, s. 17(2); and about the requirement to provide the Ministry's information sheet, see ESA Part VII, s. 17(5).

Maximum Weekly Hours

Section 17(1) of the ESA 2000 provides for maximum weekly hours of work of 48 hours. However, under s. 17(3) of the ESA 2000, employers and employees can agree, in writing, that the employee will work up to a specified number of hours in excess of the weekly limit. For such an agreement to be valid, s. 17(5) requires that non-unionized employees first be provided with a copy of the Ministry of Labour's information sheet on hours of work and overtime and that the agreement contains a statement by the employee acknowledging such receipt.

For further details about the maximum weekly hours, see ESA Part VII, s. 17(1); about agreements to vary from the maximum weekly hours, see ESA Part VII, s. 17(3); and about the requirement to provide the Ministry’s information sheet, see ESA Part VII, s. 17(5).

Free from Work between Shifts

Section 18(3) of the ESA 2000 requires employers to provide employees with a minimum period free from work of eight hours between successive shifts, with two exceptions. First, an employee may work successive shifts without the eight-hour free period if the total number of hours worked on the successive shifts is 13 or less. Second, the employer and employee can agree, in writing, to forego the eight-hour period entirely or to reduce its length. For a discussion of the interaction of s. 18(3) with the required daily rest in s. 18(1) of the ESA 2000, see s. 18(3).

Per s. 4 of O Reg 160/05, an employee and employer in the defined industry could agree in writing to a minimum daily rest of 8 hours (instead of the 11 hours in s. 18(1) of the ESA 2000). That employee could then agree in writing to work an eight and a 10-hour shift back to back, without any break between them. The agreement in writing would comply with s. 18(3) of the ESA 2000, but if it resulted in the employee receiving a daily rest of less than eight consecutive hours (per the agreement under s. 4 of O Reg 160/05), the schedule would be in violation of O Reg 160/05 and, therefore, would not be permitted. In other words, an employee in the defined industry cannot agree to work hours under s. 18(3) of the ESA 2000 that would result in the employee getting less than the eight consecutive hours free from work each day stipulated in s. 4(2) of O Reg 160/05.

Weekly/Biweekly Rest Periods

Section 18(4) of the ESA 2000 establishes weekly or bi-weekly free time requirements for employees. The free time periods must be at least either 24 consecutive hours in every "work week" or 48 consecutive hours in every two consecutive "work weeks".

See ESA Part VII, s. 18(4) for a discussion of the weekly/biweekly rest period provisions.

Exceptional Circumstances

Section 19 of the ESA 2000 allows employers to require employees to work more daily or weekly hours than are permitted under s. 17 of the ESA 2000, or to work during a free period (daily, in between shifts and weekly or biweekly) as required by s. 18 of the ESA 2000 (and s. 4(2) of O Reg 160/05) in any of the specified circumstances, but only so far as is necessary to avoid serious interference with the ordinary working of the employer's establishment or operations.

For a discussion of the exceptional circumstances, see ESA Part VII, s. 19.

Eating Periods

Under s. 20 of the ESA 2000, an employer is required to provide an eating period of at least 30 minutes, timed so that no employee works longer than five consecutive hours without receiving an eating period, or, if the employer and employee agree (not necessarily in writing), two eating periods that together total at least 30 minutes within the same period of five consecutive hours.

For further details about eating periods, see ESA Part VII, s. 20.

Ontario Regulation 228/20 - Infectious Disease Emergency Leave

O. Reg. 228/20 – Infectious Disease Emergency Leave - was filed on May 29, 2020. It revoked and replaced O. Reg. 66/20, which had the same title.

As of May 29, 2020, O. Reg. 228/20:

1. Incorporated the provisions from O. Reg. 66/20, which:
    - was made on March 19, 2020 but pursuant to s. 3 of that regulation was deemed to have come into force on January 25, 2020,
    - established which diseases are designated as infectious diseases for purposes of unpaid infectious disease emergency leave (and paid infectious disease emergency leave from April 19, 2021 to December 31, 2021),
    - prescribed a start date of January 25, 2020 for the entitlement to unpaid infectious disease emergency leave because of a reason set out in subclauses 50.1(1.1)(b)(i) to (vi) of the ESA related to coronavirus (COVID-19).
        - During the time O. Reg. 66/20 was in effect, the only reasons for which there was an entitlement to unpaid infectious disease emergency leave for COVID-19 were set out in subclauses 50.1(1.1)(b)(i) to (vi) of the ESA – i.e. there were no prescribed reasons pursuant to subclause (vii)).

2. Introduced new provisions that apply to **non-unionized** employees during the defined COVID-19 period and that:

    - prescribes a new reason pursuant to subclause 50.1(1.1)(b)(vii) of the ESA for which there is an entitlement to unpaid infectious disease emergency leave: the employee's hours of work are temporarily reduced or temporarily eliminated by the employer for reasons related to COVID-19,
    - deems employees who are not performing the duties of their position because of the prescribed reason to be on unpaid infectious disease emergency leave under the ESA in respect of any time that the employee is not performing their duties for that reason,
    - provides that employees whose hours of work or wages are temporarily reduced or temporarily eliminated by the employer for reasons related to COVID-19 are not considered to be laid off under the ESA,
    - provides that a temporary reduction or temporary elimination of an employee's hours of work or wages by the employer for reasons related to COVID-19 does not constitute a constructive dismissal under the ESA,
    - deems, with exceptions, complaints not to have been filed with the Ministry if they were filed for termination or severance of employment on the basis that the employee's wages or hours of work were temporarily reduced or temporarily eliminated by the employer for reasons related to COVID-19 during the defined COVID-19 period.

O. Reg. 228/20 initially defined the "COVID-19 period" to be retroactive to March 1, 2020 and to extend until six weeks after the day the emergency declared by Order in Council 518/2020 (Ontario Regulation 50/20) pursuant to the *Emergency Management and Civil Protection Act* is terminated or disallowed. That emergency was terminated on July 24, 2020, which meant the final day of the COVID-19 period was initially set to be September 4, 2020. However, the definition of the "COVID-19 period" has been amended several times:

- On September 3, 2020, the definition of "COVID-19 period" was amended to extend the COVID-19 period until January 2, 2021.
- On December 17, 2020, the definition was amended to extend the COVID-19 period until July 3, 2021.
- On June 4, 2021, the definition was amended to extend the COVID-19 period until September 25, 2021.
- On September 16, 2021, the definition was amended to extend the COVID-19 period until January 1, 2022.

As such, the "COVID-19 period" is March 1, 2020 to January 1, 2022.

O. Reg. 228/20 was amended on August 24, 2020 to prescribe an additional reason pursuant to clause (vii) of s. 50.1(1.1)(b) of the ESA for which employees are entitled to unpaid infectious disease emergency leave, retroactive to July 24, 2020: an order made under s. 7.0.2 of the *Emergency Management and Civil Protection Act* that is continued under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, or any amendment to such an order, that relates to the designated infectious disease applies to the employee.

O. Reg. 228/20 was amended on August 31, 2021 to prescribe, in s. 11, a later end date for entitlements to paid infectious disease emergency leave.

O. Reg. 228/20 Subsection 1(1) – Interpretation and Application

1. (1) In this Regulation,

"COVID-19 period" means the period beginning on March 1, 2020 and ending on January 1, 2022.

Subsection 1(1) provides the definition of the term "COVID-19 period". This term is used in several provisions of the regulation to establish the time period during which certain rules in the regulation apply.

"COVID-19 period" means the period beginning on March 1, 2020 and ending on January 1, 2022.

The definition of "COVID-19 period" in s. 1(1) originally provided that it ended on the date that is six weeks after the day the COVID-19 declared emergency (i.e. the emergency declared by Order in Council 518/2020 – O. Reg. 50/20 - on March 17, 2020) is terminated or is disallowed by the Legislature. As that emergency was terminated on July 24, 2020, the final day of the COVID-19 period was originally set to be September 4, 2020. The definition was amended on September 3, 2020 to extend the COVID-19 period to January 2, 2021, on December 17, 2020 to extend the COVID-19 period to July 3, 2021, on June 4, 2021 to extend the COVID-19 period to September 25, 2021, and on September 16, 2021 to extend the COVID-19 period to January 1, 2022.

O. Reg. 228/20 Subsection 1(2) – Interpretation and Application

1 (2) Subsection 2 (2) and sections 4 to 10 do not apply to an employee who is represented by a trade union.

Subsection 1(2) provides that certain provisions of O. Reg. 228/20 do not apply to employees who are represented by a trade union.

It does not matter for the purposes of ss. 1(2) whether or not the unionized employees are covered by a collective agreement. So long as the employees are represented by a trade union, the specified provisions do not apply to them. If an employee is or was represented by a trade union for only part of the COVID-19 period (e.g. a trade union was certified to represent the employee on March 27, 2020) and the employee meets the conditions for the deemed leave and other specified provisions, the specified provisions will not apply to the employee during the time the employee is or was represented by the trade union but will apply during the rest of the COVID-19 period.

The provisions that do **not** apply to employees who are represented by a trade union are:

- ss. 2(2), 4 and 5: these provisions create an entitlement to unpaid infectious disease emergency leave - and deem employees to be on the unpaid leave - when the employer temporarily reduces or temporarily eliminates an employee's hours of work for reasons related to COVID-19 during the COVID-19 period.
- s. 6: provides that employees whose hours of work or wages are temporarily reduced or temporarily eliminated by the employer for reasons related to COVID-19 during the COVID-19 period are not considered to be laid off under the ESA.
- s. 7: provides that employees whose hours of work or wages are temporarily reduced or temporarily eliminated by the employer for reasons related to COVID-19 during the COVID-19 period are not considered to be constructively dismissed under the ESA.
- s. 8: deems certain complaints not to have been filed with the Ministry.
- s. 9: establishes when an employee's hours of work or wages are considered to be reduced for the purposes of O. Reg. 228/20.

- s. 10: provides that, for greater certainty, O. Reg. 228/20 applies to assignment employees and provides that certain provisions apply with necessary modifications.

O. Reg. 228/20 Section 2 – Designated Diseases

2. (1) For the purposes of section 50.1 of the Act, the following diseases are designated as infectious diseases:

> **1. Diseases caused by a novel coronavirus, including Severe Acute Respiratory Syndrome (SARS), Middle East Respiratory Syndrome (MERS) and coronavirus (COVID-19).**

(2) Despite subsection (1), the designation of coronavirus (COVID-19) as an infectious disease applies with respect to the reason prescribed in paragraph 1 of subsection 4 (1) only during the COVID-19 period.

Subsection 2(1) establishes which diseases are designated as infectious diseases for the purposes of unpaid infectious disease emergency leave in ESA Part XIV, s. 50.1 (and paid infectious disease emergency leave from April 19, 2021 to December 31, 2021). It establishes that diseases caused by a novel coronavirus are designated as infectious diseases. The provision specifically names Severe Acute Respiratory Syndrome (SARS), Middle East Respiratory Syndrome (MERS) and coronavirus (COVID-19). Note, however, that the list of diseases is an inclusive list. This means that there may be other diseases caused by a novel coronavirus that are also designated as infectious diseases for the purposes of infectious disease emergency leave.

Subsection 2(2) says that despite ss. 2(1), COVID-19 is designated as an infectious disease with respect to the reason prescribed in paragraph 1 of ss. 4(1) (i.e. where an employer temporarily reduces or temporarily eliminates an employee's hours of work for reasons related to the designated infectious disease) only during the COVID-19 period.

The COVID-19 period is defined in s. 1 to start on March 1, 2020 and to end January 1, 2022.

Pursuant to ss. 1(2) of O. Reg. 228/20, ss. 2(2) does not apply to employees who are represented by a trade union.

Section 2 must be read subject to ss. 3, 3.1(2) and 4(1.1) of O. Reg. 228/20, which establish start dates for the different reasons that create an entitlement to unpaid infectious disease emergency leave. At the time of writing, coronavirus (COVID-19) was the only infectious disease for which there is a start date. This means that at the time of writing, even though there are additional diseases designated as infectious diseases per section 1, the only disease for which unpaid infectious disease emergency leave may be taken is coronavirus (COVID-19).

O. Reg. 228/20 Section 3 – Entitlement Start Date, Reasons Under the Act

3(1). Entitlement to emergency leave under clause 50.1 (1.1) (b) of the Act because of a reason set out in subclauses 50.1(1.1)(b)(i) to (vi) of the Act related to coronavirus (COVID-19) is deemed to have started on January 25, 2020.

ESA Part XIV, s. 50.1(5.1) provides that "An employee is entitled to take a leave under clause (1.1)(b) [unpaid infectious disease emergency leave] **starting on the prescribed date**."

Subsection 3(1) prescribes a start date for the entitlement to unpaid infectious disease emergency leave because of a reason related to coronavirus (COVID-19) set out in subclauses 50.1(1.1)(b)(i)-(vi) of the ESA. Pursuant to ss. 3(1), the entitlement related to these reasons is deemed to have started on January 25, 2020. (**Paid** infectious disease emergency leave has a different start date, and a specified end date: see ss. 50.1(5.2) for details.)

Different start dates are prescribed for other reasons giving rise to the entitlement to unpaid infectious disease emergency leave:

- Subsection 3.1(2) prescribes a start date for the entitlement to unpaid infectious disease emergency leave that arises because of the prescribed reason in paragraph 1 of subsection 3.1(1) of O. Reg. 228/20 pursuant to subclause 50.1(1.1)(vii) – i.e. certain orders under the *Emergency Management and Civil Protection Act* that were continued under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, or any amendment to those orders, apply to the employee – see below for details.
- Subsection 4(1.1) prescribes a start date – and a specific period during which the entitlement applies – for the entitlement to unpaid infectious disease emergency leave that arises because of the prescribed reason in paragraph 1 of subsection 4(1) of O. Reg. 228/20 related to COVID-19 pursuant to subclause 50.1(1.1)(vii) - i.e. where an employer temporarily reduces or temporarily eliminates a non-unionized employee's hours of work for reasons related to COVID-19) – see below for details.

Note that this regulation does not prescribe a start date for an entitlement to unpaid infectious disease emergency leave with respect to any of the other designated infectious diseases set out in O. Reg. 228/20, s. 2 (i.e., other diseases caused by a novel coronavirus, including Severe Acute Respiratory Syndrome (SARS) and Middle East Respiratory Syndrome (MERS)). As such, at the time of writing, employees are not entitled to take unpaid infectious disease emergency leave with respect to any of the other designated diseases; the entitlement arises pursuant to s. 3 only in respect of the coronavirus (COVID-19).

Note that this regulation provides an entitlement to unpaid infectious disease emergency leave for a reason related to Coronavirus (COVID-19) that is:

- **retroactive to January 25, 2020** if the leave was for a reason set out in subclauses (i)-(vi) of 50.1(1.1)(b) of the Act,
- **retroactive to March 1, 2020** if the leave was for the reason prescribed in paragraph 1 of ss. 4(1) of O. Reg. 228/20 per subclause (vii) of s. 50.1(1.1)(b) of the Act, and
- **retroactive to July 24, 2020** if the leave was for the reason prescribed in paragraph 1 of ss. 3.1(1) of O. Reg. 228/20 per subclause (vii) of s. 50.1(1.1)(b) of the Act.

This means that an employee could retroactively designate absences from work for a reason set out in subclauses (i)-(iv) of s. 50.1(1.1)(b) between January 25, 2020 and March 18, 2020 (prior to when the infectious disease regulation was first put in place) as unpaid infectious disease emergency leave if the employee met the required eligibility criteria (i.e., a reason listed in s. 50.1(1.1)(b)(i)-(vi)) for the leave **at that time**. A retroactive leave of this nature raises a number of practical questions. For more information, see the discussion in ESA Part XIV, s. 50.1.

It also means that an employee is retroactively deemed to have been on unpaid infectious disease emergency leave in respect of any time the employee does not perform the duties of his or her position because the employer temporarily reduced or eliminated the employee's hours of work for COVID-19 related reasons from March 1, 2020 to May 28, 2020 (prior to O. Reg. 228/20 being filed).

With respect to the reason prescribed in paragraph 1 of ss. 3.1(1) of O. Reg. 228/20 (i.e., certain orders issued under the *Emergency Management and Civil Protection Act* that are continued under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* apply to the employee): although the regulation was amended August 24, 2020 to prescribe this reason and provide that the entitlement is retroactive to July 24, 2020, it was Program policy that employees in the situation described in the regulation were entitled to unpaid infectious disease emergency leave through clause (iii) of s. 50.1(1.1)(b) and that the amendment simply provides greater certainty that employees who are subject to such orders are entitled to the leave.

O. Reg. 228/20 Section 3.1 - Prescribed Leave, Orders Continued Under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*

3.1 (1) For the purposes of subclause 50.1 (1.1) (b) (vii) of the Act, the following reason is prescribed:

1. **An order made under section 7.0.2 of the *Emergency Management and Civil Protection Act* that is continued under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, or any amendment to such an order, that relates to the designated infectious disease applies to the employee.**

3 (2) Entitlement to emergency leave under clause 50.1 (1.1) (b) of the Act because of the reason prescribed in paragraph 1 of subsection (1) related to coronavirus (COVID-19) is deemed to have started on July 24, 2020.

Clause 50.1(1.1)(b) of the ESA sets out the reasons for which an employee may take unpaid infectious disease emergency leave. Subclause (vii) of that provision provides that additional reasons may be prescribed by regulation.

Subsection 3.1(1) prescribes an additional reason that qualifies an employee for unpaid infectious disease emergency leave: an order made under section 7.0.2 of the *Emergency Management and Civil Protection Act* (EMCPA) that is continued under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* (ROA), or any amendment to such an order, that relates to the designated infectious disease applies to the employee.

When the ROA came into force on July 24, 2020, some emergency orders that were initially made under section 7.0.2 of the EMCPA when the first declared emergency for COVID-19 was in effect (March 17, 2020 to July 24, 2020) ceased to be EMCPA orders but were continued under the ROA.

As per s. 3.1 of O. Reg. 228/20, employees who are not performing their duties because any such orders apply to them are entitled to unpaid infectious disease emergency leave.

The Program considers an order to "appl[y] to" an employee only if the order is directed at the employee, i.e., where the employee, either individually or as part of a group, is the subject of the requirement, prohibition or other direction made in the order.

In other words, this condition is not satisfied if an employee is only indirectly affected by the order or by the consequences of someone else complying with the order.

For example, an order that requires restaurants to close "applies to" the owners of restaurants. It does not apply to the employees of restaurants, even though they are affected by the closure.

At the time of writing, the orders referred to as "one employer" and "one location" orders (O. Reg. 158/20 – "Limiting Work to a Single Retirement Home", O. Reg. 146/20 – "Limiting Work to a Single Long-Term Care Home", and O. Reg. 177/20 "Congregate Care Settings") are orders continued under the ROA that may entitle certain employees to unpaid infectious disease emergency leave under this provision.

As the ROA orders – including who they apply to - may be amended from time to time, s. 3.1 provides that an employee is eligible for unpaid infectious disease emergency leave pursuant to s. 3.1 only if the order applies to the employee at the relevant time.

The start date for the entitlement to unpaid infectious disease emergency leave for this prescribed reason is retroactive to July 24, 2020, as that is the date the ROA took effect, and the EMCPA orders ceased to be orders under the EMCPA and were continued under the ROA.

Prior to July 24, 2020 - when the first emergency declaration was in place and the orders were EMCPA orders – it was Program policy that employees who were not performing the duties of their position because of a s. 7.0.2 EMCPA order that applied to them met the eligibility criteria for both declared emergency leave and unpaid infectious disease emergency leave. With respect to declared emergency leave, the Act explicitly references s. 7.0.2 EMCPA orders; with respect to unpaid infectious disease emergency leave it was Program policy that the entitlement arose based on subclause (iii) of s. 50.1(1.1)(b): these employees were considered to be subject to a control measure on the basis of a direction issued by the Government of Ontario. (It continues to be the Program's position that orders under the EMCPA amount to a "direction" issued "by the Government of Ontario" for employees to whom the order applies.)

It was similarly Program policy that employees who were not performing the duties of their position because of an EMCPA order that applied to the employee and that was continued under the ROA were eligible for unpaid infectious disease emergency leave based on subclause (iii) of s. 50.1(1.1)(b): these employees were considered to be subject to a control measure on the basis of a direction issued by the Government of Ontario. From the Program's perspective, this amendment provides greater certainty that employees in this situation are entitled to unpaid infectious disease emergency leave. As such, it is the Program's view that employees' entitlements have not changed as a result of the amendment. (Similarly, even though there is no provision corresponding to s. 3.1 of O. Reg. 228/20 that applies with respect to **paid** infectious disease emergency leave, it is the Program's position that employees meet the eligibility criterion for paid infectious disease emergency leave in ss. 50.1(1.2), para. 3 – which is worded the same as the criterion for unpaid infectious disease emergency leave set out in subclause (iii) of s. 50.1(1.1)(b) - where the employee is not performing the duties of his or her position because the employee is subject to an order that relates to COVID-19 under the ROA.)

O. Reg. 228/20 Section 4 – Prescribed Leave, Deemed Leave

4(1). For the purposes of subclause 50.1 (1.1) (b) (vii) of the Act, the following reason is prescribed:

1. **The employee's hours of work are temporarily reduced or eliminated by the employer for reasons related to the designated infectious disease.**

4 (1.1). Entitlement to emergency leave under clause 50.1 (1.1) (b) of the Act because of the reason prescribed in paragraph 1 of subsection (1) related to coronavirus (COVID-19) is deemed to have started on March 1, 2020, and applies during the COVID-19 period.

4(2). An employee who does not perform the duties of his or her position because of the reason set out in paragraph 1 of subsection (1) is deemed to be on infectious disease emergency leave under section 50.1 of the Act in respect of any time during the COVID-19 period that the employee does not perform such duties because of that reason.

Pursuant to ss. 1(2) of O. Reg. 228/20, s. 4 does not apply to employees who are represented by a trade union.

Clause 50.1(1.1)(b) of the ESA sets out the reasons for which an employee may take unpaid infectious disease emergency leave. Subclause (vii) of that provision provides that additional reasons may be prescribed by regulation.

Subsection 4(1) prescribes an additional reason that qualifies an employee for unpaid infectious disease emergency leave, ss. 4(1.1) provides the start date for the entitlement and specifies the period during which the entitlement applies, and ss. 4(2) **deems** an employee who fits within that reason to be on the leave in respect of any time during the COVID-19 period (March 1, 2020 to January 1, 2022) the employee is not performing the duties of the employee's position for that reason.

These subsections must be read together with ss. 50.1(1.1), which reads in part:

> "An employee is entitled to a leave of absence without pay if the employee will not be performing the duties of his or her position,
>
> …
>
> (b) **because** of one or more of the following reasons related to a designated infectious disease…" [emphasis added]

Together, s. 4 of O. Reg. 228/20 and ss. 50.1(1.1) of the ESA establish that where, from March 1, 2020 to the end of the COVID-19 period (as defined in s. 1 of O. Reg. 228/20), an employee who was not/is not be performing the duties of his or her position **because** the employee's hours of work are temporarily reduced or temporarily eliminated by the employer for reasons related to COVID-19, is deemed to be on unpaid infectious disease emergency leave in respect of any time the employee is not performing his or her duties because of that reason.

For example, for reasons related to COVID-19, an employer temporarily changes an employee's schedule of 9 am–5 pm every weekday to 9 am–1 pm every weekday from April 1, 2020 to August 30, 2020. As per ss. 4(2), this employee is deemed to be on unpaid infectious disease emergency leave every weekday from 1 pm to 5 pm from April 1, 2020 to August 30, 2020. As per ss. 4(3), all requirements and prohibitions that apply to Part XIV leaves (with the exceptions set out in ss. 4(4)-(6))

apply to employees who are deemed to be on a leave under this provision. (See the discussion of ss. 4(4)-(6) below for details.)

It is Program policy that the condition that the temporary reduction or temporary elimination of the employee's hours by the employer "for reasons related to the designated infectious disease" will be met so long as **at least one** of the reasons for the temporary reduction or elimination was related to the designated infectious disease.

For a discussion of the term "temporarily" in relation to a reduction or elimination, see the discussion under s. 6. For a discussion of the terms "reduced or eliminated", see the discussion under s. 9.

Note that it may be argued that there is some overlap between s. 4 of O. Reg. 228/20, which prescribes an additional reason for which employees are entitled to infectious disease emergency leave and also deems employees who meet this criteria to be on unpaid infectious disease emergency leave and both clause (iv) of s. 50.1(1.1)(b) and para. 3 of s. 50.1(1.2), which provide that an employee is entitled to take unpaid infectious disease emergency leave or paid infectious disease emergency leave, respectively, where the employee is under a direction given by his or her employer to, for example, not attend work, in response to the employer's concern that the employee may expose other individuals in the workplace to COVID-19. Although it may be argued that s. 4(1) of O. Reg. 228/20 should apply to the situation where the employer temporarily reduced or eliminated an employee's hours of work out of a concern that the employee may expose others in the workplace to COVID-19, it is Program policy that where employees are not performing the duties of their position because they are under a direction given by their employer in response to a concern of the employer that they may expose other individuals in the workplace to the designated infectious disease, the employee is eligible for infectious disease emergency leave under clause (iv) of s. 50.1(1.1)(b) and/or para. 3 of s. 50.1(1.2), rather than under s. 4(1) of O. Reg. 228/01.

An employee is deemed to be on unpaid leave only during the hours of work that the employee would have otherwise been working had the employer not temporarily reduced or temporarily eliminated the hours for reasons related to COVID-19. In other words, the deemed leave provisions **do not** give employees a right to a leave and to refuse hours/not attend work during hours the employer schedules them to work (and assert that they instead are deemed to be on leave for that time), solely because the employer has temporarily reduced the employee's hours. For example, take a situation where an employer, for reasons related to COVID-19, temporarily reduces an employee's hours from March 15, 2020 to June 20, 2020 from eight hours a day Monday to Friday down to eight hours on Mondays only. The employee is deemed to be on unpaid infectious disease emergency leave from Tuesday through Friday during this period. Does this employee have a right to be on infectious disease emergency leave on **Mondays** pursuant to s. 4(1), paragraph 1?

The answer is no. As per s. 50.1(1.1) of the ESA, an employee is entitled to infectious disease emergency leave if the employee will not be performing the duties of his or her position **because** of one of the listed reasons. **Where the employee is scheduled to work, the listed reason in s. 4 of Reg 228/20 does not apply**. An employee who used to be scheduled to work every weekday and who is now only scheduled to work Mondays is **not** considered to not be performing the duties of his or her position on Mondays just because the employer reduced her hours the rest of the week. Employees have the right to be on infectious disease emergency leave only for as long as the event or condition that triggered the entitlement lasts. After the triggering event is over or the condition is no longer present, the employee's normal obligations to attend at work are resumed (assuming the employee does not have an entitlement to infectious disease emergency leave pursuant to a different eligibility criterion – or to another leave – on

the Monday). This result is also made clear in the words of ss. 4(2), which provide that the employee is deemed to be on the leave "in respect of any time … that the employee does not perform such duties because of that reason".

Employers **are not prohibited** under the ESA from scheduling employees to be on vacation at times when the employee's hours could – absent the vacation - have been temporarily reduced or eliminated for reasons related to COVID-19 and the employee - had he or she not been scheduled for vacation - could have been deemed to be on unpaid infectious disease emergency leave. Note that this is different in the context of a leave that is not triggered by a deeming provision. In the context of those leaves, the employer does not have the right to treat an employee's leave absences as vacation (although it is open to the employee to agree to take the days as vacation days - subject to the ESA's requirements applicable to some leaves that they be taken in single period or periods of at least one week). In the **deemed** leave context, it is the employer whose actions trigger the conditions that result in the employee being deemed to be on the leave. If the employer schedules an employee for vacation, the conditions necessary for the deemed leave will not be met and the employee who is scheduled to be on vacation will not trigger the deemed leave provision.

Section 4 must be read subject to s. 5 of O. Reg. 228/20, which provides that certain employees are not considered to be on unpaid infectious disease emergency leave. See the discussion of s. 5 later in this chapter.

4(3). Subject to subsections (4), (5) and (6), all requirements and prohibitions under the Act that apply in respect of a leave apply in respect of a leave that is deemed to be taken under subsection (2).

Subsection 4(3) provides that with the exceptions set out in ss. 4(4) (re: the requirement to give notice to the employer of the leave), and ss. 4(5) and 4(6) (re: benefit plan participation / contributions during the leave) all of the requirements and prohibitions that apply to Part XIV leaves apply equally to deemed leaves under ss. 4(2) (e.g. the anti-reprisal protection, reinstatement obligation, and provisions re: continued accrual of seniority, length of employment and length of service credits).

Issues may arise as to how the reinstatement obligation under s. 53 of the ESA applies where there have been layoffs and/or wage reductions in the workplace during a statutory leave. This issue is addressed in the discussion of s. 53 of the Manual.

4(4). An employee who is deemed to be on leave under subsection (2) is exempt from the subsections 50.1 (2) and (3) of the Act.

Subsection 4(4) exempts employees who are deemed to be on unpaid infectious disease emergency leave pursuant to ss. 4(2) of O. Reg. 288/20 from ss. 50.1(2) and (3) of the ESA.

Subsection 50.1(2) of the ESA requires an employee who takes unpaid infectious disease emergency leave to advise his or her employer that he or she will be doing so. Subsection 50.1(3) provides that if the employee begins the leave before advising the employer, the employee shall advise the employer of the leave as soon as possible after beginning it.

Since an employee who is deemed to be on leave is on the leave because of the employer's action there is nothing to be achieved in requiring the employee to give notice of the leave to the employer. As such,

ss. 4(4) exempts an employee who is deemed to be on a leave pursuant to ss. 4(2) from these notice requirements.

4(5). If an employee who is deemed to be on leave under subsection (2) stopped participating in any benefit plan described in subsection 51 (2) of the Act as of May 29, 2020, the employee is exempt from subsection 51 (1) during the COVID-19 period with respect to that benefit plan.

4(6). If an employer of an employee who is deemed to be on leave under subsection (2) was not, as of May 29, 2020, making the employer's contributions for any benefit plan described in subsection 51 (2) of the Act that is related to the employee's employment, the employer is exempt from subsection 51 (3) during the COVID-19 period with respect to that benefit plan.

Section 51 of the ESA provides that employees who are on a statutory leave continue to participate in certain benefit plans unless the employee elects in writing not to do so, and it requires employers to continue to make the employer's contributions for any of those benefit plans unless the employee advises the employer in writing that the employee is not going to pay his or her contributions. (See the discussion of s. 51 of the ESA for more information.)

Subsections 4(5) and (6) of O. Reg. 228/20 provide exemptions to those requirements in certain situations.

Subsection 4(5) provides that if an employee had stopped participating in a benefit plan described in subsection 51(2) of the ESA as of May 29, 2020 (the date O. Reg. 228/20 was filed), the employee does not have a statutory right to continue to participate in **that particular benefit plan** while on the deemed leave during the COVID-19 period.

Similarly ss. 4(6) exempts employers from the requirement in ss. 51(2) of the ESA to continue making the employer contributions to a particular benefit plan described in ss. 51(2) of the ESA while their employee is on a deemed leave during the COVID-19 period **if** the employer had already discontinued its contributions to **that particular benefit plan** before May 29, 2020 (the date O. Reg. 228/20 was filed).

The exemptions in ss. 4(5) or (6) apply only with respect to benefit plans that are described in ss. 51(2) of the ESA: pension plans, life insurance plans, accidental death plans, extended health plans, dental plans, and any prescribed type of benefit plan (of which there are none at the time of writing). The exemptions **do not** apply with respect to plans that are not described in ss. 51(2) but that employees are nonetheless entitled to participate in by virtue of O. Reg. 286/01, s. 10. Section 10 of O. Reg. 286/01 provides that if employees on a leave other than a leave under Part XIV (e.g. educational leave) are entitled to participate in a benefit plan then employees on a Part XIV leave must also be entitled to participate in that plan. The most significant types of plans that are not described in ss. 51(2) are short-term and long-term disability plans. Section 51 and the exemptions in ss. 4(5) and (6) do not apply to such plans. As such, **if** the employer's plan provides short-term or long-term disability benefits to employees on leaves other than Part XIV leaves employees must be entitled to participate in those plans when they are deemed to be on unpaid infectious disease emergency leave.

The exemptions in ss. 4(5) and (6) only apply to employees who are **deemed** to be on unpaid infectious disease emergency leave. If an employee is on infectious disease emergency leave (paid or unpaid) pursuant to a different eligibility criterion – or on another statutory leave – the exemptions do not apply and s. 51 applies in its usual course.

4(7). Nothing in this section or subsection 5(2) affects any payments or benefits the employee received from the employer during the period starting on March 1, 2020 and ending on May 29, 2020.

Subsection 4(7) states that nothing in section 4 (the "prescribed leave/deemed leave" provision) or ss. 5(2) (which provides that certain employees who were given notice of termination are not considered to be on unpaid infectious disease emergency leave for the prescribed reason in s. 4 unless the employer and employee agree to withdraw the notice of termination) affects any payments or benefits the employee received from the employer during the period March 1, 2020 to May 29, 2020 (the date that O. Reg. 228/20 was filed).

This provision addresses questions that may arise because of the retroactive deeming of the leave (i.e. between March 1, 2020 and May 29, 2020, the date O. Reg. 228/20 was filed, when combined with s. 6, which provides that in certain circumstances employees are not considered to be laid off starting March 1, 2020 (see s. 6 below for details).

For example, an employer temporarily eliminated an employee's hours of work as of March 1, 2020 for reasons related to COVID-19, and the employee's weekly earnings fell to $0. Because O. Reg. 228/20 was not yet filed, at that time the employee was considered to be on weeks of layoff under the ESA. The employer expected the elimination of hours to last for a significant amount of time and so continued to make substantial payments to the employee in order to extend the period of a temporary layoff per ss. 56(2) from 13 weeks in any period of 20 consecutive weeks to 35 weeks in any period of 52 weeks. O. Reg. 228/20 – which came into force only on May 29, 2020, **after** the employer had already made these payments – retroactively provides that this employee is deemed to have been on unpaid infectious disease emergency leave and not to be considered to have been laid off under the ESA during that time (see s. 6). As such, the employer may have made certain payments or provided certain benefits to the employee prior to May 29, 2020 that it wouldn't have otherwise done had the employee been deemed to have been on a leave, and not a layoff, at the time.

Subsection 4(7) provides that the retroactive deeming of that period of layoff as unpaid infectious disease emergency leave does not affect any payments that were made by the employer March 1, 2020 to May 29, 2020. In other words, nothing about the retroactive application of s. 4 requires employees to pay these amounts back. Note, however, that the ESA does not prohibit an employer from recovering the amounts of those payments through wage deductions under s. 13 if the employee provides written authorization to do so in writing in accordance with s. 13(3) of the ESA.

O. Reg. 228/20 Section 5 – When Employee Not on Leave

5. (1) For greater certainty, an employee whose employment is,

(a) terminated under clause 56 (1) (a) of the Act or severed under clause 63 (1) (a), (d) or (e) of the Act on or after March 1, 2020; or

(b) terminated under clause 56 (1) (b) or (c) of the Act or severed under clause 63 (1) (b) or (c) of the Act before May 29, 2020,

shall not be considered to be on infectious disease emergency leave for the reason set out in paragraph 1 of subsection 4 (1).

(2) An employee who has been given written notice of termination in accordance with section 57 or 58 of the Act shall not be considered to be on infectious disease emergency leave for the

reason set out in paragraph 1 of subsection 4 (1) unless the employer and employee agree to withdraw the notice of termination.

Pursuant to ss. 1(2) of O. Reg. 228/20, s. 5 does not apply to employees who are represented by a trade union.

Subsection 5(1)

O. Reg. 228/20 does not prevent employers from terminating or severing their employees' employment by dismissing them or refusing/being unable to continue employing them during the COVID-19 period and nothing about the regulation's retroactive application resurrects employment relationships that were already terminated or severed before the regulation was filed. Employees in these situations are **not** deemed to be on infectious disease emergency leave.

Subsection 5(1) simply reinforces that outcome by providing that for greater certainty:

- Clause (a): an employee whose employment is terminated under s. 56(1)(a) or severed under s. 63(1)(a), (d) or (e) any time on or after March 1, 2020 (the first day an employee can be deemed to be on unpaid infectious disease emergency leave under this regulation) will not, from the date of the termination or severance, be considered to be on the leave.

- Clause (b): an employee whose employment was terminated and/or severed before May 29, 2020 (the date the regulation was filed) as the result of a constructive dismissal and subsequent resignation by the employee in response will not be considered to have been on unpaid infectious disease emergency leave for the prescribed reason prior to the termination or severance even if the conditions in the prescribed reason were present.

  This provision clarifies that a pre-May 29, 2020 termination that resulted from a constructive dismissal and subsequent resignation that was based on the employer unilaterally temporarily reducing or eliminating an employee's hours of work or wages for reasons related to COVID-19 during the defined COVID-19 period isn't "undone" by retroactively deeming that reduction or elimination to be a leave.

  Note that this provision applies if the termination or severance resulting from a constructive dismissal happened before May 29, 2020, not the constructive dismissal itself. (To be a termination or severance resulting from a constructive dismissal under the ESA, there must be a constructive dismissal and the employee must resign in response to the constructive dismissal within a reasonable period of time. In other words, this provision applies only if the employee who was constructively dismissed resigned in response to that constructive dismissal prior to May 29, 2020.)

Subsection 5(2)

Subsection 5(2) states that an employee whose employer gave him or her written notice of termination in accordance with s. 57 or s. 58 of the ESA is not deemed to be on unpaid infectious disease emergency leave, even if the relevant criteria are met, unless the employer and employee agree in writing to withdraw the notice of termination before the termination crystallized. (An employer may wish to withdraw notices of termination where, for example, it provided them in anticipation of a layoff exceeding the length of a temporary layoff under the ESA before O. Reg. 228/20 was filed and the rules of temporary layoff were altered.)

Notice of termination, once given, generally cannot be withdrawn unless the employee consents to the withdrawal – see she discussion of this issue in s. 56 of the Manual for details.

If the notice of termination is withdrawn, the rules with respect to the application of the deemed leave provision apply as per usual **from the date of the withdrawal forward**.

(Note: if the criteria for being on a deemed leave were met **before** the employee received written notice of termination – i.e. there was a COVID-19 related reduction or elimination before notice of termination was given and the reduction or elimination was intended **at the time** only to be temporary - the employee would be deemed to be on unpaid infectious disease emergency leave with respect to that time.)

As per ss. 4(7) of O. Reg. 228/20, ss. 5(2) does not affect any payments that were made by the employer from March 1, 2020 to May 29, 2020. For example, as required by s. 60 of the ESA, an employer who provided notice of termination paid its employees their regular wages during the notice period even though the employees were not working. Subsection 4(7) provides that ss. 5(2) does not affect those payments and does not require the employee to pay those amounts back to the employer even if the employer and employee agree to withdraw the notice of termination.

O. Reg. 228/20 Section 6 – Reduction in Hours, Wages Not a Layoff

6(1) An employee whose hours of work are temporarily reduced or eliminated by the employer, or whose wages are temporarily reduced by the employer, for reasons related to the designated infectious disease during the COVID-19 period is exempt from the application of sections 56 and 63 of the Act for the purposes of determining whether the employee has been laid off, and the employee shall not be considered to be laid off under those sections, other than under clause 63 (1) (d) of the Act.

Pursuant to subsection 1(2) of this regulation, section 6 does not apply to an employee who is represented by a trade union.

Subsection 6(1) states that where an employee's wages are temporarily reduced and/or hours of work are temporarily reduced or temporarily eliminated by the employer during the defined "COVID-19 period" for reasons related to COVID-19, the employee is **not** considered to be laid off for the purposes of sections 56 and 63 of the ESA (other than clause 63(1)(d)) and the employee is exempt from the application of sections 56 and 63 for the purposes of determining whether the employee has been laid off.

The effect of this provision is to "freeze" the temporary layoff clock from ticking as of March 1, 2020 and for the duration of the COVID-19 period where the prescribed conditions are met. In other words, the provision stops specified weeks from being counted as a week of layoff. Only the numerator in the 13/20 or 35/52 thresholds is affected. The provision does not freeze or otherwise affect the denominator in the "count", i.e. the 20- or 52-week rolling periods. As such, for an employee to whom this provision applies, a termination of employment cannot be triggered during the defined COVID-19 period by virtue of s. 56(1)(c), nor can a severance of employment be triggered by virtue of s. 63(1)(c) by way of a layoff exceeding the length of a temporary layoff.

Note that subsection (2) clarifies that where an employee was terminated pursuant to clause 56(1)(c) or severed under clause 63(1)(c) prior to May 29, 2020 (the date O. Reg. 228/20 was filed), this provision does not apply to that employee.

The following discussion will look at each of the five conditions that must be present for this provision to apply:

1. The employee is subject to a reduction or elimination in hours of work and/or wages

This provision specifies that it applies to reductions or eliminations in the following situations: it applies where “hours of work are temporarily reduced or eliminated” and where “wages are temporarily reduced”. The Program views this condition as being met if the employee experiences a reduction or an elimination in either hours of work or wages. In other words, though not explicitly stated, the provision is interpreted to include the elimination of wages. As such, an employee will meet this condition if the employee is subject to any of the following: a reduction in hours of work, a reduction in wages, or an elimination in hours of work and an elimination in wages. All other ESA rules, such as the obligation to comply with the minimum wage requirements where work is performed, continue to apply as usual.

Section 9 of the regulation establishes specific rules to be used in determining whether hours and/or wages have been reduced for the purposes of the regulation. Subsection 9(1), read in conjunction with ss. 9(3) and (4), establishes what is a reduction in hours of work for the purpose of this provision. Subsection 9(2), read in conjunction with ss. 9(3) and (4), establishes what is a reduction in wages for the purpose of this provision. Please see the discussion of section 9 for more information.

2. The reduction or elimination of hours of work and/or wages must be temporary

This condition is met only where the employee is subject to a **temporary** reduction or a **temporary** elimination in hours of work or wages. The condition is not met if the reduction or elimination is a permanent change.

Determining whether a reduction or elimination of hours of work or wages is temporary or permanent is a question of fact that can only be answered on a case-by-case basis taking all relevant facts into consideration. Note, however, that key elements in this assessment are the employer’s intention and the parties’ understanding at the time the change was made. Did the employer intend for the change to be temporary or did the employer instead intend to initiate a permanent change to the terms and conditions of the employee’s employment? What was the employee’s understanding of the change? If the change was intended to be a permanent change, this condition would not be met and section 6 would therefore not apply to the employee.

Given the climate of economic uncertainty brought about by COVID-19, it is possible that an employer may, at the time the change is made, be unsure whether the reduction or elimination of an employee’s hours of work and/or wages will be temporary or permanent. It may be that the employer is taking a “wait and see” approach to its ability to maintain employment relationships and to return terms and conditions of employment to their pre-COVID-19 period state. These outcomes may depend on factors such as when the business is permitted to reopen, demand for the employer’s products during the pandemic, production capacity while maintaining physical distancing for employees etc. The Program takes the view that, in this type of situation, the employer is generally considered to have intended the change to be temporary, unless there is evidence to the contrary.

3. It must be the employer that temporarily reduces or eliminates the employee’s hours of work and/or wages

The temporary reduction or elimination of the employee’s hours of work and/or wages must be initiated by the employer for section 6 to apply. In other words, if the employee works fewer hours for a reason that is initiated or brought about by the employee – for example, if the employee was away from work because

the employee elected to take a statutory leave of absence such as sick leave or family responsibility leave, or requested personal time away from work – this provision does not apply.

Note that in a situation where the employer gives the employee an ultimatum between accepting a reduction in hours and/or wages or termination, if the employee "chooses" the reduction in hours and/or wages, the Program considers this change to have been initiated by the employer and not the employee.

4. The temporary reduction or elimination of the employee's hours of work and/or wages must have occurred for reasons related to the designated infectious disease

This condition is met where the employer's decision to temporarily reduce or temporarily eliminate an employee's hours of work and/or wages is made in whole or in part for reasons related to the designated infectious disease. The designated infectious disease referenced here is COVID-19, pursuant to section 2.

In some cases, there will be more than one reason an employer temporarily reduces or temporarily eliminates an employee's hours or wages. As long as one of the reasons is related to the COVID-19, this condition is met. The reason for the reduction or elimination can be directly related to COVID-19 or it can be indirect. Examples of reasons related to COVID-19 include: an employer's business was ordered to suspend operations by order under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* or by an emergency order under the *Emergency Management and Civil Protection Act;* a brewer reduced its employees' hours because the demand for beer was reduced since restaurants and pubs had been ordered pursuant to an order to close temporarily; a private children's bus line eliminated some of its employees' hours because schools were closed; a party supply business reduced its employees' wages due to reduced revenue resulting from a lack of demand for party supplies when physical distancing rules were in effect; an employee's hours were temporarily eliminated because the employer was concerned that the employee might expose others in the workplace to COVID-19.

5. The above four conditions must occur during the defined COVID-19 period

Subsection 1(1) of this regulation defines the "COVID-19 period". **The COVID-19 period is March 1, 2020 to January 1, 2022.**

Only where the four conditions discussed above occur during the defined COVID-19 period does section 6 to apply. For example, it could be that an employee's hours of work were temporarily reduced by the employer for reasons related to COVID-19 beginning on February 23, 2020 and ending on June 1, 2020. In that case, section 6 applies only to the reduction in hours that occurred from March 1, 2020 to June 1, 2020; the reduction in hours that occurred prior to March 1, 2020 (i.e. from February 23, 2020 to February 29, 2020) is unaffected by O. Reg. 228/20.

Where the conditions are met

Where all five of these conditions are met, the employee is exempt from the application of sections 56 and 63 of the Act for the purposes of determining whether the employee has been laid off. The employee is not considered to be laid off under section 56 or section 63, with the exception of clause 63(1)(d). (Clause 63(1)(d) provides that an employee's employment is severed where the employer lays off an employee due to a permanent discontinuance of all of the employer's business at an establishment.)

The effect of this provision is to “freeze” the temporary layoff clock from ticking from March 1, 2020 to January 1, 2022 where the prescribed conditions are met. In other words, the provision stops specified weeks from being counted as a week of layoff. Only the numerator in the 13/20 or 35/52 thresholds is affected. The provision does not freeze or otherwise affect the denominator in the “count”, i.e. the 20- or 52-week rolling periods. As such, for an employee to whom this provision applies, a termination of employment cannot be triggered during the defined COVID-19 period by virtue of s. 56(1)(c), nor can a severance of employment be triggered by virtue of s. 63(1)(c) by way of a layoff exceeding the length of a temporary layoff.

Note, however, that there may be situations where a reduction or elimination in hours and/or wages starts out as a reduction to which section 6 applies – and therefore to which a layoff under sections 56 and 63 do not apply - but the circumstances change partway through such that the five conditions in section 6 are no longer met. At the point in time where any one of the conditions is no longer met, section 6 stops applying and the rules set out in section 56 and 63 resume their application.

For example, say the employee’s hours of work were temporarily eliminated due to the closure of a business resulting from an order issued under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* or under the *Emergency Management and Civil Protection Act*. The elimination of hours originally falls within purview of section 6. If, for example, at a particular point in time, the business is no longer viable and, as such, it becomes clear to the employer that there is no longer a possibility of the employee’s hours of work being reinstated, the reduction in hours is no longer “temporary” and so this provision no longer applies. As of that point in time, the exemption no longer applies and sections 56 and 63 resume application.

6(2). Subsection (1) does not apply to an employee whose employment was terminated under clause 56 (1) (c) of the Act or severed under clause 63 (1) (c) of the Act before May 29, 2020.

Subsection 6(2) clarifies that where an employee was terminated under clause 56(1)(c) or severed under clause 63(1)(c) **prior to** May 29, 2020 (the date O. Reg. 228/20 was filed), this provision does not apply to that employee. In other words, where an employee was on a temporary layoff that lasted longer than the period of temporary layoff, and which consequently resulted in the termination or severance of the employee’s employment **before** May 29, 2020, the employee is not affected by this provision. The employment relationship is not resurrected by the regulation.

O. Reg. 228/20 Section 7 – Reduction in Hours, Wages Not a Constructive Dismissal

7(1) The following does not constitute constructive dismissal if it occurred during the COVID-19 period:

1. **A temporary reduction or elimination of an employee’s hours of work by the employer for reasons related to the designated infectious disease.**

2. **A temporary reduction in an employee’s wages by the employer for reasons related to the designated infectious disease.**

Pursuant to subsection 1(2) of this regulation, section 7 does not apply to an employee who is represented by a trade union.

This provision establishes that where, during the defined "COVID-19 period" an employee's hours of work or wages are temporarily reduced or eliminated by the employer for reasons related in whole or in part to COVID-19, the change does not constitute constructive dismissal for the purposes of the ESA. As such, since an employee who is in this situation is not constructively dismissed for the purposes of the ESA, a termination of employment will not be triggered in these circumstances by virtue of s. 56(1)(b), nor will a severance of employment be triggered by virtue of s. 63(1)(b).

Note that subsection (2) clarifies that where an employee was terminated under clause 56(1)(b) or severed under clause 63(1)(b) prior to May 29, 2020, this provision does not apply to that employee.

The following discussion will look at each of the five conditions that must be present for this provision to apply:

1. The employee is subject to a reduction or elimination in hours of work and/or wages

This provision states that it applies to reductions or eliminations in the following situations: it applies where "hours of work are temporarily reduced or eliminated" and where "wages are temporarily reduced". The Program views this condition as being met if the employee experiences a reduction or an elimination in either hours of work or wages. In other words, though not explicitly stated, the provision is interpreted to include the elimination of wages where there has been an elimination of hours. As such, an employee will meet this condition if the employee is subject to any of the following: a reduction in hours of work, a reduction in wages, an elimination in hours of work or a corresponding elimination in wages.

Section 9 of the regulation establishes specific rules to be used in determining whether hours and/or wages have been reduced for the purposes of the regulation. Subsection 9(1), read in conjunction with ss. 9(3) and (4), establish what is a reduction in hours of work for the purpose of this provision. Subsection 9(2), read in conjunction with ss. 9(3) and (4), establish what is a reduction in wages for the purpose of this provision. Please see the discussion of section 9 for more information.

2. The reduction or elimination of hours of work and/or wages must be temporary

This condition is met only where the employee is subject to a **temporary** reduction or a **temporary** elimination in hours of work or wages. The condition is not met if the reduction or elimination is a permanent change.

Determining whether a reduction or elimination of hours of work or wages is temporary or permanent is a question of fact that can only be answered on a case-by-case basis taking all relevant facts into consideration. Note, however, that key elements in this assessment are the employer's intention and the parties' understanding at the time the change was made. Did the employer intend for the change to be temporary or did the employer instead intend to initiate a permanent change to the terms and conditions of the employee's employment? What was the employee's understanding of the change? If the change was intended to be a permanent change, this condition would not be met and subsection 7(1) would therefore not apply to the employee.

Given the climate of economic uncertainty brought about by COVID-19, it is possible that an employer may, at the time the change is made, be unsure whether the reduction or elimination of an employee's hours of work and/or wages will be temporary or permanent. It may be that the employer is taking a "wait and see" approach to its ability to maintain employment relationships and to return terms and conditions of employment to their pre-COVID-19 period state. These outcomes may depend on factors such as when the business is permitted to reopen, demand for the employer's products during the pandemic, production capacity while maintaining physical distancing for employees etc. The Program takes the view

that, in this type of situation, the employer is generally considered to have intended the change to be temporary, unless there is evidence to the contrary.

3. It must be the employer that temporarily reduces or eliminates the employee's hours of work and/or wages

The temporary reduction or elimination of the employee's hours of work and/or wages must be initiated by the employer for subsection 7(1) to apply. In other words, if the employee works fewer hours for a reason that is initiated or brought about by the employee – for example, if the employee was away from work because the employee elected to take a statutory leave of absence such as sick leave or family responsibility leave or requested personal time away from work – this provision does not apply.

Note that in a situation where the employer gives the employee an ultimatum between accepting a reduction in hours and/or wages or termination, if the employee "chooses" the reduction in hours and/or wages, the Program considers this change to have been initiated by the employer and not the employee.

4. The temporary reduction or elimination of the employee's hours of work and/or wages must have occurred for reasons related to the designated infectious disease

This condition is met where the employer's decision to temporarily reduce or temporarily eliminate an employee's hours of work/wages is made in whole or in part for reasons related to the designated infectious disease. The designated infectious disease referenced here is COVID-19, pursuant to section 2.

In some cases, there will be more than one reason an employer temporarily reduces or temporarily eliminates an employee's hours or wages. As long as one of the reasons is related to the COVID-19, this condition is met. The reason for the reduction or elimination can be directly related to COVID-19 or it can be indirect. Examples of reasons related to COVID-19 include: an employer's business was ordered to suspend operations by order under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* or by an emergency order under the *Emergency Management and Civil Protection Act;* a brewer reduced its employees' hours because the demand for beer was reduced since restaurants and pubs had been ordered pursuant to an emergency order to close temporarily; a private children's bus line eliminated some of its employees' hours because schools were closed; a party supply business reduced its employees' wages due to reduced revenue resulting from a lack of demand for party supplies when physical distancing rules were in effect an employee's hours were temporarily eliminated because the employer was concerned that the employee might expose others in the workplace to COVID-19.

5. The above four conditions must occur during the defined COVID-19 period

Subsection 1(1) of this regulation defines the "COVID-19 period". **The "COVID-19 period" is March 1, 2020 to January 1, 2022.**

Subsection 7(1) applies only where all four of the conditions discussed above occur during the defined COVID-19 period.

(Note, however, this condition must be read subject to subsection 2 that provides that where a temporary reduction or elimination in hours of work or wages occurred prior to May 29, 2020 – even ones brought about by the employer for reasons related to COVID-19 that occurred during the COVID-19 period – if the change resulted in a constructive dismissal and the employee resigned from his or her employment in response to the change within a reasonable period of time **and** the resignation occurred prior to May 29, 2020, a claim relating to this constructive dismissal can be filed with the Ministry of Labour, Training and Skills Development investigated, and may result in a finding that the employee was terminated pursuant to ss. 56(1)(b). See the discussion of ss. 7(2) and s. 8 for more details.)

Where the conditions are met
Where the conditions are met, the temporary reduction or elimination of the employee's hours of work or wages by the employer for reasons related to COVID-19 during the COVID-19 period does not constitute constructive dismissal for the purposes of the ESA.

Since an employee who is in this situation is not constructively dismissed for the purposes of the ESA, a termination of employment will not be triggered in these circumstances by virtue of s. 56(1)(b), nor will a severance of employment be triggered by virtue of s. 63(1)(b). Without subsection 7, a unilateral reduction in hours of work or wages might otherwise amount to a constructive dismissal if the reduction was significant enough, and it would create termination and severance pay obligations if the employee resigned in response within a reasonable period of time.

Note that this provision addresses constructive dismissal only under the ESA. The provision does not address what constitutes a constructive dismissal at common law.

7(2) Subsection (1) does not apply to an employee whose employment was terminated under clause 56 (1) (b) of the Act or severed under clause 63 (1) (b) of the Act before May 29, 2020.

This provision took effect when O. Reg. 228/20 was filed on May 29, 2020.

Subsection 7(2) clarifies that where an employee was terminated under clause 56(1)(b) or severed under clause 63(1)(b) prior to May 29, 2020, this provision does not apply to that employee.

Note that in order to be terminated under clause 56(1)(b) or severed under clause 63(1)(b), the employee must have been constructively dismissed *and* must have resigned from his or her employment in response employer's actions within a reasonable period. It is only where both the constructive dismissal and the employee's resignation occurred prior to May 29, 2020 that the employee is not affected by subsection 7(1). If an employee was constructively dismissed by his or her employer and the employee resigned in response to the employer's actions *after* May 29, 2020, subsection 7(1) applies.

Note that nothing in section 7 affects a constructive dismissal that arises for reasons other than the employer temporarily reducing or eliminating an employee's hours of work or wages for reasons related to COVID-19 during the defined COVID-19 period. If, for example, an employee was constructively dismissed during the defined COVID-19 period as the result of changes to the employee's wages or hours for reasons wholly unrelated to COVID-19, or if the change that results in a constructive dismissal is made for a COVID-related reason but relates to something other than hours of work or wages – such as a significant change in the employee's work location or a significant reduction in the employee's job responsibilities etc. – the employee may be found to be terminated and/or severed per the usual application of s. 56(1)(b) and/or s. 63(1)(b).

O. Reg. 228/20 Section 8 – Complaint Deemed Not to Have Been Filed

8. (1) A complaint filed with the Ministry that a temporary reduction or elimination of an employee's hours of work by the employer or a temporary reduction in an employee's wages by the employer constitutes the termination or severance of the employee's employment shall be deemed not to have been filed if the temporary reduction or elimination of hours or the temporary reduction in wages occurred during the COVID-19 period for reasons related to the designated infectious disease.

(2) Subsection (1) does not apply if the employee's complaint relates to,

(a) a termination under clause 56 (1) (a) of the Act or a severance under clause 63 (1) (a), (d) or (e) of the Act; or

(b) a termination under clause 56 (1) (b) or (c) of the Act or a severance under clause 63 (1) (b) or (c) of the Act before May 29, 2020.

Subsection 8(1) provides that certain complaints regarding termination and/or severance filed with the Ministry of Labour, Training and Skills Development are deemed not to have been filed. By deeming the complaint not to have been filed, employees who filed the complaint are not prohibited by s. 97 of the ESA from commencing a civil proceeding regarding their termination and/or severance entitlements. For example, an employee could choose to pursue wrongful dismissal litigation in the courts.

Pursuant to ss. 1(2) of O. Reg. 228/20, s. 8 does not apply to employees who are represented by a trade union.

In general terms, this provision applies to claims for termination pay and/or severance pay that are based on a constructive dismissal or on a layoff that exceeded the period of a temporary layoff if the foundation for the constructive dismissal or layoff was a temporary reduction or temporary elimination of wages or hours of work for reasons related to COVID-19 during the COVID-19 period.

Specifically, complaints are deemed not to have been filed if the complaint is with respect to termination and/or severance and the foundation of the complaint meets **all** of these conditions:

- the employee's wages or hours of work were **temporarily reduced or temporarily eliminated by the employer**,
- the temporary reduction or temporary elimination was for **reasons related in whole or in part to COVID-19**, and
- the temporary reduction or temporary elimination **occurred during the COVID-19 period**, which is defined in s. 1 of O. Reg. 228/20 to be March 1, 2020 to January 1, 2022.

Subsection 8(1) applies equally whether the employee specifically raised the disallowed allegations in the claim form, or whether the issue arose during the course of an investigation.

Subsection 8(1) applies regardless of the date the claim is filed. Subject to ss. 8(2), the provision applies, for example, to claims that were filed before O. Reg. 228/20 was made and those filed after the COVID-19 period is over.

The deeming provision applies only to the **portion** of the claim relating to the disallowed termination and/or severance allegation. If the claim contains allegations that are not disallowed per ss. 8(1), those other allegations are investigated in the usual course.

For example, if a claim was made for termination pay and it was based on a temporary reduction or temporary elimination of wages or hours of work by the employer that was for reasons related in whole or in part to COVID-19 from February 1, 2020 to April 30, 2020, the claim would proceed for investigation as per usual with respect to the reduction or elimination that occurred in February, i.e. prior to the March 1, 2020 beginning of the COVID-19 period.

Another example relates to reprisal allegations. Even if a reprisal allegation arises from a temporary reduction or temporary elimination in hours of work or wages that are related to COVID-19 during the COVID-19 period, that allegation will be investigated as per usual. Take a situation where a claimant alleges that an employer who had to eliminate the hours of 20% of its workforce because of COVID-19 during the COVID-19 period selected the claimant in part because he had taken a statutory leave or exercised another ESA right. The reprisal allegation would be investigated as per usual.

Employment Standards Officers address the question as to whether there are disallowed allegations at the **outset** of an investigation. A claim that is deemed not to have been filed does not trigger the application of s. 97 of the ESA..

Subsection 8(1) must be read in conjunction with ss. 8(2), which provides that ss. 8(1) doesn't apply if the employee's complaint relates to:

(a) a termination under clause 56(1)(a) of the Act or a severance under clause 63(1)(a) of the Act, (i.e. where an employer dismisses the employee or otherwise refuses or is unable to continue employing the employee) or a severance under clause 63(1)(d) or (e), (i.e. where the severance of employment is because of a permanent discontinuance of all of the employer's business at an establishment or because the employee gave written notice of resignation during the statutory notice period where certain conditions were met.)

    Claims for termination or severance pay based on these kinds of terminations or severances are **not** disallowed pursuant to ss. 8(1) and are investigated as per usual.

    Such claims are allowed even if the reason for the termination or severance was related to COVID-19 (e.g. the employer permanently closed its business because of COVID-19 and the employee claims the employer did not provide the required notice of termination or pay in lieu).

    This provision, while not strictly necessary since terminations and severances under clause 56(1)(a) of the Act or a severance under clause 63(1)(a), (d) and (e) of the Act are permanent and therefore do not fall within the condition in ss. 8(1) that the changes be "temporary", clarifies that claims filed with the Ministry for termination and/or severance pay based on this kind of termination and/or severance are not disallowed.

(b) a termination under clause 56(1)(b) or (c) or a severance under section 63(1)(b) or (c) that occurred before May 29, 2020 (the date O. Reg. 228/20 was filed).

    Clause (b) creates an exception to the "deemed not filed" rule in ss. 8(1).

    It allows claims to be filed and investigated where the termination or severance resulting from a layoff or constructive dismissal crystallized before the law was changed by O. Reg. 228/20.

    Specifically, it provides that claims for termination or severance pay that are based on a layoff exceeding the period of a temporary layoff or on a constructive dismissal are not disallowed pursuant to ss. 8(1) and therefore are investigated as per usual **if they occurred before May 29, 2020** (the date O. Reg. 228/20 was filed)**.**

    Such claims are allowed even if the reason for the layoff or constructive dismissal was COVID-19 related and even if the termination or severance occurred during the defined COVID-19 period.

    With respect to terminations or severances resulting from a constructive dismissal, note that the termination and severance occur on the date that the employee resigns in response to the constructive dismissal, not on the date the constructive dismissal occurred.

Although ss. 8(1) states that certain claims are disallowed if they are based on a situation where an employee's "hours of work are temporarily reduced or eliminated" or where "wages are temporarily reduced" the Program's position is that this provision also applies to disallow a claim if the allegation is based on a temporary elimination of wages for reasons related to COVID-19 during the COVID-19 period.

Some might argue that the inclusion of the phrase "wages are temporarily reduced" without also including "wages are temporarily eliminated" means that a claim based on the temporary elimination of wages is not disallowed. The Program's position is that the reference to an elimination in hours of work also captures the situation where there has been a corresponding elimination in employees' wages resulting

from the eliminated hours, and as such, claims based on the temporary elimination of wages are disallowed by the phrase “hours of work are temporarily … eliminated”. The phrase “wages are temporarily reduced” captures a scenario where an employee’s wages were temporarily reduced where there was no corresponding reduction in the employee’s hours, i.e. where an employee’s wage **rate** was reduced.

O. Reg. 228/20 Section 9 – Reduction in Hours of Work, Wages

Pursuant to subsection 1(2) of this regulation, section 9 does not apply to an employee who is represented by a trade union.

The provision sets out formulas to be used in establishing whether an employee’s hours of work and/or wages are considered to have been reduced for the purposes of the regulation. In general terms, the formulas are based on comparing the employee’s hours of work and/or wages during the COVID-19 period to the employee’s hours of work and/or wages during a period of time before the effects of COVID-19 were felt in most workplaces.

9 (1) For the purposes of this Regulation, an employee’s hours of work are considered to be reduced as follows:

1. If the employee has a regular work week, the employee’s hours of work are considered to be reduced if the employee works fewer hours in the work week than they worked in the last regular work week before March 1, 2020.

2. If the employee does not have a regular work week, the employee’s hours of work are considered to be reduced if the employee works fewer hours in the work week than the average number of hours they worked per work week in the period of 12 consecutive work weeks that preceded March 1, 2020.

3. If the employee was not employed by the employer during the entire work week that immediately preceded March 1, 2020, the employee’s hours of work are considered to be reduced if the employee works fewer hours in the work week than they worked in the work week in which they worked the greatest number of hours.

Reduction in Hours of Work

Subsection 9(1), read in conjunction with ss. 9(3) and (4), establish when an employee’s hours of work are considered to have been reduced for the purposes of the regulation.

Assessing whether an employee’s **hours of work** have been reduced is relevant in the application of the following provisions:

- Section 4: an employee is deemed to be on unpaid leave if the employee’s hours of work have been temporarily reduced or temporarily eliminated by the employer for reasons related to COVID-19 during the defined COVID-19 period.
- Section 6: an employee is not considered to be on a temporary layoff for the purposes of sections 56 and 63 if the employer has temporarily reduced or temporarily eliminated the employee’s hours of work for reasons related to COVID-19 during the defined COVID-19 period.
- Section 7: a temporary reduction or temporary elimination of hours by the employer for reasons related to COVID-19 during the defined COVID-19 period does not constitute constructive dismissal for the purposes of the ESA.
- Section 8: complaints filed with the Ministry that a temporary reduction or elimination of an employee’s hours of work by the employer constitutes the termination or severance of the employee’s employment are deemed not to have been filed if the temporary reduction or elimination occurred during the COVID-19 period for reasons related to COVID-19.

The provision establishes different formulas that apply depending on which of three categories the employee falls into: the employee has a regular work week, the employee does not have a regular work week, or, regardless of whether or not the employee has a regular work week, the employee was not employed by the employer during the entire work week that immediately preceded March 1, 2020. Each of these categories are discussed below:

1. Employee has a regular work week

If the employee has a regular work week, the employee's hours of work are considered to be reduced if the employee works fewer hours in the work week than the employee worked in the last regular work week before March 1, 2020. (Note that if the employee was not employed by the employer during the entire work week that immediately preceded March 1, 2020, the employee falls into category 3.)

However, per ss. 9(3), if the employee was on vacation, not able to work, not available for work, subject to a disciplinary suspension or was not provided with work because of a strike or lock-out occurring at his or her place of employment or elsewhere for any part of the last work week before March 1, 2020, then the work week to be applied is, instead, the last regular work week before March 1, 2020 in which such conditions did not apply for any part of the work week.

This formula therefore involves comparing the number of hours the employee worked in the last regular work week before March 1, 2020 during which none of the scenarios set out in subsection 9(3) occurred, to the work week in question.

Work week is defined in s. 1 of the ESA as follows:

> **"Work week " means,**
>
> **(a) a recurring period of seven consecutive days selected by the employer for the purpose of scheduling work, or**
>
> **(b) if the employer has not selected such a period, a recurring period of seven consecutive days beginning on Sunday and ending on Saturday.**

In order to determine what is the last regular work week before March 1, 2020, it is necessary to first establish the work week that includes March 1, 2020. From there, look back one full work week. This will be the last full work that occurred prior to March 1, 2020. If none of the scenarios set out in subsection (3) apply for any part of the work week, then then this is the work week used in the comparison. However, if, during that work week, any of the scenarios set out in subsection 9(3) applied for any period of time, then it is necessary to continue to look back work week by work week to find the first work week in which none of the scenarios set out in subsection 9(3) are present.

Once the comparator work week is established, the number of hours the employee worked in that work week is compared to the number of hours the employee worked in the work week in question (i.e. the work week during the COVID-19 period). If the employee worked more hours in the pre-March 1, 2020 "comparator week" as compared to the work week in question, then the employee is considered to have had a reduction in his or her hours of work for the purposes of sections 4, 6, 7 and 8.

For example, assume that in applying this formula, the employee has a comparator work week of 40 hours. If during the COVID-19 period, the employee works anything less than 40 hours in a given work week, then there will have been a reduction for the purposes of sections 4, 6, 7 and 8 of the regulation.

2. Employee does not have a regular work week

If the employee does not have a regular work week, the employee's hours of work are considered to be reduced if the employee works fewer hours in the work week than the average number of hours the employee worked per work week in the period of 12 consecutive work weeks that preceded March 1, 2020. (Note: if the employee was not employed by the employer during the entire work week that immediately preceded March 1, 2020, the employee falls into category 3.)

However, per ss. 9(4), if the employee was not employed, was on vacation, was not able to work, was not available for work, was subject to a disciplinary suspension or was not provided with work because of a strike or lock-out occurring at his or her place of employment or elsewhere for any part of a work week in the 12-week period referred to in those paragraphs, then that work week is excluded for the purposes of the averaging.

This formula therefore involves comparing the average number of hours the employee worked in the 12 consecutive work weeks prior to March 1, 2020 (or lesser number of averaged weeks if there are any excluded weeks pursuant to ss. 9(4)) to the number of hours the employee worked in the work week in question during the COVID-19 period.

Work week is defined in s. 1 of the ESA as follows:

> **"Work week " means,**
>
> **(a) a recurring period of seven consecutive days selected by the employer for the purpose of scheduling work, or**
>
> **(b) if the employer has not selected such a period, a recurring period of seven consecutive days beginning on Sunday and ending on Saturday.**

In order to establish the period of 12 consecutive work weeks that preceded March 1, 2020, it is necessary to first establish the work week that includes March 1, 2020. From there, look back 12 work weeks.

Next, determine if during any of those 12 work weeks, any of the scenarios set out in subsection (4) apply for any period of time. If any of the scenarios apply during a work week, that work week is excluded from the averaging calculation, meaning the average is calculated over a period shorter than 12 weeks. For example, if the only condition that applied during the 12-week timeframe was that the employee was on vacation for one week or a part of a week, the average of the remaining 11 weeks would be calculated.

Once the comparator average is established, the next step is to determine the number of hours the employee worked during the work week in question (i.e. the work week during the COVID-19 period). If the average number of hours of work determined pursuant to subsection 9(2) amounts to more hours than the employee worked in the work week in question, then the employee is considered to have a reduction in his or her hours of work for the purposes of sections 4, 6, 7 and 8.

3. Employee was not employed by the employer during the entire work week that immediately preceded March 1, 2020

If the employee was not employed by the employer during the entire work week that immediately preceded March 1, 2020, then the employee's hours of work are considered to be reduced if the employee worked fewer hours in the work week in question than the employee worked in the work week in which he or she worked the greatest number of hours. This formula applies regardless of whether or not the employee has a regular work week.

Where an employee falls into this category, a comparison is made between the work week in which the employee worked the greatest number of hours - regardless of when that occurred during the employment relationship - and the number of hours the employee worked during the work week in question during the COVID-19 period.

If the employee worked more hours during any previous work week than he or she worked in the work week in question, then the employee is considered to have a reduction in his or her hours of work for the purposes of sections 4, 6, 7 and 8.

9(2) For the purposes of this Regulation, an employee's wages are considered to be reduced as follows:

> **1. If the employee has a regular work week, the employee's wages are considered to be reduced if the employee earns less regular wages in the work week than they did in the last regular work week before March 1, 2020.**
>
> **2. If the employee does not have a regular work week, the employee's wages are considered to be reduced if the employee earns less regular wages than the average amount of regular wages they earned per work week in the period of 12 consecutive work weeks that preceded March 1, 2020.**
>
> **3. If the employee was not employed by the employer during the entire work week that immediately preceded March 1, 2020, the employee's wages are considered to be reduced if the employee earns less regular wages than they did in the work week in which they earned the most regular wages.**

Reduction in Wages

Subsection 9(2), read in conjunction with ss. 9(3) and (4), establish when an employee's wages are considered to have been reduced for the purposes of this regulation.

Assessing whether an employee's wages are considered to have been reduced is relevant in the application of the following provisions:

- Section 6: an employee is not considered to be on a temporary layoff for the purposes of sections 56 and 63 if the employer has temporarily reduced or temporarily eliminated the employee's wages for reasons related to COVID-19 during the defined COVID-19 period.
- Section 7: a temporary reduction or temporary elimination of an employee's wages by the employer for reasons related to COVID-19 during the defined COVID-19 period does not constitute constructive dismissal for the purposes of the ESA.
- Section 8: complaints filed with the Ministry that a temporary reduction or elimination of an employee's wages by the employer constitutes the termination or severance of the employee's employment are deemed not to have been filed if the temporary reduction or elimination occurred during the COVID-19 period for reasons related to COVID-19.

The provision establishes different formulas that apply depending on which of three categories the employee falls into: the employee has a regular work week, the employee does not have a regular work week, or, regardless of whether or not the employee has a regular work week, the employee was not employed by the employer during the entire work week that immediately preceded March 1, 2020. Each of these categories are discussed below:

1. Employee has a regular work week

If the employee has a regular work week, the employee's wages are considered to be reduced if the employee earns less regular wages in the work week than he or she earned in the last regular work week

before March 1, 2020. (Note, if the employee was not employed by the employer during the entire work week that immediately preceded March 1, 2020, the employee falls into category 3.)

However, per ss. 9(3), if the employee was on vacation, not able to work, not available for work, subject to a disciplinary suspension or was not provided with work because of a strike or lock-out occurring at his or her place of employment or elsewhere for any part of the last work week before March 1, 2020, then the work week to be applied is, instead, the last regular work week before March 1, 2020 in which such conditions did not apply for any part of the work week.

This formula therefore involves comparing the regular wages the employee earned during the last regular work week before March 1, 2020 in which none of the scenarios set out in subsection 9(3) occurred, to the regular wages the employee earned in the work week in question.

Work week is defined in s. 1 of the ESA as follows:

> **"Work week " means,**
>
> **(a) a recurring period of seven consecutive days selected by the employer for the purpose of scheduling work, or**
>
> **(b) if the employer has not selected such a period, a recurring period of seven consecutive days beginning on Sunday and ending on Saturday.**

"Regular wages" is defined in ESA Part I, s. 1 as follows:

> **"regular wages" means wages other than overtime pay, public holiday pay, premium pay, vacation pay, domestic or sexual violence leave pay, infectious disease emergency leave pay, termination pay, severance pay and termination of assignment pay and entitlements under a provision of an employee's contract of employment that under subsection 5(2) prevail over Part VIII, Part X, Part XI, section 49.7, Part XV or section 74.10.1.**

In order to determine what is the last regular work week before March 1, 2020, it is necessary to first establish the work week that includes March 1, 2020. From there, look back one full work week. This will be the last full work that occurred prior to March 1, 2020. If none of the scenarios set out in subsection (3) apply for any part of the work week, then then this is the work week used in the comparison. However, if during that work week, any of the scenarios set out in subsection 9(3) applied for any part of that work week, then it is necessary to continue to look back work week by work week to find the first work week in which none of the scenarios set out in subsection 9(3) are present.

Once the comparator work week is established, the regular wages the employee earned in that work week are compared to the regular wages the employee earned in the work week in question (i.e. the work week during the COVID-19 period). If the employee earned more regular wages in the pre-March 1, 2020 “comparator week” as compared to the work week in question, then the employee is considered to have had a reduction in his or her wages for the purposes of sections 6, 7 and 8.

2. Employee does not have a regular work week

If the employee does not have a regular work week, the employee’s wages are considered to be reduced if the employee earns less regular wages in the work week than the average amount of regular wages the

employee earned per week in the period of 12 consecutive work weeks that preceded March 1, 2020. (Note that if the employee was not employed by the employer during the entire work week that immediately preceded March 1, 2020, the employee falls into category 3.)

However, per ss. 9(4), if the employee was not employed, was on vacation, was not able to work, was not available for work, was subject to a disciplinary suspension or was not provided with work because of a strike or lock-out occurring at his or her place of employment or elsewhere for any part of a work week in the 12-week period referred to in those paragraphs, then that work week is excluded for the purposes of the averaging.

This formula therefore involves comparing the average regular wages the employee earned in the 12 consecutive work weeks prior to March 1, 2020 (or lesser number of averaged weeks if there are any excluded weeks pursuant to ss. 9(4)) to the regular wages the employee earned in the work week in question during the COVID-19 period.

Work week is defined in s. 1 of the ESA as follows:

> **"Work week " means,**
> **(a) a recurring period of seven consecutive days selected by the employer for the purpose of scheduling work, or**
> **(b) if the employer has not selected such a period, a recurring period of seven consecutive days beginning on Sunday and ending on Saturday.**

"Regular wages" is defined in ESA Part I, s. 1 as follows:

> **"regular wages" means wages other than overtime pay, public holiday pay, premium pay, vacation pay, domestic or sexual violence leave pay, infectious disease emergency leave pay, termination pay, severance pay and termination of assignment pay and entitlements under a provision of an employee's contract of employment that under subsection 5(2) prevail over Part VIII, Part X, Part XI, section 49.7, Part XV or section 74.10.1.**

In order to establish the period of 12 consecutive work weeks that preceded March 1, 2020, it is necessary to first establish the work week that includes March 1, 2020. From there, look back 12 work weeks.

Next, determine if during any of those 12 work weeks, any of the scenarios set out in subsection (4) apply for any part of a work week. If any of the scenarios apply during a work week, that work week is excluded from the averaging calculation, meaning the average is calculated over a period shorter than 12 weeks. For example, if the only condition that applied during the 12-week timeframe was that the employee was on vacation for a portion of one week, the average of the remaining 11 work weeks would be calculated.

Once the comparator average of the employee's regular wages is established, the next step is to determine the regular wages the employee earned during the work week in question (i.e. the work week during the COVID-19 period). If the employee earned more regular wages pursuant to the averaging calculation than the regular wages the employee earned during the work week in question, then the employee is considered to have a reduction in his or her wages for the purposes of sections 6, 7 and 8.

3. Employee was not employed by the employer during the entire work week that immediately preceded March 1, 2020

If the employee was not employed by the employer during the entire work week that immediately preceded March 1, 2020, then the employee's regular wages are considered to be reduced if the employee earns less regular wages than they did in the work week in which they earned the most regular wages. This formula applies regardless of whether or not the employee has a regular work week.

Where an employee falls into this category, a comparison is made between the work week in which the employee earned the most regular wages - regardless of when that occurred during the employment relationship - and the regular wages the employee earned during the work week in question during the COVID-19 period.

If the employee earned more regular wages during any previous work week than he or she worked in the work week in question, then the employee is considered to have a reduction in his or her wages for the purposes of sections 6, 7 and 8.

9(3) For the purposes of paragraph 1 of subsection (1) and paragraph 1 of subsection (2), if the employee was on vacation, not able to work, not available for work, subject to a disciplinary suspension or was not provided with work because of a strike or lock-out occurring at his or her place of employment or elsewhere for any part of the last work week before March 1, 2020, then the work week to be applied is, instead, the last regular work week before March 1, 2020 in which such conditions did not apply for any part of the work week.

Subsection 9(3) affects the application of paragraph 1 of subsection 9(1) and paragraph 1 of subsection 9(2). These paragraphs establish the formula that applies to determine whether there has been a reduction in hours of work (ss. 9(2)) or wages (ss. 9(3)) for an employee who has a regular work week. (These paragraphs do not apply to employees who were not employed by the employer during the entire work week that immediately preceded March 1, 2020.)

If any of the listed scenarios applied to the employee for any part of the last regular work week before March 1, 2020, then this provision provides that the "comparator" week to be used in the formula is, instead, the last regular work week before March 1, 2020 in which none of the listed scenarios applied for any part of the work week.

The listed scenarios are as follows:

The employee is on vacation

This includes any time during which the employee was on vacation.

The employee is not able to work

This includes any time the employee was not able to work because the employee was, for example, off on sick leave, workers' compensation, or is otherwise unable to work for medical reasons.

The employee is not available for work

This includes any time in which the employee was unavailable for work (for example, because the employee was in jail, or on a Part XIV leave).

The employee is subject to disciplinary suspension

This includes any time in in which the employee was on a bona fide disciplinary suspension that was within the employer's express or implied authority under the contract of employment.

The employee was not provided with work because of a strike or lock-out occurring at his or her place of employment or elsewhere

This includes any time in which the employee was not provided with work by the employer due to a strike or lock-out at the employee's place of employment or elsewhere. For example, if there is a strike or lock-out at a supplier, and the employer is a manufacturer dependent upon the supplier for its parts, that employer may be forced to close down until the strike or lock-out is over or a new supplier can be found. In that case, this condition is met. Whether or not the strike or lockout is legal pursuant to the *Labour Relations Act, 1995* is irrelevant in applying this condition

(4) For the purposes of paragraph 2 of subsection (1) and paragraph 2 of subsection (2), if the employee was not employed, on vacation, not able to work, not available for work, subject to a disciplinary suspension or was not provided with work because of a strike or lock-out occurring at his or her place of employment or elsewhere for any part of a work week in the 12-week period referred to in those paragraphs, then that work week is excluded for the purposes of the calculation.

Subsection 9(4) affects the application of subsection 9(1) paragraph 2 and subsection 9(2) paragraph 2. These paragraphs establish the formula that applies to determine whether there has been a reduction in hours of work (ss. 9(2)) or wages (ss. 9(3)) for an employee who does not have a regular work week. (These paragraphs do not apply to employees who were not employed by the employer during the entire work week that immediately preceded March 1, 2020.)

If any of the listed scenarios applied to the employee for any part of a work week in the 12-week period referred to in those paragraphs, then that work week is excluded for the purposes of the calculation.

The listed scenarios are as follows:

The employee was not employed

This includes any time during which the employee was not employed by the employer.

The employee is on vacation

This includes any time during which the employee was on vacation.

The employee is not able to work

This includes any time the employee was not able to work because the employee is, for example, off on sick leave, workers' compensation, or was otherwise unable to work for medical reasons.

The employee is not available for work

This includes any time in which the employee was unavailable for work (for example, because the employee was in jail, or on a Part XIV leave).

The employee is subject to disciplinary suspension

This includes any time in which the employee was on a bona fide disciplinary suspension that was within the employer's express or implied authority under the contract of employment.

The employee was not provided with work because of a strike or lock-out occurring at his or her place of employment or elsewhere

This includes any time in which the employee was not provided with work by the employer due to a strike or lock-out at the employee's place of employment or elsewhere. For example, if there is a strike or lock-out at a supplier, and the employer is a manufacturer dependent upon the supplier for its parts, that employer may be forced to close down until the strike or lock-out is over or a new supplier can be found. In that case, this condition is met. Whether or not the strike or lockout is legal pursuant to the *Labour Relations Act, 1995* is irrelevant in applying this condition.

O. Reg. 228/20 Section 10 – Assignment Employees

10. For greater certainty, this Regulation applies to assignment employees, and sections 6 and 9 apply to such employees with necessary modifications.

Pursuant to subsection 1(2) of this regulation, section 10 does not apply to an employee who is represented by a trade union.

Section 10 provides that sections 6 and 9 of O. Reg. 228/20 apply to assignment employees with necessary modifications. It also provides "for greater certainty" that this regulation applies, in its entirety, to assignment employees.

Section 6 provides that where, during the defined "COVID-19 period", an employee's hours of work or wages are temporarily reduced or temporarily eliminated by the employer for reasons related in whole or in part to COVID-19, the employee is not considered to be laid off for the purposes of sections 56 and 63 of the ESA. Section 9 sets out the formulas to be used in determining, for the purposes of this regulation, whether an employee has had a reduction in his or her hours of work or wages during the defined COVID-19 period.

An example of a necessary modification to section 6 relates to the reference in that provision to a temporary layoff under sections 56 and 63 of the ESA. Section 74.11 of the ESA modifies the application of Part XV ("Termination and Severance of Employment") to temporary help agencies and their assignment employees. Some of these modifications establish different rules from those under s. 56 and s. 63 to determine when an assignment employee is considered to be on a temporary layoff and what are excluded weeks. As such, the reference in section 6 of the regulation to sections 56 and 63 of the ESA is to be read to include the relevant modifications to the temporary layoff scheme that are brought about by section 74.11.

O. Reg. 228/20 Section 11 – Prescribed Date, Entitlement to Paid Leave

11. For the purposes of subsection 50.1 (5.2) of the Act, December 31, 2021 is prescribed as the date on which an employee's entitlement to paid leave ends.

Subsection 50.1(5.2) of the Act establishes that entitlements to paid infectious disease emergency leave end on September 25, 2021 or such later date as may be prescribed. Section 11 of O. Reg. 228/20 prescribes a later end date. It establishes that employee's entitlements to paid infectious disease emergency leave end on December 31, 2021.

Ontario Regulation 285/01 – When Worked Deemed to Be Performed, Exemptions and Special Rules

This regulation sets out special rules for certain categories of employees and exemptions to Parts VII to XI which deal with hours of work and eating periods, overtime pay, minimum wage, public holidays and vacation with pay, respectively, and ESA Part XVII, s. 73 that deals with retail business establishments. The regulation also establishes the minimum wage rates for categories of employees and exemptions to those rates.

O Reg 526/17 amended the name of this regulation from “Exemptions, Special Rules and Establishment of Minimum Wage” to “When Work Deemed to Be Performed, Exemptions and Special Rules”, effective January 1, 2018.

O Reg 285/01 Section 1 – Definitions

Construction Employee, Construction Industry

"construction employee" means,

(a) an employee employed at the site in any of the activities described in the definition of "construction industry", or

(b) an employee who is engaged in off-site work, in whole or in part, but is commonly associated in work or collective bargaining with an employee described in clause (a);

"construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site;

The term "construction employee" is referred to in the exemptions from the hours of work, daily rest, and weekly and bi-weekly rest provisions set out in O Reg 285/01. The term construction employee is also referred to in those provisions setting out the exemptions from public holiday entitlements in O Reg 285/01, s. 9(2). See also O Reg 288/01, s. 1 with respect to the construction employee exemptions from notice of termination and severance entitlements in that regulation. Note that although the definition of construction employee in O Reg 285/01 is cross-referenced in O Reg 288/01, employees who are engaged in the maintenance of roads and who are considered construction employees for the purposes of the hours of work exemptions in O Reg 285/01, are not considered construction employees for the purposes of O Reg 288/01. As a result, they are not exempt as construction employees from notice of termination under O Reg 288/01, s. 2(1) paragraph 9. However, they are specifically exempted from severance entitlements under O Reg 288/01, s. 9(1) paragraph 8.

The definition of construction employee includes employees engaged at the site in any of the activities described in the definition of construction industry (i.e., constructing, altering, decorating, repairing or demolishing buildings structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works) "At the site" simply refers to a place where employees are engaged in construction activities. For example, it would refer to a downtown lot where an office building is being constructed but would also refer to the yard of a manufacturing plant where employees were engaged in constructing storage sheds to store materials or products manufactured at the plant.

Note that despite the reference to "construction industry" within the definition of "construction employee", the employee's employer does not have to be carrying out construction, alteration, etc., as its sole or even primary business; construction, alteration, etc. could be just a minor or incidental activity so far as the employer is concerned. As a result, the employees of an employer whose primary business is

manufacturing would be construction employees if they were engaged in performing construction activities as described in the definition of construction industry at the manufacturing plant.

The definition also includes employees who work off-site (either in whole or in part), if the off-site employees are "commonly associated in work or collective bargaining" with employees who are employed at the site in any of the activities referred to in the construction industry definition (i.e., constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works). Note again that the definition does not require an off-site employee's employer to be solely or primarily engaged in the construction business in order for the employee to be a construction employee; the critical issue is whether the employee is "commonly associated in work or collective bargaining" with employees employed at the site in any of the activities described in the definition of construction industry. See 1703171 Ontario Inc. o/a The Construction Group and Bath Solutions v Russo-Janzen, 2016 CanLII 8145 (ON LRB) for a discussion of what it means to be “commonly associated in work” with on-site construction employees.

The definition includes repair work but not maintenance work. Maintenance is distinguished from repair work in that maintenance involves the preserving of the functioning of a system, whereas repair involves restoration of a system to a functional state. However, the dividing line between maintenance and repair is not always clear, particularly since some maintenance activity may involve procedures that bear a close resemblance to repair (e.g., replacing worn or broken components). In determining whether an employee should be considered to be engaged in repair or in maintenance, one should look to the activity in which the employee spends the majority of their working hours. See: Stearns Catalytic Ltd. v Everingham (September 3, 1986), ESC 2166 (Kerr); Beaver Engineering Limited v Lightfoot and Woods (April 26, 1985), ESC 1840 (Franks); and Warren v Rexway Sheet Metal (January 10, 1995), ESC 95-06 (Palumbo).

However, it is the Program's position that the term construction employee in O Reg 285/01 does include employees engaged in the on-site maintenance of roads (e.g., snow ploughing and salting of roads). The rationale for this position is as follows:

- The definition of construction employee covers on-site employees employed in any of the activities described in the definition of construction industry
- The definition of construction industry includes the "constructing . . . of . . . roads", which phrase we consider to be equivalent to road building
- Road building is defined as including the maintenance of roads
- Therefore, an employee engaged in the maintenance of roads falls under the definition of construction employee.

As a result, employees engaged in on-site road maintenance are:

- Exempted from ESA Part VII, ss. 17, 18 and 19 by virtue of being a construction employee, and
- Are subject to the special overtime threshold in O Reg 285/01, s. 13 by virtue of being a road building employee.

One question that has arisen concerns the definition of construction industry in the *Employment Standards Act, 2000* as compared to the definition of construction in the *Occupational Health and Safety Act,* RSO 1990, c O.1 ("OHSA"). The definition of construction in the OHSA specifically excludes "any work or undertaking underground in a mine" and persons engaged in such work are therefore not considered construction workers for the purposes of the OHSA.

However, the ESA 2000 definition of the construction industry contains no similar exception. Therefore, an employee engaged in the construction of a mine, whether at the surface or underground, is a construction employee for the purposes of the ESA 2000. In this regard, see the Ontario Labour Relation Board's decision in Hollos v Cementation Canada Inc., 2007 CanLII 17545 (ON LRB). In that case, the employee was employed as a "development miner" performing work in the construction of mine shafts. He argued that because he worked primarily underground he was engaged in mining but the Board held that regardless of where it was being performed, the nature of the work was construction and accordingly, he was a construction employee.

The definitions of construction industry and construction employee are substantially the same in scope as the construction industry definition in s. 1(1) of the *Labour Relations Act, 1995,* SO 1995, c 1, Sch A ("LRA 1995") and the employee definition in the Construction Industry part of the LRA 1995.

Domestic Worker

"domestic worker" means a person who is employed by a householder to perform services in the household or to provide care, supervision or personal assistance to children, senior or disabled members of the household, but does not include a sitter who provides care, supervision or personal assistance to children on an occasional, short-term basis;

The domestic worker definition is referred to in the special rules for domestic workers section in O Reg 285/01, s. 19. These special rules require the employer to provide the domestic worker with written particulars of employment, and sets out special rates for room and board.

Domestic workers are defined to include persons who are employed by the householder to perform services in the household (e.g., housekeeping or cleaning) as well as those providing care, supervision or personal assistance to children, senior or disabled members of the household. The definition makes no distinction between full-time, part-time, live-in or live-out workers. However, the definition specifically excludes babysitters who work on an occasional and short-term basis.

Employed by the householder

A domestic worker must be employed by the householder of the residence where they work. If the householder hired the worker through an agency, they are still a domestic worker if it is the householder who employs the worker and the householder was just using the agency as a "head-hunter". However, if the householder contracts with the agency for services and the employee is employed by that agency, or if the worker, although working in the residence is employed not by the householder but by some other employer, this definition will not apply (although the worker may be a homemaker in that case).

Perform services in the household

A domestic worker is defined to include persons employed by the householder who perform services in the household. This would include such functions as cleaning, dusting, vacuuming, laundry and the preparation of meals. A domestic worker is not a homeworker. See ESA Part I, s. 1(1) for the definition of homeworkers and ESA Part and O Reg 285/01, s. 12 for further information regarding the special rules that apply to homeworkers.

To provide, care supervision or personal assistance to children

An employee will fall under the definition of domestic worker if they provide care, supervision or personal assistance to a child of the householder. This would include a nanny who has received formal training in

child care as well as a sitter who has had no formal training. Note, however, that a sitter who provides care on an occasional, short-term basis is not covered under the definition of domestic worker. For example, a teenager who occasionally babysits on weekend evenings for a neighbour would not fall under this definition.

To provide, care supervision or personal assistance to senior or disabled members of the household

To fall within this category of domestic worker, the employee would have to be providing care, assistance, supervision or protection to a person who, because of advanced age or physical or mental disability, cannot care for their own needs. The services could include household work related to the care of the person (for example, meal preparation, bed-making, etc.). In addition, the worker must be employed by the householder and be attending to the needs of a member of the employer's household. Thus, for example, the definition would not apply to someone employed to provide personal care to a resident in a nursing home, where the employer is the resident's adult son who does not live in the nursing home, even if the resident used to live in the son's household.

Election Official

"election official" means,

(a) an employee appointed as a returning officer under the *Election Act*,

(b) an employee who is employed on a temporary basis to assist in the administration of a general election or by-election under the *Election Act* and who is managed or supervised, directly or indirectly, by a returning officer, and

(c) an employee of the Chief Electoral Officer who is assigned on a temporary basis to provide support to returning officers in the administration of a general election or by-election under the *Election Act* within a region made up of one or more, but not all, electoral districts as determined under the *Representation Act, 2015*; ("membre du personnel électoral")

The definition of "election official" was added to section 1 of O Reg 285/01, effective March 9, 2018. The definition of election official covers:

a) **An employee who is appointed as a returning officer the under *Election Act***

   Note that each riding has a returning officer who is appointed by the Lieutenant Governor in Council for a ten-year term.

b) **An employee who is employed on a temporary basis to assist in the administration of a general election or by-election under the *Election Act* and who is managed or supervised, directly or indirectly, by a returning officer,**

   In order to fall under clause (b) of this definition, the following must be met:

   - The employee must be employed temporarily.
   - The employee's work must involve assisting in the administration of a general election or a by-election under the *Election Act*.
   - The employee must be managed or supervised directly or indirectly by a returning officer.

Note that the reference to indirect management or supervision means that the exemption can apply even if the returning officer is not the immediate manager or supervisor of the employee in question.

For example, a poll clerk who is supervised by a deputy returning officer, who in turn is supervised by a returning officer, would be "indirectly" supervised by a returning officer for the purposes of this definition.

c) An employee of the Chief Electoral Officer who is assigned on a temporary basis to provide support to returning officers in the administration of a general election or by-election under the *Election Act* within a region made up of one or more, but not all, electoral districts.

In order to fall under clause (c) of this definition, the following must be met:

- The employee must be an employee of the Chief Electoral Officer.

  The Chief Electoral Officer is appointed by the Lieutenant Governor in Council under the *Election Act.* The Chief Electoral Officer has overall responsibility for conducting Ontario provincial elections. The Chief Electoral Officer employs permanent staff to work at the Office of the Chief Electoral Officer.
- The employee must be assigned on a temporary basis to provide support to returning officers in the administration of a general election or a by-election under the *Election Act*
- The employee must provide this support within a region that has one or more, but not all, electoral districts.

  In other words, if an employee provides support to all electoral districts, the employee would not meet the definition as set out in clause (c).

Election officials defined in this section are referred to in O Reg 285/01, s. 4(1)(g). During the period specified in section 4(1.1), these employees are exempt from s. 17, 18 & 19 of the ESA, which cover the hours of work, daily rest, and weekly and bi-weekly rest provisions of the Act.

Hotel, Motel, Tourist Resort, Restaurant and Tavern

"hotel, motel, tourist resort, restaurant and tavern" means an establishment that provides accommodation, lodging, meals or beverages for payment, and includes hotels, motels, motor hotels, tourist homes, tourist camps, tourist cabins and cottages, tourist inns, catering establishments and all other establishments of a similar nature;

This definition is referred to in the public holiday exemption in O Reg 285/01, s. 9(1)(j) regarding seasonal workers in such establishments, i.e., those who work 16 weeks or less in a calendar year and who are provided with room and board. It is also referred to in O Reg 285/01, s. 14, which establishes special rules and exemptions for overtime pay for employees in such establishments who are employed for 24 weeks or less in a calendar year and who are provided with room and board.

Information Technology Professional

"information technology professional" means an employee who is primarily engaged in the investigation, analysis, design, development, implementation, operation or management of information systems based on computer and related technologies through the objective application of specialized knowledge and professional judgement;

Information technology professionals ("IT professionals") as defined in this section are exempt from the hours of work provisions in ESA Part VII by O Reg 285/01, s. 4(3)(b) and overtime pay provisions in ESA Part VIII by O Reg 285/01, s. 8(1).

It is important to note that this definition does not include all people working in the information technology field.

The exemption is limited to professional employees who use specialized knowledge and professional judgement in their work. Webster's *Third New International Dictionary* defines "professional" as a person "engaged in one of the learned professions or in an occupation requiring a high level of training and proficiency" and "characterized by or conforming to technical or ethical standards of a profession or occupation". "Judgement" is defined as "the mental or intellectual process of forming an opinion or evaluation by discerning or comparing".

It is the Program's view that employment as an information technology professional would be characterized by the exercise of professional judgement requiring the application of specialized knowledge in accordance with technical standards. For example, this could include the assessment of the information systems needs of a client and the evaluation of risks and benefits associated with the various options in accordance with generally accepted principles in the computer and related technologies field. The Program would consider an employee who is responsible for the development of a company's software or the day-to-day maintenance of a company's software and hardware products to be an IT professional. On the other hand, an employee whose responsibility was to repair or "trouble-shoot" home computers sold by their employer would not be considered to be an IT professional.

In addition, a person using the hardware and software products developed and maintained by IT professionals would not themselves be considered IT professionals. For example, persons employed as computer animators would not likely be considered IT professionals as their work would involve using the systems and software created by IT professionals but would not involve developing or maintaining such systems or software. Note however that some computer animators may fall within the definition of employees in the recorded visual and audio-visual entertainment industry and consequently would be exempt from the hours of work and eating periods in the Act.

Although "related technologies" is not defined, the Program would not consider an employee who was responsible for the development or operation of "high tech" equipment such as TVs, DVDs or stereos to be an IT professional.

Formal educational attainment or the absence thereof is not determinative of whether the employee will be exempt. The Program will also recognize informal, on the job training and experience and training outside the traditional education sector.

In applying this definition, it is necessary to recognize that there will also be non-professional information technology staff, such administrative and support staff. These employees may perform routine tasks involving or pertaining to information technology, but they do not perform the more sophisticated tasks contemplated in the definition and will not be exempt. If a job description includes a large proportion of tasks that are not specific to the information technology field, it will not likely be exempt. Furthermore, the mere fact that an employee works for an information technology business does not mean that the exemption will apply. Conversely, an IT professional may be employed by an employer that produces cars, TVs or furniture.

Recorded Visual and Audio-Visual Entertainment Production Industry

"recorded visual and audio-visual entertainment production industry" means the industry of producing visual or audio-visual recorded entertainment that is intended to be replayed in cinemas or on the Internet, as part of a television broadcast, or on a VCR or DVD player or a similar device, but does not include the industry of producing commercials (other than trailers), video games or educational material;

The "recorded visual and audio-visual entertainment production industry" definition refers generally to the film and television industry. This definition is relevant to O Reg 285/01, s. 4, which exempts all employees in that industry from Part VII Hours of Work and Eating Periods, and O Reg 285/01, and O Reg 285/01, s. 9.1, which exempts employees in that industry from ESA Part XII, s. 42.1. Such employees include all employees of foreign and domestic companies that produce recorded visual and audio-visual entertainment in Ontario. This may include employees working as computer animators in the recorded visual and audio-visual industry.

The exemption generally does not apply to live performers in that industry as they typically do not fall within the definition of "employee" in ESA Part I, s. 1.

Residential Care Worker

"residential care worker" means a person who is employed to supervise and care for children or developmentally handicapped persons in a family-type residential dwelling or cottage and who resides in the dwelling or cottage during work periods, but does not include a foster parent;

The residential care workers as defined in O Reg 285/01 are subject to special rules and exemptions regarding hours of work, free time, overtime, minimum wage entitlement and records of hours as set out in O Reg 285/01, ss. 20 to 23.

The definition of residential care worker in O Reg 285/01 has a number of elements as follows:

Supervises and cares for children or develop-mentally handicapped persons

"Supervision" and "care" are broad terms and include all those activities involved in looking after children and developmentally handicapped adults: preparing meals, feeding, cleaning, organizing play activities, and so on. An employee may perform duties that are similar to a domestic worker, a superintendent, or a caretaker. However, if they perform those duties in a residential care facility and meets the other requirements of O Reg 285/01, this regulation will apply. See Marshall Children's Foundation v Grieve et al (November 8, 1976), ESC 378 (Aggarwal).

Children are generally considered by the Program to be persons under the age of 18 years. Previously, it was the Program's policy that developmentally handicapped persons were considered to be persons with a condition or handicap that was present or occurred before the age of 18 years, which was consistent with the Board's decision in Pacaldo v Dolega-Kamienski Estate, 2003 CanLII 35096 (ON LRB). In that decision, the Board referred to the *Day Nurseries Act,* RSO 1990, c D.2 (repealed) and the *Developmental Services Act,* RSO 1990, c D.11 (repealed), which defined the term "developmentally disabled" as "a condition of mental impairment present or occurring during the person's formative years . . .", and a definition from an authoritative medical dictionary which defined "developmental disability" as a "substantial handicap of indefinite duration with the onset before the age of 18 years, such as mental retardation, autism, cerebral palsy, epilepsy or other neuropathy", and concluded that "developmentally handicapped" has the same meaning as developmentally disabled. As a result, where a disability was related to such things as the aging process (e.g., Alzheimer's disease) or an accident, the Program did

not consider the person to be developmentally disabled for the purposes of the residential care worker rules and exemptions in O Reg 285/01, ss. 20 to 23.

However, in *Lorraine Fraser Viscount Residence et al. v Ontario Labour Relations Board et al.,* the Divisional Court overturned an Ontario Labour Relations Board decision that held that two applicant group homes which provided residential care for schizophrenic adults were not entitled to the residential care worker exemptions and special rules because there was no evidence before the Board that the residents of the group homes were diagnosed with schizophrenia before the age of 18. In reversing the Board's decision, the Court expressed concerns about the imposition of the "18 year old" test saying that while the Board had addressed the purpose of the ESA, it had failed to consider the purpose of the exclusion or exemption for residential care workers, which it said is to facilitate the operation of the homes, while at the same time protecting workers.

As a result, the Program has amended its operational policy to now consider a person to be developmentally disabled for the purposes of the residential care worker rules and exemptions in O Reg 285/01, ss. 20 to 23 if the person possesses a disability of indefinite duration, manifested in their formative years, that is characterized by significant limitations to cognitive and adaptive functioning. "Cognitive functioning" refers to a person's intellectual capacity, including the capacity to reason, organize, plan, make judgments and identify consequences. "Adaptive functioning" refers to a person's capacity to gain personal independence, based on the person's ability to learn and apply conceptual, social and practical skills in their everyday life.

Works in a family-type residential dwelling or cottage

Only work in a residential care facility that is designed to provide a home-like atmosphere is covered. Work in an institution, such as a hospital, is not covered.

Resides in the dwelling or cottage during work periods

Program policy is that the employee must be required by the employer to reside at the facility and must actually do so, that is, eat, sleep, and spend rest periods there. If the employer merely provides accommodation for the employees and it is their option whether or not to use them, the regulation does not apply. The regulation is meant to apply in those situations where it is essential that the worker remain at the facility virtually 24 hours per day.

"Work period" refers to the period between the time the employee enters the facility for the purpose of working and residing there through to the time when they leave. Residence need not be permanent in order for the regulation to apply. In other words, the employee may have accommodation elsewhere where they reside when not on a shift. For example, an employee may be scheduled to work a set number of days at the facility, until they are relieved, at which time they can leave and live elsewhere.

Road Building

"road building" means the preparation, construction, reconstruction, repair, alteration, remodelling, renovation, demolition, finishing and maintenance of streets, highways or parking lots, including structures such as bridges, tunnels or retaining walls in connection with streets or highways, and all foundations, installation of equipment, appurtenances and work incidental thereto;

Employees who are engaged in "road building" are subject to special rules (different overtime thresholds) for overtime pay as set out in O Reg 285/01, s. 13.

Employees engaged in road building will also fall under the general definition of construction employees in O Reg 285/01, s. 1. As a result, such employees may also be exempt from the hours of work, daily rest and weekly and bi-weekly rest provisions and public holiday provisions of the Act. See the discussion of the definition of construction employee above for further information.

Seasonal Employee

"seasonal employee" means an employee who works not more than 16 weeks in a calendar year for an employer;

The seasonal employee definition is referenced in O Reg 285/01, s. 9(1)(j) and s. 15.

Section 9(1)(j) establishes an exemption from the public holiday provisions of the Act for seasonal employees of a hotel, motel, tourist resort, restaurant or tavern, who are provided with room and board.

Section 15 establishes special rules and exemptions for overtime pay for seasonal employees in fresh fruit and vegetable processing.

Taxi Cab

"taxi cab" means a vehicle, with seating accommodation for not more than nine persons exclusive of the driver, used to carry persons for hire;

This definition is referenced in O Reg 285/01, s. 8(j) and S. 9(1)(i), which exempt taxi cab drivers from overtime pay and public holiday pay.

In order for a vehicle to be a taxi cab, both elements of the definition must be met; it must seat no more than nine people (not counting the driver), and it must be used for the carriage for hire of people. Therefore, a car driven by a private chauffeur for one employer is not a taxi cab; nor is a bus that seats more than nine people plus the driver (even if it is often the case that nine or fewer people are actually riding in it).

Employers sometimes operate a mix of regular taxi cabs and larger vehicles that seat more than nine people. Employees who drive both types of vehicles will fall under this definition for the purposes of the overtime and public holiday exemptions, only if they spend the majority of their time driving vehicles that fall within the definition of taxi cab.

Wage Rate

"wage rate" means, where an employee is paid for piecework, the rate paid per piece and if there is more than one piece rate, each of the piece rates, and the number of pieces paid at each rate.

This definition applies with respect to the wage statement obligations in ESA Part V, s. 12. Under that section, an employer is required to provide, on the employee's pay day, a written statement setting out, among other things, the employee's wage rate.

The definition is inclusive but is intended to indicate what an employee's wage rate is if the employee is paid on a piecework basis. The definition provides that wage rate includes the piece rate or rates together with the number of pieces paid at each rate.

For example, in the case of fruit, vegetable or tobacco harvesters it may refer to the rate paid for each of bushel or pound of produce harvested by the employee and the number of bushels or pounds paid for.

In the case of homeworkers, the piece rate would be the rate paid for a specified number of articles or things manufactured. "Manufacture" is defined in O Reg 285/01, s. 12(3) to include preparation, improvement, repair, alteration, assembly or completion. See O Reg 285/01, s. 12 for information regarding special rules for homeworkers.

O Reg 285/01 Section 1.1 – When Work Deemed to Be Performed

When Work Deemed to Be Performed – s. 1.1(1)

1.1 (1) Subject to subsection (2), work shall be deemed to be performed by an employee for the employer,

(a) where work is,

(i) permitted or suffered to be done by the employer, or

(ii) in fact performed by an employee although a term of the contract of employment expressly forbids or limits hours of work or requires the employer to authorize hours of work in advance; or

(b) where the employee is not performing work and is required to remain at the place of employment,

(i) waiting or holding himself or herself ready for call to work, or

(ii) on a rest or break-time other than an eating period. O. Reg. 526/17, s. 2.

Section 1.1(1), which deems work to be performed in certain circumstances, is subject to s. 1.1(2), which sets out circumstances where work will not be deemed to be performed. As a consequence, in the circumstances set out in s. 1.1(2), work will not be deemed to be performed even though it would otherwise be deemed to have been performed under s. 1.1(1).

The fact that O Reg 285/01, s. 1.1(1) deems work to be performed in specified circumstances means that the deemed working time must be taken into account in determining compliance with the statutory requirements, such as the hours of work, minimum wage and overtime pay standards*. **How the employee is paid for that time however, is a separate issue**. Under the ESA, it is possible for an employee to be paid different rates for different types of work, including receiving no financial compensation or a rate that is lower than the hourly minimum wage rate for some types of work (so long as the minimum wage requirements, which are based on a pay period basis, are met). See “Payment for Time Worked” at the end of the discussion on s. 1.1 for details.

Work Permitted or Suffered to be Done

Section 1.1(1)(a)(i) provides that an employee is considered to have performed work if the employer allowed the employee to perform work. In other words, it is not necessary that the employer have asked or authorized the employee to do the work; the employee will be considered to have performed the work if the employer was aware that the employee was working or could have anticipated that they might be working but failed to take steps to prevent it. In *M. Alzner Contractors Ltd. v Standard* (December 16, 1985), ESC 2015 (Brown), the referee found that the employer had "permitted or suffered" work to be done by the employee because the employer knew that the employee was present on the job site, but did not ask him to leave or instruct him not to engage in any work on behalf of the employer. Similarly, employees who perform work prior to the start of their scheduled shift (e.g. because the employee

regularly arrives at the workplace early) or after the end of the scheduled shift (e.g. because the employee is finishing up with a customer) will be considered to be performing work during that time so long as the employer was aware or could have anticipated that the employee might be working and didn't take steps to prevent it.

Work in Fact Performed Even if Forbidden / Not Authorized by Contract

Section 1.1(1)(a)(ii) is, in effect, an elaboration of s. 1.1(1)(a)(i). It provides that work is deemed to be performed if it is in fact performed, even though the employment contract prohibited the performance of the work or the employee failed to obtain the employer's approval despite the fact that the contract required such approval.

For example, work was deemed to be performed where the employee's actual hours of work exceeded those for which the employee was scheduled - see *Weiche-Huttenkofer Corporation Limited v Masschelein* (August 25, 1980), ESC 872 (Gorsky); and where the employee performed work that was not authorized in advance as required by the employer - see *469754 Ontario Limited o/a Rumors Restaurant & Tavern v Lalonde* (October 16, 1982), ESC 1305 (Betcherman). The fact that the work performed by the employee was unnecessary (i.e., it was not required to be done) does not render s. 1.1(1) inapplicable - see *Keyes Supply Company Limited o/a Amalgamated Iron & Metal Co. v Cabral* (February 15, 1979) ESC 582 (Picher); nor does the fact that the work was unsatisfactory - see *The Living Institute v Roberts* (March 6, 1978), ESC 489 (Haladner) and *Elgin Lumber & Packaging Corp. Ltd. v Tait et al* (June 19, 1978) ESC 524 (Brent).

Not Performing Work But Required to Remain at Place of Employment

i. Section 1.1(1)(b)(i) provides that work is deemed to be performed where an employee is not in fact performing work but is required to be at the place of employment waiting to be called to work.

Where the employee is holding themselves ready for work but not at the place of employment, work is not deemed to be performed. See *379480 Ontario Ltd. c.o.b.a. Arlington Public House and Restaurant v Kish* (November 26, 1981), ESC 1107 (Davis) and the discussion in s. 1.1(2) below.

ii. Section 1.1(1)(b)(ii) provides that work is deemed to be performed where an employee is not in fact performing work but is required to be at the place of employment while on a break or rest period other than an eating period. See *Cardelli and Cardarelli o/a Dina's Beauty Salon v Grey* (March 6, 1978), ESC 488 (Springate) where the employee was at his place of work, ready for a call to work, but not actively working.

If the employee is allowed to leave or is required to leave the place of employment during a break, work will not be deemed to be performed – see *Cancoil Thermal Corporation v Hawkins* (April 13, 1999), 4529-97-ES (ON LRB).

There may be situations where some employees are deemed to have performed work during their breaks while others are not, for example, at workplaces where employers require employees who wish to smoke on their breaks to leave the place of employment, while requiring non-smoking employees to stay. Neither the ESA 2000 nor the regulations prohibit that kind of situation. Generally speaking, "place of employment" for the purposes of O Reg 285/01, s. 1.1(1) may encompass both the building and the land, including the parking lot, owned by the employer, but would exclude public sidewalks and roads.

Scenarios where the issue as to whether work is being performed may arise

The question as to when time constitutes “work” for the purposes of the ESA often arises. The Program’s policy for some scenarios in which this question has arisen is set out below.

i. Travel Time

It is Program policy that any time a person spends traveling (irrespective of the mode of transportation) for the purpose of getting to or from some-where where work will be or was performed, with the exception of commuting time, counts as working time.

Commuting time for an employee who has a usual workplace means the time required for the employee to travel to their usual workplace from home and vice versa.

In situations where an employee does have a usual workplace but is required to travel to a location other than the usual workplace to perform work, all time spent travelling to and from that location is considered working time rather than commuting time. For example, if an employee who usually works in City A is required to travel to City B for work, all time spent getting either from home or the workplace in City A (depending on whether the employee was beginning their journey from home or the workplace) to the destination in City B will count as working time. (In the case where the employee travels by air, for example, the time spent getting to the airport, waiting to get on the plane, time on the plane and time spent getting to the destination in City B after the plane lands all counts as working time.)

In situations where an employee does not have a usual workplace, commuting time is generally considered to be the time it takes the employee to get from their residence to the first work location and the time it takes for the employee to get home from their last work location. For example, if an employee works for a housecleaning service, time spent travelling from their home to the first residence they are scheduled to clean is considered to be commuting time as will the trip home from the last residence. However, time spent travelling during the work day to go from residence to residence would be considered working time rather than commuting time. If the employee is required to attend at the employer’s shop at the start of the shift in order to pick up supplies and at the end of the shift to drop off the supplies and do paperwork, the time spent travelling from the shop to the first house and from the last house to the shop is considered working time. See, for example, *Hopkins v 1719453 Ontario Inc. (Clean Team)*, 2012 CanLII 25680 (ON LRB).

As noted, commuting time is not counted as working time. However, there are exceptions to this rule:

- If the employee takes a work vehicle home in the evening for the convenience of the employer, the hours of work begin when the employee leaves home in the morning and end when they arrive home in the evening.
- If the employee is required to pick up other staff or supplies on the way from home to work, or to drop off other staff or supplies on the way from work to home, all the time spent from home to work and vice versa must be treated as working time.

ii. Training Time

It is Program policy that time spent in training that is required by the employer or by law as a condition of employment or continued employment will be considered working time.

Training that is taken at the option of the employee, i.e., training that is not required by the employer as a condition of employment or continued employment or that is not otherwise necessary for the performance of the employee’s job would not be considered working time. This includes training that is required to meet the qualifications for a new position with the current employer (e.g., a course and certificate in project management as a condition for promotion to manager).

iii. Time Spent at the Workplace Prior To/After Scheduled Shift & Punching In and Out

Employees are often required for practical reasons to be at their workplace and/or to perform work functions in advance of their scheduled shift start time in order to ensure they are ready at their workstation (be in the right place such as, for example, a desk, in front of a cash station, on an assembly line, etc.) to start their shift on time. Some situations that would require an employee to arrive at the workplace in advance of their scheduled shift include:

- putting on a required uniform or personal protective equipment when that can be done only on the work premises either because that is where the employer requires the uniform/equipment to be kept or because it would not be practical for the employee to wear the uniform/equipment during the commute from home to work)
- counting the cash in a till prior to replacing another colleague at the register
- lining up at the punch clock where there is often a wait

The Program considers that where it is necessary for the employee to spend time or to perform functions in the workplace in order to start a shift on time, that time is considered working time.

The same policy applies with respect to time spent performing functions after the end of a shift. For example, time after the end of the scheduled shift that an employee spends counting the cash in the till or waiting in line to punch out at the time clock is considered working time.

iv. Employer/Contract Deems Employees Not to Have Worked

A related issue arises when employers deem employees to have worked less time than they in fact did for purposes of calculating employees' wages.

For example, some employers may, under the terms of the employment contract, pay an employee who punches in more than 5 minutes but fewer than 15 minutes late wages only for 45 minutes for that hour. This method of calculating an employee's wages is not prohibited under the ESA 2000. (Although note that depending on the employee's wage rate, there may be an issue with minimum wage compliance – see the discussion udner "Deductions, s. 13(1))".)

However, compliance with the hours of work provisions is determined on the basis of time worked (whether actually worked or deemed to have been worked under this section of the regulation), not on the provisions of the contract that might, in some circumstances, deem the employee to have worked less time than they in fact did.

Payment for Time Worked

Once it is determined that time is considered working time, the next issue is whether the employee is entitled to be paid for that work, and if so, at what rate. The question to be answered is what pay, if any, was payable under the contract in respect of the work.

The ESA does not prohibit employers from entering into contracts with employees to pay them different rates for different types of work, including paying some types of work at a rate that is lower than the hourly minimum wage rate – including no payment at all – so long as the minimum wage requirements, which are based on a pay period basis, are met.

For example, a contract may provide that the time an employee spends lining up to punch in and out will not be compensated, even though that time is considered to be work. Or, it may provide that the time an employee spends donning and doffing personal protective equipment at the workplace will not be

compensated even though that time is considered to be work. Similarly, a contract may provide that travel time will be compensated at 50% of the employee's regular rate. These types of contractual terms are not prohibited under the ESA 2000, so long as the minimum wage requirements – compliance with which are determined on a pay period basis, not an hourly basis – are satisfied.

The contractual terms regarding payment may be explicitly set out in a written contract, but in many cases they won't be and officers will rely on other evidence, including the individual employee's understanding, to determine what the parties' agreement – explicit or implied – was with respect to payment.

Same – s. 1.1(2)

1.1(2) Work shall not be deemed to be performed for an employer during the time the employee,

(a) is entitled to,

(i) take time off work for an eating period,

(ii) take at least six hours or such longer period as is established by contract, custom or practice for sleeping and the employer furnishes sleeping facilities, or

(iii) take time off work in order to engage in the employee's own private affairs or pursuits as is established by contract, custom or practice; or

(b) is not at the place of employment and is waiting or holding himself or herself ready for call to work. O. Reg. 526/17, s. 2.

Section 1.1(1), which deems work to be performed (e.g., where work was permitted or suffered to be done or the employee was on-call at their place of work), is subject to s. 1.1(2). As a consequence, in the circumstances set out in s. 1.1(2), work will not be deemed to be performed, even though it would otherwise be found that work had been performed pursuant to s. 1.1(1).

An example of the joint effect of ss. 1.1(1) and (2) occurs where a live-in employee is required to remain on the premises of an employer operating a remote location hunting or fishing camp. If the employee is called to do work from time to time as the need arises, without any defined period(s) of time off, they will be deemed, pursuant to s. 1.1(1)(b)(i), to be working during all hours. This, however, is subject to s. 1.1(2), which states that work is not deemed performed during the time an employee is entitled to take time off for eating, sleeping or private pursuits. In order to apply s. 1.1(2), the employer must demonstrate that the employee was in fact entitled to take such time off.

Meal Breaks

Section 1.1(2)(a)(i) establishes that where the employee is entitled to take time off for a meal break, that time will not be deemed to be work time.

Note that while an employee may ostensibly have an entitlement to take time off, there may be no entitlement in fact. For example, if the employer advises an employee that they have an eating period at, say, noon, each day but then makes it impossible for the employee to take the break, s. 1.1(2) would not apply. As a result, the meal break would not be deemed non-work time. (In such a case, there may also be a violation of the ESA Part VII, ss. 20 and 21 requirement to provide the employee with a meal break.)

For example, if the employer provides a meal break from 1:00 to 1:30 p.m. but advises the employee at 1:00 p.m. that 50 widgets must be made by 1:30 p.m., the employer has effectively denied the entitlement

to the meal break. No entitlement means that s. 1.1(2) does not apply and the officer will find that work was performed. Note that if the employee decided on their own initiative to make another 50 widgets between 1:00 and 1:30 p.m., that time would not count as hours of work. The employee was entitled to take the meal break and, therefore, work is deemed not to be performed during that period.

The Program takes the position that an employee may be required to take an ESA Part VII, s. 20 meal break in a designated place (e.g., on the employer's premises) and to be on call while on that break. If an eating period is not provided in compliance with ESA Part VII, s. 20(1) or (2), because the employee was on call and the meal break was interrupted, the employee is considered not to have had a meal break for the purposes of s. 20. As a result, s. 1.1(2) will not apply and the officer will find that work was performed as per s. 1.1(1)(b).

For example, an employer provides a 30-minute eating period for an employee and requires the employee to take his/her eating period in a designated place on the employer's premises and to be on call. The employee is only able to complete 20 minutes of the 30-minute eating period before getting called back to work. Because the employee was not able to have an uninterrupted 30-minute eating period, a s. 20(1) eating period is considered not to have been provided, and a new uninterrupted 30-minute period must be given. Further, because a s. 20(1) eating period has not been provided, the 20 minutes taken would not be considered an eating period and the “work deemed not to be performed” provision of s. 1.1(2)(a)(i) would not apply. The 20 minutes would be deemed to be work performed under s. 1.1(1)(b).

Similarly, the above would also apply to situations under s. 20(2) where the eating period is split into two periods of time that total 30 minutes within a five hour period. For example, an employer and employee have agreed that the employee will receive two 15-minute eating periods within a five hour period of work. The two 15-minute periods are not scheduled and the employer requires the employee to take the eating period on the employer's premises and to be on call while on break. The employee is able to take the first 15-minute eating period without an interruption. However, 10 minutes into the second 15-minute eating period, the employee is called back to work. Because the second 15-minute eating period was not completed, s. 20(2) has not yet been complied with. Another 15-minute eating period must be provided in order to achieve compliance with s. 20(2). Should the employee not be able to complete the second 15-minute eating period within a 5-hour period of work, then there would not be compliance with s. 20(2). All of the break time taken, including the first 15-minute break would not be considered an eating period per s. 1.1(2)(a)(i) and would be deemed to be work per s. 1.1(1)(b).

Sleeping Periods

Section 1.1(2)(a)(ii) establishes that a sleeping period of at least six hours where sleeping facilities are provided by the employer will not be deemed to be work time so long as the employee is entitled to the time off. The employee must be entitled to uninterrupted sleep for at least six hours and entitled to refuse work during the period designated as a sleep period in order for the sleeping period to be deemed non-working time. If the employee does not have the right to refuse work during the sleeping period, the entire sleeping period is included in hours of work, whether or not the employee is actually called on to work - see *Stark v Kerry's Place (Autism Services)* (June 16, 1999), 3048-97-ES (ON LRB).

Time Off for Personal Matters

Section 1.1(2)(a)(iii) establishes that when an employee is given time off to engage in private affairs or pursuits, the employee will not be considered to be working. For this provision to apply, it must be clear that the employee was entitled to take the time off and was not simply on-call, waiting to be assigned or put to work.

On Call to Work

Section 1.1(2)(b) establishes that on call employees are not considered to be working if they are not at their place of employment while waiting to be called in to work – see *379480 Ontario Ltd. c.o.b.a. Arlington Public House and Restaurant v Kish*. For a discussion of what is meant by on call see ESA Part VII, s. 18(2).

O Reg 285/01 Section 2 – Exemptions from Parts VII to XI of Act

Exemptions from Parts VII to XI of the Act – s. 2(1)

Exempted Professionals – s. 2(1)(a) and (b)

2(1) Parts VII, VII.1, VIII, IX, X and XI of the Act do not apply to a person employed,

(a) as a duly qualified practitioner of,

- **i. architecture**,
- **ii. law,**
- **iii. professional engineering,**
- **iv. public accounting,**
- **v. surveying, or**
- **vi. veterinary science;**

(b) as a duly registered practitioner of,

- **i. chiropody,**
- **ii. chiropractic,**
- **iii. dentistry,**
- **iv. massage therapy,**
- **v. medicine,**
- **vi. optometry,**
- **vii. pharmacy,**
- **viii. physiotherapy, or**
- **ix. psychology;**

The professionals listed above are exempt from the Hours of Work and Eating Periods (Part VII), Three Hour Rule (Part VII.1), Overtime Pay (Part VIII), Minimum Wage (Part IX), Public Holidays (Part X) and Vacation with Pay (Part XI) provisions of the ESA 2000.

In order for the exemption to apply, two conditions must be met. For the professionals listed in s. 2(1)(a), the employee must be "duly qualified" and must be a "practitioner" of the profession.

For the professionals listed in s. 2(1)(b) the employee must be "duly registered" and must be a "practitioner" of the profession.

Duly Qualified

The employees listed in s. 2(1)(a) must be entitled to practise the profession under the following legislation:

Profession	**Legislation**
Architecture	*Architects Act,* RSO 1990, c A.26
Law	*Law Society Act,* RSO 1990, c L.8
Professional Engineering	*Professional Engineers Act,* RSO 1990, c P.28
Public Accounting	*Public Accounting Act, 2004,* SO 2004, c 8
Surveying	*Surveyors Act,* RSO 1990, c S.29
Veterinary Science	*Veterinarians Act,* RSO 1990, c V.3

Duly Registered

The employees listed in s. 2(1)(b) must be duly registered under the following legislation:

Profession	**Legislation**
Chiropody	*Chiropody Act, 1991,* SO 1991, c 20
Chiropractic	*Chiropractic Act,* 1991, SO 1991, c 21
Dentistry	*Dentistry Act, 1991,* SO 1991, c 24
Massage Therapy	*Massage Therapy Act, 1991,* SO 1991, c 27

Profession	Legislation
Medicine	*Medicine Act, 1991,* SO 1991, c 30
Optometry	*Optometry Act, 1991,* SO 1991, c 35
Pharmacy	*Pharmacy Act, 1991,* SO 1991, c 36
Physiotherapy	*Physiotherapy Act, 1991,* SO 1991, c 37
Psychology	*Psychology Act, 1991,* SO 1991, c 38

Duly Qualified/Registered

The practitioner in a profession described in s. 2(1)(a) or s. 2(1)(b) must be duly qualified or registered under the legislation referred to above.

For example, "duly qualified practitioner of . . . law" means an individual who is licensed by the Law Society of Ontario to practise law. Paralegals are not covered by this exemption, because although they are governed by the *Law Society Act* and Law Society of Ontario, they are licensed only to "provide legal services", not to "practise law".

A duly qualified practitioner of architecture includes an architect, intern architect and a student architect licensed to practice architecture by the Ontario Association of Architects ("OAA") under the *Architects Act*. It may also include persons designated as Licensed Technologists if they are issued a restricted or limited certificate of practice by the OAA.

Note that a midwife is not considered to be a practitioner of medicine as the practise of midwifery is governed by the *Midwifery Act, 1991,* SO 1991, c 31 and not the *Medicine Act, 1991*.

Duly Qualified Practitioner with License to Practise Public Accounting – s. 2(1)(a)(iv)

A duly qualified practitioner of public accounting refers to a person who is a practitioner of and who is qualified to practise public accounting under the *Public Accounting Act, 2004* ("PAA"). This means that the employee either:

- Has a license to practise public accounting under the *Public Accounting Act, 2004* ("PAA"); or
- Is exempt from the licensing requirement under the PAA.

The Public Accountants Council for the Province of Ontario (the Council) is the corporate body that oversees the regulation of public accounting in Ontario. The Public Accountants Council may authorize other organizations (called "designated bodies") to license and govern the activities of their members as public accountants. In order to become an "authorized designated body", the designated body must meet certain standards set by the Public Accountants Council.

The Public Accountants Council had previously authorized the following "designated bodies" to issue licenses to its members to practise public accounting in Ontario:

- Institute of Chartered Accountants of Ontario
- Certified General Accountants Association of Ontario (as of June 2010)
- Certified Management Accountants of Ontario (as of January 2012)

As a result, individuals licensed to practise public accounting under the PAA may include members of the Institute of Chartered Accountants of Ontario, members of the Certified General Accountants Association of Ontario, and members of the Certified Management Accountants of Ontario.

In 2014, the three designated bodies amalgamated into the Chartered Professional Accountants of Ontario (CPA Ontario) in 2014.

Effective May 17, 2017, this amalgamation was recognized in the *Chartered Professional Accountants of Ontario Act, 2017* (CPA Act). CPA Ontario is now the sole “designated body” under the *Public Accounting Act, 2004* authorized to license its members to practice public accounting in Ontario and govern the activities of its members as public accountants.

Concurrent with the coming into force of the CPA Act, the enabling statutes for the predecessor designated bodies (*Certified General Accountants Act, 2010, Certified Management Accountants Act, 2010* and the *Chartered Accountants Act, 2010*) were repealed. However, all members of the former three designated bodies carry a CPA Ontario designation in conjunction with their legacy designation until November 1, 2022.

Qualified Practitioner of Public Accounting Exempted from Licensing Requirements – s. 2(1)(a)(iv)

A person may also be duly qualified to practise public accounting under the PAA even though they are not required to hold a license if they provide public accounting services exclusively in respect of:

- Any public authority or any commission, committee or emanation of a public authority, including a Crown corporation;
- Any bank, loan or trust company;
- Any transportation company incorporated by an Act of the Parliament of Canada; or
- Any other publicly-owned or publicly-controlled public utility organization.

Therefore, an employee who provides public accounting services exclusively for one of the above-listed organizations, may be considered duly qualified in the practise of public accounting even if they are not been issued a license in public accounting.

Practitioner

An employee in a profession described in s. 2(1)(a) or s. 2(1)(b) above must actually be practising the profession in order for the exemption to apply. For example, a store clerk who is a member of the Law Society of Ontario is duly qualified; however as she is not practising law, the exemption will not apply.

With respect to what is meant by the "practise" of public accounting, the Public Accountants Council for the Province of Ontario defines public accounting as: the business of expressing independent assurance and certain other services in respect of financial statements and other financial information of enterprises where it can reasonably be expected that the services will be relied upon or used by a third party.

For clarity, a person is not practising public accounting if they are engaging solely in bookkeeping, cost accounting, or the installation of bookkeeping or business systems. Likewise, the preparation of financial statements solely as part of tax returns without provision of an opinion independent of the taxpayer in respect of the financial statements, is not considered practising public accounting.

Duly Registered Practitioner Under the *Naturopathy Act, 2007* – s. 2(1)(c)

2(1) Parts VII, VII.1, VIII, IX, X and XI of the Act do not apply to a person employed,

(c) as a duly registered practitioner under the *Naturopathy Act, 2007*;

This clause was amended effective January 1, 2019 to replace the reference to the (repealed) *Drugless Practitioners Act* (DPA) with a reference to the *Naturopathy Act, 2007*. (At the time of the repeal the only remaining class of drugless practitioners under the DPA were the drugless therapists/naturopaths.)

A duly registered naturopathic practitioner is exempt from the Hours of Work and Eating Periods (Part VII), Three Hour Rule (Part VII.1), Overtime Pay (Part VIII), Minimum Wage (Part IX), Public Holidays (Part X), and Vacation with Pay (Part XI) provisions of the ESA 2000.

In order for the exemption to apply, the employee must be duly registered under the *Naturopathy Act, 2007* and be practising the profession of naturopathy. The *Naturopathy Act, 2007* (s. 3) defines the practice of naturopathy as follows:

> *"The practice of naturopathy is the assessment of diseases, disorders and dysfunctions and the naturopathic diagnosis and treatment of diseases, disorders and dysfunctions using naturopathic techniques to promote, maintain or restore health."*

All persons who were registered to practice under the *Drugless Practitioners Act* by the Board of Directors of Drugless Therapy immediately before July 1, 2015 were deemed to be holders of a certificate of registration issued under the *Naturopathy Act, 2007*.

Teacher as Defined in the Teaching Profession Act – s. 2(1)(d)

2(1) Parts VII, VII.1, VIII, IX, X and XI of the Act do not apply to a person employed,

(d) as a teacher as defined in the Teaching Profession Act**;**

Certain teachers are exempt from the Hours of Work and Eating Periods (Part VII), Three Hour Rule (Part VII.1), Overtime Pay (Part VIII), Minimum Wage (Part IX), Public Holidays (Part X), and Vacation with Pay (Part XI) provisions of the ESA 2000.

"Teacher" is defined in the *Teaching Profession Act*, RSO 1990, c T.2 ("TPA"):

"teacher" means a person who is a member of the Ontario College of Teachers and is employed to teach by a board as a teacher but does not include a supervisory officer, a principal, a vice-principal or an instructor in a teacher-training institution.

A person may be employed to teach, but that in itself does not mean that the person falls within the exemption. In the first place, as the definition indicates, the term "teacher" does not include supervisory officers (e.g., directors of education), principals and vice-principals, or instructors in a teacher-training institution.

Secondly, some teachers are not employed by a board as that term is used in the definition. While the term "board" is not defined in O Reg 285/01 or the TPA, the *Education Act*, RSO 1990, c E.2., defines it

as a "district school board or school authority". Based on the principle of statutory interpretation that holds that words and expressions used in different statutes dealing with the same subject matter should be interpreted consistently and on the fact that the TPA, the *Education Act* and s. 2(1)(d) of O Reg 285/01 all deal with the teachers, it is the Program's position that the word "board" as it appears in the exemption should be construed as a district school board or school authority (as opposed to, say, a board of directors or board of governors).

It follows that teachers who are not employed by a district school board or school authority, such as teachers in a private school or a college or university, do not fall within the exemption. See, for example, *Guru Tegh Bahadur International School Inc. v. Director of Employment Standards*, 2019 CanLII 22126 (ON LRB). (Note that teachers in these institutions are not required by legislation to be members of the Ontario College of Teachers, and if they are not they would be outside the scope of the exemption on that ground as well.)

Student in Training for an Occupation Mentioned in Clause (a),(b),(c) or (d) – s. 2(1)(e)

2(1) Parts VII, VII.1, VIII, IX, X and XI of the Act do not apply to a person employed,

(e) as a student in training for an occupation mentioned in clause (a), (b), (c) or (d);

Students in training to be one of the professionals listed in clause (a) or (b), a naturopathic practitioner as mentioned in clause (c), or a teacher as defined in clause (d) are exempt from the Hours of Work and Eating Periods (Part VII), Three Hour Rule (Part VII.1), Overtime Pay (Part VIII), Minimum Wage (Part IX), Public Holidays (Part X), and Vacation with Pay (Part XI) provisions of the ESA 2000.

Most of these professions and callings have some type of work experience or apprenticeship requirement that must be completed before a person can qualify to practise the profession. This work experience requirement is often mandated by the authorizing statute. It is only while a student is engaged in obtaining work experience as per the statute that they are exempted from the above standards. For example, the *Professional Engineers Act* requires applicants for a license as a duly qualified practitioner of professional engineering to have certain educational qualifications and 48 months of experience in the practice of engineering. After completing the 48 months of work experience, the Council of the Association of Professional Engineers of Ontario reviews the experience to determine whether it is sufficient to allow the student to meet the generally accepted standards of practical skill required to engage in the practice of professional engineering. Some students in training enroll in the Engineering Intern Training ("EIT") Program. This Program, which is administered by the Professional Engineers of Ontario, provides the student with an annual review of their engineering experience (as well as a subscription to certain professional publications). For the purposes of the ESA 2000, a student-in-training would include a student in the EIT Program but would also include a student who is not in the Program but is currently engaged in obtaining the 48 months of experience required under the *Professional Engineers Act*.

If the student is merely studying the subject area of the profession at university or college, the exemption will not apply to any employment they undertake while studying. For example, a person may be studying dentistry while employed by the operator of a restaurant part-time as a waiter; the exemption will not apply to exempt the restaurant operator from the obligation to comply with the above standards.

Commercial Fishing – s. 2(1)(f)

2(1) Parts VII, VII.1, VIII, IX, X and XI of the Act do not apply to a person employed,

(f) in commercial fishing;

Employees engaged in commercial fishing and who fall under provincial jurisdiction will be exempt from the Hours of Work and Eating Periods (Part VII), Three Hour Rule (Part VII.1), Overtime Pay (Part VIII), Minimum Wage (Part IX), Public Holidays (Part X) and Vacation with Pay (Part XI) provisions of the ESA 2000. Please refer to ESA Part III, s. 3(2) for further information. Note, however, that this exemption has not been held to apply to "in plant" employees on the basis that employees engaged in preparing and distributing the fish for market were not engaged in commercial fishing – see *Kingsville Fishermen's Company Limited v Ontario Ministry of Labour* (April 8, 1988), ESC 2324 (Springate).

Salesperson or Broker, as Defined in the Real Estate and Business Brokers Act, 2002 – s. 2(1)(g)

2(1) Parts VII, VII.1, VIII, IX, X and XI of the Act do not apply to a person employed,

(g) as a salesperson or broker, as those terms are defined in the Real Estate and Business Brokers Act, 2002**;**

A registered salesperson of a real estate broker is exempt from the Hours of Work and Eating Periods (Part VII), Three Hour Rule (Part VII.1), Overtime Pay (Part VIII), Minimum Wage (Part IX), Public Holidays (Part X), and Vacation with Pay (Part XI) provisions of the ESA 2000.

This exemption was amended effective March 31, 2006 by O Reg 92/06 to reflect the repeal and replacement of the *Real Estate Business and Brokers Act,* RSO 1990, c R.4 with the *Real Estate Business and Brokers Act, 2002,* SO 2002, c 30, Sch C which came into force on that date.

In order for the exemption to apply, the salesperson must be registered as a broker under the *Real Estate and Business Brokers Act, 2002* and be employed by a brokerage to trade in real estate. They must actually be employed as a salesperson. Other types of employees, even if they also happen to be registered as salespersons, would not be exempted, for example, a secretary or an office manager – see *Luft and Beaudry Inc. and Broom and Associates Realty Inc. v Bradshaw* (September 6, 1991), ESC 2901 (Hovius).

Salesperson – s. 2(1)(h)

2(1) Parts VII, VII.1, VIII, IX, X and XI of the Act do not apply to a person employed,

(h) as a salesperson, other than a route salesperson, who is entitled to receive all or any part of his or her remuneration as commissions in respect of offers to purchase or sales that,

i. relate to goods or services, and

ii. are normally made away from the employer's place of business.

Salespersons (other than route salespersons) who earn, as part or all of their remuneration, commissions for the sale of goods or services where such sales are normally made away from the employer's place of business are exempt from the Hours of Work and Eating Periods (Part VII), Three Hour Rule (Part VII.1), Overtime Pay (Part VIII), Minimum Wage (Part IX), Public Holidays (Part X), and Vacation with Pay (Part XI) provisions of the ESA 2000.

Other Than a Route Salesperson

The question of what is a route salesperson has frequently been considered by the Ontario Labour Relations Board. In *Orlov v Amato*, 2003 CanLII 2984 (ON LRB), the Board found that children who were selling boxed chocolates door-to-door on streets determined by the employer were route salespersons and therefore not exempt from the core employment standards under s. 2(h) of O Reg 285/01. The Board cited six cases under the corresponding exemption under the former Act, which was substantially the same as s. 2(h), where a determination was made regarding the exclusion of "route salespersons" from the salesperson exemption. These cases focused on the purpose of the exemption and noted that although the term "route salesperson" was not defined in the Act or regulations, the degree of control exercised by the employee (as opposed to the employer) was a significant factor in determining whether the work in issue was "route" sales but also noted that the issue of whether an employee was a route salesperson could not turn on the matter of control alone.

Another case on the question of what is a route salesperson, *Schiller v P & L Corporation Ltd.*, 2012 CanLII 12611 (ON LRB), concerned an employee selling newspaper subscriptions door-to-door who was picked up by the employer with other employees each day and dropped off in an assigned neighbourhood. She was provided with a list of non-subscribers on particular streets within the neighbourhood to solicit and she could not increase her ability to earn more by working at times or in neighbourhoods other than those assigned to her by the employer. The Board held that she was a route salesperson because sales in this case were conducted on the basis of "routes" which were established and determined by the employer.

Normally Made Away from the Employer's Place of Business

In *Evangelista v Number 7 Sales Limited*, 2008 ONCA 599 (CanLII), the Court of Appeal interpreted s. 2(1)(h)(ii) and considered the meaning of "normally made away from the employer's place of business". The case involved a used car sales manager who was paid on a commission basis and who spent one day each week away from the employer's premises buying and selling used cars at an auction. The Court asserted that the exemption was not intended to deny rights to salespersons who carry out only a small portion of their duties away from the employer's business premises. The Court held that the exemption is "directed at salespersons who normally carry out their duties off-site in the sense that they spend most of their time away from their employer's place of business."

Exemptions from Parts VII to XI of the Act – s. 2(2)

2(2) Subject to sections 24, 25, 25.1, 26 and 27 of this Regulation, Parts VII, VII.1, VIII, IX, X and XI do not apply to a person employed on a farm whose employment is directly related to the primary production of eggs, milk, grain, seeds, fruit, vegetables, maple products, honey, tobacco, herbs, pigs, cattle, sheep, goats, poultry, deer, elk, ratites, bison, rabbits, game birds, wild boar and cultured fish.

Certain farm employees are exempt from the Hours of Work and Eating Periods (Part VII), Three Hour Rule (Part VII.1), Overtime Pay (Part VIII), Minimum Wage (Part IX), Public Holidays (Part X), and Vacation with Pay (Part XI) provisions of the ESA 2000.

In order for the exemption to apply:

1. The person must be **employed on a farm**; and
2. The person's employment must be **directly related** to the primary production of any of the **specified commodities**: eggs, milk, grain, seeds, fruit, vegetables, maple products, honey,

tobacco, herbs, pigs, cattle, sheep, goats, poultry, deer, elk, ratites, bison, rabbits, game birds, wild boar and cultured fish.

Current Program policy with respect to this exemption incorporates the Divisional Court decision in *Rouge River Farms Inc*. v. *Director of Employment Standards and Ontario Labour Relations Board*, 2019 ONSC 3498.

1. "Employed on a Farm"

The normal, ordinary meaning of "a farm" is a tract of land under cultivation or used for pasture for the growing or raising of agricultural products. However, it is Program policy that the term can also cover other types of facilities used in the primary production of the specified commodities such as greenhouses, insulated buildings containing frame beds for the growing of mushrooms, storage facilities, or industrial buildings used to carry out post-harvest primary production activities (see *Rouge River Farms Inc*. v. *Director of Employment Standards and Ontario Labour Relations Board*, 2019 ONSC 3498).

It is the Program's position that there is no requirement that the land or buildings in question be contained on a single tract of land or even on contiguous lots or part lots. **So long as all of the tracts of land and/or buildings are worked or managed by the same farmer, they will all be considered to be "a farm"**; this is true regardless of the distance between the locations. For example:

- where, in expanding his or her operations, Farmer A has purchased fields that are separated by roads or highways or even another farmer's field, all the fields owned by Farmer A are considered to be a farm.
- where a farmer purchases a building in an industrial park to carry out post-harvest primary production activities for corn, that building can be a farm even if it is very distant from the farmer's land where the corn was grown. (*Rouge River Farms Inc. v. Director of Employment Standards and Ontario Labour Relations Board*, 2019 ONSC 3498)

"Employed on a farm" requires that the employment duties relate to the activities surrounding or flowing out of the main enterprise of growing agricultural products or raising animals and that those duties are performed in whole, or at least in part, on the farm in question.

It is the Program's position that "employed on a farm" does not generally necessitate employment with the person that owns or runs the farm. In other words, the employee does not have to be the employee of the farmer to be considered to be employed on a farm. However, "employed on a farm" has been interpreted by the Board as meaning "employed on a **single** farm" – see *976395 Ontario Inc. v Burry*, 2001 CanLII 11999 (ON LRB). In that case, where employees were picked up and transported to catch and carry chickens from the barn to the truck at a number of different farms, the Board concluded that the exemption did not apply because the employees were not employed to provide services to a single farm. As a result, the Program's view is that although the employee does not have to be employed by the farmer, the employee's services must be provided to a single farmer for the employee to be considered to be employed on a farm.

2. "Directly Related to the Primary Production" of Specified Commodities

"Directly Related"

As per the Ontario Labour Relations Board decision in *Highline Produce Limited v Flieler,* 2009 CanLII 40205 (ON LRB), "directly related" refers to "hands on" work with the specified commodity. However, it is Program policy that "hands on" work does not require the employee to actually touch the specified

commodity as part of his or her job. “Hands on” in this context means participation in tasks that have a direct impact or direct influence on the primary production of the specified commodity. For example, an employee whose sole responsibility is to ensure the proper temperature and humidity in a greenhouse will be considered to be working “hands on” with the commodity – i.e. will be considered to be in employment that is “directly related” to the primary production - even if this employee does not physically touch the commodity. As another example, an employee who manages or supervises a group of employees whose work is directly related to the primary production of a specified commodity may satisfy the “directly related” requirement on the basis that the manager or supervisor directly influences the primary production of a specified commodity.

In light of the Divisional Court decision in *Rouge River Farms Inc*. v. *Director of Employment Standards and Ontario Labour Relations Board*, 2019 ONSC 3498, which held that work that is “directly related to primary production” need not occur at the physical location where the growing occurs and that the exemption applied to industrial buildings used to carry out post-harvest primary production activities that were very distant (in some cases, hundreds of kilometres) from the farmer’s land where the commodity was grown, it is no longer Program policy that there be “immediate” hands on work with the commodity for the employment to be considered to be “directly related” to the primary production. As set out in the paragraph above, the “directly related” criterion will be met if the work has a direct impact or direct influence on the primary production of the specified commodity.

Note, that the "hands on" / “directly related” requirement means that some work that is carried out on a farm is not captured by this exemption, even if the farm produces one of the specified commodities and even if the work supports the farming enterprise. For example, employees who prepare the meals for other farm employees whose work is directly related to primary production will not be captured by this exemption because the connection between their work and primary production is too remote, i.e. it is **indirect**.

“Primary Production”

"Primary production" means any step in the growing or production of the specified commodity prior to a change in the form or state of the commodity. This includes harvesting, cooling, sorting, trimming, grading, on-farm storage, on-farm packaging in a raw state, as well as transportation to market of agricultural products that have not been changed in form or state (see below).

“Primary production” ends once employees are engaged in transforming the raw specified commodity into a different form or state (e.g., by pureeing, cooking, brining, canning, drying, or, in the case of specified livestock and other live commodities, slaughter). This “transformation” was described by the Board in the Highline Produce decision as follows: "the processing of a raw vegetable into some other state, such as a liquid or cooked solid would not be part of ‘primary production’ nor would the handling of the product in the changed state or form". *Highline Produce Limited v. Flieler,* 2009 CanLII 40205 (ON LRB).

As such, the relevant question in assessing whether a particular activity falls within “primary production” is to ask whether the activity is a step in the growing or production of the specified commodity occurring prior to the raw commodity being **transformed** in form or state.

Note that there are a number of decisions in which the word “processing” is used to describe this change in form or state, and that earlier versions of the Policy and Interpretation Manual also used the word “processing” to describe the test. The Program now primarily uses the term “transforming” to describe the point at which primary production ends. **This change in language is not a substantive change to the Program’s approach in any way.** Rather, the term “transforming” is now being used to avoid potential misunderstandings as to what does and what does not fall within “primary production”; i.e. certain “processes” / activities that **are** part of primary production may be misinterpreted as “processing” the commodity (for example, the hydro-cooling of corn: because hydro-cooling does not change the form or

state of the corn, that process is part of primary production). To avoid confusion, the language of "transforming" in form or state is preferred by the Program.

As transforming specified commodities into a different form or state - and steps subsequent to this transformation (e.g., the transportation of the product post-transformation) - are not "directly related to primary production", employees engaged in such activities do not fall under the exemption in s. 2(2) of O Reg 285/01. See, however, O Reg 285/01, s. 15 which establishes a special overtime threshold for seasonal employees whose employment is directly related to the activities of canning or processing of fresh fruits or vegetables – which constitutes a transformation of the fresh fruit or vegetables. (The special overtime threshold also applies to seasonal employees whose employment is directly related to the non-transforming activities of packing fresh fruit and vegetables, but who are not "employed on a farm".)

Insofar as storage or transportation of the raw or pre-transformed product is concerned, however, it should be noted that the exemption in s. 2(2) would only apply if the farmer was the employer of the employee in question and it is the farmer's own goods (in their pre-transformed form or state) that are being stored or transported. Thus, if the farmer used a trucking company to take its produce to market, the exemption would not apply to the individuals employed by the trucking company.

It should be noted that some employees employed on a farm **to harvest** the items listed in s. 2(2) also fall within ss. 24 through 27 of O Reg 285/01. These provisions, which apply to fruit, vegetable, and tobacco harvesters override s. 2(2) to the extent of giving the employees in question an entitlement to minimum wage, coverage under the three hour rule and, if they are employed for 13 weeks or more, vacation and public holiday pay. See ss. 24 to 27 in O Reg 285/01 for further information regarding harvest workers.

Specified Commodities

In order for this exemption to apply, an employee must be employed on a farm and his or her employment must be directly related to the primary production of one of the following specified commodities:

- eggs, milk, grain, seeds, fruit, vegetables, maple products, honey, tobacco, herbs, pigs, cattle, sheep, goats, poultry, deer, elk, ratites, bison, rabbits, game birds, wild boar and cultured fish.

Only those employees involved in the primary production of the listed commodities are exempted. For example, employees engaged in the production of the following products are not exempted: gladioli bulbs since they are not "seeds"; flowers – see *Butt v Six Employees* (April 4, 1973), ESC 118 (McNish), but also see ss. 4(3)(a)(ii), 8(e)(ii) and 9(1)(d)(ii) of O Reg 285/01 regarding exemptions for flower growers from the hours of work and eating periods, overtime pay and public holiday provisions of the Act; and peat moss since it is not a "vegetable" – see *Thomas Edward Quinn Enterprises Limited v Employees* (April 18, 1973), ESC 126 (Armstrong).

Mushrooms

It should be noted that although from a strictly scientific standpoint a mushroom is not a vegetable (it is, rather, a fungus), mushrooms have been held to be a vegetable for purposes of the primary production exemption. In *Re Ontario Mushroom Co. Ltd. et al. and Learie et al.*, 1977 CanLII 1117 (ON SC), the Divisional Court held that the word "vegetable", as used in a predecessor to the current exemption, should be interpreted in its ordinary, as opposed to technical sense, and that in its ordinary sense the term "vegetable" would include mushrooms. The Court went on to hold that the exemption applied to persons employed in the growing of mushrooms, despite the more specific – and somewhat less extensive – exemptions (now found in ss. 4(3)(a)(i), 8(e)(i) and 9(1)(d)(i) of O Reg 285/01) that applied specifically to such employees.

In 2008, believing that principles of statutory and regulatory interpretation had evolved since the time of the *Re Ontario Mushroom Co. Ltd. et al. and Learie et al.* decision to the point where the exemptions

specific to mushroom growing would be held impliedly to exclude employees whose employment was directly related to the growing of mushrooms from the broader exemption in s. 2(2), the Program changed its policy and took the position that such employees would not fall within that subsection. Subsequently, however, in *Highline Produce Limited v Flieler*, the Ontario Labour Relations Board found that the employment of an employee engaged in the packing of mushrooms was "directly related to the primary production of . . . vegetables" and, having so found, held that it was unnecessary to go on to consider whether the employee fell within the exemptions that applied to persons whose employment was directly related to mushroom growing. In light of the *Highline Produce Limited v Flieler* decision, the Program has reverted to its previous policy; persons whose employment is directly related to the growing of mushrooms, including the packing of mushrooms in their raw state, should thus be considered to fall within s. 2(2).

SUMMARY

In order for the exemption in subsection 2(2) to apply, all of the following criteria must be met:

1) The employee must be employed on a farm.
2) The employee must engage directly with the specified commodity through “hands-on” work, meaning participation in tasks that have a direct impact or direct influence on the primary production of the specified commodity.
3) The work must occur at a stage in the growing or production of the specified commodity that precedes a transformation in the form or state of the commodity.
4) The commodity in question must be a specified commodity, meaning it is specifically listed in the section.

O Reg 285/01 Section 2.1 – Exemption for the Crown and Certain Public Bodies

Section 2.1 was added to O Reg 285/01 effective January 1, 2019.

There have been several significant changes to “the Crown” exemptions since January 2018. See the table at the end of this section for details of which provisions applied to “the Crown” at which point in time.

Crown, etc., exemption – s. 2.1(1)

2.1 (1) The Crown, a Crown agency or an authority, board, commission or corporation all of whose members are appointed by the Crown, and any employees of such an employer, are exempt from every provision of the Act except for those listed in subsection (2).

This provision exempts the Crown, a Crown agency or authority, board, commission or corporation all of whose members are appointed by the Crown from all provisions of the ESA 2000 other than those listed in subsection (2).

The term "Crown" refers to the government of Ontario. More precisely, it refers to the executive branch of government, as the term Crown does not include the Legislative Assembly or the judiciary.

The determination of whether an entity is a Crown agency and therefore exempted from every provision of the ESA 2000 except those listed is 2.1(2) is generally made on the basis of the common law, which looks at the nature and degree of control which the Crown, through its Ministers, exercises over the entity. For example, see *Westeel-Rosco Ltd. v Board of Governors of South Saskatchewan Hospital Centre*, [1977] 2 SCR 238, 1976 CanLII 185 (SCC).

In some cases, a statute will expressly state that an entity is a Crown agency. See, for example, the *Liquor Control Act*, RSO 1990, c L.18, which specifically states the Liquor Control Board of Ontario is a Crown agency. In such a case, there is no need to consider the common law test.

The *Crown Agency Act*, RSO 1990, c C.48, defines "Crown agency" as "a board, commission, railway, public utility, university, manufactory, company or agency, owned, controlled or operated by Her Majesty in right of Ontario, or by the Government of Ontario, or under the authority of the Legislature or the Lieutenant Governor in Council". This definition, if read literally, would make even privately-owned business corporations Crown agencies, given that they usually operate under the authority of an Act of the Legislature, such as the Ontario *Business Corporations Act*, RSO 1990, c B.16. However, Ontario courts have generally continued to use the control test to determine whether an entity is a Crown agency. See P.W. Hogg, P. J. Monahan & W.K Wright, *Liability of the Crown*, 4th ed., p. 468, n. 27.

Accordingly, it is Program policy that an entity will be considered to be a Crown agency only if it is controlled by the Crown or if a statute states that the entity or that particular type of entity is a Crown agency. An example of the latter is the *Ontario Colleges of Applied Arts and Technology Act, 2002*, SO 2002, c 8, Sch F, which specifically provides that colleges established under that Act are Crown agencies.

It is important to bear in mind that not all public sector employers are Crown employers for the purposes of enforcing the ESA 2000. In fact, the majority are not. Examples of public sector employers who are not considered Crown employers and are therefore subject to all provisions of the ESA 2000 include:

- **Hospitals, municipalities and boards of education**: these entities are not or at least generally are not subject to control by the executive branch of government.
- **Universities**: Despite the inclusion of “university” in the definition of “Crown agency” in s. 1 of the *Crown Agency Act*, a university is not considered by the Program to be a Crown agency since it is not subject to the control of the executive branch of government.
- **The Ombudsman**: the Ombudsman is an officer of the Legislature and not part of the executive branch of government.

The reference in s. 2.1(1) to an "authority, board, commission or corporation all of whose members are appointed by the Crown" encompasses entities that would not be considered Crown agencies, but whose members are all government appointees. An example would be the Ontario Labour Relations Board.

Provisions that apply – s. 2.1(2)

2.1(2) Only the following provisions of the Act apply with respect to an employer or employee described in subsection (1):

1. **Part I (Definitions).**
2. **Part III (How This Act Applies), subject to the application of subsection 4 (4.1).**
3. **Part IV (Continuity of Employment).**
4. **Section 14.**
5. **Part VI (Records).**
6. **Part IX (Minimum Wage).**
7. **Part XI (Vacation with Pay).**

8. Part XII (Equal Pay for Equal Work).

9. Part XIII (Benefit Plans).

10. Part XIV (Leaves of Absence).

11. Part XV (Termination and Severance of Employment).

12. Part XVI (Lie Detectors).

13. Part XVIII (Reprisal), except for subclause 74 (1) (a) (vii) and clause 74 (1) (b).

14. Part XIX (Building Services Providers).

15. Part XXI (Who Enforces This Act and What They Can Do).

16. Part XXII (Complaints and Enforcement).

17. Part XXIII (Reviews by the Board).

18. Part XXVI (Miscellaneous Evidentiary Provisions).

19. Part XXVII (Regulations).

20. Part XXVIII (Transition).

Pursuant to s. 2.1(2), only the provisions listed in that subsection apply to the Crown, a Crown agency or authority, board, commission or corporation all of whose members are appointed by the Crown.

If a provision of the ESA 2000 is not listed it does not apply to the Crown, etc. Specifically, **these provisions do <u>not</u> apply:**

1. Part II – Posting of Information Concerning Rights and Obligations
2. Section 4(2)*
3. Part V – Payment of Wages (other than section 14)
4. Part V.1 – Employee Tips and Other Gratuities
5. Part VII – Hours of Work and Eating Periods
6. Part VII.1 – Three Hour Rule
7. Part VIII – Overtime Pay
8. Part X – Public Holidays
9. Part XVII – Retail Business Establishments
10. Sections 74(1)(a)(vii) and 74(1)(b)
11. Part XVIII.1 – Temporary Help Agencies
12. Part XX - Liability of Directors
13. Part XXIV – Collection
14. Part XXV – Offences and Prosecutions

*Note that the exemption from s. 4(2) of the ESA 2000 arises from s. 4(1) of the ESA 2000, not from the operation of this regulation.

HISTORY OF THE "CROWN" EXEMPTIONS

The following table outlines how the ESA 2000 applied at specific points in time to the Crown, a Crown agency or an authority, board, commission or corporation all of whose members are appointed by the Crown and its employees (referred to collectively as “the Crown” in this table).

Prior to January 1, 2018	The following provisions/Parts applied to the Crown: o Part IV: Continuity of Employment o Section 14: Priority of Claims o Part XII: Equal Pay for Equal Work o Part XIII: Benefit Plans o Part XIV: Leaves of Absence o Part XV: Termination and Severance of Employment o Part XVI: Lie Detectors o Part XVIII: Reprisal, except subclause 74(1)(a)(vii) and clause 74(1)(b)), o Part XIX: Building Services Providers (This was set out in ss. 3(4) of the ESA 2000.)
January 1, 2018	Entire ESA 2000 applied, except s. 4(2) (the “related employer” provision). (This was pursuant to the *Fair Workplaces Better Jobs Act, 2017*, which repealed ss. 3(4), added s. 3.1 that states the ESA 2000 binds the Crown, and added the exception to the “related employer” provision in ss. 4(4.1).)
October 24, 2018	The Crown is exempt from Part VII (Hours of Work and Eating Periods) and Part VIII (Overtime Pay). (This is pursuant to an amendment to O Reg 285/01) (The exemption from s. 4(2) of the ESA 2000 continues.)
January 1, 2019	The Crown is exempt from every provision of the ESA 2000 except those listed in section 2.1 of O Reg 285/01. Section 2.1 of O Reg 285/01 provides that only the following provisions/Parts apply to the Crown: o Part I: Definitions o Part III: How This Act Applies, subject to subsection 4(4.1) which provides that the “related employer” provision does not apply to the Crown o Part IV: Continuity of Employment o Section 14: Priority of Claims o Part VI: Records o Part IX: Minimum Wage o Part XI: Vacation With Pay o Part XII: Equal Pay for Equal Work o Part XIII: Benefit Plans o Part XIV: Leaves of Absence o Part XV: Termination and Severance of Employment o Part XVI: Lie Detectors o Part XVIII: Reprisal, except subclause 74(1)(a)(vii) and clause 74(1)(b) o Part XIX: Building Services Providers o Part XXI: Who Enforces This Act And What They Can Do o Part XXII: Complaints and Enforcement o Part XXIII: Reviews by the Board o Part XXVI: Miscellaneous Evidentiary Provisions o Part XXVII: Regulations o Part XXVIII: Transition

	(This is pursuant to amendments to O Reg 285/01 that added s. 2.1 and revoked the provisions that had created the October 2018 Hours of Work and Overtime Pay exemptions.)

O Reg 285/01 Section 3 – Special Rules re Certain Leaves

These provisions limit the rights of and create special rules for certain employees with respect to sick leave, family responsibility leave and bereavement leave.

Note that this section was amended effective January 1, 2019. Prior to January 1, 2019, this exemption applied to the below-described classes of professionals in relation to personal emergency leave, which was repealed effective January 1, 2019. As of January 1, 2019, the special rule applies to the same employees in relation to sick leave (s. 50), family responsibility leave (s. 50.0.1) and bereavement leave (s. 50.0.2).

Professional Duty – s. 3

3. Sections 50, 50.0.1 and 50.0.2 of the Act do not apply to any of the following persons in circumstances in which the exercise of the entitlement would constitute an act of professional misconduct or a dereliction of professional duty:

1. A person described in clause 2(1)(a), (c), (d) or (e).

2. A person employed as a registered practitioner of a health profession set out in Schedule 1 to the *Regulated Health Professions Act, 1991*, including a person described in clause 2(1)(b).

Employees described in s. 3 paragraphs 1 or 2 who, if they exercised the right to sick leave, family responsibility leave or bereavement leave under ESA Part XIV, s. 50. s. 50.0.1 or s. 50.0.2, would in the circumstances be guilty of professional misconduct or dereliction of duty, are exempt from the right to take any of these leaves in those circumstances. For example, a nurse would be precluded from exercising a right to family responsibility leave if by doing so it would constitute professional misconduct or dereliction of duty because she had left a patient unattended.

The employees subject to this limited exemption are: those described in s. 2(1)(a), (b), (c) and (d) and students in training for those professions, and any registered health practitioners of professions set out in Schedule 1 of the *Regulated Health Professions Act, 1991,* SO 1991, c 18 not already listed in s. 2(1)(b). The latter professions are:

Profession	Act
Audiology and Speech-Language Pathology	*Audiology and Speech-Language Pathology Act, 1991, SO 1991, c 19*
Dental Hygiene	*Dental Hygiene Act, 1991, SO 1991, c 22*
Dental Technology	*Dental Technology Act, 1991, SO 1991, c 23*
Denturism	*Denturism Act, 1991, SO 1991, c 25*

Profession	Act
Dietetics	*Dietetics Act, 1991, SO 1991, c 26*
Homeopathy	*Homeopathy Act, 2007, SO 2007, c 10, Sched Q*
Kinesiology	*Kinesiology Act, 2007, SO 2007, c 10, Sched O*
Medical Laboratory Technology	*Medical Laboratory Technology Act, 1991, SO 1991, c 28*
Medical Radiation Technology	*Medical Radiation Technology Act, 1991, SO 1991, c 29*
Midwifery	*Midwifery Act, 1991, SO 1991, c 31*
Nursing	*Nursing Act, 1991, SO 1991, c 32*
Occupational Therapy	*Occupational Therapy Act, 1991, SO 1991, c 33*
Opticianry	*Opticianry Act, 1991, SO 1991, c 34*
Psychotherapy	*Psychotherapy Act, 2007, c 10, Sched R*
Respiratory Therapy	*Respiratory Therapy Act, 1991, SO 1991, c 39*
Traditional Chinese Medicine	*Traditional Chinese Medicine Act, 2006, SO 2006, c 27*

O Reg 285/01 Section 3.0.1 – Construction Employee - REVOKED

Section 3.0.1 of O. Reg. 285/01 was revoked effective January 1, 2019. This provision is therefore no longer in force. However, construction employees who work in the construction industry may still have a complaint relating to personal emergency leave pay that arose during the period of time this provision – which established a special rule relating to the now-repealed personal emergency leave pay provision – was in force: from January 1, 2018 to December 31, 2018. For that reason, the Program's interpretation of this section remains as part of this publication.

Construction Employee – s. 3.0.1

3.0.1 If a construction employee who works in the construction industry receives 0.8 per cent or more of his or her hourly rate or wages for personal emergency pay, the employee,

(a) is not entitled to paid days of leave under section 50 of the Act; and

(b) is entitled to take a total of 10 days of unpaid leave under section 50 of the Act in each calendar year.

This section provides a special rule which may be applicable to construction employees who work in the construction industry: if these employees receive 0.8% or more of the employee's hourly rate or wages for personal emergency pay, the employees will not be entitled to be paid for the first two personal emergency leave days that they take within a calendar year. However, they will be entitled to take up to 10 unpaid personal emergency leave days in a calendar year if they meet the eligibility requirements of ESA Part XIV, s. 50.

Note that employers of construction employees are not required to follow the special rule, and may instead revert to the basic personal emergency leave entitlements under s. 50, including the requirement to pay employees the wages that they would have earned had they worked during the first two days of personal emergency leave taken in the calendar year.

"Construction employee" and "construction industry" are both defined terms: see O Reg 285/01, s. 1 for more information.

For the personal emergency pay special rule, 0.8 per cent represents approximately two days of wages.

O Reg 285/01 Section 3.1 - Fees, s. 28 of Ontario Municipal Employees Retirement System Act, 2006

Section 3.1(1)

3.1(1) An employer is exempted from the application of section 13 of the Act if the employer participates in an OMERS pension plan under the *Ontario Municipal Employees Retirement System Act, 2006*, but only with respect to fees that a by-law made under section 28 of that Act requires employees to pay. O Reg 444/07, s. 1.

This provision applies only to employers that participate in an Ontario Municipal Employees Retirement System ("OMERS") pension plan under the *Ontario Municipal Employees Retirement System Act, 2006,* SO 2006, c 2 ("OMERSA"). It makes s. 13 of the *Employment Standards Act, 2000*, which subject to certain exceptions prohibits deductions from wages, inapplicable to such employers insofar as fees that a by-law made under s. 28 of OMERSA requires an employee to pay. As a result, an employer may deduct from an employee's wages the amount that the by-law requires the employee to pay without obtaining the employee's written authorization.

Section 3.1(2)

3.1(2) Subsection (1) applies only if the employer remits the fees in accordance with the by-law. O Reg 444/07, s. 1.

Section 3.1(2) provides that the s. 3.1(1) exemption applies only if the employer remits the fees in accordance with the by-law. Therefore, if the employer fails to remit the fees in accordance with the by-law, the deduction will not be lawful.

O Reg 285/01 Section 4 – Exemptions from Part VII of Act

Exemptions to ss. 17, 18 and 19 of the Act – s. 4(1)

Firefighters – s. 4(1)(a)

4(1) Section 17, 18 and 19 of the Act do not apply to,

(a) a person employed as a firefighter as defined in section 1 of the *Fire Protection and Prevention Act, 1997*;

Pursuant to s. 4(1)(a), firefighters, as defined in s. 1 of the *Fire Protection and Prevention Act, 1997*, SO 1997, c 4 ("FPPA") are exempt from:

- the daily and weekly limits on hours of work in ESA Part VII, s. 17, and
- the daily, between shift, weekly and bi-weekly rest provisions in ESA Part VII, s. 18, and
- ESA Part VII, s. 19 which sets out exceptional circumstances in which the employee may be required to work hours in excess of those set out in s. 17 or work during a free period under s. 18.

Section 19 provides for a limited set of circumstances in which an employer can require an employee to work hours in excess of those set out in s. 17 or to work during a free period under s. 18; since ss. 17 and 18 do not apply to firefighters in the first place, it would make no sense if the regulation did not also make section 19 inapplicable.

Note that firefighters are also exempted from:

- the overtime pay provisions in ESA Part VII by O Reg 285/01, s. 8(a);
- the public holiday provisions in ESA Part X by O Reg 285/01, s. 9(1)(a); and

Section 1 of the FPPA defines a firefighter as follows:

"firefighter" means a fire chief and any other person employed in, or appointed to, a fire department and assigned to undertake fire protection services, and includes a volunteer firefighter;

"volunteer firefighter" means a firefighter who provides fire protection services either voluntarily or for a nominal consideration, honorarium, training or activity allowance.

The exemptions will therefore also apply to fire chiefs and volunteer firefighters. In addition, as the definition makes no distinction between fulltime and part-time firefighters, the exemption will apply to both.

Supervisors and Managers – s. 4(1)(b)

4(1) Section 17, 18 and 19 of the Act do not apply to,

(b) a person whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis;

A supervisor or manager who falls within the definition in O Reg 285/01, s. 4(1)(b) is exempt from:

- the daily and weekly limits on hours of work in ESA Part VII, s. 17
- the daily, between shift, weekly and bi-weekly rest provisions in ESA Part VII, s. 18, and
- ESA Part VII, s. 19 which sets out exceptional circumstances in which the employee may be required to work hours in excess of those set out in s. 17 or work during a free period under s. 18.

The reason that this category of employee is exempted from s. 19 is because s. 19 provides for a limited set of circumstances in which an employer can require an employee to work hours in excess of those set out in s. 17 or to work during a free period under s. 18; since ss. 17 and 18 do not apply to supervisors or manager in the first place, it would make no sense if the regulation did not also make s.19 inapplicable.

Under of O Reg 285/01, s. 8(b), such an employee is also exempted from the overtime pay provisions of the ESA 2000.

Supervisory or Managerial in Character

Work that is "supervisory or managerial in character" generally refers to the supervision of employees rather than the supervision of machines. However, managerial functions can be distinct from supervisory functions. Although supervision of other employees is a primary indication of a managerial employee, this factor is not the only one to be considered. Some employees can be considered managerial even though they do not supervise other employees. Some examples of managerial functions are hiring and firing of employees, responsibility for making substantial purchases, financial control and budgeting, and production planning. Other management functions would include the regular exercise of discretion and independent judgment in management affairs.

Just because a contract of employment or collective agreement states that a person is a manager or supervisor does not mean that the exemption will automatically apply. The actual functions of the person must be assessed. The intention here is that the exemption applies only to the true supervisor who does not regularly or ordinarily perform the same work as the people they supervise. The section therefore exempts employees who perform such managerial or supervisory work exclusively, and also those managers and supervisors who perform non-supervisory or non-managerial tasks either on an irregular or exceptional basis.

Irregular

"Irregular" implies that although the performance of non-supervisory or non-managerial duties is not unusual or unexpected, their performance is unscheduled or sporadic (i.e., does not occur at a regular or set time). For example, if a manager is expected or required to cover staff duties for non-supervisory staff as a result of an unexpected rush of customers, or because a non-supervisory employee has called in sick, these duties may be considered irregular because they are not performed at a scheduled or otherwise regular time. However, if a pattern developed with the result, for example, that a manager was performing staff duties every day during the lunch rush between 11:30 a.m. and 1:00 p.m., the Program's position would be that the performance of those duties was clearly no longer irregular.

The exemption will not apply even though the employer has not assigned the non-supervisory or non-managerial work, but places the employee in such a position that they have no alternative but to regularly perform day-to-day duties of non-supervisory/managerial employees in order to keep the business in operation. An example would be the manager of small shoe store who operates the business by himself or herself on Monday and is provided with part-time help for the rest of the week. This person is performing non-supervisory or non-managerial work on a regular basis. They are, each Monday, required to run the entire operation, including arranging displays, assisting customers, etc., in addition to their managerial duties.

Finally, whether the performance of non-supervisory or non-managerial duties on a daily basis is irregular may also depend not only on whether or not they are "scheduled", but also the frequency with which such duties are performed and the amount of time spent performing them. Therefore, if a manager spends a significant period of time on each shift performing non-supervisory duties, the performance of such duties could not be said to be irregular, despite the fact that there was no set schedule for their performance. For example, if a manager at a fast food restaurant spends an hour or more of each shift assisting at the cash or in food preparation, these non-supervisory or non-managerial duties may be considered a regular part of their duties because they are performed on a "daily basis", even though the hour of non-

supervisory work is not scheduled or performed at a set time each day. Similarly, if a manager spent three or four hours of an eight-hour shift performing non-managerial duties once a week, these non-managerial duties may be considered regular duties and the exemption would not apply.

Exceptional

"Exceptional" suggests that non-supervisory or non-managerial duties may be performed so long as they are being performed outside of the ordinary course of the employee's duties. That is, their performance is not in the normal course. For example, if, as a result of a severe snowstorm, the manager were to assist a staff member to clear the snow from the entrance to the employer's establishment (ordinarily the responsibility of the staff member), the performance of this non-supervisory duty could be considered exceptional. Another example is where a manager performs bargaining unit work during a strike or lock-out. Generally, the performance of bargaining unit work due to a strike or lock-out will be seen as an exceptional situation, and the exemption will continue to apply during the strike or lockout. However, there may be situations, such as where the strike or lock-out lasts for more than a few months and the manager is performing non-supervisory and non-managerial duties continually for more than a few months, where the situation is no longer seen as exceptional and the exemption will no longer apply.

Fishing or Hunting Guide – s. 4(1)(c)

4(1) Section 17, 18 and 19 of the Act do not apply to,

(c) a person employed as a fishing or hunting guide;

Pursuant to s. 4(1)(c), a fishing or hunting guide is exempt from:

- the daily and weekly limits on hours of work in ESA Part VII, s. 17;
- the daily, between shift, weekly and bi-weekly rest provisions in ESA Part VII, s. 18; and
- ESA Part VII, s. 19 which sets out exceptional circumstances in which the employee may be required to work hours in excess of those set out in s. 17 or work during a free period under s. 18.

Note that since ss. 17 and 18 do not apply to guides in the first place, it would make no sense if the regulation did not also make s.19 inapplicable.

Note that such employees are also exempted from the overtime pay provisions in ESA Part VIII by O Reg 285/01, s. 8(c) the public holiday provisions in ESA Part X by O Reg 285/01, s. 9(1)(b).

Also note that fishing and hunting guides are subject to a special minimum wage – see O Reg 285/01, s. 5(1) para. 3.

Hunting and fishing guides may be employed by camp or lodge proprietors to provide guide services for their guests or by guide services in their own right.

Construction Employee – s. 4(1)(d)

4(1) Section 17, 18 and 19 of the Act do not apply to,

(d) a construction employee;

Pursuant to s. 4(1)(d), a construction employee as defined in O Reg 285/01, s. 1 is exempt from:

- the daily and weekly limits on hours of work in ESA Part VII, s. 17;
- the daily, between shift weekly and bi-weekly rest provisions in ESA Part VII, s. 18; and

- ESA Part VII, s. 19 which sets out exceptional circumstances in which the employee may be required to work hours in excess of those set out in s. 17 or work during a free period under s. 18.

Since ss. 17 and 18 do not apply to construction employees in the first place, it would make no sense if the regulation did not also make s. 19 inapplicable.

Note that they are also exempted from the public holiday provisions in ESA Part X if the employee receives 7.7 per cent or more of their hourly rate of wages for vacation pay or holiday pay – see O Reg 285/01, s. 9(2).

Superintendent, Janitor or Caretaker – s. 4(1)(e)

4(1) Section 17, 18 and 19 of the Act do not apply to,

(e) a person who is employed as the superintendent, janitor or caretaker of a residential building and resides in the building;

Pursuant to s. 4(1)(e), a person employed as a superintendent, janitor or caretaker of a residential building who resides in the building is exempt from:

- the daily and weekly limits on hours of work in ESA Part VII, s. 17;
- the daily, between shift, weekly and bi-weekly rest provisions in ESA Part VII, s. 18; and
- ESA Part VII, s. 19 which sets out exceptional circumstances in which the employee may be required to work hours in excess of those set out in s. 17 or work during a free period under s. 18.

Since ss. 17 and 18 do not apply to residential building superintendents, janitors and caretakers in the first place, it would not make sense if the regulation did not also make s. 19 inapplicable to these employees.

Note that these employees are also exempted from the application of the three hour rule in ESA Part VII.1, s. 21.2 by O Reg 285/01, s. 4.1(d), the minimum wage provisions in ESA Part IX by O Reg 285/01, s. 7(d), the overtime pay provisions in ESA Part VIII by O Reg 285/01, s. 8(i), and the public holiday provisions in ESA Part X by O Reg 285/01, s.9(1)(h).

The exemption only applies to employees working in residential buildings: apartments, condominiums, etc. Those working in office or manufacturing buildings are not exempted by this provision.

The employee must actually live in the building for which they responsible or in another building in the same complex. If they do not do so, they are not exempt.

The exemption does not apply to a person who performs night-time surveillance duties in a building housing people in specialized treatment programs. See Goyette and Goyette v Residence Sainte Marie Inc. (May 9, 1997), ES 97-56 (Novick).

The ESA 2000 does not deal with the rules regarding the tenancy of superintendents, janitors or caretakers. These are dealt with under the *Residential Tenancies Act, 2006*, SO 2006, c 17. Employees with concerns regarding their tenancy should be referred to the Ministry of Municipal Affairs and Housing for further information.

Embalmer or Funeral Director – s. 4(1)(f)

4(1) Section 17, 18 and 19 of the Act do not apply to,

(f) a person employed as an embalmer or funeral director.

Pursuant to s. 4(1)(f), a person employed as an embalmer or funeral director is exempt from:

- the daily and weekly limits on hours of work in ESA Part VII, s. 17;
- the daily, between shift, weekly and bi-weekly rest provisions in ESA Part VII, s. 18; and
- ESA Part VII, s. 19 which sets out exceptional circumstances in which the employee may be required to work hours in excess of those set out in s. 17 or work during a free period under s. 18.

Since ss. 17 and 18 do not apply to embalmers and funeral directors, it would not make sense if the regulation did not also make s. 19 inapplicable to these employees.

No person can act as a funeral director or embalmer unless they have been properly licensed as a "funeral director" under the *Funeral Directors and Establishments Act*, RSO 1990, c F.36. Only licensed individuals who are performing funeral and embalming services are exempt. Other employees in the funeral industry, even if they are employed in a funeral home, are not exempt. For example, secretaries, receptionists, hearse drivers, students in training to be a funeral director, and workers at a crematorium or cemetery are not exempt.

Election Official – s. 4(1)(g)

4(1) Section 17, 18 and 19 of the Act do not apply to,

(g) subject to subsection (1.1), an election official.

(1.1) The exemption in clause (1) (g) only applies during a period that begins with the issue of a writ for a general election or by-election under the *Election Act* and ends on the day after polling day. O. Reg. 97/18, s. 2 (2).

Clause 4(1)(g) and subsection 4(1.1) came into effect on March 9, 2018.

Pursuant to s. 4(1)(g), an election official is exempt from:

- the daily and weekly limits on hours of work in ESA Part VII, s. 17;
- the daily, between shift weekly and bi-weekly rest provisions in ESA Part VII, s. 18; and
- ESA Part VII, s. 19 which sets out exceptional circumstances in which the employee may be required to work hours in excess of those set out in s. 17 or work during a free period under s. 18.

Since ss. 17 and 18 do not apply to election officials, it would not make sense if the regulation did not also make s. 19 inapplicable to these employees.

Per subsection 4(1.1), the exemption applies only during a period that begins with the issue of a writ for a general election or by-election under the *Election Act* and ends on the day after polling day.

Note that “election official” is a defined term in s.1 of O Reg 285/01.

Some employees who fall within the “election official” definition may also be considered to be “Crown” employees under section 2.1 of O. Reg. 285/01. Where that is the case, section 2.1 and its longer list of exemptions will apply to those employees.

Exemptions to ss. 17 and 19 of the Act – s. 4(2)

Landscape Gardener – s. 4(2)(a)

4(2) Sections 17 and 19 of the Act do not apply to a person employed,

(a) as a landscape gardener;

Pursuant to s. 4(2)(a), persons employed as landscape gardeners are exempt from:

- the daily and weekly limits on hours of work in ESA Part VII, s. 17, and
- ESA Part VII, s. 19 which sets out exceptional circumstances in which the employee may be required to work hours in excess of those set out in s. 17 or work during a free period under s. 18.

Note that employees in this category are not exempt from the application of ESA Part VII, s. 18, but because they are exempt from the application of s. 19, an employer could not require such an employee to work during a rest period to which the employee was entitled under s. 18, despite the existence of exceptional circumstances such as those described in s. 19.

Note that they are also exempted from the overtime pay provisions in ESA Part VIII by O Reg 285/01, s. 8(i) and the public holiday provisions in ESA Part X by O Reg 285/01, s. 9(1)(h).

The Program's view is that a person employed as a landscape gardener is engaged in work that directly involves the modification or maintenance of land for a purpose that is substantially aesthetic (as contrasted with utilitarian). Generally, the exemption will apply to employees engaged in:

- Landscape maintenance (e.g., raking, watering, weeding);
- Planting or moving plants including hedges, trees or shrubs;
- Preparing the ground for planting;
- Caring for established lawns;
- Trimming, pruning and maintaining plants including hedges, trees, and shrubs;
- Installing rock gardens, ponds, and planters;
- Park gardening;
- Golf course greens-keeping; and
- Installation and maintenance of irrigation systems (including both drip lines and sprinklers) where the irrigation system contributes to sustaining and maintaining plants (including sod, trees, shrubs and flowers). Note: Previously, the Program's position was that these activities were not subject to the exemption. However, the position changed in light of the Ontario Labour Relations Board's decision in AWS Irrigation Management Inc. v Delottinville, 2014 CanLII 75486 (ON LRB).

The Program considers employees engaged in the following activities to fall outside the definition of a person employed as a landscape gardener:

- Persons employed by a landscaping company who do not perform landscaping work (e.g., administrative employees, landscape architects/designers and truck drivers);
- Builders of retaining walls for purely, or substantially, structural purposes;
- Installers of lighting systems; and
- Persons involved in weed spraying of roads and industrial sites – see Albert Andres Enterprises Inc. o/a Andrews Agrichemicals v DeForest and Daye (May 29, 1992), ES 89/92 (Novick).

Mixed Work

Employees in many landscaping businesses multi-task; performing a variety of duties, some of which fall within the exemption for a person employed as a landscape gardener and some that do not.

Overtime Pay

ESA Part VII, s. 22(9) provides that an employee who performs some work that is subject to the 44 hour overtime threshold, and some work that is exempt from the overtime provisions will be entitled to overtime pay after working 44 hours in a week, unless the employee spends the majority of their time in that week engaged in activities that are exempt from overtime.

Consequently, an employee who performs work that is covered by the landscape gardener exemption will be exempt from overtime pay for a particular week only if the landscape gardening work represents more than 50% of the time the employee spent working that week.

Example:

John spent 75% of his work week caring for established lawns while the other 25% of his time was spent installing sprinkler systems. The overtime exemption would apply to John because he spent more than 50% of his time in that work week doing "landscape gardener" work. John is therefore not entitled to overtime pay in respect of that week.

Public Holidays

ESA Part X. s. 25(2) provides that unless the majority of time spent in any week in which a public holiday falls is work that is exempt under the regulations, the public holiday provisions will apply with respect to that particular public holiday.

Consequently, an employee who performs work that is covered by the landscape gardener exemption will be exempt from the public holiday provisions for a particular public holiday only if the landscape gardening work represents more than 50% of the time the employee spent working during the week with that public holiday.

Example:

During the work week in which Labour Day fell, Afet spent 75% of her time caring for established lawns while the other 25% of her time was spent installing sprinkler systems. The public holiday exemption would apply to Afet with respect to Labour Day because she spent more than 50% of her time in that work week doing "landscape gardener" work. Therefore, the public holiday entitlements with respect to Labour Day do not apply to Afet.

Hours of Work

The ESA 2000 does not specify the period of time to be considered when determining whether the hours of work provisions (daily, weekly maximums) apply to employees who do both landscape gardening work and non-landscape gardening work. It is Program policy to consider whether the core, or essential nature of the employee's work is landscape gardening. This may involve application of the majoritarian test; however the period under consideration would generally be considered to be the full period of employment with the employer, provided there has not been a permanent change in the core or essential nature of the employee's job. For example, if an employee has been engaged in a mix of landscape

gardening and non-landscape gardening activities over the five year course of their employment, consideration would be given to where the employee spent the majority of their time over those five years.

Where the core, or essential nature of an employee's job changes, work performed prior to a permanent change in the nature of the employee's job will not be relevant when making a determination as to whether or not the employee is currently a person employed as a landscape gardener or not.

Example:

If an employee spent five years employed in the office of a landscaping company performing administrative duties and subsequently accepted a permanent position with that company planting trees and hedges in residential gardens, they would be considered to be a person employed as a landscape gardener immediately upon commencing their new position because there was a permanent change to the core nature of their job. As a result, the hours of work exemptions would apply immediately.

Swimming Pool Installation and Maintenance – s. 4(2)(b)

4(2) Sections 17 and 19 of the Act do not apply to a person employed,

(b) to install and maintain swimming pools.

Pursuant to s. 4(2)(b), a person employed to install and maintain swimming pools is exempt from:

- the daily and weekly limits on hours of work in ESA Part VII, s. 17, and
- ESA Part VII, s. 19 which sets out exceptional circumstances in which the employee may be required to work hours in excess of those set out in s. 17 or work during a free period under s. 18.

Note, however, that because employees in this category are not excluded from ESA Part VII, s. 18, an employer could not require such an employee to work during a rest period to which the employee was entitled under that section, despite the existence of exceptional circumstances such as those described in s. 19.

Note that they are also exempted from the overtime pay provisions in ESA Part VIII by O Reg 285/01, s. 8(i) and the public holiday provisions in ESA Part X by O Reg 285/01, s. 9(1)(h).

It is the Program's position that this exemption does not extend to people employed to install and maintain hot tubs, on the basis that exemptions from the rights and benefits afforded under the legislation must be construed narrowly. In King v RNR Patient Transfer Services Inc., 2008 CanLII 22 (ON LRB) the Ontario Labour Relations Board cited the Supreme Court's decision in Rizzo & Rizzo Shoes Limited (Re), [1998] 1 SCR 27 at paragraph 36:

...Since the ESA is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour or the claimants.

In applying this principle in the context of exemptions, the Board said: "A liberal and generous interpretation of the Act requires any regulation, like (s. 8 of O Reg 285/01) that limits the application of the ESA 2000 or exempts certain individuals from receiving the benefits conferred by the ESA 2000 to be strictly or narrowly construed."

On a plain reading, the terms "swimming pool" and "hot tub" have different meanings and the Program's position in light of the above is that the exemption does not apply to persons employed to install and maintain hot tubs.

Exemptions to Part VII of the Act – s. 4(3)

4(3) Part VII of the Act does not apply to,

(a) a person whose employment is directly related to,

- **i. the growing of mushrooms,**
- **ii. the growing of flowers for the retail and wholesale trade,**
- **iii. the growing, transporting and laying of sod,**
- **iv. the growing of trees and shrubs for the wholesale and retail trade,**
- **v. the breeding and boarding of horses on a farm, or**
- **vi. the keeping of furbearing mammals as defined in the *Fish and Wildlife Conservation Act, 1997*, for propagation or the production of pelts for commercial purposes;**

A person whose employment is directly related to the activities described in ss. 4(3)(a) (i)-(vi) is exempt from all of the hours of work and eating periods provisions contained in Part VII of the ESA 2000. This includes the daily and weekly limits on hours of work in s. 17, the daily, weekly and bi-weekly rest provisions in s. 18, the provisions in s. 19, and the right to an unpaid eating period(s) as set out in ss. 20 and 21 of the ESA 2000. Section 19 provides for a limited set of circumstances in which an employer can require an employee to work hours in excess of those set out in s. 17, or to work during a free period under s. 18. Since ss. 17 and 18 do not apply to employees listed in s. 4(3)(a) in the first place, it would make no sense if the regulation did not also make s. 19 inapplicable.

Note that they are also exempted from the overtime pay provisions in ESA Part VIII by O Reg 285/01, s. 8(i) and the public holiday provisions in ESA Part X by O Reg 285/01, s. 9(1)(h).

The use of the word "directly" in ss. 4(3)(a)(i)-(vi) of O Reg 285/01 eliminates, by implication, all persons employed "indirectly" in the employment described in s. 4(1)(a)(i) through (vi) of the regulation. It, therefore, excludes work that merely contributes to making possible or assisting in the ultimate performance of the work described. For example, a person employed on a farm to prepare meals for employees engaged in the breeding and boarding of horses is assisting in the ultimate performance of an element of horse breeding and boarding, but the work of such a person is not directly related to that activity.

Growing of Mushrooms – s. 4(3)(a)(i)

4(3) Part VII of the Act does not apply to,

(a) a person whose employment is directly related to,

- **(i) the growing of mushrooms,**

As was noted in the discussion of s. 2(2) of O Reg 285/01, in accordance with the Ontario Labour Relations Board's decision in Highline Produce Limited v Flieler, 2009 CanLII 40205 (ON LRB)), an employee whose employment is directly related to the growing of mushrooms is an employee "whose employment is directly related to the primary production vegetables" within the meaning of that subsection, and as a result, such an employee would be excluded from the coverage of Parts VII through XI of the ESA 2000. This is despite the specific exemptions from Parts VII (Hours of Work and Eating Periods), Part VIII (Overtime) and Part X (Public Holidays), set out, respectively, in ss. 4(3)(a)(i), 8(e)(i)

and 9(1)(d)(i) of O Reg 285/01. See O Reg 285/01, s. 2(2) for a more detailed discussion regarding the application of the exemption to persons whose employment is directly related to the primary production (or growing) of mushrooms.

Growing of Flowers – s. 4(3)(a)(ii)

4(3) Part VII of the Act does not apply to,

(ii) the growing of flowers for the retail and wholesale trade,

A person employed in the growing of flowers is exempt from Part VII (Hours of Work and Eating Periods) of the ESA 2000.

Note that they are also exempted from the overtime pay provisions in ESA Part VIII by O Reg 285/01, s. 8(e)(ii) and the public holiday provisions in ESA Part X by O Reg 285/01, s. 9(1)(d)(ii).

In Butt v Six Employees (April 4, 1973), ESC 118 (McNish) the referee concluded that the six employees who had been engaged to plant gladioli in the summer and then called back in the fall to cut the flowers and dig up the corms and pack them in boxes were engaged in the growing of flowers for the wholesale and retail trade. The referee also appears to suggest that if other employees had been engaged solely in the packaging, assembling, order preparation and distribution of the flowers and corms that he would have found those employees to be employed in the growing of flowers. However, the referee noted that in so doing, he was giving the phrase "growing of flowers" a "liberal interpretation", which is contrary to the Program's approach to construe exemptions to the standards narrowly. As a result, Referee McNish's comments regarding employees engaged solely in packaging, assembly and distribution of flowers are not followed by the Program. See more on this approach under the discussion of s. 4(2)(b) above.

Growing, Transporting and Laying of Sod – s. 4(3)(a)(iii)

4(3) Part VII of the Act does not apply to,

(iii) the growing, transporting and laying of sod,

A person employed in the growing, transporting and laying of sod is exempt from Part VII (Hours of Work and Eating Periods) of the ESA 2000. They are also exempt from the overtime pay provisions (see s. 8(e)(iii) of O Reg 285/01) and the public holidays provisions (see O Reg 285/01, s. 9(1)(d)(iii)).

Growing of Trees and Shrubs – s. 4(3)(a)(iv)

4(3) Part VII of the Act does not apply to,

(iv) the growing of trees and shrubs for the retail and wholesale trade,

A person employed in the growing of trees and shrubs is exempt from Part VII (Hours of Work and Eating Periods) of the ESA 2000. They are also exempt from the overtime pay provisions (see s. 8(e)(iv) of O Reg 285/01) and the public holidays provisions (see s. 9(1)(d)(iv) of O Reg 285/01).

Breeding and Boarding of Horses – s. 4(3)(a)(v)

4(3) Part VII of the Act does not apply to,

(v) the breeding and boarding of horses on a farm, or

A person employed in the breeding and boarding of horses is exempt from Part VII (Hours of Work and Eating Periods) of the ESA 2000. They are also exempt from the overtime pay provisions (see O Reg 285/01, s. 8(e)(v)) and the public holidays provisions (see O Reg 285/01, s. 9(1)(d)(v)).

In order for this exemption to apply, two preconditions must be met:

1. The employee must be employed in the breeding and boarding of horses; and
2. The employee must be employed on a farm.

Breeding and Boarding of Horses

The referee in Kenneth Nixon c.o.b. Nixon Stables v. Adams (November 20, 1985), ESC 1989 (Brown) noted that the ***Random House Dictionary Unabridged Edition*** (1966) defined "breed" as: "1. to produce (offspring); procreate; engender. 2. to procure by mating; propagate sexually; reproduce", and "breeding" as "the act of one who or that which breeds".

Therefore, in order for this precondition to be met, the employee must be involved in the accommodation and feeding of mares and studhorses, or the production of offspring from the mares. For example, employees who monitor expectant mares in foaling season are exempt - see Carment Di Paola o/a Riviera Racing Stable v Davenport and Skinner (October 29, 1990), ESC 2768 (Betcherman). Employees engaged in the production of horse feed, such as those described in Bert Simon Larch Tree Farm v. Woolnough and Kraley (September 3, 1980), ESC 857 (Adamson) or engaged in grooming and racing horses, such as those described in Nixon Stables v. Adams are not.

On a Farm

Unlike the other exemptions in s. 4(3)(a), the horse-breeding and boarding exemption contains a requirement relating to the location of the work. Only those workers employed "on a farm" are exempt. Persons employed in the breeding and boarding of horses at a racetrack or at a riding stable that is not part of a farm do not fall within the exemption. In order to be on a farm, the operation must be on land that can be cultivated or used as pasture to provide a substantial part of its own feed needs. A large garden plot attached to a riding stable would not qualify as the operation of a farm.

Keeping of Fur-Bearing Mammals – s. 4(3)(a)(vi)

4(3) Part VII of the Act does not apply to,

(vi) the keeping of fur-bearing mammals, as defined in the *Fish and Wildlife Conservation Act, 1997*, for propagation or the production of pelts for commercial purposes;

A person employed in the keeping of fur-bearing animals is exempt from Part VII Hours of Work and Eating Periods. They are also exempt from the overtime pay provisions (see O Reg 285/01, s. 8(e)(vi)) and the public holidays provisions (see O Reg 285/01, s. 9(1)(d)(vi)).

Fur farming is regulated under the *Fish and Wildlife Conservation Act, 1997*, SO 1997, c 41 ("FWCA"), which contains the following definition of "fur-bearing mammals":

"furbearing mammal" means a member of a species set out in Schedule I or prescribed by the regulations as a species of furbearing mammal;

Schedule 1 of the FWCA lists the following as furbearing mammals: badger, beaver, bobcat, coyote, fisher, gray fox, arctic fox, red fox, lynx, mink, muskrat, marten, opossum, otter, raccoon, striped skunk, red squirrel, least weasel, short-tailed weasel (ermine), long-tailed weasel and wolf.

O Reg 669/98 to the FWCA additionally prescribes polar bears and wolverines as furbearing mammals.

Information Technology Professional – s. 4(3)(b)

4(3) Part VII of the Act does not apply to,

(b) an information technology professional;

A person employed as an information technology professional as defined in s. 1 of O Reg 285/01 is exempt from Part VII Hours of Work and Eating Periods. See O Reg 285, s. 1 for further information regarding the definition of information technology professional. Such an employee is also exempt from the overtime pay provisions of the ESA 2000 – see O Reg 285/01, s.8(l).

Recorded Visual and Audio-Visual Entertainment Protection Industry – s. 4(3)(c)

4(3) Part VII of the Act does not apply to,

(c) a person employed in the recorded visual and audio-visual entertainment production industry.

A person employed in the recorded visual and audio-visual entertainment production industry as defined in s. 1 of O Reg 285/01 is exempt from Part VII Hours of Work and Eating Periods.

See O Reg 285/01, s. 1 for further information regarding the definition of the industry and those persons employed therein.

O Reg 285/01 Section 4.1 – Exemptions from Part VII.1 of the Act

Exemptions from Three Hour Rule – s. 4.1 (a) - (d)

Students – s. 4.1 (a), (b) and (c)

4.1 Section 21.2 of the Act does not apply to,

(a) a person who is employed as a student in a recreational program operated by a charitable organization registered under Part I of the *Income Tax Act* (Canada) and whose work or duties are directly connected with the recreational program;

(b) a person employed as a student to instruct or supervise children;

(c) a person employed as a student at a camp for children;

Section 4.1 was added to O Reg 285/01 effective January 1, 2019. Pursuant to s. 4.1, the above-described students are exempt from the three hour rule found in Part VII.1, section 21.2 of the ESA 2000.

(Note that these employees were also exempt from the differently worded three hour rule previously found in subsection 5(7) of O Reg 285/01 prior to January 1, 2019.)

Students who fall into these categories are also exempt from the minimum wage provisions – see O Reg 285/01, ss. 7(a) 7(b) and 7(c); the overtime pay provisions – see O Reg 285/01, ss. 8(h), (f) and (g); and the public holiday provisions – see O Reg 285/01, ss. 9(1)(g), (e) and (f). For a full discussion about who

falls into these student categories, and about the relevant exemptions, see O Reg 285/01, s. 7 under the heading “Students”.

Superintendent, Janitor or Caretaker – s. 4.1(d)

4.1 Section 21.2 of the Act does not apply to,

….

(d) a person who is employed as the superintendent, janitor or caretaker of a residential building and resides in the building;

Section 4.1 was added to O Reg 285/01 effective January 1, 2019. Pursuant to s. 4.1(d), a person employed as a superintendent, janitor or caretaker of a residential building who resides in the building is exempt from the three hour rule found in Part VII.1, section 21.2 of the ESA 2000.

Please refer to O Reg 285/01 s. 4 for a discussion about employees who fall into these categories and for information regarding additional exemptions for these employees.

O Reg 285/01 Section 5 – Rules Re Minimum Wage

Minimum Wage Rates – pre-January 1, 2018 ss. 5(1) and (3) – REVOKED

5(1) From June 1, 2014, onwards, the minimum wage is as follows:

1. For an employee who is a student under 18 years of age, if the weekly hours of the student are not in excess of 28 hours or if the student is employed during a school holiday, $10.30 an hour.

2. For an employee who, as a regular part of his or her employment, serves liquor directly to customers, guests, members or patrons in premises for which a license or permit has been issued under the Liquor License Act, $9.55 an hour.

3. For the services of a hunting or fishing guide, $55.00 for less than five consecutive hours in a day and $110.00 for five or more hours in a day whether or not the hours are consecutive.

4. For an employee who is a homeworker, $12.10 an hour.

5. For any other employee, $11.00 an hour.

5(2) revoked by O Reg 31/14

5(3) If an employee falls within both paragraphs 1 and 4 of subsection (1), the employer shall pay the employee not less than the minimum wage for a homeworker.

Until January 1, 2018, subsection 5(1) of O Reg 285/01 as amended by O Reg 31/14 had prescribed the minimum wage rates that were required to be paid pursuant to paragraph 1 of ESA Part IX, s. 23(1), effective June 1, 2014.However, from October 1, 2015 onwards, the minimum wage rates were no longer prescribed by regulation. Rather, the minimum wage rates in effect immediately before October 1 in each year were to be adjusted in accordance with the formula set out in ESA Part IX, s. 23.1(4). (The

Stronger Workplaces for a Stronger Economy Act, 2014 ("SWSEA"), SO 2014, c 10 added s. 23.1 to the ESA 2000.)

The *Fair Workplaces Better Jobs Act, 2017* ("FWBJA") subsequently amended the SWSEA amendment, which directly tied changes in the minimum wage rates from October 1, 2015 on to changes in the Consumer Price Index through a formula in s. 23.1(4). The FWBJA provided for increases to minimum wage rates to the amounts that were set out in s. 23.1(1) effective January 1, 2018 and January 1, 2019. It had also provided that effective October 1, 2019, the minimum wage rates immediately in effect before October 1 each year were to be adjusted annually by the formula set out in s. 23.1(4).

The *Making Ontario Open for Business Act, 2018* (MOOBA) then amended s. 23.1(1) to keep the minimum wages at the January 1, 2018 rates and to delay by one year the date that the annual adjustments are to take effect, changing the date from October 1, 2019 to October 1, 2020.

See ESA Part IX, s. 23.1.

Room and Board – s. 5(1)

5(1) If an employer provides room or board to an employee, the following are the amounts that shall be deemed to have been paid as wages for the purposes of determining whether the minimum wage has been paid:

1. For room, $31.70 a week if the room is private and $15.85 a week if the room is not private.

2. For board, $2.55 a meal and not more than $53.55 a week.

3. For both room and board, $85.25 a week if the room is private and $69.40 a week if the room is not private.

Section 5(1) sets the amounts deemed to be paid as wages with respect to meals or rooms (private and non-private).

Note that prior to January 1, 2018 this provision appeared in subsection 5(4). As a consequence of the minimum wage rates being moved from this regulation to the Act itself by the MOOBA, this regulation was amended and the subsections were renumbered.

The amounts deemed to be paid as wages under s. 5(1) are used only for the purpose of ensuring that the applicable minimum wage has been paid where the employer seeks to satisfy its minimum wage obligations in part through the provision of room, board or room and board. See O Reg 285/01, s. 19 for a discussion of the corresponding provisions that relate to domestic workers. See O Reg 285/01, s. 25 for a discussion of the corresponding provisions that relate to fruit, vegetable and tobacco harvesters.

The ordinary meaning of the words "private" and "not private" is applied when determining which value to use. For example, an employee's bedroom is not private if the only access to a laundry room used by the employer is through it – see Flores v Walker and Bassett Walker (July 8, 1998), 2234-97-ES (ON LRB).

Where the employer seeks to satisfy its minimum wage obligations in part through the provision of room, board or room and board, and accordingly pays the employee minimum wage less the amounts deemed to have been paid as wages for room, board or room and board (as the case may be) as set out above, there is no deduction from wages, and hence no written authorization for deduction is required in relation to the room and board amounts.

In some cases, an employer may wish to make a larger deduction in respect of room and board than the amounts set out above, for example where the employee's wages exceed the minimum wage set out in the ESA 2000. However, that would have to be authorized in writing by the employee.

Minimum Standards for Room and Board – s. 5(5)

5(2) The amount provided in subsection (1) in respect of a room shall be deemed to have been paid as wages only if the room is,

(a) reasonably furnished and reasonably fit for human habitation;

(b) supplied with clean bed linen and towels; and

(c) reasonably accessible to proper toilet and wash-basin facilities.

This provision establishes certain minimum standards of quality for the room the employer provides in order for amounts with respect to that room to be deemed to be paid as wages under s. 5(1). See O Reg 285/01, s. 19 for a discussion of the corresponding provisions that relate to domestic workers. See O Reg 285/01, s. 25 for a discussion of the corresponding provisions that relate to fruit, vegetable and tobacco harvesters.

Note that prior to January 1, 2018 this provision appeared in subsection 5(5). As a consequence of the minimum wage rates being moved from this regulation to the ESA 2000 itself by the MOOBA, this regulation was amended and the subsections were renumbered.

First, a room is required to be reasonably furnished. Program policy is that a room is reasonably furnished if it contains a bed, a table, a chair, and a wardrobe or chest of drawers. It must also be reasonably fit for human habitation. The employer must also provide clean bed linen and towels, not necessarily daily, but on a frequent enough basis to maintain the standard of cleanliness. The employee must have reasonable access to toilet and washing facilities. Facilities just across a hall would usually be reasonable; facilities requiring a trip across a field to an outhouse may or may not be, depending, for example, on the location of the place of employment and on the norms in that particular community.

If any of these requirements is not met, the amount set out in s. 5(1) cannot be deemed to be paid as wages in determining whether the minimum wage has been paid.

When Room and Board Deemed Paid – s. 5(3)

5(3) Room or board shall not be deemed to have been paid by the employer to an employee as wages unless the employee has received the meals or occupied the room.

Note that prior to January 1, 2018 this provision appeared in subsection 5(6). As a consequence of the minimum wage rates being moved from this regulation to the ESA 2000 itself by the MOOBA, this regulation was amended and the subsections were renumbered.

Section 5(3) provides that the amounts set out in s. 5(1) with respect to room and board cannot be deemed to have been paid unless the room was occupied and the meals were received by the employee. Where the employee has actually received the meals and room, these amounts can be treated as forming part of the wages paid to the employee for the purposes of determining if the minimum wage standard has been met. A written authorization of the employee is not required since the charges, rather than being deductions from wages, form part of the formula for determining the gross wages paid to the employee. These amounts can be deemed to have been paid even though no record of these amounts were shown on the employee's payroll record. See O Reg 285/01, s. 19 for a discussion of the corresponding provisions that relate to domestic workers. See O Reg 285/01, s. 25 for a discussion of the corresponding provisions that relate to fruit, vegetable and tobacco harvesters.

In *Steven Carapiet c.o.b.a. the Fish Tale Lodge v Cayen and Lamothe* (February 17, 1986), ESC 2041 (Adamson), Referee Adamson found that amounts could not be deemed to have been paid as wages for the supply of a room for weeks during which the room was not occupied. The parties did not contest the period of occupancy.

There may be some question as to whether meals were in fact provided or a room was in fact occupied. The Program's position is that a room will be considered occupied if the employee lived, slept or stored belongings in the room during the period for which the employer is claiming credit against the minimum wage obligation. For example, although the employee may be away for a specified period (e.g., on vacation), the room will be considered occupied if it is still being used for the storage of the employee's personal belongings while they are absent.

Three Hour Rule – s. 5(7) (REVOKED)

The three hour rule established by subsection 5(7) of O Reg 285/01 was revoked effective January 1, 2019, at the same time that a (revised) three hour rule was introduced into the ESA 2000 under a new Part VII.1 of the ESA 2000 in s. 21.2. (See the discussion under that provision for more information.) Subsection 5(7) is therefore no longer in force. The discussion of s. 5(7) is being maintained for use in situations that arose when it was in effect.

5(7) For the purpose of determining whether an employee other than a student has been paid the minimum wage, the employee shall be deemed to have worked for three hours if he or she,

(a) regularly works more than three hours a day;

(b) is required to present himself or herself for work; and

(c) works less than three hours.

Subsection 5(7) provides for what is commonly referred to as the "three hour rule" which, under certain circumstances, requires three hours' pay at the rate of at least minimum wage, even though the employee has worked less than three hours. Note that employees in the women's coat and suit industry and the women's dress and sportswear industry have special rules that apply instead of s. 5(7) – see O Reg 291/01, s. 3.

The circumstances in which s. 5(7) apply are as follows:

- The employee is not a student
    - Note that “student” in this subsection does not have the same meaning as it has in paragraph 1 of s. 5(1) of this regulation; for the purposes of the three hour rule, “student” means a student of any age, including students over the age of 18 years;
- The employee regularly works more than three hours per day
    - Note that the three hour rule has no application if the employee regularly works three hours a day or regularly works less than three hours a day;
- The employee is required to present themselves for work
    - Note this section will not apply where the employee has reported to work when directed not to do so by the employer, even on a day that is normally a workday; and
- The employee works less than three hours.

It is immaterial whether the hours are worked on a regular work day or on a day on which the employee does not usually work, provided that they were required to present themselves for work that day.

In other words, the three hour rule may also apply when the employee is called in to work on a day that is not a regular workday, if the employee works less than three hours that day.

Note however that if the employee's schedule includes regularly working more than three hours a day and regularly working three hours a day or less, the application of the three hour rule will depend on whether the day is one where the employee would regularly work more than three hours or one where the employee would regularly work three hours or less.

As an example, assume an employer occasionally schedules staff to attend Saturday morning meetings. Assuming that the employees regularly worked 8 hours a day Monday through Friday, the three hour rule would apply to these occasional Saturday staff meetings. However, if the employer was found to regularly schedule the employees for one-hour Saturday morning staff meetings, it would be the Program's position that the three hour rule would not apply to those Saturday shifts/meetings. That is because it is the Program's view that s. 5(7) was not intended to prohibit an employer from having a regular shift schedule that incorporates shifts of less than three hours.

As another example, an employer could establish a shift schedule that has the employee working four-hour shifts on Mondays, Wednesdays and Fridays and two-hour shifts on Tuesdays and Thursdays. The regularly scheduled Tuesday and Thursday shifts would not trigger the application of the three hour rule because the employee regularly works less than three hours on those days. Note though that if the employee was not provided with at least three hours of work on a Monday, Wednesday or Friday, the rule would apply.

Where the provision does apply, an employee will be entitled to be paid at least three hours at the minimum wage. The provision does not mean the employee must be paid three hours at their regular rate if it is in excess of the minimum wage. In other words, an employee who is called into work but works less than three hours must receive three hours' pay at minimum wage OR their regular wages for the time actually worked, **whichever is greater.**

Example 1

Employee:

- Is not a student, regularly works more than three hours per day and is required to present themselves for work on July 15, 2018;
- Regular rate is $17.00/hour;
- Works one hour and is then directed by the employer to leave;
- Is paid regular rate of $17.00 for one hour's work;
- Is deemed by virtue of s. 5(7) to have worked three hours for the purpose of determining if minimum wage has been paid.
- Entitlement is the greater of:
    - Three hours x the minimum wage rate of $14.00 = $42.00; OR
    - One hour x $17.00 = $17.00
    - Balance owing to employee is $42.00 - $17.00 (already paid to employee) = $25.00

Example 2

The same facts as in the first example, but the regular rate is $45.00/hour.

- Employee was paid $45.00.
- Entitlement is the greater of:
    - Three hours x $14.00 = $42.00; OR
    - One hour x $45.00 = $45.00
    - Difference of $3.00 ($45.00 - $42.00) to be retained by employee.

When Three Hour Rule Does Not Apply – s. 5(8) (REVOKED)

Subsection 5(8) was revoked effective January 1, 2019 at the same time that a (revised) three hour rule was introduced into the ESA 2000 under a new Part VII.1 of the ESA 2000 in s. 21. (See the discussion under that provision for more information.) This provision is therefore no longer in force. The discussion of s. 5(8) is being maintained for use in situations that arose when it was in effect.

5(8) Subsection (7) does not apply if the employer is unable to provide work for the employee because of fire, lightning, power failure, storms or similar causes beyond the employer's control that result in the stopping of work.

Subsection 5(8) establishes that the three hour rule in s. 5(7) does not apply when certain types of circumstances that are beyond the control of the employer prevent it from providing work to an employee who reports for work.

For this provision to apply, the circumstances described in the section must be responsible for the complete stoppage of an employee's work. If the circumstances only reduce the demand for the employee's services, this provision will not apply and the three hour rule will apply. For example, a severe electrical storm could result in an employer being unable to provide a construction employee with any work and s. 5(8) would therefore apply. The same storm might only reduce the volume of work available for an employee who works in a car wash so that s. 5(8) would therefore not apply.

O Reg 285/01 Section 6 - Minimum Wage for Wilderness Guides

6. (1) Wilderness guides are prescribed as a class of employees for the purposes of subsection 23.1(2) of the Act.

(2) The minimum wage prescribed for the services of a wilderness guide is the following:

1. **On or after January 1, 2022 but before October 1, 2022, $75.00 for less than five consecutive hours in a day and $150.05 for five or more hours in a day, whether or not the hours are consecutive.**
2. **From October 1, 2022 onwards, the amount determined under subsection 23.1 (4) of the Act.**

This section was added to O Reg 285/01 effective June 3, 2019. It prescribes wilderness guides as a class of employees for the purposes of ESA Part IX, s. 23.1(2) and prescribes a block rate minimum wage for them (which is the same rate that is set pursuant to s. 23.1(1) for hunting and fishing guides).

Originally, the provision set out a specific rate in subsection (2) that was in place until September 30, 2020. Beginning on October 1, 2020 , the minimum wage applying to this class of employees was adjusted in accordance with ESA Part IX, ss. 23.1(4) – (6).

This provision was amended effective January 1, 2022 to set out specific rates that apply to wilderness guides between January 1, 2022 and September 30, 2022. The rates are $75.00 for less than five consecutive hours in a day, and $150.05 for five or more hour in a day, whether or not the hours are consecutive. From October 1, 2022 onward, the minimum wage rate applying to this class of employee is adjusted in accordance with ESA Part IX, ss. 23.1(4).

For information about the definition of wilderness guide, see O Reg 285/01, s.1.

O Reg 285/01 Section 7 – Exemptions from Part IX of Act

Students – s. 7(a), (b) and (c)

7 Part IX of the Act does not apply to,

(a) a person who is employed as a student in a recreational program operated by a charitable organization registered under Part I of the *Income Tax Act* (Canada) and whose work or duties are directly connected with the recreational program;

(b) a person employed as a student to instruct or supervise children;

(c) a person employed as a student at a camp for children;

The above-described students are exempt from the minimum wage provisions of the ESA 2000. They are also exempt from the three hour rule – see O Reg 285/01, s. 4.1(a)-(c); the overtime pay provisions – see O Reg 285/01, ss. 8(h), (f) and (g), and the public holidays provisions – see O Reg 285/01, ss. 9(1)(g), (e) and (f).

For example, such students may be employed as:

- Recreational sports officials and instructors; arts and crafts instructors;
- Playground leaders to teach and supervise crafts, songs and sports; wading pool supervisors; sports officials to instruct and supervise sports programs; youth centre leaders to instruct and supervise young teens; swimming instructors; a sitter in a private home (this assumes that the sitter is not working as an independent contractor, as in that case the exemption would be irrelevant, as the ESA 2000 would not even apply to him or her; typically short-term babysitters are independent contractors but in some cases an employment relationship may exist in which case this exemption would apply – see the discussion of the definition of employee at ESA Part I, s. 1 for information on the tests applied in assessing whether there is an employer/employee relationship); and
- Camp counsellors, lifeguards, kitchen staff, and so on at a camp for children.

In order for the exemption in s. 7(a) of the regulation to apply, the employer must be able to show that it is a duly-registered charitable institution by showing its registration number under the federal *Income Tax Act,* RSC 1985, c 1 (5th Supp). If it is not, the exemption will not apply, even if the employer is operating a

recreational program that is virtually identical to one operated by a charitable institution. Also, the student's employment must be directly connected with the recreational program, and not, for example, with another portion of the organization's operation, such as general administration or a social assistance program. Unlike the exemptions under ss. 7(b) and (c), the recreational program in exemption s. 7(a) need not involve children (that is, persons under 18).

Meaning of "employed as a student…"

A "student" is a person who is working full or part-time while in full-time attendance at a primary, secondary or post-secondary institution, or who is working during a holiday period but has the intention of returning to fulltime education at the end of that holiday period.

Note that for the purposes of this exemption (as well as the exemptions from the overtime pay provisions - see O Reg 285/01, ss. 8(h), (f) and (g) – and the public holidays provisions – see O Reg 285/01, ss. 9(1)(g), (e) and (f) – the term "student" is not limited to a person less than 18 years of age. This is in contrast to the use of the word "student" for the purposes of the student minimum wage provisions: the student minimum wage applies to a student (not otherwise exempted from the ESA 2000 pursuant to s. 3(5) of the ESA 2000 and not exempt from the minimum wage provisions under s. 7 of O Reg 285/01) who is under the age of 18 years and 1) does not work more than 28 hours per week while attending school or 2), is employed while on school holiday. For more information on the student minimum wage, please see O Reg 285/01, s. 5.

The onus is on the employer seeking to apply any of the exemption in ss. 7(a), (b) or (c) of O Reg 285/01 to confirm that the employee is either in attendance at an educational institution or on a holiday period from an institution.

In order for the exemptions in ss. 7(a), (b) or (c) to apply, the core of the student's employment must fall within the scope of work set out in the provision, though a part of their functions may fall outside it. For example, if a student spends 60 per cent of their time instructing children and the remaining 40 per cent of her time instructing adults, the exemption in s. 7(b) would apply. The test is where and how the employee spends the majority of their working hours.

Only those employees who are "students", as defined above, are exempt. Other employees, even if performing exactly the same work (e.g., instructing or supervising children, etc.), are not exempt.

Superintendent, Janitor or Caretaker – s. 7(d)

7 Part IX of the Act does not apply to,

(d) a person who is employed as the superintendent, janitor or caretaker of a residential building and resides in the building.

A person employed as superintendent, janitor or caretaker of a residential building who resides in the building is exempt from the minimum wage provisions of the ESA 2000. Please refer to O Reg 285/01, s. 4 for further information regarding additional exemptions for these employees.

O Reg 285/01 Section 8 – Exemptions from Part VIII of Act

Exemptions from Overtime – ss. 8(a) to (j), (l)

Part VIII of the Act does not apply to,

(a) a person employed as a firefighter as defined in section 1 of the *Fire Protection and Prevention Act, 1997*;

(b) a person whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis;

(c) a person employed as a fishing or hunting guide;

(d) a person employed,

- **i. as a landscape gardener, or**
- **ii. to install and maintain swimming pools;**

(e) a person whose employment is directly related to,

- **i. the growing of mushrooms,**
- **ii. the growing of flowers for the retail and wholesale trade,**
- **iii. the growing, transporting and laying of sod,**
- **iv. the growing of trees and shrubs for the retail and wholesale trade,**
- **v. the breeding and boarding of horses on a farm, or**
- **vi. the keeping of furbearing mammals, as defined in the *Fish and Wildlife Conservation Act, 1997*, for propagation or the production of pelts for commercial purposes;**

(f) a person employed as a student to instruct or supervise children;

(g) a person employed as a student at a camp for children;

(h) a person who is employed as a student in a recreational program operated by a charitable organization registered under Part I of the *Income Tax Act* (Canada) and whose work or duties are directly connected with the recreational program;

(i) a person who is employed as the superintendent, janitor or caretaker of a residential building and resides in the building;

(j) a person employed as a taxi cab driver;

(l) an information technology professional.

Please refer to the following sections for a discussion of the exemptions in s. 8 of O Reg 285/01:

- Section 8(a): O Reg 285/01, s. 4(1)(a)
- Section 8(b): O Reg 285/01, s. 4(1)(b)
- Section 8(c): O Reg 285/01, s. 4(1)(c)
- Section 8(d)(i): O Reg 285/01, s. 4(2)(a)
- Section 8(d)(ii): O Reg 285/01, s. 4(2)(b)
- Section 8(e)(i): O Reg 285/01, s. 4(3)(a)(i)
- Section 8(e)(ii): O Reg 285/01, s. 4(3)(a)(ii)

- Section 8(e)(iii): O Reg 285/01, s. 4(3)(a)(iii)
- Section 8(e)(iv): O Reg 285/01, s. 4(3)(a)(iv)
- Section 8(f): O Reg 285/01, s. 7(b)
- Section 8(g): O Reg 205/01, s. 7(c)
- Section 8(h): O Reg 285/01, s. 7(a)
- Section 8(i): O Reg 285/01, s. 4(1)(e)
- Section 8(j): O Reg 285/01, s. 1 re definition of taxi cab
- 8(k): see below
- Section 8(l): O Reg 285/01, ss. 1 and 4(3)(b)

Ambulance Driver, Ambulance Driver's Helper or First-Aid Attendant – s. 8(k)

8 Part VIII of the Act does not apply to,

(k) a person employed as an ambulance driver, ambulance driver's helper or first-aid attendant on an ambulance;

An ambulance driver, ambulance driver's helper or a first-aid attendant on an ambulance is exempt from the overtime pay provisions of the ESA 2000.

Compliance with the criteria set out in the definition of ambulance under the *Ambulance Act*, RSO 1990, c A.19 is not determinative of whether a person is an ambulance driver, ambulance driver's helper or first-aid attendant on an ambulance or whether the conveyance used for the transportation of persons is an ambulance for the purposes of the ESA 2000. See Direct Care Patient Transfer Inc. v Clarke, 2000 CanLII 12519 (ON LRB).

When determining if the exemption applies, it must be established whether the nature of the service and the transportation used is either an ambulance service (i.e., for medical emergencies where the exemption would apply) or a non-ambulance medical transfer service (in which case the exemption would not apply). There are several factors that may assist in making this determination. They include:

- Are the people being transported in stable medical condition?
- Are the employees trained and authorized to administer drugs or medical assistance?
- Are the vehicles being used equipped with drugs or medical equipment
- Are the vehicles being used equipped with sirens or emergency lights that are operational? If so, are they allowed to be used?
- Are the employees required to be licensed as level 1 paramedics who can be required to administer certain drugs and operate a defibrillator?
- If there is an emergency during a transfer, are the employees are required to call 911 and wait for an ambulance to deal with the medical emergency?

For further discussion, see the Ontario Labour Relations Board's decision in King v RNR Patient Transfer Services Inc., 2008 CanLII 22 (ON LRB).

O Reg 285/01 Section 9 – Exemptions from Part X of Act

Exemptions to Public Holidays - ss. 9(1)(a) to (i)

9(1) Part X of the Act does not apply to,

(a) a person employed as a firefighter as defined in section 1 of the *Fire Protection and Prevention Act, 1997*;

(b) a person employed as a fishing or hunting guide;

(c) a person employed,

- **i. as a landscape gardener, or**
- **ii. to install and maintain swimming pools;**

(d) a person whose employment is directly related to,

- **i. mushroom growing,**
- **ii. the growing of flowers for the retail and wholesale trade,**
- **iii. the growing, transporting and laying of sod,**
- **iv. the growing of trees and shrubs for the retail and wholesale trade,**
- **v. the breeding and boarding of horses on a farm, or**
- **vi. the keeping of furbearing mammals, as defined in the *Fish and Wildlife Conservation Act, 1997*, for propagation or the production of pelts for commercial purposes;**

(e) a person employed as a student to instruct or supervise children;

(f) a person employed as a student at a camp for children;

(g) a person who is employed as a student in a recreational program operated by a charitable organization registered under Part I of the *Income Tax Act* (Canada) and whose work or duties are directly connected with the recreational program;

(h) a person who is employed as the superintendent, janitor or caretaker of a residential building and resides in the building;

(i) a person employed as a taxi cab driver; or

Please refer to the following sections for a discussion of the exemptions from the public holiday provisions of the *Employment Standards Act, 2000* set out in O Reg 285/01, s. 9:

- Firefighters – s. 9(1)(a): O Reg 285/01, s. 4(1)(a)
- Hunting and fishing guides – s. 9(b): O Reg 285/01, s. 4(1)(c)
- Landscape gardeners – s. 9(c)(i): O Reg 285/01, s. 4(2)(a)
- Swimming pool installation and maintenance – s. 9(c)(ii): O Reg 285/01, s. 4(2)(b)
- Mushroom growers – s. 9(d)(i): O Reg 285/01, s. 4(3)(a)(i)

- Flower growers – s. 9(d)(ii): O Reg 285/01, s. 4(3)(a)(ii)
- Growing, transporting and laying sod – s. 9(d)(iii): O Reg 285/01, s. 4(3)(a)(iii)
- Tree and shrub growers – s. 9(d)(iv): O Reg 285/01, s. 4(3)(a)(iv)
- Horse breeders and boarders – s. 9(d)(v): O Reg 285/01, s. 4(3)(a)(v)
- Furbearing mammal keepers – s. 9(d)(vi): O Reg 285/01, s. 4(3)(a)(vi)
- Students who instruct or supervise children –s. 9(e): O Reg 285/01, s. 7(b)
- Students at camps for children – s. 9(f): O Reg 285/01, s. 7(c)
- Students in recreational programs operated by charitable organizations – s. 9(g): O Reg 285/01, s. 7(a)
- Residential superintendents, janitors or caretakers – s. 9(h): O Reg 285/01, s. 4(1)(e)
- Taxi cab drivers – s. 9(i): O Reg 285/01, s. 1 re definition of taxi cab

Seasonal Employee in Hotel, Motel, Resort, etc. - s. 9(1)(j)

9(1) Part X of the Act does not apply to,

(j) a person who is employed as a seasonal employee in a hotel, motel, tourist resort, restaurant or tavern and is provided with room and board;

A seasonal employee in a hotel, motel, tourist resort, restaurant or tavern who is provided with room and board is exempt from the public holiday provisions of the Act. See O Reg 285/01, s. 1 for a discussion of the definition of "seasonal" as well as "hotel, motel, tourist resort, restaurant or tavern".

Construction Employees - s. 9(2)

9(2) Part X of the Act does not apply to a construction employee who works in the construction industry if,

(a) the employee's period of employment is less than five years and the employee receives 7.7 per cent or more of his or her hourly rate or wages for vacation pay or holiday pay; or

(b) the employee's period of employment is five years or more and the employee receives 9.7 per cent or more of his or her hourly rate or wages for vacation pay or holiday pay.

Construction employees who work in the construction industry are exempt from the public holiday provisions of the Act if their period of employment is less than five years and they receive 7.7 per cent or more of their hourly rate or wages for vacation pay or holiday pay. If their period of employment is equal to or greater than five years, they are exempt if they receive 9.7 per cent or more of their hourly rate or wages for vacation pay or holiday pay. See O Reg 285/01, s. 1 for the definition of "construction employee" and "construction industry".

The percentages are based on the Act's four per cent and six per cent vacation pay entitlements plus a percentage calculated on the basis of nine days of public holiday pay per year for an employee who regularly works five days a week.

O Reg 285/01 Section 9.1 – Exemptions from Part XII of Act

Section 9.1 of O Reg 258/01 was revoked effective January 1, 2019 pursuant to a regulatory amendment. This section is therefore no longer in force.

Section 9.1 set out employees who were exempt from the application of section 42.1 of the ESA 2000 (the “equal pay for equal work: difference in employment status” provision). Section 42.1 of the ESA 2000 was repealed effective January 1, 2019 as a result of the *Making Ontario Open for Business Act, 2018*.

Since employees may still file a complaint relating to section 42.1 that arose during the period of time when that section was in force – from April 1, 2018 to December 31, 2018 – the Program’s interpretation of section 9.1 (establishing the exemptions that applied to s. 42.1 during the relevant period) remains as part of this publication. The text appears in red to highlight that this section has been repealed.

9.1 Section 42.1 of the Act does not apply to,

(a) a person employed as a firefighter as defined in section 1 of the *Fire Protection and Prevention Act, 1997*;

(b) an employee who is a student under 18 years of age, if the weekly hours of the student are not in excess of 28 hours or if the student is employed during a school holiday; or

(c) a person employed in the recorded visual and audio-visual entertainment production industry.

This provision sets out the employees who are exempt from ESA Part XII, s. 42.1. Section 42.1 prohibits employers from paying employees different rates of pay on the basis of a difference in employment status.

Firefighters

Pursuant to s. 9.1(a), firefighters, as defined in s. 1 of the *Fire Protection and Prevention Act, 1997,* SO 1997 are exempt from ESA Part XII, s. 42.1.

Section 1 of the FPPA defines a firefighter as follows:

"firefighter" means a fire chief and any other person employed in, or appointed to, a fire department and assigned to undertake fire protection services, and includes a volunteer firefighter;

"volunteer firefighter" means a firefighter who provides fire protection services either voluntarily or for a nominal consideration, honorarium, training or activity allowance.

The exemptions will therefore also apply to fire chiefs and volunteer firefighters.

Students

Pursuant to s. 9.1(b), students under the age of 18 are exempt from ESA Part XII, s. 42.1 if:

- The student works 28 hours or less per week, or
- The student is employed during a school holiday.

Recorded Visual and Audio-Visual Entertainment Production Industry

Pursuant to s. 9.1(c), employees who work in the recorded visual and audio-visual entertainment production industry are exempt from ESA Part XII, s. 42.1.

Recorded visual and audio-visual entertainment production industry is defined in O Reg 285/01, s. 1 as follows:

"recorded visual and audio-visual entertainment production industry" means the industry of producing visual or audio-visual recorded entertainment that is intended to be replayed in cinemas or on the Internet, as part of a television broadcast, or on a VCR or DVD player or a similar device, but does not include the industry of producing commercials (other than trailers), video games or educational material.

O Reg 285/01 Section 10 – Application of s. 73 of Act

Retail Business Establishment - s. 10(1)

10(1) Despite section 73 of the Act, an employee in a retail business establishment shall not refuse to work on a Sunday if he or she agreed, at the time of being hired, to work on Sundays.

Subsection 10(1) creates an exception to the provisions of s. 73 of the *Employment Standards Act, 2000*. Under s. 73(2), an employee of a retail business establishment may refuse to work on a Sunday. Under the exception established by s. 10(1) of the regulation, an employee who agreed at the time of hire to work on Sundays may not subsequently avail themselves of the right to refuse Sunday work. It is Program policy that this exemption can apply only to employees who were hired on or after September 4, 2001, based on the presumption against retroactive application. Thus, employees hired before September 4, 2001, still have the right to refuse Sunday work and the right not to be punished for refusing. (Also, see discussion of s. 10(2) below.)

Religious Belief or Observance - s. 10(2)

10(2) Subsection (1) does not apply to an employee who declines to work on a Sunday for reasons of religious belief or religious observance.

Subsection 10(2) provides that s. 10(1), which precludes employees of a retail business establishment from refusing Sunday work where they have agreed to it at the time of hire, does not apply where an employee refuses Sunday work for reasons of religious belief or religious observance. Thus, an employee who was hired on or after September 4, 2001 and who had agreed at the time of hiring to work on Sundays would be able to subsequently refuse to work on Sundays for reasons of religious belief or religious observance.

Human Rights Code - s. 10(3)

10(3) The employer shall not make an employee's agreement to work on Sundays a condition of being hired if the condition would be contrary to section 11 of the *Human Rights Code*.

Section 11 of the Ontario *Human Rights Code,* RSO 1990, c H.19 (the "Code") deals with constructive discrimination (also known as "adverse effect" discrimination). It reads as follows:

11(1) A right of a person under [the Part of the Code dealing with freedom from discrimination] is infringed where a requirement qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

(a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or

(b) it is declared in this Act that to discriminate because of such ground is not an infringement of a right.

11(2) The Commission, the board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

11(3) The Commission, the board of inquiry or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship.

Section 11 of the *Human Rights Code* addresses rules or practices that, although not among the specific, prohibited grounds of discrimination set out in Part I of the Code, result in unequal treatment of a particular person or group against whom the Code prohibits discrimination. This type of unintentional discrimination is known as "constructive" or "adverse effect" discrimination. In other words, the Code prohibits practices that have a discriminatory effect, even if they are not expressly or intentionally discriminatory. Therefore, if an employer's policy is not to hire any person who refuses to work on Sundays and such employer will make no exception for those whose religious beliefs or observance practices prevent them from working on Sundays, this may violate the Code.

Subsection 10(3) prohibits an employer from making an employee's agreement to work on Sunday a condition of employment if by so doing a violation of s. 11 of the Code would occur.

O Reg 285/01 Section 11 – Homemakers

Definition of Homemaker – s. 11(1)

11(1) In this section, "homemaker" means a person who is employed,

(a) to perform homemaking services for a householder or member of a household in the householder's private residence, and

(b) by a person other than the householder.

Section 11 defines the term homemaker. There are three basic elements to the definition, as follows:

Performs homemaking services

There is no definition of "homemaking services" within the *Employment Standards Act, 2000*. However in a decision under the former *Employment Standards Act*, *Re Service Employees International Union, Local 204 and Community Services to Jewish Elderly o/a Senior Care*, an adjudicator considered it appropriate in the circumstances to look at the definition of homemaking services as defined in Reg 634, RRO 1990 made under the *Homemakers and Nurses Services Act*, RSO 1990, c H.10. This regulation defines homemaking services as meaning housekeeping services including:

- Care of a child or children;
- Meal planning, marketing and preparation of nourishing meals, and the preparation of special diets where required;
- Light, heavy and seasonal cleaning;

- Light laundry, ironing and essential mending of clothing;
- Personal care, including assistance in walking, climbing or descending stairs, getting into or out of bed, eating, dressing, bathing and other matters of personal hygiene;
- Simple bedside care, where required, under the direction of a physician or nurse, but not including nursing services; and
- Training and instruction in household management and the care of children.

It is Program policy that an employee providing such services is providing homemaking services. Services that are not listed in Reg 634 may also be considered to be homemaking services for the purposes of s. 11, such as providing care to an adult or adults.

Note that a homemaker is not a homeworker – see ESA Part I, s. 1 for the definition of homeworker.

Performs these services in the householder's private residence

If the person is performing the services in a non-private institution, the section will not apply. For example, cleaners in retirement homes are not homemakers

Employed by a person other than the householder

This refers to the situation in which a householder contracts with a business to have an employee of that business come into their house to perform homemaking services. In contrast, a domestic worker, while performing similar duties, is employed by the householder directly.

Refer to O Reg 285/01, s.1 for a discussion of domestic workers.

Minimum Wage – s. 11(2)

11(2) Despite section 6, the hours of work in respect of which a homemaker is to be paid at least the minimum wage shall not be more than 12 hours in a day.

Section 6 of O Reg 285/01 establishes when work is deemed to be, or not to be, performed (and so establishes the hours for which an employee must normally be paid at least the minimum wage and overtime pay). When such rules are applied to a homemaker, it may turn out that the homemaker has worked more than 12 hours in a day. However, s. 11(2) of the regulation states that despite the fact that a homemaker works or is deemed to have worked more than 12 hours in a day, they are entitled to be paid the minimum wage for only 12 hours. For example, even if they worked 14 hours in a day, they need only be paid for 12 hours.

In other words, a homemaker is entitled to be paid at least the minimum wage for no more than 12 of the hours they work. There is effectively a cap on what the employer must pay, although the employer is not prohibited from paying more.

Homemakers are not exempted from the application of the minimum wage provisions. If a homemaker works 12 hours or fewer, the homemaker must be paid at least minimum wage calculated with reference to the number of hours worked and if the homemaker works more than 12 hours, the homemaker must be paid at least the minimum wage for 12 hours of work. If the employer pays the homemaker as per the preceding sentence, the homemaker will be considered to be paid in accordance with s. 11(2) and the limits on hours of work will not apply, by virtue of s. 11(3).

Exemption to Parts VII and VIII – s. 11(3)

11(3) Parts VII (Hours of Work and Eating Periods) and VIII (Overtime Pay) and paragraph 4 of subsection 15(1) (record of hours worked) of the Act do not apply to a homemaker who is paid in accordance with subsection (2).

The general rules regarding hours of work and eating periods in ESA Part VII and overtime pay in ESA Part VIII, as well as the requirement in paragraph 4 of ESA Part VI, s. 15(1) to keep a record of daily and weekly hours, do not apply to homemakers if the employer complies with s. 11(2), i.e., if the employer pays the employee at least the minimum wage for all hours worked in a day to a maximum of 12. If s. 11(2) is not complied with, then both Parts VII and VIII and paragraph 4 of s. 15(1) will apply. The homemaker's hours of work will be subject to the limits set out in Part VII, and they will be entitled to rest and eating periods, overtime pay and the daily and weekly hours record-keeping requirements.

O Reg 285/01 Section 12 – Homeworkers

12(1) The employer of a homeworker shall advise the homeworker in writing of the type of work that he or she is being employed to perform and,

- **(a) if the homeworker is to be paid according to the number of hours worked, of the amount to be paid for an hour of work in a regular work week;**
- **(b) if the homeworker is to be paid according to the number of articles or things manufactured, of the amount to be paid for each article or thing manufactured in a regular work week; or**
- **(c) if the homeworker is to be paid on some other basis, the basis on which he or she is to be paid.**

(2) If the employer of a homeworker who is paid according to the number of articles or things manufactured requires the manufacture of a certain number of articles or things to be completed by a certain date or time, the employer shall advise the homeworker of those requirements in writing.

(3) In this section, "manufacture" includes preparation, improvement, repair, alteration, assembly or completion.

This provision is similar in effect to s. 13.1 of Reg 325 under the former *Employment Standards Act*.

Section 12 requires that the employer notify the homeworker in writing of the type of work that he or she is being employed to perform and the rate of pay, whether the basis for the rate is hourly, piecework or some other method, and of any completion deadlines.

These special rules concerning the employment of homeworkers are in addition to the special record-keeping requirements for employers of home-workers, which are set out in s. 15(2) of the *Employment Standards Act, 2000*. A definition of "homeworker" appears in s. 1 of the Act. Please ESA Part VI and ESA Part I for a discussion of the Act's general record-keeping requirements, and the definition of "homeworker", respectively.

O Reg 285/01 Section 13 – Road Building

Higher Overtime Threshold - ss. 13(1) & (2)

13(1) Despite Part VIII of the Act, in the case of an employee engaged at the site of road building in relation to streets, highways or parking lots,

(a) subject to clause (b), the employer shall pay overtime pay for each hour worked in excess of 55 hours in a work week, at an amount not less than one and one-half times the employee's regular rate; and,

(b) if the employee works less than 55 hours in a work week, the difference between 55 hours and the number of hours actually worked, up to an amount not exceeding 22 hours, may be added to the maximum set out in clause (a) for the purpose of determining the employee's overtime pay for the next work week.

13(2) Despite Part VIII of the Act, in the case of an employee engaged at the site of road building in relation to structures such as bridges, tunnels or retaining walls in connection with streets or highways,

(a) subject to clause (b), the employer shall pay overtime pay for each hour worked in excess of 50 hours in a work week, at an amount not less than one and one-half times the employee's regular rate; and

(b) if the employee works less than 50 hours in a work week, the difference between 50 hours and the number of hours actually worked, up to an amount not exceeding 22 hours, may be added to the maximum set out in clause (a) for the purpose of determining the employee's overtime pay for the next work week.

Section 13 of O Reg 285/01 establishes a higher overtime threshold for employees engaged at the site of road building. Employees engaged at the site of road building in relation to streets, highways or parking lots are entitled to overtime pay for each hour of work in excess of 55 in a "work week". Employees engaged at the site of road building in relation to structures such as bridges, tunnels or retaining walls in connection with streets or highways are entitled to overtime pay for each hour of work in excess of 50 in a "work week".

Mixed Threshold Work

If an employee in a "work week" is engaged at the site of road building in both types of work - work to which the 55-hour threshold applies and work to which the 50 hour threshold applies, consistent with s. 22(9) - it is Program policy that the employee receives overtime pay, in respect of all work performed in a given "work week", in accordance with the lower overtime threshold if he or she performs work that attracts the lower overtime threshold 50% or more of the time in any given "work week".

The Meaning of Road Building - s. 1

The special overtime thresholds in s. 13 apply if the employee is engaged at the site of "road building", whether he or she is engaged in the activity of "road building" or not.

"Road building" is defined in s. 1 of O Reg 285/01 as follows:

Road building means the preparation, construction, reconstruction, repair, alteration, remodelling, renovation, demolition, finishing and maintenance of streets, highways or parking lots, including

structures such as bridges, tunnels or retaining walls in connection with streets or highways, and all foundations, installation of equipment, appurtenances and work incidental thereto;

"Road building" includes road maintenance activities, such as snow ploughing and sanding, as well as work that is incidental to road building (if performed at the road building site), such as surveying and the repair or servicing of road building equipment.

"Road building" is considered by the Program to include the construction of secondary roads, e.g., logging roads, as well as streetcar tracks. It is also Program policy that railroad construction falls within the definition of "road building" - see Deckert-Dancy & Associates (Eastern) Ltd. v Ontario Ministry of Labour (July 23, 1973), ESC 38 (Fram).

The following activities have been held not to constitute road building:

- Application of herbicides at roadsides and railroads - see ***Albert Andrews Enterprises Inc. o/a Andrews Agrichemicals v DeForest and Daye*** (May 29, 1992), ES 89/92 (Novick);
- Construction of a parking area allowing vehicular access to pits where mock fires were staged for purposes of firefighter training - see ***Capital Petroleum Services Ltd. v 14 Employees*** (February 6, 1995), ESC 95-35 (Randall); and
- Paving of residential driveways - see ***O'Brien Paving Inc. v Hill***, 2012 CanLII 39480 (ON LRB).

As indicated above, to be subject to the special overtime thresholds in s. 13, the employee's work must be at the road building site, but it is not necessary that the employee be himself or herself engaged in road building or that the employer be in the road building industry. For example, a flag person employed by a security firm who works at the site of road-building will be subject to the special road building overtime threshold. Note, however, that a flag person is not himself or herself engaged in road building; as a result, the notice of termination and severance pay exemptions that apply to construction employees would not apply to such a flag person.

It should also be noted that the Program takes the position that employees of employers in the crushed stone quarry and sand and gravel industry (other than office workers not employed at the plant site) will be considered to be engaged at the site of road building and subject to the special overtime threshold in s. 13(1) if more than 50% of the output of the employer's plant consists of materials destined for use in road building.

The Program also takes the position that employees of employers in the asphalt paving-mix industry (except office workers not employed at the plant site) will be considered to be engaged at the site of road building and subject to the special overtime threshold in s. 13(1) if the output of the employer's plant is destined for use in the road building industry.

Carry Forward Provisions - s. 13(1)(b) and s. 13(2)(b)

This section of O Reg 285/01 provides that where hours worked are less than the thresholds established in s. 13(1)(a) and s. 13(2)(a), the difference between hours worked in that "work week" and the relevant threshold up to a total of 22 hours, may be added to the threshold in the "work week" immediately following, in order to determine what, if any, overtime pay is payable in the following week.

Example 1: Section 13(1)(b) 55-hour overtime threshold

Assume the employee works the following hours:

- Week 1 = 48 hours
- Week 2 = 65 hours
- Week 3 = 45 hours

If an employee is engaged in road building in relation to streets, highways and parking lots, the 55-hour threshold in s. 13(1)(a) of O Reg 285/01 applies. In the above example, the 48 hours worked during Week 1 are payable at the "regular rate". There is also a carry forward time of seven hours as per s. 13(1)(b) (being the 55-hour threshold less 48 hours actually worked). As a result, in Week 2, overtime will not be triggered until the employee works more than 62 hours (the 55 hours plus the 7 hours carried forward). In Week 2, the 55 hour-threshold plus the 7-hour carry-forward are payable at straight time and only 3 hours are payable at the overtime rate.

The "carry forward" relief provided under s. 13(1)(b) only operates to reduce the overtime pay payable with respect to the following work week, not the previous work week. For example, the 10-hour difference between the 55-hour overtime threshold and the 45 hours worked in Week 3 cannot be "carried back" to Week 2 - they can only be carried forward to Week 4.

Example 2: Section 13(2)(b) - 50-hour overtime threshold

Assume the employee works the following hours:

- Week 1 = 48 hours
- Week 2 = 65 hours
- Week 3 = 45 hours

If an employee is engaged in road building in relation to structures such as bridges, tunnels or retaining walls, the 50-hour threshold in s. 13(2)(a) of O Reg 285/01 applies. In the above example, the 48 hours worked during Week 1 are payable at the "regular rate". There is also a carry forward time of two hours as per s. 13(2)(b) (being the 50-hour threshold less 48 hours actually worked). As a result, in Week 2, overtime will not be triggered until the employee works more than 52 hours (the 50 hours plus the two hours carried forward). In Week 2, the 50-hour threshold plus the 2-hour carry forward are payable at straight time and 13 hours are payable at the overtime rate.

The "carry forward" relief provided under s. 13(2)(b) only operates to reduce the overtime pay payable with respect to the following work week, not the previous work week. For example, the 5-hour difference between the 50hour overtime threshold and the 45 hours worked in Week 3 cannot be "carried back" to Week 2 - they can only be carried forward to Week 4.

Only the maximum permissible carry forward of 22 hours can be brought forward to the immediately following calendar week. This is so notwithstanding that there was a discrepancy of more than 22 hours between the actual hours worked and the overtime threshold of 55.

O Reg 285/01 Section 14 – Hotels, Motels Tourist Resorts, Restaurants and Taverns

14. Despite Part VIII of the Act, the employer shall pay an employee who works for the owner or operator of a hotel, motel, tourist resort, restaurant or tavern for 24 weeks or less in a calendar year and who is provided with room and board overtime pay for each hour worked in excess of 50 hours in a work week, at an amount not less than one and one-half times the employee's regular rate.

Section 14 of Regulation 285/01 provides for a special threshold of 50 hours for an employee who meets all of the following criteria:

1. The employee works for the owner or operator of a hotel, motel, tourist resort, restaurant or tavern.
2. The employee does not work more than 24 weeks in a calendar year for a single employer (note: these weeks need not be consecutive).
3. The employee is provided with room and board.

Each criterion is discussed below.

1. The employee works for the owner or operator of a hotel, motel, tourist resort, restaurant or tavern.

Hotel, motel, tourist resort, restaurant and tavern are defined in s. 1 of O Reg 285/01 as follows:

"hotel, motel, tourist resort, restaurant and tavern" means an establishment that provides accommodation, lodging, meals or beverages for payment, and includes hotels, motels, motor hotels, tourist homes, tourist camps, tourist cabins and cottages, tourist inns, catering establishments and all other establishments of a similar nature.

2. The employee does not work more than 24 weeks in a calendar year for a single employer (note: these weeks need not be consecutive).

Where an employee (who works for the owner or operator of a hotel, motel, etc., and is provided with room and board) is hired with the intention that the employee's employment will not exceed 24 weeks, but in fact the employee does work more than 24 weeks, he or she does not fall under this provision. If he or she had been paid an overtime premium based on this section’s threshold, he or she must in fact be paid retroactively the balance owing, based on the overtime premium due after 44 hours worked in a "work week".

3. The employee is provided with room and board.

For a discussion as to whether an employee is considered to have been provided with room and board, refer to O Reg 285/01, s. 5.

O Reg 285/01 Section 15 – Fresh Fruit and Vegetable Processing

15. Despite Part VIII of the Act, the employer shall pay a seasonal employee whose employment is directly related to the canning, processing and packing of fresh fruits or vegetables or their distribution by the canner, processor or packer overtime pay for each hour worked in excess of 50 hours in a work week, at an amount not less than one and one-half times the employee's regular rate.

Section 15 provides a special overtime threshold of 50 hours for employees who meet the criteria set out in the section. The criteria are:

1. The employee is a seasonal employee; and

2. The employee's employment is directly related to the canning, processing, and packing of fresh fruit or vegetables or the distribution thereof by the canner, processor, or packer.

In addition, note that employees who are employed on a farm and whose employment is directly related to the **packing** of fresh fruit or vegetables or their **distribution by the packer** may – depending on the circumstances – be subject to the "primary production" exemptions (including from the overtime pay standard) pursuant to ss. 2(2) of O Reg 285/01 rather than to the special overtime threshold set out in s. 15. See the heading *Interplay Between s. 15 and s. 2(2) of O. Reg. 285/01* below for a discussion of this issue.

1. The employee is a seasonal employee.

Seasonal employee is defined in s. 1 of O Reg 285/01 as follows:

In this Regulation, "seasonal employee" means an employee who works not more than sixteen weeks in a calendar year for an employer.

The weeks of employment in the calendar year need not be consecutive for the purposes of this section.

Where an employee (whose employment is directly related to the canning, processing and packing of fresh fruits or vegetables or their distribution by the canner, processor or packer) is hired with the intention that the employment will not exceed 16 weeks in a calendar year, but in fact does work more than 16 weeks, the employee does not fall under this section. If he or she had been paid an overtime premium during the first 16 weeks of employment in a calendar year based on this subsection's threshold, he or she must be paid retroactively the balance owing, based on the overtime premium due after 44 hours worked in a work week.

2. The employee's employment is directly related to the canning, processing, and packing of fresh fruits or vegetables or the distribution thereof by the canner, processor, or packer.

The employee's employment must be directly related to the canning, processing or packing of fresh fruits or vegetables, or their distribution by the canner, processor, or packer.

It is not necessary that the employer be in the industry for the special overtime threshold in s. 15 to apply. Thus, a temporary help agency that provides assignment employees to a processing plant could pay the overtime premium after 50 hours (as opposed to after 44) in a work week, as long as the assignment employees' employment was directly related to the canning, processing, packing or distribution of fresh fruit or vegetables.

Note, however, that when it comes to the "distribution" of the canned, processed or packed fresh fruit or vegetables, the special overtime threshold in s. 15 will **not** apply to employees of a trucking company that has been engaged by the canner, processor or packer to distribute the product. This is because s. 15 applies if the distribution is **"by"** the canner, processor, or packer. In this case, the special overtime thresholds for local cartage or highway transport may apply to the employees engaged in the distribution – see ss. 17 and 18 of O. Reg. 285/01 for details.)

The general overtime threshold will be applicable to a **re-processing** of the fruits or vegetables. For example, where fresh strawberries are frozen and then re-processed to make jam, the special overtime

threshold (i.e., 50 hours) applies to the initial processing (freezing) and the general overtime threshold (i.e., 44 hours) will apply to the re-processing (making jam).

Interplay between s. 15 and s. 2(2) of O. Reg. 285/01

Where employees are engaged in the packing of fresh fruits and vegetables and the distribution/transportation of these fresh commodities, questions may arise as to the interplay between this provision and the "primary production" exemption found in subsection 2(2) of O Reg 285. This is because the packing of fresh fruits and vegetables and the transport of these commodities are "pre-transformation" activities, such that the work meets the "primary production" criterion under ss. 2(2).

(Note that this same question does not arise in respect of employees engaged in "canning" and "processing" fresh fruits and vegetables and in the transport of these processed/canned commodities by the canner or processor since these are "post-transformation" activities and, as such, do not meet the "primary production" criterion of ss. 2(2)).

Whether or not an employee engaged in the packing or distribution of fresh fruit or vegetables falls under the ss. 2(2) exemption depends on whether the employee is employed "on a farm". What is "a farm" for the purposes of the ss. 2(2) exemption was established by the Ontario Superior Court in the Rouge River decision (*Rouge River Farms Inc.* v*. Director of Employment Standards and Ontario Labour Relations Board,* 2019 ONSC 3498); a farm may include, for example, industrial buildings used to carry out post-harvest production activities so long as the tracts of land where the produce was grown and the industrial buildings where the produce is packaged are worked or managed by the same farmer. Please see here for a detailed discussion of the ss. 2(2) exemption.

Where the exemption in ss. 2(2) applies to an employee, the employee is exempt from the overtime standard and therefore s. 15 does not apply. If an employee does not fall within ss. 2(2) (e.g. because the employee is not employed on "a farm") but does fall within s. 15, the employee is subject to the special overtime threshold of 50 hours per week. The following example helps to illustrate this distinction,.

Seasonal employee A works in an industrial facility shucking corn and packing fresh corn cobs onto styrofoam trays. Depending on the circumstances, this activity could fall under ss. 2(2) or under s. 15.

Scenario A:

If the packing facility is a "farm" because it is owned and/or managed by the same farmer on whose land the corn was grown, the exemption in s. 2(2) would apply to seasonal employee A. That is because this employee would meet ss. 2(2) criteria:

1. The employee is employed on a farm,
2. The employee engages directly with the agricultural product through "hands on work",
3. The employee's work occurs at a stage in the growing or production of the commodity that precedes a transformation in its form or state, and
4. The agricultural product in question (corn) is a commodity that is specified in ss. 2(2) (i.e. "vegetable").

As such, this employee would be exempt from the overtime standard (and subject to other exemptions pursuant to ss. 2(2)).

Scenario B:

If the packing facility is not owned and/or managed by the farmer (in other words the facility is **not** part of an enterprise involved in producing the corn) – e.g. the packing facility is owned by "Veggie Packers Inc."

– then the employee would not be “employed on a farm”. As such, the exemption in ss. 2(2) would not apply. This is the case even if all of the vegetables that “Veggie Packers Inc.” packs are from a single farmer. Given that the employee in this example is a seasonal employee whose work is directly related to the packaging of fresh vegetables, section 15 would apply and this employee would be subject to an overtime threshold of 50 hours.

O Reg 285/01 Section 16 – Sewer and Watermain Construction

16. Despite Part VIII of the Act, the employer shall pay an employee who is employed in laying, altering, repairing or maintaining sewers and water-mains and in work incidental thereto, or in guarding the site during the laying, altering, repairing or maintaining of sewers and watermains, overtime pay for each hour worked in excess of 50 hours in a work week, at an amount not less than one and one-half times the employee's regular rate.

Section 16 of O Reg 285/01 provides for a special overtime threshold of 50 hours for employees involved in:

1. Laying, altering, repairing or maintaining sewers and watermains and work incidental thereto; or
2. Guarding the site during the laying, altering, repairing or maintaining of sewers and watermains.

The critical requirement for this threshold to apply relates to the type of work that the employee is performing. It is not essential that the employer be in the sewer and watermain construction industry. For example, this section would still cover a security guard or driver employed in this work, notwithstanding that his or her employer is a security firm or temporary help agency.

Sewers and watermains are those conduits installed for the movement of sewage or water and are typically found in publicly owned places or in easements. It is Program policy that:

- A lateral from a sewer or watermain to a private dwelling or a commercial building is part of the sewer or watermain system;
- Farm tile drainage is considered to be watermain construction;
- Plumbing work normally performed by a plumber is not subject to this special overtime threshold;
- Sprinkler system installation or repair are not subject to this special overtime threshold; and
- The installation of septic systems is not subject to this special overtime threshold.

On this last point, see 1496161 Ontario Inc. (Todd Grier Excavating) v Ontario (Employment Standards), 2009 CanLII 33900 (ON LRB), where the Ontario Labour Relations Board held that a septic system is not a "sewer" because the defining characteristic of the term "sewer" is that it is a conduit or channel for the movement of waste, while the core of a septic system is the septic tank - a holding tank that is neither a channel nor a conduit for the movement of waste. The Board also noted that "sewers" exist as part of an intricately connected system to move waste from various sources, as contrasted with a septic system’s self-contained, on-site nature. The Board also observed that even if there was ambiguity about whether septic systems are captured by the word "sewers", the Board, in accordance with Machtinger v HOJ Industries Ltd., [1992] 1 SCR 986, 1992 CanLII 102 (SCC) and *Re Blais* is to construe an exemption’s applicability narrowly, and to prefer an interpretation that extends the protections of the *Employment Standards Act, 2000* over an interpretation that does not.

O Reg 285/01 Section 17 – Local Cartage

17(1) Despite Part VIII of the Act, the employer shall pay an employee who is a driver of a vehicle or a driver's helper overtime pay for each hour worked in excess of 50 hours in a work week, at an amount not less than one and one-half times the employee's regular rate.

17(2) Subsection (1) applies to employees who are,

(a) drivers of vehicles used in the business of carrying goods for hire within a municipality or to any point not more than five kilometres beyond the municipality's limits; or

(b) drivers' helpers on such vehicles.

Section 17(1) of O Reg 285/01 creates a special overtime threshold of 50 hours in a work week if the following criteria are met:

1. The employee is the driver or driver's helper of the vehicle;
2. The vehicle is in the business of carrying goods for hire; and
3. The vehicle carries goods within a municipality or to any point not more than five kilometres beyond the municipality's limits.

Each criterion is discussed below.

The employee is the driver or driver's helper of the vehicle.

This threshold only applies to the driver or driver's helper, not to someone simply employed to maintain the vehicle.

If a person was employed to drive the vehicle, but also did some maintenance work as part of their duties, s. 17 would still be operative as long as that work was merely incidental to their employment as a driver. However, if they spent the majority of their working hours maintaining one or more vehicles, s. 22(1) of the *Employment Standards Act, 2000* and the 44-hour threshold would then apply.

The vehicle is used in the business of carrying goods for hire.

If the vehicle is carrying the employer's own goods, the general threshold of 44 hours, as opposed to the local cartage threshold of 50 hours, will apply.

The carrying of goods for hire includes waste cartage and disposal, septic tank contents cartage and disposal, and courier services (including bicycle and other vehicle courier services).

Within a municipality or to any point not more than 5 kilometres beyond the municipality's limits.

The vehicle must not carry goods for hire further than five kilometers beyond the municipality’s limit.

If a vehicle is at any time carrying goods for hire more than five kilometres beyond the municipality, it would have been required to be licensed under the former *Truck Transportation Act,* RSO 1990, c T.22 (TTA) and would consequently be subject to the special overtime threshold set out in s. 18 of O Reg 285/01.

It is Program policy that the smallest area of municipal organization will constitute the “municipality” for the purposes of section 17. This is relevant in situations where, for example, there is an “upper tier”

municipality (for example, the Regional Municipality of Peel) and a “lower tier” municipality within the “upper tier” municipality (for example, the City of Brampton). In this example, the City of Brampton would be treated as the municipality for the purposes of section 17. (Note this interpretation is consistent with interpretation of “local municipality” that was applied in practice under the former TTA and that consequently informs the special rule set out in s. 18 of this regulation.)

O Reg 285/01 Section 18 – Highway Transport

Overtime Threshold – s. 18(1)

18(1) Despite Part VIII of the Act, the employer shall pay an employee to whom this subsection applies overtime pay for each hour worked in excess of 60 hours in a work week, at an amount not less than one and one-half times the employee's regular rate.

Section 18(1) creates a special overtime threshold of 60 hours for employees described in s. 18(2). Generally, the 60-hour threshold applies with respect to truck drivers who are engaged in hauling goods on a "for-hire" basis. Such employees must be paid at least one and one-half times their regular rate of pay for all hours in excess of 60 per week.

Prior to January 1, 2006, the 60-hour threshold in s. 18 generally applied to employees who were drivers of public trucks operated by holders of operating licenses issued under the former *Truck Transportation Act,* RSO 1990, c T.22 ("TTA"), which was repealed effective January 1, 2006. Section 18 of O Reg 285/01 was therefore replaced with a new s. 18 (filed February 6, 2006) that reflected the repeal of the TTA, but the scope of the new s. 18 is intended as much as possible to be the same as the scope of its predecessor.

Note that pursuant to subsection 18(5), s. 18(1) does not apply to an employee to whom s. 17 of O Reg 285/01 applies.

Application of Subsection (1) – s. 18(2)

18(2) Subsection (1) applies to an employee who is the driver of any of the following:

1. A truck whose operator held an operating licence under the former Act on December 31, 2005.

2. A truck whose operator held a certificate of intercorporate exemption under the former Act on December 31, 2005, if after that date the truck is operated to carry, for compensation, goods of another person who is not an affiliated corporation under the former Act, such that the operator would be required to hold an operating licence under the former Act if it were still in force.

3. A truck that is operated to carry the goods of another person for compensation, if the operator,

- **i. did not hold an operating licence or a certificate of intercorporate exemption under the former Act on December 31, 2005, and**
- **ii. would be required to hold an operating licence under the former Act if it were still in force.**

Under s. 18(2), the 60-hour threshold applies to an employee who is a driver of any of the three following categories of trucks:

Operator held an operating license under the former Act on December 31, 2005… – s. 18(2) para. 1

The 60-hour threshold in s. 18(1) will apply if the operator held an operating license under the former TTA on December 31, 2005.

Operator held a certificate of intercorporate exemption… – s. 18(2) para. 2.

This paragraph provides that, subject to s. 18(3), if an operator held a certificate of intercorporate exemption (CIE)* under the TTA on December 31, 2005, the 60-hour threshold applies if, after that date, the operator carried goods for compensation for a person other than an affiliated corporation, such that the operator would be required to hold an operating license if the former TTA were still in force. In other words, if the operator now hauls goods on behalf of anyone other than its corporate affiliates and "would have been required to hold an operating license" under the former TTA the 60-hour threshold will apply, subject to s. 18(3) – see the discussion below.

A truck that is operated to carry the goods of another person for compensation, if the operator,

i. Did not hold an operating license or a certificate of intercorporate exemption under the former Act on December 31, 2005, and

ii. Would be required to hold an operating license under the former Act if it were still in force – s. 18(2) para. 3

Subject to s. 18(4), if the operator held neither an operating license nor a certificate of intercorporate exemption on December 31, 2005, the 60-hour threshold applies if the operator would be required to hold an operating license under the former TTA, if it were still in force. See the discussion of s. 18(4) below.

Exemptions to Licensing Under the Former TTA – s. 18(2) para. 2 and subpara. 3(ii)

18(2) Subsection (1) applies to an employee who is the driver of any of the following:

2. A truck whose operator held a certificate of intercorporate exemption under the former Act on December 31, 2005, if after that date the truck is operated to carry, for compensation, goods of another person who is not an affiliated corporation under the former Act, such that the operator would be required to hold an operating licence under the former Act if it were still in force.

3. A truck that is operated to carry the goods of another person for compensation, if the operator,

i. did not hold an operating licence or a certificate of intercorporate exemption under the former Act on December 31, 2005, and

ii. would be required to hold an operating licence under the former Act if it were still in force.

These provisions set out exemptions to licensing under the former TTA that apply in considering whether an operator would be required to hold an operating license under the former TTA if it were still in force.

When determining whether an operator "would be required to hold an operating license" under the former TTA, if it were still in force, as required under para. 2 of s. 18(2) and subpara. 3 ii of s. 18(2), consideration must be given to the classes of goods being hauled.

Although the former TTA required an "operating license" in most cases where goods were carried on a "for-hire" basis, a license was not required if, for example, the operator was hauling the following classes of goods (see s. 3(4) of the former TTA):

- Fresh fruit and vegetables grown in the continental United States or Mexico;
- Certain primary agricultural products, provided the truck is a three-axel vehicle (or smaller) with no trailer (see STCC** number 01 1 – field crops, 01 2 – fresh fruits or tree nuts, 01 3 - fresh vegetables, 01 91 - horticultural specialties, 01 99 - farm products, not elsewhere classified in the STCC, 01 41 – livestock and 01 92 – animal specialties);
- Fresh, unprocessed milk (see STCC number 01 421 10) and bulk fluid milk, skim milk or cream (see STCC number 20 261) carried on behalf of the Ontario Milk Marketing Board;
- Wheat, where the vehicle operator is an agent for the Ontario Wheat Producers' Marketing Board;
- Ready mixed concrete;
- Certain primary forest or raw wood materials (see STCC number 24 1); and
- Goods that are carried as part of the operator's primary business where the primary business is not carrying goods "for-hire" (e.g., a carpentry business moves materials between a hardware store and the building site in addition to performing carpentry work; the carpentry company moves the goods on behalf of the owner of the building project, but its main business is carpentry, not carrying goods "for-hire").

Section 18 does not apply to an operator described in paragraphs 2 or 3 of s. 18(2) if the operator exclusively hauls any or all of the goods listed above. However, if the operator also hauls non-excluded classes of goods, the 60-hour overtime threshold will apply.

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* Certificates of Inter-corporate exemption – Under s. 3(5) of the former TTA, a trucking operation that only hauled goods on behalf of its corporate affiliates (the former TTA included a test to determine what is an affiliate), could obtain a CIE instead of an "operating license" under the TTA. The CIE was not an "operating license" under the TTA, and for this reason, the 60-hour threshold established by the former section 18 did not apply.

** Under s. 3(4) of the former TTA the description of certain goods incorporates a cross-reference to the STCC (Standard Transportation Commodity Code Tariff). Reference must therefore be made to both s. 3(4) of the TTA and to the STCC to determine whether an operator was ***exempted*** from the requirement to hold an operating license because it was transporting goods listed in s. 3(4) of the former TTA.

Application of s. 3(6) of the Former TTA – s. 18(3)

18(3) For the purposes of paragraph 2 of subsection (2), subsection 3(6) of the former Act does not apply.

Subsection 18(3) provides that for the purposes of para 2. of ss. 18(2), 3(6) of the former TTA does not apply. Under that section, operators holding a trip permit* were not required to hold an operating license under the former TTA. As a result, when determining whether the operator would be required to hold an operating license under the former TTA in accordance with para. 2 of s. 18(2), the fact that the operator may or may not have been eligible for a trip permit under the former TTA is not a relevant consideration.

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* Trip permits were authorizations to carry goods “for-hire” on a trip-by-trip basis. Because the holder of a trip permit would not have an operating license, the driver of a truck operated by the holder of a trip permit would not have been covered by the 60-hour overtime threshold established by the former s. 18 of O. Reg. 285/01.

Application of s. 3(5) & (6) of the Former TTA – s. 18(4)

18(4) For the purposes of subparagraph 3 ii of subsection (2), subsections 3 (5) and (6) of the former Act do not apply.

Subsection 18(4) provides that for the purposes of determining whether subparagraph 3 ii of s. 18(2) applies, neither s. 3(5) nor s. 3(6) of the former TTA apply. In other words, whether or not the operator would have otherwise been eligible to hold a certificate of intercorporate exemption or a trip permit is irrelevant to the determination of whether the operator would be required to hold an operating license under the former TTA, if it were still in force, and consequently, whether the 60-hour threshold applies.

Exemption for Employees to Whom s. 17 Applies – s. 18(5)

18(5) Subsection (1) does not apply to an employee to whom section 17 applies.

Subsection 18(5) provides that s. 18(1) does not apply to an employee to whom s. 17 of O Reg 285/01 applies. Section 17 establishes a special overtime threshold of 50 hours for certain employees engaged in "local cartage".

Calculating Number of Hours Worked – s. 18(6)

18(6) For the purposes of this section, in computing the number of hours worked by an employee in a week, only the hours during which he or she is directly responsible for the truck shall be included.

Subsection 18(6) provides that in computing the total number of hours worked for the purpose of the overtime provisions only those hours during which the employee is directly responsible for the vehicle shall be included. The driver is not considered directly responsible for the vehicle during times when they are free to leave the vehicle (regardless of whether they actually leave it or not), such as meal periods, sleeping periods, and during extended waits for the loading or unloading of the vehicle, if it can be parked and left in the interim.

By contrast, there are times during which the driver must remain with the vehicle, for example, to move it up in a loading or unloading line, a truck inspection line, at a customs or ferry line, or to supervise or observe loading or unloading of the vehicle. In these situations, the driver is considered to be directly responsible for the vehicle and those hours will be included in the calculations for entitlement to overtime pay.

Definitions – s. 18(7)

18(7) In this section,

"commercial motor vehicle" has the same meaning as in the former Act;

"former Act" means the *Truck Transportation Act*;

"operate" has the same meaning as in the former Act and "operator" has a corresponding meaning;

"truck" means a commercial motor vehicle or the combination of a commercial motor vehicle and trailer or trailers drawn by it.

Commercial Motor Vehicle

Subsection 18(7) states that "commercial motor vehicle" has the same meaning as it did under the former TTA, which was as follows:

"commercial motor vehicle" means a motor vehicle with a permanently attached truck or delivery body and includes a truck tractor used for hauling purposes, but does not include an ambulance, hearse, casket wagon, fire apparatus, bus or motor vehicle commonly known as a tow truck when the tow truck is being used as a tow truck.

Former Act

Subsection 18(7) states that "former Act" means the TTA (repealed).

Operate

Subsection 18(7) states that "operate" has the same meaning as it had under the former TTA and that operator has a corresponding meaning.

The former TTA defined "operate" as follows:

"operate" means to cause to be driven on a highway and "operated has the same meaning."

"Operate" does not refer to the driving of a vehicle, but to the ultimate control of the vehicle. The operator will often be the employer, but this will not necessarily be the case in every instance.

Truck

Subsection (7) defines "truck" as follows:

"truck" means a commercial motor vehicle or the combination of a commercial motor vehicle and trailer or trailers drawn by it.

O Reg 285/01 Section 19 – Domestic Workers

Written Particulars - s. 19(1)

19(1) A householder shall provide the domestic worker with written particulars of employment respecting,

(a) the regular hours of work, including the starting and finishing times, and

(b) the hourly rate of pay.

The wage statement requirements set out in s. 12 of the *Employment Standards Act, 2000* apply to domestic workers. However, s. 19(1) of the regulation requires that an employer of a domestic worker also provide the employee with information respecting the regular hours of work, including starting and finishing times, and the hourly rate of pay. This information must be provided in writing. For a discussion of the definition of "domestic worker", please see O Reg 285/01, s.1.

Room and Board Rates - s. 19(2)

19(2) If the householder provides room or board to the domestic worker, then the following are the amounts that shall be deemed to have been paid as wages for the purposes of determining whether the minimum wage has been paid:

1. For a private room	$31.70 a week.
2. For a non-private room	$0.00
3. For board	$2.55 a meal and not more than $53.55 a week.
4. For both room and board	$85.25 a week if the room is private and $53.55 a week if the room is not private.

This subsection sets the amounts that are deemed to have been paid as wages where meals or a room are provided to the domestic worker for purposes of determining whether the minimum wage has been paid.

With respect to the provision of a room, the ordinary meaning of the words "private" and "not private" is to be applied when determining which amount to use. For example, a domestic worker's bedroom is not private if the only access to a laundry room used by the employer is through it - see Flores v Walker and Bassett Walker (July 8, 1998), 2234-97-ES (ON LRB).

Where the employer seeks to satisfy its minimum wage obligations in part through the provision of room and/or board, and accordingly pays the domestic worker minimum wage less the amounts deemed to have been paid as wages for room and/or board (as the case may be) as set out above, there is no deduction from wages, and hence no written authorization for deduction is required in relation to the room and board amounts.

In some cases, an employer may wish to make a larger deduction in respect of room and board than the amounts set out above (for example, where the domestic worker's wages exceed the minimum wage set out in the Act). However, that would have to be authorized in writing by the domestic worker.

Amounts Deemed to Wages - s. 19(3)

19(3) The amount provided in subsection (2) in respect of a room shall be deemed to have been paid as wages only if the room is,

(a) reasonably furnished and reasonably fit for human habitation;

(b) supplied with clean bed linen and towels; and

(c) reasonably accessible to proper toilet and wash-basin facilities.

This subsection mirrors ss. 5(5) (which applies generally to employees) and 25(8) (which applies to fruit, vegetable and tobacco harvesters) of O Reg 285/01.

Room and Board Not Deemed Paid - s. 19(4)

19(4) Room or board shall not be deemed to have been paid by the householder to the domestic worker as wages unless the employee has received the meals or occupied the room.

Subsection 19(4) provides that an amount for room or board shall not be deemed to have been paid to a domestic worker unless he or she has occupied the room and received the meals. This subsection mirrors ss. 5(6) (which applies generally to employees) and 25(9) (which applies to fruit, vegetable and tobacco harvesters) of O Reg 285/01.

O Reg 285/01 Section 20 – Residential Care Workers

Day - s. 20(1)

20(1) In this section,

"day" means the 24 hour period between 12:00 midnight on a day and 12:00 midnight on the next day.

This section defines "day" for the purposes of s. 20: the 24-hour period from 12 midnight to 12 midnight. An employer may use some other period for its own purposes, such as scheduling (for example, 8:00 a.m. to 8:00 p.m., 10:00 a.m. to 10:00 p.m., etc.). However, the employer's definition of day does not, for purposes of s. 20 of the regulation, override the definition set out in s. 20.

Payment to Care Workers - s. 20(2)

20(2) Despite section 6 and subject to subsection (3), the employer shall pay to a residential care worker for each day of work wages in a minimum amount, not less than the amount calculated by multiplying 12 hours by the worker's regular rate, which shall not be less than the minimum wage.

This section sets out the basic rule for paying residential care workers. Despite s. 6 (which stipulates when work is deemed to be performed), and subject to s. 20(3), an employer must pay a residential care worker for each day an amount equal to the worker's regular rate multiplied by 12 hours. This regular rate cannot be less than the general minimum wage. Even if the employee has worked more than 12 hours in that day, this section would not require the employer to pay the employee for more than twelve hours. But see the discussion of s. 20(4) of O Reg 285/01 below.

Payment for Actual Hours Worked - s. 20(3)

20(3) If a residential care worker, by arrangement with the employer, is free from the performance of normal and regular duties in a day and as a result works less than 12 hours, the worker shall be paid wages not less than an amount calculated by multiplying the number of hours actually worked by the worker's regular rate as mentioned in subsection (2).

This provision is similar in effect to s. 3(2) under Reg 326 to the former *Employment Standards Act.*

An employee may be allowed by his or her employer to be free from duties in the facility for part of the day even though during that time he or she is still required to be in the facility. As a result, he or she may end up working fewer than 12 hours in a day. If that is the case, he or she need only be paid at his or her regular rate for the actual hours worked.

Reading ss. 20(2) and (3) together, therefore, for each day, a residential care worker is entitled to be paid for the actual hours worked or for 12 hours, whichever is less. In determining what are hours of work, reference should be made to s. 22 of the regulation.

Payment for Additional Hours - s. 20(4)

20(4) In addition to the wage payable under subsection (2), the employer shall pay to a residential care worker not less than the worker's regular rate for not more than three additional hours worked in excess of 12 hours of work in a day if the worker,

(a) makes and keeps an accurate daily record of the number of hours worked in the day; and

(b) provides the record to the employer on or before the first pay day after the pay day for the pay period in which the work is performed.

This provision is similar in effect to s. 4 of O Reg 326 under the former *Employment Standards Act.*

Sections 20(2) and (3) establish the basic rule that the most a residential care worker is entitled to be paid at his or her regular rate is for the actual hours worked, or for 12 hours, whichever is less. However, s. 20(4) creates an exception to this basic rule: if the residential care worker works more than twelve hours in a day, he or she must be paid for those additional hours, but only up to a maximum of three hours, and only if he or she keeps an accurate daily record of hours worked and provides the record to the employer on or before the pay day following the pay day for the pay period in which the extra hours were worked. If the employee fails to provide the record to the employer within the prescribed time limits, the employer could refuse to pay for the extra hours, even if the worker has maintained accurate records on a daily basis.

Examples regarding ss. 20(3) and (4):

1. Employee works 10 hours.
    - Employee is paid for 10 hours.
2. Employee works 13 hours, and does not maintain a record of hours worked.
    - Employee is paid for 12 hours.
3. Employee works 13 hours and does maintain record of hours worked and does submit the record to the employer within the prescribed time limit.
    - Employee is paid for 13 hours.
4. Employee works 17 hours and does not maintain a record of hours worked.
    - Employee is paid for 12 hours.
5. Employee works 17 hours and does maintain record of hours worked and does submit the record to the employer within the prescribed time limit.

- Employee is paid for 15 hours (the maximum 12 hours + the maximum three extra hours).

O Reg 285/01 Section 21 – Free Time

Hours Free from Work - s. 21(1)

21(1) Despite section 18 of the Act, every employer shall give to a residential care worker not less than 36 hours in each work week, either consecutive or as may be arranged with the consent of the worker, free from the performance of any duties for the employer.

This provision is similar in effect to s. 6(1) of Reg 326 under the former *Employment Standards Act*.

A residential care worker is entitled to at least 36 hours off in each "work week", which is defined in s. 1 of the *Employment Standards Act, 2000*. The worker must be completely free from any requirement to perform any duties during this time. The 36 hours can be given in one consecutive period or, if arranged with the worker, they can be divided into any number of periods of any length so long as they total 36 hours. If the worker does not consent to such an arrangement, the 36 hours must be consecutive. Note that the requirement in s. 1(3) of the Act that "agreements" be in writing does not apply to this section, since this section uses the words "arrangement" and "consent".

Request to Perform Duties During Time Off - s. 21(2)

21(2) If the residential care worker consents, at the employer's request, to do work during a free hour mentioned in subsection (1),

(a) that hour shall be added to one of the next eight 36-hour periods of free time; or

(b) the employer shall pay the residential care worker at least one and one-half times the worker's regular rate for the time spent doing work during a free hour.

This provision is similar in effect to ss. 6(2) and (3) under Reg 326 to the former *Employment Standards Act*.

An employer may request a worker to perform duties during one of the 36-hour periods of time-off mentioned in s. 21(1). A worker is not obliged to comply with this request. However, if the worker does consent to work, he or she does not lose the free time: under subclause (a), it is added to any one of the 36-hour free periods in the next eight work weeks. The decision as to which of those eight periods will be extended is made by the employer. In the alternative, under subclause (b), the employee may be paid a premium rate of at least one and one-half times his or her regular rate, for the time spent working during a free hour. Note that the requirement in s. 1(3) of the Act that "agreements" be in writing does not apply to this section, since this section uses the word "consents".

O Reg 285/01 Section 22 – When Work Deemed not to be Performed

22. Despite section 6, work shall be deemed not to be performed during any time that satisfies the following conditions:

1. The residential care worker spends the time at the dwelling or cottage,

i. attending to private affairs or pursuits, or

ii. resting, sleeping or eating.

2. The time is, by agreement with the employer, free from the performance of any duties.

This provision is similar in effect to s. 7 under Reg 326 to the former *Employment Standards Act*.

As a residential care worker actually resides at his or her place of employment, it may be unclear when he or she is working. This section defines when work is not deemed to be performed in the specific context of residential care workers, and provides that these rules apply despite s. 6 of this regulation, which set out general rules for when work is not deemed to be performed.

First, when the worker is resting, sleeping or eating, or attending to private affairs or pursuits, he or she is not deemed to be at work even if he or she is "on call" and can be called away at any time to perform duties. (There is no requirement that time falling into this category be the subject of a written agreement.)

Secondly, if the worker is on a break period free from any duties at the facility by agreement with the employer, he or she is not deemed to be at work, even if he or she remains at the facility. There must be written agreement between the worker and his or her employer as to when such break periods are to be taken – see ESA Part I, s. 1(3) and s. 1(3.1) for more information on written agreements.

O Reg 285/01 Section 23 – Exemptions

23. Parts VII (Hours of Work and Eating Periods) and VIII (Overtime Pay) and paragraph 4 of subsection 15(1) (record of hours worked) of the Act do not apply to or in respect of a residential care worker.

This provision is similar in effect to s. 8 under Reg 326 to the former *Employment Standards Act.*

This section provides that the hours of work and eating periods and overtime pay provisions of the *Employment Standards Act, 2000* do not apply to residential care workers. Also, the requirement in paragraph 4 of s. 15(1) of the Act for an employer to keep a record of the number of hours worked by an employee in each day and week does not apply to a residential care worker. However, the employer is still required to maintain the other information about the worker set out in s. 15(1) of the Act.

O Reg 285/01 Section 24 – Application

24 Sections 25, 25.1, 26 and 27 apply to an employee who is employed on a farm to harvest fruit, vegetables or tobacco for marketing or storage.

The effect of s. 24 is to bring the employees described in this section back in for entitlements to minimum wage, the three hour rule, vacation or vacation pay and public holiday pay, even though they may fall under the “primary production” exemptions from those standards set out in s 2(2).

This provision was amended effective January 1, 2019 to include a reference to section 25.1, which provides for coverage under Part VII.1 of the ESA 2000 – the three hour rule.

Section 24 only applies to those employees who meet all the requirements of this section:

They must be employed on a farm.

The normal, ordinary meaning of "farm" is a tract of land under cultivation or used as pasture for the growing of agricultural products and for the raising of animals. However, the term can also cover other types of facilities used in the growing or raising of agricultural products, e.g. greenhouses or the insulated buildings containing frame beds for the growing of mushrooms. In order that a person be "employed on a farm" within the meaning of section 24, it is necessary that their employment duties relate to the activities surrounding and flowing out of the main enterprise of growing agricultural products and that those duties are performed in whole or at least in part on the farm in question.

They must harvest fruit, vegetables or tobacco.

Only harvesters are covered by ss. 25 through 27, and only certain harvesters, that is, those who pick fruit, vegetables or tobacco leaves. This section of the regulation does not apply to other farm workers (although other provisions in the regulation may apply; see ss. 8(e), 9(d) and 15 of O Reg 285/01).

They must be harvesting for marketing or storage.

The provisions of ss. 25 through 27 will apply if the farm is sending its products for wholesale or retail sale, or selling the products directly to the public itself. They will also apply if the products are not sold immediately, but are kept in storage (either on or off the farm). If the products are not being sold "whole", but are being sold to be processed (into jams, fruit juices, etc.) or to be canned or frozen, or (in the case of tobacco) to be made into cigarettes, these provisions will still apply, as the farm is "marketing" its products to such manufacturers.

It is possible that an employee may perform work that is covered by these sections, work that is covered by the farming exemptions in ss. 8(e) or 9(d) of O Reg 285/01, and work that is not exempt at all: for example, harvesting fruit, pruning trees and working in a store, respectively.

In such a case, ss. 25 to 27 will apply to the employee in a given week if the majority of their time in that week is spent harvesting.

O Reg 285/01 Section 25 – Minimum Wage

Rate of Pay – s. 25(1)

25(1) For each pay period, the employer shall pay to each employee an amount that is at least equal to the amount the employee would have earned at the minimum wage.

This section provides that fruit, vegetable and tobacco harvesters are entitled to be paid at least the minimum wage. In this regard, careful note should be made of the special provisions relating to minimum wage and piece work rates that apply to harvesters as set out in s. 25(2).

Piece Work Rate – ss. 25(2), (3) & (4)

25(2) The employer shall be deemed to comply with subsection (1) if employees are paid a piece work rate that is customarily and generally recognized in the area as having been set so that an employee exercising reasonable effort would, if paid such a rate, earn at least the minimum wage.

25(3) Subsection (2) does not apply in respect of an employee described in subparagraph 1 i of subsection 23.1(1) of the Act.

25(4) For the purposes of this section, "piece work rate" means a rate of pay calculated on the basis of a unit of work performed.

These sections will apply where the employer does not calculate the wages based on hours worked, but rather pays a piece rate as defined in s. 25(4), that is, a certain amount of money for each unit of work performed (for example, $X for each basket of apples picked).

The rate must be one that is generally recognized in the area in which the farm is located. There is no hard and fast rule defining what is meant by "area". An employment standards officer should consider the area generally considered by the industry as the local farming community.

The rate must be set so that an employee using reasonable effort, if paid such a rate, would earn at least the general minimum wage for the actual hours worked. Thus, a poor or less diligent worker might end up earning less than the minimum wage for hours worked; however, as long as the piece work rate is appropriate, in the sense that an employee using reasonable effort could have earned at least the minimum wage at that rate, the employer will have complied with the ESA 2000. In order to determine whether the rate is appropriate, an officer should consult with local industry representatives and neighbouring farmers, and if need be, observe a number of harvesters performing the same work under similar conditions. The proper comparison is "an employee exercising reasonable effort". The hypothetical employee exercising reasonable effort is an ordinary or typical employee, as opposed to a highly experienced or unusually productive employee.

It is important to note that, by virtue of s. 25(3), this provision only applies to workers who are entitled to receive the general minimum wage. It does not apply to a student under 18 years of age who works not more than 28 hours/week or who works during a school holiday. This does not mean that such a student cannot be paid a piece work rate. However, if the student is paid a piece work rate, the total wages received must equal at least the student minimum wage for the total hours worked, regardless of whether an employee using reasonable effort paid at the same piece work rate could have earned at least the student minimum wage. If there is a shortfall, the employer must make up the difference.

Room and Board Amounts – s. 25(5)

25(5) If an employer provides room or board to an employee, the following are the amounts which shall be deemed to have been paid by the employer to the employee as wages for the purposes of determining whether the minimum wage has been paid:

1. For serviced housing accommodation	**$99.35 a week.**
2. For housing accommodation	**$73.30 a week.**
3. For room	**$31.70 if the room is private and $15.85 a week if the room is not private.**
4. For board	**$2.55 a meal and not more than $53.55 a week.**

5. For both room and board	**$85.25 a week if the room is private and $69.40 a week if the room is not private**

This section sets the amount deemed to have been paid as wages where room or board is provided for the purposes of determining whether the applicable minimum wage has been paid. The employer must pay in monetary form the applicable minimum wage less the value of the above-noted maximum allowances.

Room and Board Deemed Paid – s. 25(6)

25(6) The amount provided in subsection (5) in respect of housing accommodation shall be deemed to have been paid as wages only if the accommodation,

(a) is reasonably fit for human habitation;

(b) includes a kitchen with cooking facilities;

(c) includes at least two bedrooms or a bedroom and a living room; and

(d) has its own private toilet and washing facilities.

The requirements of this definition are fairly self-evident: either a dwelling with a kitchen, private bathroom and at least two bedrooms, or one with a kitchen, private bathroom, and at least one bedroom and a living room. It must be "reasonably fit for human habitation". No hard and fast rules can be established to define this concept; an officer should determine what a reasonable person would consider fit considering factors such as the location of the farm. If the s. 25(6) requirements are not met, an employer who provides unserviced housing accommodation will not be deemed to have paid the amount set out in paragraph 2 of s. 25(5) for purposes of determining whether the employee has been paid at least the minimum wage.

Serviced Housing Deemed Paid as Wages – s. 25(7)

25(7) The amount provided in subsection (5) in respect of serviced housing accommodation shall be deemed to have been paid as wages only if,

(a) the accommodation complies with clauses 6(a) to (d); and

(b) light, heat, fuel, water, gas, or electricity are provided at the employer's expense.

This subsection sets out two requirements that must be met if an employer wishes to be deemed to have paid the amount for "serviced housing accommodation" (i.e., the amount set out in paragraph 1 of s. 25(5)) for minimum wage purposes. In accordance with s. 25(7)(a), the employer must provide accommodation that meets the requirements for "housing accommodation" as set out in s. 25(6). In addition, the employer must comply with s. 25(7)(b) by paying for the provision of any one or more of the following: light, heat, fuel, water, gas or electricity. Note: As long as the employer pays for at least one of these services, the requirement under s. 25(7)(b) will be met, even if the employee is required to pay for the remaining services.

Room Deemed Paid as Wages – s. 25(8)

25(8) The amount provided in subsection (5) in respect of a room shall be deemed to have been paid as wages only if the room is,

(a) reasonably furnished and reasonably fit for human habitation;

(b) supplied with clean bed linen and towels; and

(c) reasonably accessible to proper toilet and wash-basin facilities.

This provision mirrors s. 5(2) of O Reg 285/01 which applies to employees generally and s. 19(3) of O Reg 285/01 which applies to domestic workers; it places conditions which must be met if the employer who provides a room wishes to be deemed to have paid the amount indicated in s. 25(5) for a room for minimum wage purposes.

First, the room must be reasonably furnished; in the view of the Program, that means it must contain at least a bed, a table, a chair, and a wardrobe or chest of drawers. It must also be reasonably fit for human habitation. Further, the employer must provide clean bed linen and towels (not necessarily daily, but on a frequent enough basis to maintain cleanliness), and the employee must have reasonable access to toilet and washing facilities. Again, an officer should determine what a reasonable person would consider reasonable. Facilities just across a hall would usually be reasonable; facilities requiring a trip across a field to an outhouse may or may not, depending, for example, on the location of the farm and the norms in that particular community.

Room or Board Not Deemed Paid as Wages – s. 25(9)

25(9) Room or board shall not be deemed to have been paid by the employer to an employee as wages unless the employee has received the meals or occupied the room.

Section 25(9) provides that amounts in respect of room and board are not deemed to have been paid unless the employee has received the meals or occupied the room. This section mirrors s. 5(3) of O Reg 285/01 (which applies generally) and s. 19(4) of O Reg 285/01 (which applies to domestic workers). For purposes of s. 25(9), "room" includes housing accommodation that is not a room (at least in the ordinary sense), e.g., a barracks.

O Reg 285/01 Section 25.1 – Three Hour Rule

Special Rules Re Fruit, Vegetable and Tobacco Harvesters

25.1 Part VII.1 of the Act applies to an employee described in section 24 of this Regulation.

Section 25.1 was added to O Reg 285/01 effective January 1, 2019. This section, read in conjunction with section 24, provides that the three hour rule set out in Part VII.1, section 21.2 of the ESA 2000 applies to employees who are employed on a farm to harvest fruit, vegetables or tobacco for marketing or storage.

For more information, please see the discussion at O Reg 285/01 Section 24 and ESA Part VII.1, section 21.2.

O Reg 285/01 Section 26 – Vacation or Vacation Pay

26(1) If an employee has been employed by the employer for 13 weeks or more, the employer shall, in accordance with Part XI of the Act,

(a) give the employee a vacation with pay; or

(b) pay the employee vacation pay.

26(2) An employee entitled to vacation pay under subsection (1) earns vacation pay from the commencement of his or her employment.

26(3) Section 41 of the Act does not apply to the employee.

A harvester is only entitled to a vacation with pay after he or she has been employed for 13 weeks or more as a harvester, by the same employer. The weeks of employment need not be consecutive, but they must have been for a single employer. Once this condition is met, the employer must comply with Part XI of the *Employment Standards Act, 2000* (Vacation With Pay) and either provide a vacation with pay or, where appropriate, four per cent vacation pay. If the harvester works for an employer for less than 13 weeks in a year, he or she is not entitled to vacation pay.

Vacation pay need only be paid on the wages earned while harvesting or on other non-exempt wages. For example, if an employee spends most of her time harvesting fruit, but occasionally works in the office and sometimes works in the cultivation of the plants, vacation pay would only be payable on the wages earned while harvesting and while in the office, but not on the wages earned while cultivating, as non-harvester employees working on a farm in primary production are exempted from the vacation pay provisions by s. 2(2) of this regulation.

Section 41 of the Act, under which the Director of Employment Standards may approve an agreement for an employee to forego taking vacation to which he or she is entitled, does not apply to harvesters.

O Reg 285/01 Section 27 – Public Holidays

27(1) Part X of the Act applies to an employee who has been employed by an employer for a period of 13 weeks or more.

27(2) For the purposes of this section, an employee shall be deemed to be employed in a continuous operation.

27(3) (former exemption for elect to work employees) Revoked: O. Reg. 443/08, s. 2.

Part X of the *Employment Standards Act, 2000* (Public Holidays) applies to a person employed for at least 13 weeks as a harvester. In other words, unlike regular employees to whom Part X applies, harvesters are entitled to public holiday entitlements only once their employment (as a harvester) reaches 13 weeks or more. Because the words used in this section are "a period of 13 weeks or more", the 13 weeks must be consecutive. This is unlike s. 26, where the 13 weeks do not need to be consecutive - see O Reg 285/01, s. 26 for more information.

Once it is determined under s. 27(1) that the public holiday provisions apply to a harvester, the employee is deemed to be employed in a "continuous operation". The public holiday entitlements for employees in continuous operations are different than they are for other employees. See ESA Part X (Public Holidays) for further discussion.

O Reg 285/01 Section 28 – Commission Automobile Sales Sector

Application - s. 28(1)

28(1) This section applies with respect to employees who sell automobiles partially or exclusively on a commission basis.

Section 28 sets out special rules for the commission automobile sales sector.

Section 28(1) states that s. 28 applies to all employees who sell automobiles on a commission basis, whether their remuneration is entirely or only partially paid by commission.

Many car salespeople are paid on a pure commission basis. In order to ensure that employees have some income during periods of slow sales, many of these employees receive a regular draw, or advance, against commissions. Section 28 operates in this context and is intended to ensure that the minimum wage requirement of the *Employment Standards Act, 2000* is met.

Pay Periods - ss. 28(2), (3)

28(2) For each pay period, the employer shall pay to each employee an amount that is at least equal to the amount the employee would have earned at the minimum wage.

28(3) A pay period shall not exceed one month.

Sections 28(2) and (3) use the term "pay period" for purposes of these special provisions respecting commission automobile sales employees. These sections require employers to pay each employee an amount at least equal to the minimum wage for each pay period, and stipulate that a pay period shall not exceed a period of one month in length.

Reconciliation Periods - ss. 28(4),(5),(6),(7)

28(4) Payments made to an employee shall be reconciled with wages earned by the employee for each reconciliation period.

28(5) No balance shall be carried forward past any reconciliation period.

28(6) The reconciliation of payments made to an employee and wages earned by an employee shall not result in any employee receiving less than the minimum wage for any pay period.

28(7) For each year, the reconciliation periods shall be:

1. January 1 - March 31.

2. April 1 - June 30.

3. July 1 - September 30.

4. October 1 - December 31.

These provisions introduce the term "reconciliation period" (as distinct from "pay period"), and prescribe the dates of four reconciliation periods a year. Where a commission automobile sales employee receives wages in the form of a draw or advance against commissions earned, the employer is required to reconcile at the end of each reconciliation period the amount advanced with the amount of commissions that the employee earned. The reconciliation cannot result in the employee being paid less than minimum wage for each pay period. Further, the balance at the end of each reconciliation period cannot be carried

forward into the next reconciliation period. An employee's account must start fresh, with a balance of zero, at the beginning of each reconciliation period.

Under this reconciliation process, if the employee earns more in commissions than he or she received in draws during a particular reconciliation period, the surplus is to be paid to the employee. The surplus may not be carried forward past the end of the reconciliation period in order to offset any deficit that may accrue on the employee's account during later reconciliation periods.

Similarly, if the employee earns less in commissions than he or she received in draws during a particular reconciliation period, the "deficit" may not be carried forward past the end of the reconciliation period in order to offset commissions earned in later reconciliation periods. (Note, however, that the employer may be able to recoup the amount of the deficit - so long as it does not result in the employee earning less than minimum wage for each pay period - by making deductions from wages earned in the next reconciliation period if the employee provides written authorization to do so.)

Reconciliation and Termination - s. 28(8)

28(8) If an employee's employment terminates before the end of a reconciliation period, payments made to the employee shall be reconciled with wages earned by him or her, and subsection (6) applies.

This section requires that reconciliation take place at the end of an employee's employment (whether the employee quit or the employer terminated the employee). Because this section states that s. 28(6) applies, the reconciliation must not result in the employee receiving less than minimum wage for each pay period.

O Reg 285/01 Section 32 – Certain Approved Agreements Irrevocable

32(1) Despite subsection 17(6) of the Act, an agreement under subsection 17(2) of the Act that was made at the time of the employee's hiring and that has been approved by the Director is irrevocable unless both the employer and the employee agree to its revocation.

32(2) The Director may impose conditions in granting an approval.

Subsections 32(1) and (2) of O Reg 285/01 must be read in conjunction with subsections 141(9) and (10) of the ESA 2000. Those provisions state:

> **141(9) An employer may not require an employee who has made an agreement approved by the Director under a regulation made under paragraph 9 of subsection (1) to work more than 10 hours in a day, except in the circumstances described in section 19.**
>
> **141(10) If an employee has agreed to work hours in excess of those referred to in clause 17(1)(a) and hours in excess of those referred to in clause 17(1)(b), the fact that the Director has approved the agreement in accordance with a regulation made under paragraph 9 of subsection (1) does not prevent the employee from revoking, in accordance with subsection 17(6), that part of the agreement dealing with the hours in excess of those referred to in clause 17(1)(b).**

Together these sections provide that despite s. 17(6) of the ESA 2000 (which provides that an employee can revoke an excess daily hours of work agreement with two weeks' written notice), employees who were hired on or after September 4, 2001, and who agreed in writing at the time of hiring to work hours in excess of the daily maximum cannot unilaterally withdraw from the agreement (even with two weeks' notice), if the Director of Employment Standards approved the agreement. The agreement can be revoked only if the employer and employee both agree, in writing, to revoke it.

Note that this exception to the revocability of agreements applies only to agreements to work excess *daily* hours (and only if the agreement was approved by the Director of Employment Standards). These employees retain the right under s. 17(6) to revoke, with two weeks' written notice, agreements to work excess weekly hours.

Note also that pursuant to s. 141(9) employees who are party to these approved agreements to work excess daily hours cannot be required to work more than 10 hours a day except in s. 19 exceptional circumstances.

O Reg 285/01 Section 32.1 – Existing Arrangements for Long Shifts

32.1(1) Clause 17(1)(a) of the Act does not apply with respect to the class of employees each of whom,

(a) has an arrangement described in subsection (2) with an employer to whom a permit was issued under section 18 of the *Employment Standards Act*; and

(b) is not required by the employer to work more than 10 hours a day.

32.1(2) The arrangement,

(a) provides that the employee is willing to work, at the employer's request, more hours per day than the number of hours in his or her regular work day;

(b) was made at or before the time of the employee's hiring and before September 4,2001; and

(c) has not been revoked by the mutual consent of the employer and employee.

32.1(3) The terms of the arrangement need not be reduced to writing.

See ESA Part VII (Hours of Work and Eating Periods) for a discussion of these provisions.

Ontario Regulation 286/01 – Benefit Plans

O Reg 286/01 provides various exemptions from the prohibition in s. 44(1) of the *Employment Standards Act, 2000* against age, sex and marital status and discrimination in benefit plans; certain limited types of age, sex and marital status discrimination are specifically allowed by O Reg 286/01.

References to spouse and marital status must be read to include same-sex spouses as well as opposite-sex spouses (whether married or common-law) and same-sex marital status as well as opposite-sex marital status (whether married or common-law).

O Reg 286/01 Section 1 – Definitions

Section 1 of O Reg 286/01 provides definitions of various terms for purposes of Part XIII and the regulation only.

Each of the above terms are individually discussed below:

Actuarial Basis

"actuarial basis" means the assumptions and methods generally accepted and used by fellows of the Canadian Institute of Actuaries to establish, in relation to the contingencies of human life such as death, accident, sickness and disease, the costs of pension benefits, life insurance, disability insurance, health insurance or any other similar benefits, including their actuarial equivalents;

This term is used in O Reg 286/01 in the context of allowing certain differentiations that are "determined on an actuarial basis." It is defined as meaning the assumptions generally accepted and used by a Fellow of the Canadian Institute of Actuaries to establish the costs of benefits including the actuarial equivalents of such benefits, which costs depend upon certain contingencies such as rates of death, accident, sickness and disease, as well as interest rates, early retirement rates, salary scales and termination rates.

The policy of the Employment Standards Program is that a differentiation in a benefit plan is not "determined on an actuarial basis" merely because actuaries have "costed out" the benefits and contributions in the plan using generally accepted actuarial principles. Rather the Program holds that a differentiation is "determined on an actuarial basis" if the benefits or contributions involved are actuarially equivalent. For example, actuaries may determine that benefits in a pension plan are actuarially equivalent based on the relative remaining life expectancies of two employees retiring at different ages (e.g., an employee retiring at age 60 receives $800 a month and an otherwise similar employee retiring at age 65 receives $1,000 a month). Actuaries would determine that the total pay-outs to the two employees would be equivalent once life expectancy and other factors such as interest rates are considered.

Note: These examples are provided for illustration only. They are not necessarily actuarially sound.

Age

"age" means any age of eighteen years or more and less than 65 years;

Age is defined as any age of 18 or more, but less than 65. Therefore, an employer may, for example, exclude employees from a plan on the basis that they are less than 18 or that they are 65 or older. The prohibition in s. 44 of the *Employment Standards Act, 2000* regarding age differentiations applies only to employees and not to differentiations based on the age of the employees' dependants, spouses or survivors.

Benefits

"benefits" includes,

(a) an aggregate, annual, monthly or other periodic amount or the accrual of such an amount to which an employee, or the employee's beneficiaries, survivors or dependants is, are or will become entitled under a benefit plan provided on superannuation, retirement, disability, accident or sickness,

(b) any medical, hospital, nursing, drug or dental expenses or other similar amounts or expenses paid under a benefit plan, and

(c) any amounts under a benefit plan to which an employee is entitled upon termination of employment or to which any person is entitled upon the death of an employee;

This term is defined very broadly and includes both lump sum and periodic benefits. Furthermore, it includes benefits that are or will be received by the employee, his or her beneficiaries, survivors or dependants. Therefore, a violation may occur where a plan contains provisions discriminatory on the basis of age, sex or marital status of the employees, regardless of whether any action has been taken pursuant to those provisions. (But see discussion of the definition of "employer" above.) Generally, the definition in the regulation includes amounts accrued or payments to which the employee is entitled under a pension plan, retirement plan or life, health, dental or disability insurance plan.

Dependant

"dependant" means a dependant as defined in the relevant benefit plan, and "dependent child" and "dependent spouse" have corresponding meanings;

Dependant is defined by reference to the definition contained in the relevant benefit plan. But the creators of the plan do not have a carte blanche to define the term in absolutely any way they choose; the purposes of the Act and in particular the purposes of the prohibition in s. 44 limit the freedom to define. Thus, the definition cannot make a distinction on the basis of age, sex or marital status of the employees. (In other words, dependent children of married employees must be treated the same as dependent children of single employees.) Further, the definition cannot purport to give the term "dependent" a meaning that is in conflict with its ordinary or commonly understood sense.

Disability Benefit Plan

"disability benefit plan" means a benefit plan, that provides benefits to an employee for loss of income because of sickness, accident or disability;

This provision defines a disability plan and includes both short-term disability plans (payable for less than 52 weeks) and long-term disability plans. Some pension plans will contain a benefit called a "disability pension". It is important to determine whether such a plan is a pension or a disability plan within the meaning of O Reg 286/01, since different exemptions apply to the two types of plans. In order for a "disability pension" to be considered a pension plan, it must be evident that the disability benefit is part of or ancillary to a pension plan, and that the disability benefit is payable on the employee's retirement or termination of employment.

Former Act

"former Act" means the *Employment Standards Act*, RSO 1990, c E.14;

References in this Regulation to "former Act" are defined to mean the former *Employment Standards Act*, RSO 1990, c E.14.

Health Benefit Plan

"health benefit plan" means a benefit plan that provides benefits to an employee, a spouse or a dependant of an employee or deceased employee for medical, hospital, nursing, drug or dental expenses or other similar expenses;

This definition includes benefits such as dental plans and plans that pay some or all of the costs associated with such things as prescription medications, massage, physiotherapy or chiropractic treatments, hearing aids, prosthetic limbs, etc.

Life Insurance Plan

"life insurance plan" means a benefit plan that, on the employee's death, provides a lump sum or periodic payments to the employee's beneficiary, survivor or dependant, and includes accidental death and dismemberment insurance;

This definition states that a life insurance plan is one that provides a death benefit, whether payable periodically or as a lump sum, to the employee's beneficiary, survivor or dependant, and includes dismemberment insurance, which is payable for loss of limbs.

Long-Term Disability Benefit Plan

"long-term disability benefit plan" means a disability benefit plan under which the payments or benefits to an employee are payable for a period of not less than 52 weeks or until recovery, retirement or death, whichever period is shorter;

This term is defined to include any disability benefit plan under which benefits may be paid for a period of not less than 52 weeks, or until recovery, retirement or death, whichever is the lesser.

Marital Status

"marital status" includes,

(a) the condition of being an unmarried person who is supporting, in whole or in part, a dependent child or children, and

(b) common law status as defined in the relevant benefit plan;

This term would apply to persons who are legally married (whether to a person of the same or opposite sex) but is also defined to include single, unmarried parents who are supporting dependent children and persons in a common law relationship as that relationship is defined in the benefit plan. However, the creators of the plan do not have a carte blanche to define the term in absolutely any way they choose; the purposes of the Act and in particular the purposes of the prohibition in s. 44 and the reference to common law relationships in the "marital status" definition itself impose some limit on the freedom to define. Since one of those purposes was to prevent discrimination against employees in common law spousal relationships in employer-provided benefit plans, a plan definition cannot purport to define "common law

status" in such a way as to effectively exclude persons in what would ordinarily be understood to be in a common law spousal relationship from the protection of the prohibition.

Since the Ontario Court of Appeal decision in Halpern v Canada (Attorney General), 2003 CanLII 26403 (ON CA), in which the Court ruled that the exclusion of same sex couples from marriage was inconsistent with the equality guarantees in the Canadian *Charter of Rights and Freedoms*, was not saved by s. 1 ("reasonable limits") and was, therefore, unconstitutional, "common law status as defined in the relevant benefit plan" must include same-sex as well as opposite-sex common law couples.

Based on the common elements of definitions of "spouse" which appear in many Ontario statutes, the Employment Standards Program has adopted a policy under which persons are considered to be common law spouses if they are not legally married to each other and have been living together in a conjugal relationship continuously for a period of not less than three years, or living together in a conjugal relationship of some permanence if they are the natural or adoptive parents of a child. The employer may, of course, adopt a more liberal definition of common law spouse than the one set out in this interpretation.

Any exemptions from Part XIII for employees on the basis of marital status must be applied to legally married employees whether married to someone of the same or opposite sex, to employees in common law marriages (with reference to the above-noted definition and whether in a relationship with a person of the same or opposite sex) and to single, unmarried employees supporting a dependent child or children. Alternatively, if a benefit plan is provided to married employees (which includes legal and common law marriages), it must also be provided to single, unmarried employees supporting dependent children.

Normal Pensionable Date

"normal pensionable date" means the date specified in a pension plan at which an employee can retire from his or her employment and receive the regular pension benefit provided by the pension plan, whether the date is the day upon which the employee attains a given age or upon which he or she has completed a given period of employment;

This is defined as the date on which an employee can retire and receive a regular (i.e., full) pension as provided in the plan. The normal pensionable age can be determined with reference to age or to years of service.

Pension Plan

"pension plan" means a benefit plan that provides benefits to a participating employee or to his or her spouse or dependant, on the employee's retirement or termination of employment, out of contributions made by the employer or the employee or both and the investment income, gains, losses and expenses on or from those contributions, and includes,

(a) a unit-benefit pension plan, under which the benefits are determined with reference to a percentage of salary or wages and length of employment or a specified period of employment,

(b) a defined benefit pension plan, under which the benefits are determined as a fixed amount and with reference to length of employment or a specified period of employment,

(c) a money purchase pension plan, under which the benefits are determined with reference to the accumulated amount of the contributions paid by or for the credit of an employee, and the investment income, gains, losses and expenses on or from those contributions,

(d) a profit sharing pension plan, under which payments or contributions by an employer are determined by reference to profits or out of profits from the employer's business, and the benefits are determined with reference to the accumulated amount of contributions paid by or for the credit of an employee and the investment income, gains, losses and expenses on or from those contributions, and

(e) a composite pension plan, which is any combination of the pension plans described in clauses (a) to (d);

A pension plan is defined very broadly to include a plan that provides benefits upon retirement (e.g., a superannuation plan) or termination to an employee or his or her spouse or dependant. The definition continues to specifically include various types of pension plans, such as:

1. Unit benefit plan: an example of this would be a plan that would provide a pension of 60 per cent of the average of the employee's final five years of earnings;
2. Defined benefit pension plan: for example, a plan that provides $1,000 a month in benefits after 25 years of service;
3. Money purchase pension plan: where the employer and/or the employee agree to contribute a specified amount to the plan and the benefits are determined with reference to the assets in the plan; this is also known as a defined contribution plan;
4. Profit sharing plan: a form of defined contribution plan where the employer contributes to the plan amounts that are calculated in accordance with the profits of the business; the benefits are determined with reference to the assets in the plan; and
5. Composite pension plan: a combination of any or all of the above types of pension plans.

It should be noted that some types of pension plans are included in the O Reg 286/01 definition but are not pensions for purposes of the *Pension Benefits Act,* RSO 1990, c P.8. These types of pensions are:

1. A profit sharing plan;
2. A group RRSP;
3. An "employee pay all" plan where the employer makes no contributions; and
4. A retiring allowance as defined in the *Income Tax Act,* RSC 1985, c 1 (5th Supp).

Sex

"sex" includes,

(a) a distinction between employees that excludes an employee from a benefit under a benefit plan or gives an employee a preference to a benefit under a benefit plan because the employee is or is not a head of household, principal or primary wage earner or other similar condition, and

(b) a distinction between employees in a benefit plan because of the pregnancy of a female employee;

As noted in the discussion of s. 44 of the Act, sex is defined as including a distinction based on pregnancy and distinctions based on whether an employee is the head of a household or a primary wage earner.

Short-Term Disability Benefit Plan

"short-term disability benefit plan" means a disability benefit plan other than a long-term disability benefit plan;

This term is defined to include any disability benefit plan that does not meet the criteria set out in the regulation for a "long-term disability benefit plan" (i.e., a plan under which benefits are payable for a period of at least 52 weeks or until recovery, retirement or death, whichever period is shorter. (See the definition of "long-term disability plan" above.)

Spouse

"spouse" means a spouse as defined in the relevant benefit plan;

This term is defined with reference to the definition of "spouse" contained in a relevant benefit plan. However, the creators of the plan do not have a carte blanche to define the term in absolutely any way they choose; the purposes of the Act and in particular the purposes of the prohibition in s. 44 and the reference to common law relationships in the "marital status" definition impose some limit on the freedom to define. Since one of those purposes was to prevent discrimination against employees in common law spousal relationships in employer-provided benefit plans, a plan definition cannot purport to define "spouse" in such a way as effectively to exclude persons in what would ordinarily be understood to be a common law spousal relationship from the protection of the prohibition.

Since the Halpern v Canada (Attorney General) decision, "spouse as defined in the relevant benefit plan" must include persons in same-sex as well as opposite-sex relationships.

Based on the common elements of definitions of "spouse" which appear in many Ontario statutes, the Employment Standards Program has adopted a policy under which persons are considered to be common law spouses if they are not legally married to each other and living together in a conjugal relationship continuously for a period of not less than three years, or living together in a conjugal relationship of some permanence if they are the natural or adoptive parents of a child. The employer may, of course, adopt a more liberal definition of common law spouse than the one set out in this interpretation.

Voluntary Additional Contribution

"voluntary additional contribution" means an additional contribution by an employee under a pension plan, except a contribution whose payment, under the terms of the plan, obliges the employer to make a concurrent additional contribution.

This is a voluntary contribution that an employee may make to his or her pension plan without obliging the employer to make a corresponding contribution.

O Reg 286/01 Section 2 – Pension Plans, Permitted Differences Re Employee’s Sex

Pension Plans, Permitted Differentiation Re Employee's Sex - s. 2(1)

2(1) The prohibition in subsection 44(1) of the Act does not apply in respect of a differentiation in the rates of contribution by an employer to a pension plan if the differentiation is made on an

actuarial basis because of an employee's sex and in order to provide equal benefits under the plan.

Section 2(1) of O Reg 286/01 allows employers to differentiate on the basis of sex in contributions to a pension plan if two requirements are met:

1. The differentiation is made on an actuarial basis; and
2. The differentiation is made in order to provide equal benefits.

Actuarial tables indicate that women, as a group, tend to live longer than men; because of this, if male and female employees are to be provided by the employer with equal monthly (or other periodic) pension benefits, the employer will have to make greater contributions to the pension plan in respect of female employees than it will have to make in respect of male employees. The exemption allows this to the extent that actuaries have determined that it is necessary to do in order to equalize pension benefits as between male and female employees.

Application of s. 44(1), Employment Prior to 1987 - s. 2(2)

2(2) The prohibition in subsection 44(1) of the Act does not apply in respect of a differentiation made under a pension plan if,

(a) the *Pension Benefits Act* applies to the pension plan; and

(b) the differentiation is made,

i. because of an employee's sex, and

ii. in respect of employment before January 1, 1987, other than employment that is described in clause 52(3)(b) or (c) of the *Pension Benefits Act.*

This is a transitional provision designed to prevent the retroactive application of the current exemptions contained in s. 2 of O Reg 286/01 to *Pension Benefits Act,* RSO 1990, c P.8 ("PBA") plans, insofar as pre-1987 employment is concerned. It must be read in conjunction with s. 2(4), which effectively defines "differentiation" for purposes of s. 2(2) [and also s. 2(3)] as a differentiation that was permitted under the version of the *Employment Standards Act* that existed in the 1980s by the benefits regulation RRO 1980, Reg 282 prior to the amendment of that regulation in 1988.

The effect of s. 2(2) is that the exemptions from the prohibition against discrimination on the basis of sex previously set out in s. 2 of the former RRO 1980, Reg 282, prior to its amendment by O Reg 443/88, continue to apply to pension plans governed by the PBA insofar as pre-1987 employment is concerned, except where such employment was covered by the PBA's own sex discrimination provisions, contained in ss. 52(3)(b) and (c) of the PBA. The PBA's sex discrimination provisions cover post-1986 employment, but also cover pre-1987 employment if it is dealt with in pension plans established after 1986 or in plan amendments made after 1986.

Application of s. 44(1), Employment Before July 12, 1988 - s. 2(3)

2(3) The prohibition in subsection 44(1) of the Act does not apply in respect of a differentiation made under a pension plan if,

(a) the *Pension Benefits Act* does not apply to the pension plan; and

(b) the differentiation is made,

(i) because of an employee's sex, and

(ii) in respect of employment before July 12, 1988.

This is a transitional provision designed to prevent the retroactive application of the current exemptions contained in s. 2 of O Reg 286/01 to plans to which the PBA does not apply, insofar as employment before July 12, 1988, is concerned. Plans not covered by the PBA include profit sharing plans, group registered retirement savings plans, "employee pay all" plans and "retiring allowances" as defined in the *Income Tax Act,* RSC 1985, c 1 (5th Supp). Like s. 2(2), s. 2(3) must be read in conjunction with s. 2(4), which effectively defines "differentiation" for the purposes of s. 2(2) [and also s. 2(3)] as a differentiation that was permitted under the version of the *Employment Standards Act,* RSO 1980, c 137 that existed in the 1980s by the benefits regulation RRO 1980, Reg 282 prior to the amendment of that regulation in 1988.

This means that exemptions from the prohibition against discrimination in pension plans on the basis of sex set out in s. 2 of the former RRO 1980, Reg 282 (prior to its amendment by O Reg 443/88) continue to apply to pension plans not governed by the PBA in regards to differentiation in those plans on the basis of sex insofar as pre-July 12, 1988, employment is concerned. Note that even though an employer makes a contribution or pays a benefit on or after July 12, 1988, it will be subject to the old rules regarding sex discrimination to the extent that it relates to employment prior to July 12, 1988.

Differentiation - s. 2(4)

2(4) In subsections (2) and (3),

"differentiation" means a type of differentiation to which the prohibition in the predecessor of subsection 33(2) of the former Act did not apply on December 31, 1987.

This section defines "differentiation" for purposes of ss. 2(2) and 2(3) of O Reg 286/01 only. "Differentiation" then means the types of differentiations on the basis of sex, in pension plans, permitted by the predecessor to s. 2 of RRO 1980, Reg 282 under the former *Employment Standards Act,* RSO 1980, c 137. That predecessor provision read as follows:

2. The prohibition in subsection 34(2) of the Act does not apply to,

(a) monthly or other periodic amounts provided under a money purchase, profit sharing or composite pension plan where such amounts differentiate between employees because of sex and such differentiation is determined upon an actuarial basis;

(b) benefits provided under additional voluntary employee-pay-all pension plans or voluntary additional contribution features of pension plans where the benefits differentiate between employees because of sex and such differentiation is determined upon an actuarial basis;

(c) the conversion of normal pension benefits under an option contained in a pension plan where the adjustment of benefits differentiate between employees because of sex and such differentiation is determined upon an actuarial basis;

(d) the conversion of normal pension benefits because of the retirement of an employee before or after his normal retirement date where the adjustment of the benefits differentiate between employees because of sex and such differentiation is determined upon an actuarial basis; and

(e) a differentiation in the rates of contribution of an employer to a pension plan where such differentiation is made on an actuarial basis because of the sex of the employee and in order to provide equal benefits under the plan.

Subsection 34(2) of the version of the *Employment Standards Act,* RSO 1980, c 137 is a predecessor provision to s. 33(2) of the *Employment Standards Act,* RSO 1990, c E.14 and to s. 44 of the *Employment Standards Act, 2000*.

O Reg 286/01 Section 3 — Pension Plans, Permitted Differentiation Re Marital Status

Pension Plans, Permitted Differentiation Re Marital Status - s. 3(1)

3(1) The prohibition in subsection 44(1) of the Act does not apply to,

(a) an increase in benefits payable to an employee under a pension plan that provides for the increased benefits because the employee has a dependent spouse;

(b) a differentiation under a pension plan because of marital status, if the differentiation is made for the purpose of providing benefits that are payable periodically during the joint lives of an employee who is entitled to the pension and the employee's spouse, and thereafter during the life of the survivor of them, as provided in the pension plan; and

(c) a differentiation in the rates of contribution of an employer to a defined benefit or a unit-benefit pension plan that provides an increase in benefits to an employee because of marital status, if the rates of contribution of the employer differentiate between employees because of marital status.

O Reg 286/01 permits three types of differentiation on the basis of marital status in pension plans:

1. Increased benefits payable to employees with dependent spouses.
2. The payment of joint and survivor pensions to employees and their spouses. A "joint and survivor pension" is a pension that is payable as long as either of the two spouses is alive. This type of pension is now required by the *Pension Benefits Act,* RSO 1990, c P.8 ("PBA") under the circumstances described in s. 3(3) of O Reg 286/01. This exemption is not applicable if the plan contravenes the PBA's provisions regarding joint and survivor pensions.
3. Employer contributions to a defined benefit or unit benefit pension plan that differentiate because of marital status where the differentiation is made in order to provide increased benefits to employees because of their "marital status", because they have a spouse or, are unmarried but supporting in whole or part a dependent child or children.
    - See the discussion of the definition of "marital status", which includes the condition of being an unmarried person who is supporting in whole or part a dependent child or children, at s. 1(j) of O Reg 286/01. This exemption is not applicable to increased employer contributions to a money purchase or profit sharing pension plan.

Commuted Benefits - s. 3(2)

3(2) For the purposes of clause (1)(b), benefits are deemed to be payable periodically despite the fact that they are commuted, if the amount of the annual benefit payable to the employee at the normal pensionable date is not more than 2 per cent of the Year's Maximum Pensionable Earnings, as defined in the Canada Pension Plan in the year that the employee terminated the employment.

The exemption in s. 3(1)(b) for joint and survivor pensions only applies if the pension benefit is payable periodically, that is, in regular instalments rather than in a lump sum. However, s. 3(2) is a "de minimis" provision which states that the exemption in s. 3(1)(b) will still apply if the amount is "commuted", that is, converted to one lump sum in a situation where the periodic payments would otherwise be very small. The benchmark figure used for commutation is that the annual benefit, before commutation, must be not more than two per cent of the Year's Maximum Pensionable Earnings ("YMPE"), as defined in the Canada Pension Plan, in the year that the employee terminated his or her employment. The YMPE is raised each year according to the cost of living.

When Prohibition Does Not Apply - s. 3(3)

3(3) Clause (1)(b) does not apply if the *Pension Benefits Act* applies to the pension plan and the plan contravenes the provisions of that Act respecting joint and survivor pensions.

This section provides that the exemption in s. 3(1)(b) of O Reg 286/01 from the prohibition against marital status discrimination in s. 44(1) of the *Employment Standards Act, 2000* does not apply if the pension plan contravenes the provision of the PBA regarding joint and survivor pensions. Section 44 of the PBA provides, subject to certain limited exceptions, that if the employee has a spouse on the date the first instalment of the pension becomes due, and is not living separate and apart from that spouse, the pension must be a joint and survivor pension, payable as long as either spouse is alive. The value of the pension payable to the surviving spouse must not be less than 60 per cent of the pension paid to the employee.

Spouse is defined in the PBA as two persons who:

- Are legally married to each other or who are not married to each other but who either have been living together in a conjugal relationship continuously for not less than three years; or
- Have been living together in a conjugal relationship of some permanence, if they are the natural or adoptive parents of a child.

O Reg 286/01 Section 4 – Pension Plans, Permitted Differentiation Re Employee's Age

Pension Plans, Permitted Differentiation Re Employee's Age - s. 4(1)

4(1) The prohibition in subsection 44(1) of the Act does not apply in respect of a differentiation that is made on an actuarial basis because of an employee's age and that relates to,

(a) the rates of voluntary additional contributions to a pension plan;

(b) the rates of contributions that an employee is required to make to a money purchase or profit sharing pension plan;

(c) the rates of contributions by an employer to a unit-benefit or defined benefit pension plan, unless the *Pension Benefits Act* applies to the plan and the plan contravenes the provisions of that Act respecting age differentiation;

(d) the rates of contributions by an employer to a money purchase or profit sharing pension plan,

i. when the employer transfers the assets from a unit-benefit or defined benefit pension plan to the money purchase or profit sharing pension plan, and

ii. if the differentiation is made in order to protect employees' pension benefits from being adversely affected by the transfer; or

(e) benefits payable to employees, if the *Pension Benefits Act*,

i. permits the differentiation, or

ii. does not apply to the pension plan.

Sections 4(1)(a)-(e) allows certain age differentiations in pension plans if those differentiations are determined on an actuarial basis. The term "actuarial basis" is defined in s. 1 of O Reg 286/01 as the assumptions used by actuaries to establish the costs of various benefits, including the actuarial equivalents of those benefits, with reference to contingencies such as death, accident, sickness or disease. See the discussion of the definition of the term "actuarial basis" at s. 1(a) of O Reg 286/01 for further information.

It is the policy of the Program that a differentiation in a pension plan is determined on an actuarial basis if the differentiation in contributions to, or benefits paid, under the plan are actuarially equivalent. Assumptions generally used by actuaries with respect to pension plans are set out in the Survey of Actuarial Assumptions and Funded Status, as follows:

- Interest;
- Salary scale;
- Yearly Maximum Pensionable Earnings increase (this is an annual figure determined under the Canada Pension Plan);
- Retirement age;
- Disability rate;
- Termination rate; and
- Mortality rate.

Section 4(1)(a)-(e), therefore, allows five types of age differentiations in a pension plan if these differentiations are "determined on an actuarial basis":

1. Differentiations in the rate of voluntary additional contributions of an employee to a pension plan.

"Voluntary additional contribution" is defined in s. 1 of O Reg 286/01 as a voluntary contribution that an employee may make to a pension plan without obligating the employer to make a corresponding contribution.

2. Differentiations in the rates of mandatory employee contributions to a money purchase or profit sharing pension plan.

The exemption refers to contributions that are mandatory once the employee is enrolled in the plan. It does not refer to "required" contributions in the sense that enrolment in the plan is compulsory.

3. Differentiations in employer contributions to a unit benefit or defined benefit pension plan unless the plan is governed by the Pension Benefits Act, RSO 1990, c P.8 ("PBA") and the plan contravenes the provisions of that Act regarding age differentiation.

This exemption is therefore conditional on the plan complying with the PBA's provisions regarding age differentiation. The major provisions of the PBA in this regard are:

- Section 31 - membership in a plan is available after two years' continuous employment (age no longer a factor);
- Section 35(1) - the normal retirement age shall not be more than 66;
- Section 35(4) - an employee who continues to work past the normal retirement date may, subject to certain "age-neutral" caps, continue to accrue benefits until actual retirement (age is no longer a factor);
- Section 37 - a deferred pension entitlement is created after two years' membership in the plan (age is no longer a factor, except with respect to benefits accrued prior to 1987).

4. Differentiations in employer contributions to a money purchase or profit sharing pension plan when the employer is switching from a unit-benefit or defined benefit plan, if the differentiations are to protect employees' pension benefits from being adversely affected by the transfer.

There is an increasing trend to defined contribution plans, in which the employer agrees to a certain level of contributions rather than to paying a certain level of benefits. When switching from a unit-benefit or defined benefit to a defined contribution plan, it may be necessary for the employer to make a one-time, lump sum "top-up" to the credit of older employees, to prevent their pensions from being adversely affected by the transition. The exemption allows this differentiation provided that the "top-up" has been actuarially calculated.

5. Differentiations in pension benefits, provided that if the PBA applies to the plan, the differentiations are permitted by the PBA.

This exemption allows age differentiations in non-PBA pension plans if they are determined on an actuarial basis, and age differentiations in PBA plans if they are determined on an actuarial basis and not in contravention of the PBA's provisions regarding age differentiation. The major provisions of the PBA regarding age differentiation are set out above, in the discussion of s. 4(1)(c).

Transitional Provision - s. 4(2)

4(2) Despite subsection (1), the requirement that a differentiation be determined on an actuarial basis does not apply to a differentiation described in clause (1)(a), (b) or (e) that is made in respect of the employment of a person before July 12, 1988.

This is a transitional provision designed to ensure that the requirement that age differentiations in pension plans be determined on an actuarial basis (which came into effect on July 12, 1988) does not have retroactive effect. Therefore, age differentiations set out in s. 4(1)(a), (b) and (e) need not be determined on an actuarial basis if they relate to that portion of the employee's employment that occurred before July 12, 1988. The provision that corresponded to s. 4(1)(c) in the benefits regulation in force prior to July 12, 1988, already required that particular differentiation to be on an actuarial basis, so it was not necessary to include this section in the transitional provision. Section 4(1)(d) is not included in the transitional provision because it did not introduce any new constraint, but simply assisted the employer in preserving the "status quo" when switching from one type of plan to another.

Application of s. 44(1) - s. 4(3)

4(3) The prohibition in subsection 44(1) of the Act does not apply with respect to a provision in a pension plan that makes a differentiation because of age in establishing a normal pensionable date for voluntary retirees or an early voluntary retirement date or age, unless

(a) the *Pension Benefits Act* applies to the plan; and

(b) the plan contravenes the provisions of that Act respecting normal retirement dates and early retirement pensions.

This exemption to the general prohibition against age differentiations in pension plans under s. 44(1) of the *Employment Standards Act, 2000*, unlike the exemptions created in s. 4(1) of O Reg 286/01, is not based on actuarial equivalents. Section 4(3) allows a differentiation based on age in a pension plan if the plan allows for voluntary retirement before the age of 65. Without this section, a pension plan in which contributions or benefits varied in accordance with an early (voluntary) retirement age of 60, for example, would not be permissible unless the differentiation was determined "on an actuarial basis". It is important to note that this exception only applies to voluntary retirement, not to mandatory retirement. Furthermore, in the case of PBA plans, the exception only applies if the plan does not contravene the provisions of the PBA regarding normal retirement dates and early retirement pensions. The PBA provisions regarding normal retirement dates are found in s. 35 of the PBA, which provides that the normal retirement date shall not be later than the date on which the employee reaches age 66, and that an employee who works past the normal retirement date may be entitled to continue to accrue benefits until actual retirement, subject to any limits on service credits or benefit amounts set out in the plan. The PBA provisions regarding early retirement are found in s. 41 of the PBA, which provides that an employee who is within 10 years of attaining the normal retirement date and terminates employment after 1987, and has been a member of the plan for at least two years, is entitled to elect to receive an early retirement pension.

O Reg 286/01 Section 5 – Life Insurance Plans, Permitted Differentiation Re Employee's Sex

Section 5 of O Reg 286/01 provides that s. 44(1) of the *Employment Standards Act, 2000* does not apply to two types of differentiation made on the basis of sex in a life insurance plan.

Differentiations in Employee Contributions - s. 5(a)

5. The prohibition in subsection 44(1) of the Act does not apply to,

(a) differentiation in the contributions of an employee to a voluntary employee-pay-all life insurance plan that is made on an actuarial basis because of sex;

Section 5(a) allows a differentiation in respect of employee contributions to a voluntary employee-pay-all life insurance plan, where the differentiation is determined on an actuarial basis. According to current actuarial tables, women tend to live longer than men. Therefore, life insurance premiums are higher for men than for women of the same age (because men are likely to die earlier and, therefore, with a fewer number of premiums having been paid on their behalf). The exemption in s. 5(a) allows for actuarially-based differentiations in life insurance plans in which participation by the employee is voluntary and in which the employee pays all of the premiums. Therefore, such plans may have greater contribution rates for male employees than for female employees, if the difference is determined according to the actuarial tables.

Differentiations in Employer Contributions - s. 5(b)

5. The prohibition in subsection 44(1) of the Act does not apply to,

(b) a differentiation in the contributions of an employer to a life insurance plan that is made on an actuarial basis because of an employee's sex and in order to provide equal benefits under the plan.

Section 5(b) allows differentiations in respect of employer contributions to a life insurance plan where the differentiation is based on sex if it is made on an actuarial basis and in order to provide equivalent benefits. This type of differentiation might be made where the employer wishes to ensure that male and female employees receive the same life insurance benefits.

O Reg 286/01 Section 6 – Life Insurance Plans, Permitted Differentiation Re Marital Status

Life Insurance Plans, Permitted Differentiation Re Marital Status - s. 6(1)

Section 6(1) provides that the prohibition against differentiation in s. 44(1) of the *Employment Standards Act, 2000* does not apply to three types of differentiations made on the basis of marital status in a life insurance plan.

Benefits Payable to Surviving Spouse - s. 6(1)(a)

6(1) The prohibition in subsection 44(1) of the Act does not apply to,

(a) benefits under a life insurance plan that are payable periodically to the surviving spouse of a deceased employee for the life of the surviving spouse or until the surviving spouse becomes a spouse of another person

Section 6(1)(a) states that benefits under a life insurance plan that are payable periodically to the surviving spouse of a deceased employee are exempt from the prohibition against differentiations on the basis of marital status in s. 44(1) of the Act. This exemption applies where the benefits are to the deceased employee's surviving spouse for his or her life, or until he or she becomes the spouse of another person. Also see s. 6(2) of O Reg 286/01, discussed below, which provides that this provision also applies to benefits of less than $25/month that have been commuted to a lump sum benefit.

Benefits Payable to Employee on Death of Spouse - s. 6(1)(b)

6(1) The prohibition in subsection 44(1) of the Act does not apply to,

(b) a benefit under a life insurance plan that is payable to an employee on the death of his or her spouse;

Section 6(1)(b) provides that a life insurance plan may differentiate on the basis of marital status where the plan provides for benefits payable to an employee upon the death of his or her spouse. The purpose of the exemption is to allow an employee to insure his or her spouse's life through the employer's plan.

Differentiations in Employer or Employee Contributions - s. 6(1)(c)

6(1) The prohibition in subsection 44(1) of the Act does not apply to,

(c) a differentiation in the contributions of an employee or an employer to a life insurance plan, if,

(i) the differentiation is made because of marital status, and

(ii) the life insurance plan provides benefits that are payable periodically to an employee's surviving spouse.

Section 6(1)(c) permits a life insurance plan to differentiate on the basis of marital status with respect to employer or employee contributions where the plan provides periodic benefits to the surviving spouse of the employee. This means that a plan may have higher employer or employee contributions in order to provide periodic survivor benefits to a deceased employee's spouse.

This exemption has no "life-time or until the person becomes a spouse" condition, and it does not have a commutation exclusion for small amounts - see s. 6(2) of O Reg 286/01, below. This exemption could apply in respect of contributions to any plan that provided for a periodic life insurance benefit payment, of any duration, to the employee's surviving spouse.

Differentiations Not Allowed Under s. 6(1)

The following are examples of provisions that would not be permissible in a life insurance plan, because they discriminate on the basis of marital status and are not exempted by s. 6(1):

- A provision stating that a medical examination is not necessary if optional insurance is elected within 60 days of marriage;
- A plan that provides for single employees' lump sum life insurance equal to two times salary, but for employees with a spouse one times salary plus a periodic survivor insurance income benefit. The survivor income benefit would be permissible under s. 61(a), but the differentiation in lump sum benefits on the basis of marital status would not be permissible.

Commuted Benefits - s. 6(2)

6(2) Clause (1)(a) also applies to benefits of less than $25 a month that have been commuted to a lump sum payment.

Section 6(2) states that the benefits under an insurance plan described in s. 6(1)(a) will be deemed to be payable periodically, notwithstanding that they have been commuted to a lump sum and would have been less than $25 a month if they had not been commuted. Commutation involves the transformation of periodic benefits into one lump sum benefit. It is done by determining the current "lump sum" value of the periodic payments, using actuarial assumptions respecting such matters as life expectancy and interest rates.

O Reg 286/01 Section 7 – Life Insurance Plans, Permitted Differentiation Re Age

Differentiations in Benefits or Employee Contributions (Voluntary Employee-Pay-All Plans Only) - s. 7(a)

7. The prohibition in subsection 44(1) of the Act does not apply to,

(a) a differentiation, made on an actuarial basis, because of an employee's age, in benefits or contributions under a voluntary employee-pay-all life insurance plan;

Section 7(a) provides that a voluntary, employee-pay-all life insurance plan (i.e., a plan where the employees may choose to participate but to which the employer does not make any contributions) may differentiate between employees on the basis of age on an actuarial basis with respect to both benefits and contributions. In other words, such a plan may provide benefits or require contributions that vary on an actuarial basis according to age. For example, the employee may contribute $100 a year toward his or her life insurance and receive benefits that vary on an actuarial basis according to his or her age. Alternatively, such a plan could provide $50,000 in insurance for each employee and the employees' contributions would vary on an actuarial basis according to their age.

Differentiations in Employer Contributions - s. 7(b)

7. The prohibition in subsection 44(1) of the Act does not apply to,

(b) a differentiation, made on an actuarial basis because of an employee's age and in order to provide equal benefits under the plan, in the employer's contributions to a life insurance plan.

Section 7(b) provides that employer contributions to a life insurance plan may differentiate with respect to an employee's age if the differentiation is made on an actuarial basis in order to provide equal benefits under the plan. As a result, an employer may make increased contributions for older employees, provided these increases are based on actuarial tables, in order to provide an actuarially equivalent life insurance benefit under the plan to all employees.

Example of Differentiation not Allowed Under s. 7

An example of a provision that would not be permissible in a life insurance plan, because it differentiates on the basis of age and is not exempted by s. 7 would be a provision in an employer-funded plan that provides a lump sum survivor benefit that varies in amount according to the number of years left to normal retirement age at the time of the employee's death.

O Reg 286/01 Section 8 – Disability Benefit Plans, Permitted Differentiation Re Age, Sex or Leave of Absence

Section 8 allows two types of differentiations in disability insurance plans.

Differentiation in Employee Contributions in Voluntary Employee-Pay-All Plans - s. 8(a)

8. The prohibition in subsection 44(1) of the Act does not apply to,

(a) a differentiation, made on an actuarial basis because of an employee's age or sex, in the rate of contributions of an employee to a voluntary employee-pay-all short or long-term disability benefit plan;

Section 8(a) allows a disability plan that is a voluntary, employee-pay-all plan, to differentiate in employee contributions on the basis of age or sex, on an actuarial basis. The purpose of the exemption is to permit this kind of plan to provide for increased contributions by employees in age or sex categories associated with higher disability insurance premiums. It is important to note that the exemption in s. 8(a) does not allow for a differentiation in benefits in such a plan, unlike the corresponding exemption for voluntary employee-pay-all life insurance plans in s. 7(a) of O Reg 286/01.

Differentiation in Employer Contributions - s. 8(b)

8. The prohibition in subsection 44(1) of the Act does not apply to,

(b) a differentiation, made on an actuarial basis because of an employee's age or sex and in order to provide equal benefits under the plan, in the rate of contributions of an employer to a short or long-term disability benefit plan.

Section 8(b) allows a disability plan to differentiate in the rate of employer contributions to the plan on the basis of age or sex, on an actuarial basis, in order to provide equal benefits under the plan. (This exemption is similar to the corresponding exemption created in s. 7(b) with respect to life insurance plans.) In other words, where the employer provides a disability plan for which the employer makes contributions, the employer may make increased contributions for employees of a certain age or sex, provided that it results in the employees receiving actuarially equivalent benefits under the plan.

Former Exemption Respecting Female Employees on Leave

Section 8(c) of RRO 1990, Reg 321 under the former *Employment Standards Act* contained the following provision:

8. The prohibition in subsection 33(2) of the Act does not apply to,

(c) the exclusion from benefits under a short or long term disability insurance plan of a female employee during the period of leave-of-absence to which she s entitled under part XI of the Act, or any greater period of leave-of-absence that she has applied for under any term of a contract of employment, oral or written, express or implied, that prevails over Part XI of the Act.

This provision explicitly permitted a benefit plan to deny disability benefits to a female employee on pregnancy or parental leave or on a leave that constituted a "greater benefit" than a leave under Part XI of the former *Employment Standards Act*.

The provision thus provided an exception to the prohibition against discrimination in the provision of benefits plans on the basis of sex, by allowing disability plans to deny short-or long-term benefits to female employees on pregnancy and parental leave.

In *Brooks v Canada Safeway Ltd.,* [1989] 1 SCR 1219, 1989 CanLII 96 (SCC), a 1989 case decided under Manitoba human rights legislation, the Supreme Court of Canada held that because discrimination on the basis of pregnancy is discrimination on the basis of sex, it is discriminatory to deny women short-term or long-term disability benefits during that portion of a leave that they are unable to work for reasons related to pregnancy and childbirth, as these constituted valid health-related reasons for absence from work. As a result, it would constitute discrimination on the basis of sex to deny a female employee disability benefits for that part of the leave.

As s. 8(c) of the former RRO 1990, Reg 321 may have been perceived as inconsistent with the Supreme Court of Canada's reasoning in *Brooks v Canada Safeway Ltd.,* no corresponding provision was incorporated into O Reg 286/01.

The position of the Employment Practices Branch is that where a disability benefit plan is provided by or through the employer, the reasoning in *Brooks v Canada Safeway Ltd.* will apply so as to give a female employee who is on pregnancy or parental leave a right to short-term or long-term disability benefits during that portion of her leave in which she is unable to work for reasons of health related to pregnancy or childbirth. (Note, however, that where an employer provides disability benefits to employees on leaves other than Part XIV leaves, s. 10 of O Reg 286/01 will apply to require that such benefits be provided to both female and male employees on a Part XIV leave and for the entire period of the leave.)

For other court decisions respecting the right to disability benefits for female employees during the "health-related" portion of a pregnancy leave, see *Alberta Hospital Association v Parcels*, 1992 CanLII 6106 (AB QB) and *O.S.S.T.F., District 34 v Barton* (1996), 91 OAC 253 (ON SC).

O Reg 286/01 Section 9 – Health Benefit Plans, Permitted Differentiation Re Sex or Marital Status

Differentiation in Employee Contributions on the Basis of Sex (Voluntary Employee-Pay-All Plans Only) - s. 9(a)

9. The prohibition in subsection 44 (1) of the Act does not apply to,

(a) a differentiation, made on an actuarial basis because of sex, in the rate of contributions of an employee to a voluntary employee-pay-all health benefit plan;

Section 9(a) allows a health benefit plan in which participation is voluntary and to which the employer does not contribute to set employee contribution rates that vary on an actuarial basis because of sex. Note that the exemption does not allow the benefits to vary according to sex.

Differentiation in Employer Contributions on the Basis of Sex - s. 9(b)

9. The prohibition in subsection 44 (1) of the Act does not apply to,

(b) a differentiation, made on an actuarial basis because of an employee's sex and in order to provide equal benefits under the plan, in the rate of contributions of an employer to a health benefit plan;

Section 9(b) allows a health benefit plan to set employer contribution rates that vary on the basis of employees' sex if such differentiations are made on an actuarial basis in order to provide equal benefits. In other words, this exemption allows an employer's (but not an employee's) contribution rates to vary on the basis of sex if the contribution rates are calculated according to actuarial tables.

Differentiation in Benefits and Employee Contributions on the Basis of Marital Status - s. 9(c)

9. The prohibition in subsection 44 (1) of the Act does not apply to,

(c) a differentiation in an employee's benefits or contributions under a health benefit plan because of marital status, if the differentiation is made in order to provide benefits for the employee's spouse or dependent child;

Section 9(c) allows employers to provide a health benefit plan that differentiates in benefits or employee contributions on the basis of marital status, in order to provide benefits to the employee's spouse or dependent child. However, it would be a violation of Part XIII if the plan made a distinction between employees with marital status. For example, this exemption does not allow an employer to provide a health benefit plan that pays benefits for the health expenses of the children of employees with a spouse but not the children of single employees (who are defined as having marital status under O Reg 286/01).

Differentiation in Employer Contributions on the Basis of Marital Status - s. 9(d)

9. The prohibition in subsection 44 (1) of the Act does not apply to,

(d) a differentiation in the rate of contributions of an employer to a health benefit plan, where there are specified premium rates and where that differentiation for employees having marital status and for employees without marital status is on the same proportional basis.

Section 9(d) allows a differentiation in a health benefit plan with respect to employer contributions where there are specified premium rates for employees having marital status and different premium rates for employees without marital status, and the differentiation in the employer contributions is on the same proportional basis.

An example of this type of agreement would be an extended health plan where single employee coverage costs $X a month, but family coverage costs $Y a month, a higher amount. Provided that the employer's subsidy is proportionally the same, i.e., 50 per cent of X and 50 per cent of Y, it will not be in violation of

s. 44 of the *Employment Standards Act, 2000* despite the fact that the employer is contributing more in terms of dollars and cents on behalf of the employees who have marital status.

Examples of Differentiations Not Allowed Under s. 9

A health benefit plan may not discriminate on the basis of age, sex or marital status, except as provided in s. 9 of O Reg 286/01. Some examples of discrimination in a health benefit plan that would not be permitted are:

- A provision excluding reimbursement for the cost of birth control pills for female employees. However, if a male birth control pill were available, it would not be a violation of Part XIII if neither male nor female employees were covered for birth control pills;
- A provision discriminating between employees on the basis of age in benefits or contributions; and
- A provision denying extended health benefits to female employees with spouses but not to male employees with spouses (on the theory, say, that many female employees have husbands who work and who could obtain family coverage under their employer's plans).

O Reg 286/01 Section 10 – Participation in Benefit Plan During Leave of Absence

10(1) A benefit plan to which Part XIII of the Act applies shall not disentitle an employee who is on a leave of absence described in subsection (2) from continuing to participate in the benefit plan during the leave of absence, if the benefit plan entitles an employee who is on a leave of absence other than the one described in subsection (2) to continue to participate.

(2) This section applies to,

(a) a leave of absence under Part XIV of the Act; and

(b) any longer leave of absence that the employee has applied for under a provision in the contract of employment that prevails under subsection 5(2) of the Act.

Section 10 provides that if employees on a leave other than a leave under ESA Part XIV, e.g., educational leave, are entitled to participate in a benefit plan, then employees on a leave under Part XIV (i.e., pregnancy, parental, sick, bereavement, family responsibility, family medical, family caregiver, organ donor, critical illness, personal emergency , child death, crime-related child disappearance, domestic or sexual violence, emergency or reservist leave), or on any longer leave of absence that constitutes a greater benefit under ESA Part III, s. 5(2) must be entitled to participate in the plan.

Under ESA Part XIV, ss. 51(1), (2) and (3), an employee on any type of Part XIV leave, except reservist leave (i.e. pregnancy, parental, sick, bereavement, family responsibility, family medical, family caregiver, organ donor, personal emergency, domestic or sexual violence, critical illness, child death, crime-related child disappearance or emergency leave) already has the statutory right to continue to participate in pension plans, life insurance plans, accidental death plans, extended health plans and dental plans during the leave. Section 10 therefore is redundant to these types of plans with respect to employees on pregnancy, parental, sick, bereavement, family responsibility, family medical, family caregiver, domestic or sexual violence, critical illness, organ donor, personal emergency, child death, crime-related child

disappearance or emergency leave because employees on such leaves have a right under the ESA 2000 to participate in them even if employees on other types of leave do not.

However, the rules are different with respect to reservist leave. An employee on reservist leave does not have the “automatic” right under the ESA 2000 to participate in pension plans, life insurance plans, accidental death plans, extended health plans and dental plans during their leave. However, where an employer provides other types of benefit plans other than the plans enumerated in ESA Part XIV, s. 51(2), to employees on a leave other than a leave under Part XIV (e.g., education leave), then s. 10 would operate to entitle employees on a reservist leave to participate in those other plans.

Undoubtedly, the most important type of benefit plan not mentioned in ESA Part XIV, s. 51 is a disability benefit plan. Note that s. 51 also refers to "prescribed" types of benefit plans prescribed by the regulations but no other types of benefit plans have been prescribed. However, it should be noted that the Employment Practices Branch takes the position, based on the Supreme Court of Canada decision in Brooks v Canada Safeway Ltd., [1989] 1 SCR 1219, 1989 CanLII 96 (SCC), that where a disability benefit plan is provided by or through the employer, a female employee who is on pregnancy or parental leave will have a right to short-term or long-term disability benefits during that portion of their leave in which they are unable to work for reasons of health related to pregnancy or childbirth.

O Reg 286/01 Section 11 – Former Exclusion From Certain Benefit Plans

11. If an employee was excluded from participating in a benefit plan or in a benefit under a benefit plan before November 1, 1975, and ceased to be so excluded on that date, the employee is entitled to participate as of that date.

This section applies to an employee who was excluded from participation in a benefit plan by reason of a provision in the plan that became impermissible on November 1, 1975, the date when Part X of the *Employment Standards Act, 1974,* SO 1974, c 112, the original predecessor to Part XIII, came into force. Under s. 11, such an employee is entitled to participate in the plan from the time that the predecessor began to apply to the plan.

O Reg 286/01 Section 12 — Compliance Not to Be Achieved by Reductions

12. No employer shall reduce the employer’s contributions to or the benefits under a health benefit plan in causing the plan to comply with Part XIII of the Act and this Regulation, or with Part X of the former Act or a predecessor of that Part and the related regulations.

Section 12 states that no employer may reduce either its contributions to or employee benefits under a plan in order to comply with Part XIII and O Reg 286/01 or Part X of the former *Employment Standards Act* and its related regulations or its predecessors. This is similar to the provision in s. 42(3) of the *Employment Standards Act, 2000*, which prohibits an employer from reducing the pay of an employee in order to comply with the equal pay provisions of the Act. An example of a reduction prohibited by s. 12 of O Reg 286/01 would be where the employer reduced the benefits of male employees under a health insurance plan to those received by females, instead of increasing the benefits paid to females, in order to provide equal benefits to male and female employees.

O Reg 286/01 Section 13 – Change to Normal Pensionable Date Under Certain Plans

13. Despite the application of Part X of the former Act or a predecessor of that Part to a pension plan that was in existence on November 1, 1975, if the normal pensionable date of a class of employees was increased in order to have the plan comply with that Part, an employee who is a member of that class is entitled to pension benefits on the normal pensionable date as provided by the pension plan before it was increased.

This section states that where an employee has his or her normal pensionable rate increased in order to comply with the original predecessor to Part XIII of the *Employment Standards Act, 2000*, the employee shall be entitled to his or her pension benefits on the normal pensionable date as it was before it was increased. An example of the type of situation that this provision was meant to address would be a pension plan that, prior to November 1, 1975, had a normal pensionable date of the day on which the employee reached age 60 for females and a normal pensionable date of the day on which the employee reached age 65 for males. In order to comply with the predecessor to Part XIII when it first became law, the plan might have been amended to provide a normal pensionable date of the day on which the employee reached age 65 for both males and females. However, according to s. 13, the females in such a plan would retain the option to retire at age 60 with a full pension. Section 13 must, however, be read as subject to the *Pension Benefits Act*, RSO 1990, c P.8, which prevails over other legislation in the event of a conflict and which, subject to certain exceptions, prohibits differentiation on the basis of sex in a pension plan.

Ontario Regulation 287/01 – Building Services Providers

This regulation supplements the building services providers provisions in the *Employment Standards Act, 2000* by identifying prescribed services for a building and prescribed employees of building services providers. The regulation also sets out what information building services providers must give about their employees for the purposes of ESA Part XIX, s. 77(1).

O Reg 287/01 Section 1 – Prescribed Services for a Building

Parking Garages and Parking Lots - s. 1 subpara. 1(i)

1. The following are prescribed as services for a building for the purposes of the definition of "building services" in subsection 1 (1) of the Act:

1. Services that are intended to relate only to the building and its occupants and visitors with respect to,

i. a parking garage or parking lot,

Section 1 of O Reg 287/01 prescribes "services that are intended to relate only to the building and its occupants and visitors with respect to a parking garage or parking lot" as "building services". This would include, for example, an underground parking garage that is part of an office tower or a shopping centre parking lot.

Concession Stands - s. 1 subpara. 1(ii)

1. The following are prescribed as services for a building for the purposes of the definition of "building services" in subsection 1 (1) of the Act:

1. Services that are intended to relate only to the building and its occupants and visitors with respect to,

ii. a concession stand.

Section 1 of O Reg 287/01 prescribes "services that are intended to relate only to the building and its occupants and visitors with respect to concession stands" as "building services". A concession stand is typically a variety, food or souvenir stand located inside premises such as a stadium, a museum, an arena or a public transportation facility. Persons using the premises may have to pay to enter and use the premises, such as in a stadium, a museum, a public transportation facility (e.g., the Toronto Transit Commission), or they may be able to enter and use the premises without paying admission, such as in the case of an airport. In contrast to food courts, virtually all of the persons using the concession stand services will be persons who are utilizing the building as a whole (rather than for the food services provided there) and as a result, such services will typically "relate only to the building and its occupants and visitors". For the most part, no one would pay to enter the Rogers Centre (formerly the Sky Dome) for example, for the sole purpose of purchasing a hot dog at one of the concession stands within the Rogers Centre. Similarly, the concession stand in a TTC subway station is intended for the use of persons using the subway facilities. Virtually no one would take an escalator down into a TTC subway station for the sole reason of buying a chocolate bar, regardless of whether the stand was located outside or inside the point at which one has to pay a fare to enter. Thus, the concession stand services are utilized by persons

who invariably are also using the building as a whole, whereas a food court restaurant is typically used by member of the public at large, even though they have no other business to conduct in the building.

Property Management Services - s. 1 para. 2

1. The following are prescribed as services for a building for the purposes of the definition of "building services" in subsection 1 (1) of the Act:

2. Property management services that are intended to relate only to the building.

Section 1 of O Reg 287/01 has prescribed "property management services that are intended to relate only to the building" as "building services". Property management companies are typically contracted by the owner of a building such as a condominium or apartment building to provide cleaning and security services, etc. The property management company will then often enter into sub-contracts with cleaning and security companies, whose employees will perform the necessary services. Pursuant to s. 1 of O Reg 287/01, although such services are provided indirectly by the property management company, they are included in the definition of "building services". This is consistent with the definition of "building services provider" in s. 1(1) of the *Employment Standards Act, 2000*, which includes any person who provides building services for a premises, including the owner or manager of the premises.

It is the Program's view that under O Reg 287/01, "property management services that are intended to relate only to the building" must refer to managing the property rather than "working" it. As a result, "property management services" would not extend to the direct performance of manual services. More particularly, it would not extend to the direct performance of manual services such as maintenance (which services, in and of themselves, would not be considered "building services") although it would include supervising and paying for the provision of maintenance services.

On the other hand, the administrative services (e.g., payroll services, accounts payable) performed by the employees of the property management company may be considered to be "property management services" on the basis that they are integral to the provision of the property management services. However, as per O Reg 287/01, such services must "relate only to the building". This means that they must pertain only to the employer's management of the building in question and not to other aspects of the employer's operation (e.g., another building). For example, if a payroll clerk processed payroll only for those employees working at the building, they would be captured as employees providing property management services "that relate only to the building" whereas such an employee who also provided payroll services in respect of the employer's employees working at other premises as well, would not.

O Reg 287/01 Section 2 – Prescribed Employees

Exemptions from Part XV - s. 2(1)

Section 2(1) sets out the exemptions in which a new provider is not required to comply with the termination and severance provisions in ESA Part XV.

Employees Actively Working Before Changeover Date - s. 2(1) para. 1

2(1) The following are prescribed for the purposes of clause 75(4) (b) of the Act as employees with respect to whom a new provider is not required to comply with Part XV (Termination and Severance of Employment) of the Act:

1. An employee whose work, before the changeover date, included providing building services at the premises, but who did not perform his or her job duties primarily at those premises during the 13 weeks before the changeover date.

This category of employees consists of those employees who actively worked for the replaced provider by providing building services at the premises prior to the changeover date but whose job duties were not performed primarily at the building premises affected by the change-over of providers during the 13-week period prior to the changeover date. This includes employees who were on lay-off, if they continued to perform job duties at the premises even though their hours and/or pay were reduced. In other words, this exemption will apply if the building premises affected by the change in providers is not the employee's principal place of work with the replaced provider during the 13-week period prior to the changeover date.

It is important to note that the issue of whether the employee works for employers other than the replaced provider (either on a part-time or a full-time basis) is irrelevant in determining whether the employee's job duties are performed primarily at the premises. In determining whether or not the site affected by the change in provider is the place where the employee's job duties are primarily performed, the officer should look at the breakdown of the hours that the employee spends at each location working for the replaced provider.

It is not necessary that the majority of the hours spent working for the provider be at the premises in question in order for the "performed primarily at the premises" test to be met. What is necessary is that the premises be the main place of work with that provider in that the employee has a significant attachment to the premises in question in terms of the number of hours spent there every week (i.e., the employee spends significantly more time at that site than working at other sites for the replaced provider).

It should be noted that if the exemption applies, the employee may still be entitled to termination and severance pay from the replaced provider.

Example 1

In determining whether or not the site affected by the change is the place where the employee's job duties were primarily performed for the replaced provider, the employment standards officer should look at the breakdown of the hours that the employee spent at each location working for that provider.

An employee who works for an office cleaning company has the following weekly schedule:

- Building A: 24 hours
- Building B: 10 hours
- Building C: 10 hours

It is evident that Building A was the employee's principal place of work with the replaced provider. The employee spent the majority (55 per cent) of their time at Building A. The exemption in O Reg 287/01, s. 2(1) paragraph 1 would therefore only apply if there were a change in contract at either Building B or Building C, as the employee did not perform their job duties primarily at those premises.

Example 2

An employee who works at a number of buildings for the same provider but does not spend the majority of their time working at any one of these buildings has the following weekly schedule:

- Building A: 10 hours
- Building B: 4 hours

- Building C: 20 hours
- Building D: 10 hours

In this case, the employee spent most of their time at Building C, but not the majority (i.e., less than 50 per cent) of their time there. However, Building C will be considered the employee's primary place of work because the employee had a significant attachment to the site in question in terms of the number of hours spent there every week (i.e., they spent significantly more hours working there for the replaced provider than working at other sites for that provider). The exemption in O Reg 287/01, s. 2(1) paragraph 1 would therefore apply only if there were a change in contract at Building A, B or D as the employee did not perform their job duties primarily at those premises.

Example 3

Some employees may not have any premises as their principal place of work.

An employee has the following weekly schedule:

- Building A: 10 hours
- Building B: 8 hours
- Building C: 10 hours
- Building D: 6 hours
- Building E: 10 hours

In this example, the employee does not work the majority of hours at any one building site (i.e., less than 50 per cent) and does not have any significant attachment to any one building site in particular (i.e., theydid not spend significantly more hours working at any one building for the provider than other buildings). Therefore, the exemption in O Reg 287/01, s. 2(1) paragraph 1 would apply if there were a change in contract at any of Buildings A, B, C, D or E as the employee did not perform their job duties primarily at any of those premises.

However, the exemption would not apply if, for example, Buildings A, B, and C were all part of one premises (e.g., an office complex consisting of three towers) and there was a change in contract with respect to the provision of building services at any of those three towers. In that case, the employee would be working 64 per cent of their hours at the premises and would be considered to perform their job duties primarily at the premises consisting of Buildings A, B and C.

Employees Not Actively at Work Before Changeover Date - s. 2(1) para. 2

2(1) The following are prescribed for the purposes of clause 75(4) (b) of the Act as employees with respect to whom a new provider is not required to comply with Part XV (Termination and Severance of Employment) of the Act:

2. An employee whose work included providing building services at the premises, but who,

i. was not actively at work immediately before the changeover date, and

ii. did not perform his or her job duties primarily at the premises during the most recent 13 weeks of active employment.

This category is essentially an extension of category 1 to exempt those employees providing building services at the premises who were not actively at work with the replaced provider immediately before the

changeover date, and whose job duties were not performed primarily at the site during their most recent 13 weeks of active employment.

Example

- January 1, 2015, to March 30, 2015 - employee performed some job duties at premises A, but duties for the replaced provider were primarily performed at other premises
- April 1, 2015, to June 1, 2015 - employee put on full lay-off (employee works 0 hours per week)
- June 1, 2015 - changeover date for contract at Premises A (employee not hired by new provider)

The employee was not actively at work immediately before the changeover date of June 1, 2015. In addition, the employee had not been primarily providing services at premises A in their most recent 13 weeks of active employment from January 1 to March 30, 20015. As a result, the new provider is exempt under O Reg 287/01, s. 2(1) paragraph 2 from the requirement to comply with the termination and severance provisions of the *Employment Standards Act, 2000* with respect to such employees.

As with category 1, if the exemption applies, the employee may still be entitled to termination and severance pay from the replaced provider.

Employees Not Working For at Least 13 Weeks - s. 2(1) para. 3

2(1) The following are prescribed for the purposes of clause 75(4) (b) of the Act as employees with respect to whom a new provider is not required to comply with Part XV (Termination and Severance of Employment) of the Act:

3. An employee who did not perform his or her job duties at the premises for at least 13 weeks during the 26-week period before the changeover date.

This is the third category of employees in regards to whom the new provider is exempt from the obligations set out in ESA Part XIX, s. 75(2). The exemption applies to those employees who have not worked at the premises for at least 13 weeks in the 26 weeks preceding the changeover date - the day on which the new provider begins to provide services at the premises.

One of the purposes of this category is to prevent replaced providers from transferring their less desirable and sometimes senior employees to the site in question upon learning that their contract will not be renewed. This may happen where the replaced provider is attempting to off-load responsibility for their termination and severance pay onto the new provider.

However, O Reg 287/01, s. 2(1) paragraph 3must be read with reference to ss. 2(3) and (4) which state as follows:

2(3) The 26-week period referred to in paragraph 3 of subsection (1) shall be calculated without including any period during which the provision of building services at the premises was temporarily discontinued.

2(4) With respect to an employee's services at the premises, the 26-week period referred to in paragraph 3 of subsection (1) shall be calculated without including any period during which the employee was on a leave of absence under Part XIV of the Act.

Section 2(3) states that in determining the employee's services at the premises, the 26-week period in O Reg 287/01, s. 2(1) paragraph 3 shall be calculated without including any period during which the provision of building services at the premises was temporarily discontinued.

For example, where a university cafeteria service closes for the summer, the 26-week period prior to the changeover date may be extended by the number of weeks during which the cafeteria was closed.

Example 1

- September 1, 2015 - Company A awarded contract for food services at cafeteria
- June 1, 2016 - Cafeteria closed for 12 weeks (June 1 - September 1, 2015)
- September 1, 2016 - Company B wins contract for food services (changeover date)

The 26-week period in O Reg 287/01, s. 2(1) paragraph 3 will begin 26 weeks prior to May 31, 2016, because it will not include the 12 weeks that the cafeteria was closed. The exemption in O Reg 287/01, s. 2(1) paragraph 3 would therefore apply to any of Company A's employees who did not work at the university cafeteria for at least 13 weeks during the 26-week period prior to May 31.

Section 2(4) states that in determining the employee's services at the premises, the 26-week period in O Reg 287/01, s. 2(1) paragraph 301 shall be calculated without including any period during which the employee was on leave of absence under ESA Part XIV. Thus the 26-week period for such an employee may be extended by the time spent on leave.

Example 2

- January 1, 2015 - employee commences employment with replaced provider
- January 1, 2016 - employee commences 52-week combined pregnancy and parental leave (note that a combined pregnancy and parental leave may be longer than 52 weeks, up to a maximum entitlement of 78 weeks)
- December 31, 2016 - employee returns to work
- March 1, 2016 - changeover date to new provider (employee not hired)

The employee had technically worked only eight weeks in the 26 weeks prior to the changeover date. However, because the 52 weeks of leave are not included in the calculation of the 26-week period, it would be extended to 78 weeks prior to the changeover date (i.e., 18 weeks prior to the commencement of the employee's leave under ESA Part XIV). Consequently, the exemption in O Reg 287/01, s. 2(1) paragraph 3 would apply if the employee had not worked at the premises for at least five of the 18 weeks prior to commencing her leave.

Despite the fact that ESA Part XIV, s. 53 provides that an employee who takes a leave under ESA Part XIV is entitled to be reinstated after the leave, the new provider is not the employer referred to in s. 53 if an employee was on leave as of the changeover date, unless the new provider hires that employee within 13 weeks of that date. It is the new provider's choice whether it wishes to hire such an employee and, if so, what terms it wishes to offer. If the new provider does not hire the employee, the new provider must comply with the employee’s termination and severance entitlements under ESA Part XIX, s. 75(2)

As with the exemptions in O Reg 287/01, s. 2(1) paragraphs 1 and 2, if the exemption applies, the employee may still be entitled to termination and severance pay from the replaced provider.

Employee Who Refuses Reasonable Offer - s. 2(1) para. 4

2(1) The following are prescribed for the purposes of clause 75(4) (b) of the Act as employees with respect to whom a new provider is not required to comply with Part XV (Termination and Severance of Employment) of the Act:

4. An employee who refuses an offer of employment with the new provider that is reasonable in the circumstances.

This paragraph creates an exemption with respect to those employees of the replaced provider that refuse a reasonable offer of employment with the new provider. It must be read in conjunction with s. 2(2), discussed below.

What Constitutes Reasonable Offer - s. 2(2)

2(2) For the purposes of paragraph 4 of subsection (1), if the new provider requested information under subsection 77 (1) of the Act, the terms and conditions of the employee's employment with the replaced provider on the date of the request are one of the circumstances that shall be taken into account in determining whether the offer is reasonable.

This category consists of employees who refuse an offer of employment with the new provider that is reasonable in the circumstances. In accordance with s. 2(2), the terms and conditions of the employee's employment with the replaced provider on the date of the request for information under ESA Part XIX, s. 77(1) are taken into consideration in determining whether the offer is reasonable. A comparison may therefore be made to such terms and conditions of the employment offered by the new provider to the remuneration, benefits, hours and schedule of work degree of responsibility, etc., with the replaced provider. See also O Reg 288/01, s. 2(1) para. 5 for a discussion of what constitutes reasonable alternate employment in the context of exemptions from the notice of termination provisions.

However, the terms and conditions of employment with the replaced provider as of the date the information is requested under ESA Part XIX, s. 77(1) are not the only circumstances to be considered in determining whether the offer is reasonable. For example, it may be appropriate to consider wage increases scheduled to take effect after the request date. On the other hand, the terms and conditions of employment of other employees of the new provider or the new provider's ability to pay would clearly not be relevant in determining whether the offer was reasonable.

One question that may arise is whether the exemption regarding the refusal of a reasonable offer of employment applies if the new provider makes the offer some time after it begins to provide services at the premises. It is the Program's view that the exemption will apply if a reasonable offer (having regard to the terms and conditions the employee had with the previous employer) is made within the 13 weeks after the changeover date (i.e. the day on which the new provider began servicing the premises) and is refused.

As with the exemptions in s. 2(1) paragraphs 1, 2 and 3, if the exemption in paragraph 4 applies, the employee is still entitled to termination and severance pay from the replaced provider.

26 Week Period - ss. 2(3), (4)

2(3) The 26-week period referred to in paragraph 3 of subsection (1) shall be calculated without including any period during which the provision of building services at the premises was temporarily discontinued.

2(4) With respect to an employee's services at the premises, the 26-week period referred to in paragraph 3 of subsection (1) shall be calculated without including any period during which the employee was on a leave of absence under Part XIV of the Act.

Sections 2(3) and (4) are discussed in detail above in s. 2(1).

Changeover Date - s. 2(5)

2(5) In this section,

"changeover date" means the day the new provider begins to provide services at the premises.

The changeover date is accordingly not the date the new provider is advised that they are the successful bidder, unless the new provider also begins to provide services at the premises on that same date.

The changeover date is relevant to the exemptions in O Reg 287/01, s. 2 from a new provider's obligations in ESA Part XIX, s. 75 to comply with the termination and severance provisions in ESA Part XV. The exemptions are discussed in further detail in s. 2(1) above.

O Reg 287/01 Section 3 – Information About Employees

Information Request by Possible New Provider - s. 3(1)

3(1) The following is the information about each employee that the owner or manager of premises shall give for the purposes of subsection 77(1) of the Act:

1. The employee's job classification or job description.

2. The wage rate actually paid to the employee.

3. A description of any benefits provided to the employee, including the cost of each benefit and the benefit period to which the cost relates.

4. The number of hours that the employee works in a regular work day and in a regular work week.

5. The date on which the provider hired the employee.

6. Any period of employment attributed to the provider under section 10 of the Act.

7. The number of weeks that the employee worked at the premises during the 26 weeks before the request date.

8. A statement indicating whether either of the following subparagraphs applies to the employee:

i. **The employee's work, before the request date, included providing building services at the premises, but the employee did not perform his or her job duties primarily at those premises during the 13 weeks before the request date.**

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

The above information requirements are reasonably straightforward.

1. Job classification or job description

Job duties as well as indication of the person to whom the employee reports.

2. Wage rates actually paid to the employee

This is the employee's "regular rate" as defined in s. 1(1) of the *Employment Standards Act, 2000*. The words "actually paid to the employee" are intended to prevent the replaced provider from attempting to intimidate potential bidders by inflating the amount of the potential Part XV (Termination and Severance of Employment) liability through such devices as a retroactive pay increase, which the employees did not receive prior to the information request.

3. Benefits

This information is required because Part XV (Termination and Severance of Employment) of the Act requires that the employer continue the employer's share of the benefit plan contributions during the period of notice set out in s. 57 in accordance with s. 60(1)(c). If notice is not given, then the amount of the benefit plan contributions that would have been paid by the employer during the notice period is included in the pay in lieu of notice owing to the employee in accordance with s. 61(1)(b).

4. Hours worked in a "regular work day" and a "regular work week" as defined in s. 1(1) of the Act

See ESA Part I, s. 1 for a discussion of these terms.

As termination pay and severance pay are calculated based on the employee's wages in a regular non-overtime work week, the information on hours worked in a "regular work day" and "regular work week" provides a potential new provider or the new provider with the necessary information to estimate the extent of the potential liability and subsequently, to determine the actual amount of the Part XV (Termination and Severance of Employment) entitlements for employees of the replaced provider. The daily hours information could also assist the new provider in determining whether contemplated offers of work would be considered reasonable (e.g., where the new provider will be establishing a different shift schedule).

Paragraph 4 of s. 3(1) of O Reg 287/01 must be read in conjunction with s. 3(3) of the regulation which states that paragraph 4 does not apply if the employee's hours of work vary from week to week:

3(3) If the employee's hours of work vary from week to week, paragraph 4 of subsection (1) does not apply and the owner or manager shall, instead, provide the number of the employee's non-overtime hours for each week that the employee worked during the 13 weeks before the request date.

See the discussion of s. 3(3) below.

5. Date on which the previous provider hired the employee

This information will also assist a potential and actual new provider to determine the amount of termination and severance pay liability. (Note that this information will have to be read in conjunction with the information required under paragraph 6 regarding previous periods of employment attributed to the replaced provider.)

6. Any period of employment attributed to the replaced provider under s. 10 of the Act

This provides that information must be given concerning the periods of employment attributed to the replaced provider under s. 10 of the Act and the provisions of the former Employment Standards Act

dealing with continuity of employment and building services providers. See ESA Part IV, s. 9(4) for more detailed information.

It is important to note, however, that this requirement is limited to information regarding those periods of employment attributed to the replaced provider by the s. 10 continuity of employment provisions in the Act and predecessors to that section. This provision does not require the building owner or manager to provide information regarding separate periods of employment with a replaced provider which are treated as one period of employment in accordance with s. 8 of O Reg 288/01 for the purposes of notice of termination/termination pay or information or information regarding separate periods of employment with the replaced provider which are added together for the purposes of calculating entitlements to severance pay. As a result, this information may not accurately reflect the employee's "actual" period of employment with the replaced provider for the purposes of either notice of termination or severance obligations. In addition, the information required does not specify whether the employee falls into any of the exemptions from notice or severance set out in O Reg 288/01. Thus, to some extent, the entity bidding on the contract will have to estimate the extent of the potential termination and severance pay liability.

7. The number of weeks the employee worked at the premises with the previous provider during the 26 weeks before the "request date"

The "request date" is the date on which information is requested under s. 77(1) or (2) of the Act. This information is required so that the potential new provider may determine whether the successful new provider would be exempt from s. 75(1) of the Act by virtue of paragraph 3 of s. 2(1) of O Reg 287/01. See O Reg 287/01, s. 2 for further discussion of this exemption.

Paragraph 7 of s. 3(1) of O Reg 287/01 must be read in conjunction with ss. 3(4) and 3(5) of the regulation which state:

3(4) The 26-week period referred to in paragraph 7 of subsection (1) shall be calculated without including any period during which the provision of building services at the premises was temporarily discontinued.

3(5) The 26-week period referred to in paragraph 7 of subsection (1) shall be calculated without including any period during which the employee was on a leave of absence under Part XIV of the Act.

8. Statement regarding employees

The final piece of information required under paragraph 8 of ss. 3(1) of O Reg 287/01 is very similar to that which describes those categories of employees in respect of whom the new provider is not required to comply with Part XV of the Act. However, the information requirement in paragraph 8 of s. 3(1) concerns the work done by the employees in the 13 weeks prior to the request date whereas the exemptions in paragraphs 1 and 2 of s. 2(1) concern the work done by the employees in the 13 weeks preceding the changeover date. Therefore, the information provided under s. 3(1) may assist the bidder to identify employees in respect of whom it would have no termination and severance obligations, but it would not definitively identify those to whom the exemption would apply.

Information Request by New Provider - s. 3(2)

3(2) The following is the information about each employee that the owner or manager of the premises shall give for the purposes of subsection 77 (2) of the Act:

1. The information listed in paragraphs 1 to 8 of subsection (1).

2. The employee's name, residential address and telephone number.

The new provider of services is consequently entitled to request additional and updated information regarding employees of the previous provider who are performing work at the premises. All information, including the information listed in paragraphs 1 to 8 of s. 3(1) which may have been provided at the time the new provider was bidding on the contract, must be accurate as of the date of the subsequent request under s. 77(2).

Paragraph 2 of s. 3(2) of O Reg 287/01 also allows the new provider to request the names, addresses and telephone numbers of the employees engaged in providing services at the premises on the date the request for information is made.

During the period from the time the new provider is awarded the contract to the "changeover date" of the contract, when the new provider begins to provide services at the building premises, the employees' names, residential addresses and telephone numbers can be used to:

- Contact employees to make job offers; or
- Arrange payment of termination pay and/or severance pay if applicable directly to the employees in question if they are terminated at the time of the "changeover date".

This subsection ensures that the new provider has access to the necessary information to determine the actual Part XV (Termination and Severance of Employment) entitlements for employees of the replaced provider. If an owner or manager of the premises fails to provide the required information, an employment standards officer could issue a compliance order under s. 108 and/or a notice of contravention under s. 113. There is no authority however for issuing a compensation order under s. 104 in favour of a new building services provider where the new provider suffers damages as a result of a failure on the part of the owner or manager to provide information under s. 77(2).

Non-Overtime Hours - s. 3(3)

3(3) If the employee's hours of work vary from week to week, paragraph 4 of subsection (1) does not apply and the owner or manager shall, instead, provide the number of the employee's non-overtime hours for each week that the employee worked during the 13 weeks before the request date.

Section 3(3) provides that if the employee's hours of work vary from week to week, the owner or manager shall provide the employee's non-overtime hours for each week worked in the 13 weeks before the "request date".

This requirement provides a potential new provider or the new provider with the necessary information to estimate the extent of the potential liability for Part XV (Termination and Severance of Employment) entitlements of replaced provider employees who do not have a regular work week, by averaging out each employee's earnings over the 13 weeks prior to the request date.

Note that if such employees were not hired by the new provider, the new provider would subsequently be required to average the employee's regular wages earned per week over the weeks worked in the twelve-week period prior to the changeover date in order to calculate the actual Part XV (Termination and Severance of Employment) entitlements pursuant to s. 61(1.1) and ss. 65(4) and (6) of the Act, if applicable

26-Week Period - s. 3(4)

3(4) The 26-week period referred to in paragraph 7 of subsection (1) shall be calculated without including any period during which the provision of building services at the premises was temporarily discontinued.

Section 3(4) establishes what weeks are excluded in the 26-week period referred to in paragraph 7 of s. 3(1). For a further discussion of paragraph 7, see subsection (1) above.

26-Week Period - s. 3(5)

3(5) The 26-week period referred to in paragraph 7 of subsection (1) shall be calculated without including any period during which the employee was on a leave of absence under Part XIV of the Act.

Section 3(5) establishes what weeks are excluded in the 26-week period referred to in paragraph 7 of s. 3(1). For a further discussion of paragraph 7, see subsection (1) above.

Request Date - s. 3(6)

3(6) In this section,

"request date" means the date on which information is requested under subsection 77 (1) or (2) of the Act, as the case may be.

The information required to be given by the building owner or manager is set out in s. 3(1) and s. 3(3) to s. 3(5) of O Reg 287/01.

Ontario Regulation 288/01 — Termination and Severance of Employment

O Reg 288/01 sets out exemptions from the termination and severance provisions. It also deals with several matters relating to notice of termination/termination pay, including “mass termination” notice requirements, the method of giving notice, the calculation of “period of employment” and the provision of temporary work after the termination date set out in a notice has arrived.

O Reg 288/01 Section 1 - Definitions

Construction Employee

1. In this Regulation,

"construction employee" has the same meaning as in Ontario Regulation 285/01 (Exemptions, Special Rules and Establishment of Minimum Wage);

The term "construction employee" in O Reg 288/01 is defined to have the same meaning as it has in O Reg 285/01. Section 1 of that regulation defines "construction employee" as follows:

"construction employee" means,

(a) an employee employed at the site in any of the activities described in the definition of "construction industry", or

(b) an employee who is engaged in off-site work, in whole or in part, but is commonly associated in work or collective bargaining with an employee described in clause (a);

Construction Industry

"Construction industry" is then defined in s. 1 of O Reg 285/01 as follows:

"construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site;

The definitions of "construction industry" and "construction employee" are substantially the same in scope as the "construction industry" definition in s. 1(1) of the *Labour Relations Act, 1995,* SO 1995, c 1, Sch A, and the "employee" definition in the Construction Industry part of that Act.

The definition of "construction employee" in O Reg 285/01 produces a significantly different result than that achieved under the former *Employment Standards Act*, in that it now includes employees who work off-site (either in whole or in part), if the off-site employees are "commonly associated in work or collective bargaining" with a "construction employee" who is employed in a "construction industry" activity at the work site. In considering the application of the construction exemption from notice of termination, the Board concluded that an off-site employee who spent about half of her time performing office manager duties and the rest in "limited" contact with on-site staff (for the purposes of scheduling them, managing their invoices and ensuring communications with the employer's managers) was not "commonly associated in work" with on-site construction employees and so was entitled to termination pay. The Board noted that its decision was consistent with the conclusions of the Board in other cases that considered what it meant to be "commonly associated in work" with on-site construction employees under both the ***Labour Relations Act, 1995*** and the ***Employment Standards Act, 2000***. See 1703171 Ontario Inc. o/a The Construction Group and Bath Solutions v Russo-Janzen, 2016 CanLII 8145 (ON LRB).

Related Definitions

Repair vs. Maintenance

The definition of "construction employee" includes repair work but generally excludes maintenance work.

Maintenance involves the preserving of the functioning of a system, whereas repair involves restoration of a system to a functional state. However, the dividing line between maintenance and repair is not always clear, particularly since some maintenance activity may involve procedures that bear a close resemblance to repair (e.g., replacing worn or broken components). In determining whether an employee should be considered to be engaged in repair or in maintenance, one should look to the activity in which the employee spends the majority of his or her working hours. See Stearns Catalytic Ltd. v Everingham (September 3, 1986), ESC 2166 (Kerr), Beaver Engineering Limited v Lightfoot and Woods (April 26, 1985), ESC 1840 (Franks) and Warren v Rexway Sheet Metal (January 10, 1995), ESC 95-06 (Palumbo).

Road Maintenance

Road Maintenance Employees Generally Fall Within "Construction Employee" Exemptions

Although maintenance work is generally not considered to constitute repair work or some other subcategory of construction, road maintenance employees are nevertheless considered to fall within the definition of "construction employee" in O Reg 285/01 because of the reference in the definition of "construction industry" to the "constructing [of] ... roads" . There is no conceptual distinction between the "constructing of roads" and "road building", and the term "road building" is defined in s. 1 of O Reg 285/01 to include the maintenance of roads. Thus, as a general rule, an employee engaged in the maintenance of roads is exempt from any employment standard from which a "construction employee" is exempt, such as the standard limiting hours of work (s. 17 of the *Employment Standards Act, 2000*).

Exception: Road Maintenance Employees Entitled to Termination Notice/Pay

There is an exception to this general rule, however, in the case of notice of termination.

While "construction employees" are not entitled to notice of termination/termination pay by virtue of paragraph 9 of s. 2(1) of O Reg 288/01 (which exempts "construction employee[s]"), the Program takes the position that employees engaged in the maintenance of roads are entitled to termination notice/pay.

The basis for this position lies in the principle of statutory interpretation that a specific provision overrides a more general provision. The severance pay exemptions in s. 9(1) of O Reg 288/01 refer not only to a "construction employee" (in paragraph 7) but also to an "employee engaged in the on-site maintenance of . . . roads" (in paragraph 8). It follows from this that for purposes of O Reg 288/01, the maintenance of roads is to be regarded as an activity distinct from the construction of roads (as otherwise there would be no need for paragraph 8). And if that is the case, then since s. 2(1) of O Reg 288/01 exempts a "construction employee" from entitlements to notice but says nothing about an employee engaged in maintenance, an employee engaged in road maintenance is entitled to notice.

Sewer and Watermain

Sewer and Watermain: Laying, Altering or Repairing

The definition of "construction industry" in O Reg 285/01 explicitly refers to sewers and watermains; therefore, employees engaged in laying, altering or repairing sewers and are exempt from those standards to which the "construction employee" exemption applies:

- Hours of Work (daily and weekly limits on hours of work, daily rest period rules, time off between shifts rule, and weekly/biweekly rest period rules) - see O Reg 285/01, s. 4(1)(d);
- Public Holidays, if they receive 7.7% or more of their hourly wages for vacation and holiday pay - see O Reg 285/01, s. 9(2);
- Notice of termination/termination pay - see O Reg 288/01, s. 2(1), para. 9;
- Severance pay - see O Reg 288/01, s. 9(1), para. 7;

They are also subject to the special overtime pay threshold of 50 hours - see O Reg 285/01, s. 9(2).

Sewer and Watermain: Maintenance

Employees who are engaged in sewer and watermain maintenance do not fall within the "construction employee" definition, as maintenance does not generally fall within the scope of activities referred to in the "construction industry" definition (maintenance of roads being the sole exception, because of the "road building" definition).

Accordingly, employees who maintain sewers and watermains are not subject to the "construction employee" exemptions.

However:

- They are exempt from the severance pay provisions pursuant to paragraph 8 of s. 9(1) of O Reg 288/01, because that paragraph explicitly applies to an "employee engaged in the on-site maintenance of . . . sewers, pipelines, mains". See O Reg 288/01, s. 9(1) para. 8 for a discussion of this exemption.
- They are subject to the special overtime threshold of 50 hours pursuant to s. 16 of O Reg 285/01, because that provision explicitly includes the activity of "maintaining" sewers and watermains.

O Reg 288/01 Section 2 – Employees Not Entitled to Notice of Termination or Termination Pay

Employees Not Entitled to Notice of Termination or Termination Pay – s. 2(1)

2(1) The following employees are prescribed for the purposes of section 55 of the Act as employees who are not entitled to notice of termination or termination pay under Part XV of the Act:

1. Subject to subsection (2), an employee who is hired on the basis that his or her employment is to terminate on the expiry of a definite term or the completion of a specific task.

2. An employee on a temporary lay-off.

3. An employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer.

4. An employee whose contract of employment has become impossible to perform or has been frustrated by a fortuitous or unforeseeable event or circumstance.

5. An employee whose employment is terminated after refusing an offer of reasonable alternative employment with the employer.

6. An employee whose employment is terminated after refusing alternative employment made available through a seniority system.

7. An employee who is on a temporary lay-off and does not return to work within a reasonable time after having been requested by his or her employer to do so.

8. An employee whose employment is terminated during or as a result of a strike or lock-out at the place of employment.

9. A construction employee.

10. REVOKED

11. An employee whose employment is terminated when he or she reaches the age of retirement in accordance with the employer's established practice, but only if the termination would not contravene the *Human Rights Code*.

12. An employee,

i. **whose employer is engaged in the building, alteration or repair of a ship or vessel with a gross tonnage of over ten tons designed for or used in commercial navigation,**

ii. **to whom a legitimate supplementary unemployment benefit plan agreed on by the employee or his or her agent applies, and**

iii. **who agrees or whose agent agrees to the application of this exemption.**

This section sets out the exemptions from the termination of employment provisions in ESA Part XV. Subject to s. 2(2) and s. 2(3), the employees listed in this section are not entitled to notice of termination or termination pay under Part XV. A discussion of each exemption appears below.

Definite term or specific task employees

Section 2(1) paragraph 1 relieves employers from the obligation to provide notice of termination or termination pay to employees who were employed for a definite term or specific task. This exemption is in recognition of the fact that employees who are hired for a definite term or to complete a specific task are, at the time of hiring, aware of when their employment will end and therefore they have already received the equivalent of notice.

Note, however, that if the assignment of an assignment employee performing work for a client of a temporary help agency was estimated to be three months or more and the assignment is terminated prior to the end of that estimated term, the temporary help agency may have an obligation to provide one week's **notice of the termination of the assignment or pay in lieu** of notice pursuant to s. 74.10.1. This is **not** notice of termination of the employment relationship with the temporary help agency but rather notice of termination of an assignment to perform work.

For the exemption in paragraph 1 of s. 2(1) to apply, the employee must be hired on the basis that their employment is to terminate either,

1. On the expiry of a definite term; or
2. On the completion of a specific task.

For the definite term part of this exemption to apply, the employee must have an agreement, either orally or in writing, which specifies the exact date the employee's contract of employment is to end.

For the specific task part of this exemption to apply, the employer and the employee must have an agreement, either orally or in writing, that describes the task with enough specificity that the employee is able to determine when the task will be completed. For example, an employee who is hired to make 100 widgets will know when the task will be completed.

An employer cannot put an employee who is not a term or task employee on a term or task arrangement as a means of terminating the employee without providing termination notice or pay, since to do so would be to undermine the purpose of Part XV and this exemption. This is so even if the employee agrees to such an arrangement, since ESA Part III, s. 5 prohibits an employee from waiving their rights under the ESA 2000. For example, if a ten-year employee agrees to go on a four-week definite term contract and

the employer terminates the employment of the employee at the end of the four-week period, the exemption will not apply. The employee will be entitled to eight weeks' notice or pay in lieu thereof. Note though that if the definite term arrangement was reduced to writing and a copy given to the employee, the employer may receive credit for the four weeks' actual written notice the employee received.

Where definite term or specific task exemption does not apply

The exemption in paragraph 1 must be read in conjunction with s. 2(2), which states:

2(2) Paragraph 1 of subsection (1) does not apply if,

(a) the employment terminates before the expiry of the term or the completion of the task;

(b) the term expires or the task is not yet completed more than 12 months after the employment commences; or

(c) the employment continues for three months or more after the expiry of the term or the completion of the task.

This section provides that the term or task exemption in paragraph 1 of s. 2(1) will not apply to term or task employees if any of the following circumstances are present:

Employment terminates before the expiry of the term or the completion of the task

Pursuant to s. 2(2)(a), the term or task exemption will not apply if the employment terminates before the expiry of the term or completion of the task and the employee will be entitled to one week of notice of termination or pay in lieu. This clause will apply where, for example, an employee is employed for a six-month term but the employer decides to terminate the employee's employment after the fourth month.

The exemption can only apply where the employee is employed for the duration of the term or until the completion of the task. This is consistent with the rationale for the term or task exemption. If the employer terminates the employee's employment before the end of the agreed upon term or the completion of the task, the basis for the exemption - the employee knowing at the outset when their employment will end - is lost.

Term expires or the task is not yet completed more than 12 months after the employment commences

Section 2(2)(b) means that the term or task exemption in paragraph 1 of s. 2(1) will not apply if:

- The term of the contract is for a period that is longer than 12 months; or
- The task is not yet completed 12 months after the employment began.

Where the employee is employed for more than one definite term and the terms are "back to back", i.e., continuous, it is Program policy that the terms should be added together when determining whether the 12-month limit in 2(2)(b) has been exceeded.

Where, however, the terms are not back to back, the terms will not be added together when determining whether the 12-month limit in clause (b) has been exceeded. This is so even if the terms are separated by less than 13 weeks. In this regard, see *Metropolitan Toronto Board of Commissioners of Police v Ministry of Labour* (October 17, 1994), ESC 94-178 (Muir). It should be noted that although the court did not

provide much reasoning in its decision on this particular point, it upheld the referee's decision as correct and therefore it constitutes a precedent that the Program follows.

It should be emphasized that despite Program policy not to add terms that are not "back to back" together for the purpose of determining whether the 12-month limit has been exceeded, the terms will be added together for the purpose of determining the period of employment in ESA Part XV, s. 57 if they are separated by less than 13 weeks – see O Reg 288/01, s. 8(2). This would be relevant, for example, if the employee's employment was terminated before the end of the subsequent term, in which case the term or task exemption would not apply and the employee would be entitled to termination notice or pay based on his or her period of employment.

Employment continues for three months or more after expiry of the term or completion of the task

Section 2(2)(c) stipulates that the term or task exemption in paragraph 1 of s. 2(1) will not apply if the employee continues to be employed for three months or more after the definite term or the specified task for which the employee was hired has either expired or is completed.

For example, an employee is employed for a six-month term and is employed on an open-ended arrangement for an additional four months before having their employment terminated. The term or task exemption will not apply to this employee, and they will be entitled to one week of termination notice or pay.

The question arises as to whether s. 2(2)(c) applies to a situation where, instead of being employed on an open-ended arrangement after the end of the original definite term, the employee is put on a second definite term contract that lasts more than three months past the end of the first contract. It is Program policy that s. 2(2)(c) applies in this situation. This policy prevents an employer from employing an employee for a series of very short, e.g., one-month contracts for a period of less than 12 months and then terminating them without notice or pay in lieu. In that situation, the employee loses the certainty of knowing when their employment will end and should therefore be entitled to the benefit of the notice of termination or pay in lieu provisions.

Employee on temporary lay-off

Pursuant to s. 2(1) paragraph 2, an employee who is on a temporary lay-off is not entitled to notice of termination or termination pay in lieu. Temporary lay-off is defined in ESA Part XV, s. 56(2).

Employee who is guilty of wilful misconduct, disobedience or wilful neglect of duty

Pursuant to s. 2(1) paragraph 3, an employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and that has not been condoned by the employer is not entitled to notice of termination or pay in lieu.

The rationale for this exemption is the view that an employer who terminates an employee because the employee was guilty of wilful misconduct, disobedience or neglect of duty should not be obliged to provide that employee with either notice of termination or pay in lieu of notice. See Sacco v MMCC Solutions Canada Company (Teleperformance Canada), 2015 CanLII 82037 (ON LRB) for a discussion of the standard that must be met in order for this exemption to apply.

This exemption will apply only if all of the following criteria are met:

5. The employee's conduct is wilful
6. The employee is guilty of:
    - misconduct, or
    - disobedience, or
    - neglect of duty
7. The employee's conduct is not trivial
8. The employee's conduct has not been condoned by the employer

Each criterion is discussed in more detail below.

For information on the application of the wilful disobedience exemption where an employee is not vaccinated against, or tested for, COVID-19 in accordance with the employer's policy, see "ESA Termination and Severance Liabilities Where an Employee is Not Vaccinated Against or Tested For COVID-19".

As with any exemption from a minimum standard, the onus is on the employer to demonstrate on a balance of probabilities that the exemption applies. As the following discussion demonstrates, this exemption is narrower than the just cause concept applied in the common law and in collective agreement disputes. In other words, an arbitrator or a judge may find that there was just cause to dismiss an employee, but this does not necessarily mean that the exemption in paragraph 3 of s. 2(1) applies.

Employee's conduct is wilful

The key element to this exemption is that the actions or omissions must be wilful on the part of the employee. Although the word "wilful" does not appear before the word "disobedience", it is clear that disobedience involves an element of wilfulness. See, for example, *Superior Propane Inc. v Cunningham* (August 13, 1988), ESC 2364 (Haefling). Thus the employer must demonstrate that there was wilfulness on the part of the employee, whether it is alleging misconduct, disobedience or neglect of duty.

Ordinarily, wilful means that the employee intended the result that came to pass. Thus, poor work or conduct that is accidental or involuntary will generally not be considered to be wilful. However, an employee who is reckless in their conduct may be guilty of wilful misconduct if that employee knew or ought to have known that their conduct would cause the result that came to pass.

Employee is guilty of wilful misconduct

The following are some examples of conduct that have been found to be wilful misconduct. The list is illustrative only and is not meant to be exhaustive.

Fraud or Theft

- Theft of cash or property of the employer – see *Burger King Canada Inc. v Ministry of Labour* (December 15, 1992), ES 223/92 (Alter);
- Where the employee falsified time sheets – see *Brookdale Treeland Nurseries Limited v Klinowski* (December 1, 1988), ESC 2422 (Joyce).

Alcohol or Drug Use

- An employee being under the influence of alcohol during working hours – see *Harisoma Investments Ltd. operating as the Sherway Inn v Berlot* (September 24, 1981), ESC 1073 (Egan).

If the employee's drinking is due to alcoholism, then the employee's behaviour is due to a recognized handicap and may not be wilful. However, if the employee has been prescribed medicine (e.g., Antabuse) to prevent alcoholism, but does not take it, the employee may be guilty of wilful misconduct since the failure to take the medicine may be in itself wilful. In this regard, see *Facelle Company Limited v Hoar and Odo* (March 31, 1989) ESC 2492 (Gorsky).

Failure to Follow Company Policy

- Where the employee fails to follow a company policy - see *Talbot Inn Limited v Graham* (April 15, 1982), ESC 1198 (Black), *Jonathan Place Ltd., c.o.b. Harry's Restauran v Estabrooks* and Lettner (April 4, 1984), ESC 1608 (Betcherman), *Grieve c.o.b.a. Glen Erin Animal Hospital v Honig* (March 30, 1987), ESC 2228 (Baum) and *607588 Ontario Inc. o/a Provincial Cartage Systems v Ministry of Labour* (October 5, 1993), ES 93-211 (Levinson).

Where the employer seeks to rely on a failure to follow company policy as grounds for wilful misconduct, the Program's policy position is that the following criteria (most of which were also referenced in the above-noted cases) should be satisfied:

- The rule that has been violated must have been clear and unequivocal;
- The rule must have a substantial bearing on the employment relationship (except perhaps in cases of repeated, deliberate infractions of less substantive rules, assuming there is no condonation by the employer - see the discussion of condonation below);
- The rule must have been communicated to the employee;
- The employee must know (or ought to know) in advance that the conduct could result in their termination; and
- The rule must not require the employee to do anything illegal or unsafe.

Recklessness

- Where the employee's behaviour was so reckless as to amount to wilful misconduct. For example, wilful misconduct was found where the employee, by failing to put pads on a hoist, caused a car to fall from the hoist - see *Northwest Motors Limited v Rodrigues* (April 4, 1984), ESC 1606 (Ison). In this case, the employee knew or ought to have known that his actions would cause the accident.

Conflict of Interest, Breach of Trust, Off-Duty Misconduct

- Where the employee is guilty of behaviour that seriously affects a position of trust that they hold with the employer and/or the employer's clientele, or where the employee puts themselves into a serious conflict of interest with the employer, such as, for example, actively engaging in a competitor's business or disclosing confidential information to a competitor - see *Polaris Computer Systems Ltd. v Carwana* (January 3, 1986), ESC 2013 (Betcherman).

Note, however, that there won't be wilful misconduct if an employee who is not in a position of trust has a passing economic relationship with a competitor in an area entirely outside of the employee and employer's normal line of work, in which no trade secrets or confidential information is disclosed. See for example *Van Noort v 566355 Ontario Ltd o/a K.J. Marketing Services* (February 26, 1998), 2677-96-ES

(Goodfellow) where the employer and its competitor were in the electrical equipment sales business and the employee built a washroom for the competitor at a time when he was not required by his employer to be at work. Note also that merely intending to join a competitor (for example, the employee has accepted a job offer with a competitor, but has not yet begun working for the competitor, and provided notice of resignation to the employer) does not amount to wilful misconduct. If, on the other hand, the employee begins to disclose confidential information to the competitor, that will be wilful misconduct. Likewise, it is the Program's position that so long as confidential information is not being disclosed to the employee's spouse, there is no conflict of interest if the employee has a spouse who works for a competitor.

- Where the employee engaged in wilful misconduct or neglect of duties by enticing fellow employees into another business venture to be conducted on the employer's time and premises - see *Canadian Aesthetic Academy Inc. v Golan,* 2008 CanLII 34124 (ON LRB).
- Where an employee prevents themselves from performing their job duties. This can include off-duty conduct where such conduct prevents the employee from carrying on their duties. For example, where an employee is convicted and incarcerated for dealing in drugs in off-duty hours, this may be wilful misconduct since the employee, by embarking on such a course of conduct, should have known that it could lead to incarceration that would prevent them from performing their job duties - see *Stelco Inc. o/a Stelpipe v Addario* (November 4, 1991), ESC 2935 (Cumming). It is also possible that this may constitute frustration of contract. See s. 2(1) para. 4 below.

Employee is guilty of wilful disobedience

As mentioned above, although the word wilful does not appear before the term disobedience in the regulation, disobedience necessarily involves an element of wilfulness.

In order for there to be disobedience within the meaning of the exemption, the Program's position is that the following criteria should be satisfied:

- The order or rule must have been clear and unequivocal;
- The order or rule must not be minor (except perhaps in cases of repeated, uncondoned infractions);
- The order or rule must have been communicated to the employee;
- The employee must know (or ought to know) in advance that the disobedience could lead to their termination; and
- The order or rule must not require the employee to do anything illegal or unsafe.

Note that these are the same factors that apply when determining whether there is wilful misconduct due to a breach of company policy.

For information on the application of the wilful disobedience exemption where an employee is not vaccinated against, or tested for, COVID-19 in accordance with the employer's policy, see "ESA Termination and Severance Liabilities Where an Employee is Not Vaccinated Against or Tested For COVID-19".

Employee is guilty of wilful neglect of duty

Similar considerations apply with respect to neglect of duty as those that apply with respect to misconduct (see the discussion of wilful misconduct, above), except that the former concept focuses on the failure to do something, rather than the doing of something. Typically, cases in which wilful neglect of duty is found to be present are ones where the employee refused to report for work, often after being refused permission to take a holiday or after being required to work overtime. See for example *Perly's Maps Limited v Lincoln* (July 17, 1980), ESC 816 (Bigelow). Other instances in which wilful neglect of duty has been found to have been present include non-innocent absenteeism and tardiness - see for example *Hunter v Ertel Manufacturing Corporation of Canada Ltd.* (January 31, 1995), ESC 95-39 (Faubert). However, as mentioned above, the exemption is narrower than the just cause concept applied in the common law and in collective agreement disputes. While an arbitrator or judge may find that there was just cause to dismiss an employee, that does not necessarily mean that the exemption in paragraph 3 of s. 2(1) applies.

For example, see *K & R Advertising Limited v Wojick* (January 12, 1981) ESC 934 (Bigelow) where the referee found that the employee "was lazy; she was slovenly; she was inconsistent; she was unreliable; she was irresponsible; she was just about everything that a competent secretary should not be. She was unquestionably discharged for just cause. But I cannot go so far as to say that she was guilty of wilful neglect of duty."

Employee's conduct is not trivial

In order for the exemption to apply, the wilful misconduct, neglect of duty or disobedience must not be trivial, i.e., unimportant or insignificant. Trivial acts of wilful misconduct, neglect of duty or disobedience will not serve to disentitle an employee from notice of termination or termination pay.

Employee's conduct has not been condoned by the employer

In order for the exemption to apply, the employee's behaviour must not have been condoned by the employer. In this discussion, the reference to behaviour means wilful misconduct, wilful neglect of duty or wilful disobedience that is not trivial.

Condonation exists in situations where the employer knows about the employee's behaviour but does not act on it, thereby giving the employee the impression that the behaviour is not serious enough to warrant termination. If such condoned behaviour is repeated by the employee, the employer is generally prevented from relying on that recurrence in order to terminate the employee without notice or pay in lieu. The employer can avoid the inference of condonation by warning the employee that such behaviour is unacceptable and that a repeat of it will result in termination. If the behaviour concerning which the employee was previously warned reoccurs, this reoccurrence may be relied on as a "culminating incident" for which the employee may be terminated without notice or pay in lieu. The uncondoned culminating incident also allows the employer to bring into consideration other behaviour of the employee that was previously condoned by the employer. See *Cool and Cool c.o.b.a. Timmons Auto Wreckers & Salvage v Duncan* (July 29, 1981), ESC 1048 (Sheppard).

Immediate action (e.g., a warning or other disciplinary action) by the employer in response to the employee's conduct is not always necessary to avoid condonation. For example, condonation will not be found where the supervisor responsible for such action is not available until some time has elapsed after the incident, where the employer waits to act until after the work day is over in order to avoid a disruption of operations, or where the employer takes a reasonable amount of time to conduct an investigation of an employee who is suspected of misconduct. In this regard, see *Montgary Food Enterprises Inc. o/a Kipling's Restaurant* (March 5, 1992), ESC 2996 (Novick) and *CCL Custom Manufacturing v Barrett*, 2000

CanLII 13149 (ON LRB). However, where there was no reason for the failure to take immediate action, there will generally be condonation. See for example *Lighthouse Inn Operations v Mosey* (November 24, 1997), 1369-15-ES (ON LRB).

"After-acquired" Information

After-acquired information can be used in determining whether the exemption in paragraph 3 of s. 2(1) applies. The fact that the employer discovered the employee's behaviour after the termination is irrelevant, since grounds for terminating the employee without notice or pay in lieu would have existed at the time of the termination. In this regard, see *Lake Ontario Portland Cement Co. Ltd. v Groner*, [1961] SCR 553, 1961 CanLII 1 (SCC).

Employment contract impossible to perform or frustrated

Section 2(1) paragraph 4 provides that, except where the impossibility or frustration is the result of the employee's illness or injury, an employee whose contract has become impossible to perform or is frustrated by a fortuitous or unforeseeable event or circumstance is not entitled to notice of termination or pay in lieu.

This section must be read in conjunction with s. 2(3), which reads:

2(3) Paragraph 4 of subsection (1) does not apply if the impossibility or frustration is the result of an illness or injury suffered by the employee.

The effect of the exemption is to relieve the employer from the obligation to give notice of termination or termination pay where there is a supervening unforeseeable event that strikes at the very root of the contract that is not the fault of the employer and that is not provided for in the contract itself.

The rationale for this exemption is the recognition that employers cannot give advance notice of termination where the termination is caused by events that the employer cannot reasonably be expected to anticipate or foresee. It is also consistent with the common law view that frustration of contract brings the contract to an end automatically by operation of law. Where frustration of the employment contract occurs, the common law does not regard the employer as having terminated the contract.

It should be noted, however, that the exemption will only apply in rare circumstances and, generally speaking, employers' arguments that the contract of employment was frustrated or had become impossible to perform have been met with some considerable skepticism by tribunals.

As with any exemption from a minimum standard, the onus is on the employer to establish on a balance of probabilities that the exemption applies.

Frustration and Impossibility in Disability Situations

Prior to the amendments made by O Reg 549/05, which, among other things, brought in s. 2(3), the exemption in paragraph 4 of s. 2 (and that in s. 9 regarding severance entitlements) of O Reg 288/01 purportedly provided that, subject to the *Human Rights Code,* RSO 1990, c H.19 (the "Code"), an employer could terminate (or sever) the employment of an employee whose employment contract was "frustrated" due to illness or injury without being required to provide notice of termination or severance pay. In other words, the exemptions purportedly applied in situations in which the contract of employment had become impossible to perform or had been frustrated as a result of injury or illness on the part of the

employee, provided that the employer had complied with the duty of reasonable accommodation under the Code.

However, on May 4, 2005, in *Ontario Nurses' Association v Mount Sinai Hospital,* 2005 CanLII 14437 (ON CA) the Ontario Court of Appeal struck down the severance pay exemption under the former *Employment Standards Act*. The Court found that the exemption was unconstitutional as it violated s. 15 of the *Charter of Rights*, in that it was discriminatory on the ground of disability, and could not be saved as a reasonable limit under s. 1 of the *Charter*. Although the wording of the notice and severance pay frustration exemptions under the ESA 2000 is different from that of the severance pay exemption in the old Act, in substance the exemptions are to the same effect. While the severance pay exemption in the former *Employment Standards Act* was not expressly made subject to the Code, it was nonetheless considered to be so subject by virtue of the provision in the Code that gives it primacy over other legislation in the event of a conflict.

Accordingly, to reflect the ruling in the *Ontario Nurses' Association v Mount Sinai* decision, O Reg 288/01 was amended by O Reg 549/05 to indicate that the exemptions for impossibility of performance or frustration do not apply where the impossibility or frustration is the result of employee injury or illness. See subsection (3) below and O Reg 288/01, s. 9(1) para. 2.

It should be noted that it is now irrelevant so far as the ESA 2000 is concerned whether a contract of employment has been frustrated as a result of disability; the crucial point is whether the employer has terminated or severed the employee's employment. Because the frustration exemption is no longer available to the employer in cases where the contract was allegedly frustrated by the employee's disability, there is no need for an officer to attempt to determine whether frustration occurred; the only thing that the officer needs to determine is whether the employer terminated or severed the employee's employment, unless, of course, some other exemption might apply.

Terminating and/or severing the employment relationship does not necessarily mean that the employer must purport to end the employment relationship expressly. The employer may terminate and/or sever the relationship with either a statement or an action that indicates the employer regards the employment relationship as having ended. For example, in *Barrette v Rainbow Concrete Industries Ltd.*, 2006 CanLII 11057 the Ontario Labour Relations Board the employer was found to have terminated the employment relationship when it sent the employee a pension form with several references to termination in it and which was intended to remove the applicant as a pension plan member when the only way to do so was by termination of employment or resignation. In this case the employer was fully aware that the employee had no intention of resigning.

In *Fleetwood Canada Ltd. v Burchall*, 2006 CanLII 34100 (ON LRB) the Board found that the employer terminated the employment of an employee with a letter that was not worded as a dismissal but which referred to the fact that its obligation to re-employ him under the *Workplace Safety and Insurance Act, 1997,* SO 1997, c 16, had expired, and that he had therefore ceased to be an employee. However, there must be a termination or severance by the employer in order for there to be an entitlement**; the mere fact that it appears to be extremely unlikely or even certain that the employee will not be returning to work is not sufficient if the employer takes no step, whether expressly or by implication, to indicate that it is ending the employment relationship**. Note that some court and arbitrator decisions on this point are contrary to the Program's position and should not be followed (for example *St. Joseph's General Hospital v Ontario Nurses' Association*, 2006 CanLII 35191 (ON LA), Hoekstra v Rehability Occupational Therapy Inc., 2019 ONSC 562 (CanLII), and Estate of Cristian Drimba v Dick Engineering Inc., 2015 ONSC 2843 (CanLII).)

The OLRB has consistently interpreted the termination and severance pay provisions of the ESA as requiring an actual terminating event on the initiative of the employer prior to a finding that an employment contract has been terminated due to frustration. The OLRB interpretation is consistent with a plain reading of the relevant provisions of the ESA. (See for example: *Ardies v 1650691 Ontario Inc. (Chip N' Charlie's Bar & Eatery),* 2015 CanLII 49514 (ON LRB); *Barrette v. Rainbow Concrete Industries Ltd.,* 2006 CanLII 11057 (ON LRB); *Fleetwood Canada v. Burchall* OLRB [2006] 2006 CanLII 34100 (ON LRB); *Nour Trading House Inc. v. Lam*, 2006 CanLII 41447 (ON LRB); *MacDonald v. Zellers Inc.,* 2005 CanLII 4315 (ON LRB); *Velovski v. Woods Industries (Canada) Inc.,* 2005 CanLII 8257; *Chandoo v. Sobeys Ontario Division,* 2002 CanLII 35376 (ON LRB); and *Glick v. Burke,* 2000 CanLII 12787 (ON LRB).

Because O Reg 549/05 was filed on October 28, 2005, and was published in the November 12th, 2005 issue of the Ontario Gazette, an issue arose as to whether the frustration exemptions as they stood prior to the amendments should still be applied in cases where the employee's employment was terminated or severed prior to November 12, 2005 (or October 28, 2005, if the employer knew about the amendments).

The position of the program is that the amendments to the frustration exemptions did not change the law. The amendments simply reflected the Court of Appeal's decision in *Ontario Nurses' Association v Mount Sinai* - in other words, the amendments brought the text of the regulation into line with what was already the law, as stated by the Court. For this reason, where an employment contract was frustrated as a result of injury or illness, the Program proceeds on the basis that the frustration exemptions cannot be applied - even if the termination or severance occurred before the amendments to the exemptions were filed or published.

Frustration and Impossibility in Non-Disability Situations

In determining the applicability of the frustration and impossibility exemption in non-disability situations, it is important to bear in mind three general principles.

1. The event that allegedly caused the employment contract to be frustrated must be something that strikes at the very basis of the contract; it is not enough that the event has made the contract a more difficult or expensive proposition for the employer.
2. The event must not have been caused through fault of the employer.
3. The employment contract must not have addressed the possibility that the event might occur and have provided for its consequences.

As well, where the allegedly frustrating event was something personal to the employee, it is Program policy that factors such as the employee's length of employment, whether or not they were a "key" employee, the length of the employee's absence from work or inability to work, and whether the employment would have been expected to continue indefinitely had it not been for the occurrence of the allegedly frustrating event should all be taken into account. If the employee had been employed for a lengthy period and their employment would have expected to continue had the allegedly frustrating event not occurred, that tends to argue against a finding of frustration. On the other hand, if the employee is a key person in the employer's operation and the absence is extremely lengthy, these factors tend to argue in favour of a finding of frustration. Also relevant is what has the employer's past practice been in response to similar situations; if the employer did not treat the contract as having been frustrated in similar cases in the past, that makes a finding of frustration less likely.

The question may arise as to whether an employment contract would be frustrated or rendered impossible to perform where the employee has been on a series of Part XIV statutory leaves for a period

of some years. Given that the employee is exercising a statutory right, it is Program policy that the contract would not be frustrated or rendered impossible to perform in these circumstances.

Set out below are some situations where there could be a possibility that the contract of employment should be regarded as having been frustrated or become impossible to perform. These are provided as examples; the list is not intended to be exhaustive.

Note that where the employee entitlement in issue is severance pay, rather than notice of termination or termination pay, the employer cannot rely on the exemption if the frustration or impossibility is the result of a permanent discontinuance of all or part of the employer's business because of a fortuitous or unforeseen event. See O Reg 288/01, s. 9(2)(a)(i)**.**

Supervening Change in the Law

Where an employer is forced to restrict its activities or discontinue its business because of a change in the law, the contract of employment may be frustrated or impossible to perform. For frustration to be found on the basis of a change in the law, generally the new law:

1. must have been unforeseen,
2. must **not** be temporary in nature when viewed in the context of the employment contract as a whole, and
3. must make the performance of the employment contract impossible or something radically different from what the employer and employee agreed to in the contract. (See for example, *Cowie v. Great Blue Heron Charity Casino*, 2011 ONSC 6357, *Klewchuk v. Switzer*, 2003 ABCA 187 (CanLII), par. 24.)

A question arose during the COVID-19 pandemic as to whether the frustration exemption applied on the basis of a change in the law where a business was forced to temporarily close or temporarily restrict its activities due to an order under *the Emergency Management and Civil Protection Act* (EMCPA) or *Reopening Ontario* (*A Flexible Response to COVID-19) Act*, 2020 (ROA). At the time of writing, the requirements of the EMCPA and ROA were all temporary. As such, at the time of writing, the second criterion to establish frustration of contract on the basis of a change in the law is not met due to the EMCPA or ROA orders and it is therefore Program policy that frustration of contact on the basis of the EMCPA or ROA orders is not established.* (Where it is determined that one of the criteria set out above is not met, it is not necessary to determine whether the other two criteria would have been met in the circumstances).

*Although the specifics of individual employment contracts on matters such as whether the contract was for a definite or indefinite term and the timing of the change in the law vis-à-vis the start of the employment contract are part of the context when determining whether the change in the law is temporary, the Program considers those factors not to be pertinent in the scenario of EMCPA/ROA orders and the ESA context where an employee must be continuously employed for three months in order to have termination entitlements, and where an exemption from termination entitlements applies to employees who are employed for a definite term or to complete a specific task.

Note that where the employee entitlement in issue is severance pay, rather than notice of termination or termination pay, the employer cannot rely on frustration because of a supervening change in the law that results in the permanent discontinuance of its business; see O Reg 288/01, s. 9(2)(a)(i)**.**

Destruction of the Employer's Business/"Act of God"

Where the employer's business premises are destroyed by "an act of God", or by other means such as terrorism, war or arson so that the employer is unable to carry on business, there will generally be frustration since such events are generally considered to be unforeseeable (even if the employer has insured itself against these losses). Other factors mentioned earlier might, however, prevent frustration from being found in these circumstances, for example, if the employer commits arson on its own premises, the allegedly frustrating event would have occurred as a result of fault of the employer, and the employer could not therefore rely on the exemption.

A question arose during the COVID-19 pandemic as to whether the pandemic constituted an "act of God" such that it would trigger the frustration exemption. Although some might argue that the pandemic itself may be an unforeseeable event, it is Program policy that the focus of the inquiry for frustration purposes is on the consequences flowing from the pandemic that were responsible for the terminations (e.g. economic downturn) and whether those consequences amount to frustration of contract, rather than the focus being on the pandemic itself. To that end, the discussion under the "Business Failure" heading below equally applies here: in light of the situation at the time of writing, it is Program policy that frustration is not established on the basis of business failure or economic conditions created by the pandemic.

Note that where the employee entitlement in issue is severance pay, rather than notice of termination or termination pay, the employer cannot rely on frustration because its business is permanently discontinued because of the destruction of its business; see O Reg 288/01, s. 9(2)(a)(i).

Loss of an Essential Licence

Where the employer loses a business licence and is thereby unable to continue operating, this may lead to frustration unless the employer knew or ought to have known of the risk that the licence would be lost or not renewed. For example, in *Lakeshore Pubs Ltd. o/a Kelly's Keg'n Jester v Reardin* (March 16, 1990), ESC 2650 (Baum) an employer had a concession agreement at Ontario Place that was not renewed. The employer subsequently terminated the employment of the employees at that location, as it was no longer able to carry on a business at the site. In this instance, it was determined that the employer could not rely on frustration of contract because it was found that the employer was fully aware of the possibility that the concession agreement might not be renewed. The employer was found to have known of the risk that staff would not be needed if its application for concession renewal failed and therefore could not resort to the argument of frustration of contract to avoid its obligations under the former *Employment Standards Act*. In addition, the employer may be prevented from relying on frustration in this circumstance if the loss of the licence was due to its own fault.

Frustration may also occur where the employee loses a licence (such as a driving licence or a professional licence) that is necessary for them to carry out the duties of the job. In that situation, the employer may rely on frustration, so long as the loss of the licence was not the employer's fault.

Note that where the employee entitlement in issue is severance pay, rather than notice of termination or termination pay, the employer cannot rely on the frustration exemption if the loss of an essential licence causes it to cease to carry on business; although the loss would be considered to frustrate the employment contract, it also represents the permanent discontinuance of all or part of its business and so the exemption is inapplicable by virtue of s. 9(2)(a)(i) of O Reg 288/01.

Intention to Join a Competitor

There are a number of decisions under the former *Employment Standards Act* that determined that an employee who gives notice of resignation and indicates that they intend to work for a competitor of the employer (or set up a business in competition with the employer) gives rise to a frustration of the employment contract – see *Avco Financial Services v Morabita* (June 12, 1973), ESC 187 (Learie) and *Yurman v J&M Tire Sales Inc.* (December 14, 1995), ESC 95-236 (Wacyk). However, the Program's policy is that these decisions should not be followed. These situations do not result in the contract being frustrated. Rather, the consideration should be whether the employee has engaged in willful misconduct. See *Nidd v Cartier Supply & Rentals Ltd.*, 2000 CanLII 12058 (ON LRB) and *MTC Leasing Inc*. and the discussion at s. 2(1) para. 3 above.

Incarceration

Referees have found that in some cases where an employee was imprisoned for a criminal offence, the contract of employment was frustrated or impossible to perform because the imprisonment rendered the employee unable to perform their job duties: see for example *Caland Ore Company Limited v Connors* (January 8, 1980), ESC 684 (Aggarwal), a decision under the former *Employment Standards Act*. However, the determination of whether the employment contract is frustrated will depend on a number of factors such as the length of the incarceration, the employee's period of service prior to the incarceration, and whether the employee was a key person.

Death of Sole Proprietor

Where the sole proprietor of a business dies, the contract will generally be considered as frustrated, except where an executor (or where the individual dies intestate, personal representative) of the sole proprietor's estate carries on the business. See *Estate of Brinklow formerly o/a Brinklow's Body Shop v Anderson et al* (January 16, 1988), ESC 235 (Haefling) and *Robitaille v J.B. Truck Repair Service & Sale* (November 14, 1994), ESC 94-203 (McKellar). Note, however, that the death of an employer will not trigger a similar exemption to severance pay – see the discussion of O Reg 288/01, s. 9(2)(a)(ii)**.**

Note that where the employee entitlement in issue is severance pay, rather than notice of termination or termination pay, the employer's estate cannot rely on the frustration exemption because of the employer's death – see O Reg 288/01, s. 9(2)(a)(ii)**.**

Strike/Lock-out

The possibility that strikes or lock-outs might occur and disrupt the employer's business is not unforeseeable and therefore these events will not generally lead to a finding of frustration or impossibility. Note, however, that if an employee's employment is terminated during or as a result of a strike or lock-out at the place of employment, the exemption in paragraph 8 of s. 2(1) of O Reg 288/01 will apply – see the discussion of s. 2(1) para. 8 below. Also see O Reg 288/01, s. 9 para. 1 for a somewhat similar exemption from the severance pay requirements.

Business Failure

The failure of a business due to such reasons as an economic downturn, reduced revenues or an inability to obtain financing will generally not support frustration or impossibility since these events are not unforeseeable circumstances. The inability to obtain financing, or poor or uncertain economic conditions, including those that lead to a bankruptcy, have historically not been considered to constitute frustration, since economic downturns are generally seen as reasonably foreseeable future events when entering

into employment contracts. See for example *Iroquois Hotel (London) Limited v Diorio et al* (September 25, 1975), ESC 290 (Murphy).

Similarly, an employer's voluntary decision to discontinue a business for economic reasons or to file for bankruptcy have historically not been considered to constitute frustration of employment contracts, since those are financial decisions and employment contracts are not frustrated simply because the employer is unprofitable or is insolvent.

A question arose during the COVID-19 pandemic as to whether the frustration exemption applied where the business failed because of economic conditions created by the pandemic. Depending on the length of the pandemic and its eventual impact on the economy, a distinction may be drawn in the future between an economic downturn that is normally foreseeable and that does not trigger the frustration exemptions, and an unforeseeable global emergency that creates an economic disaster and that could trigger the exemption. In light of the situation at the time of writing, however, it is Program policy that frustration is not established on the basis of business failure caused by the economic conditions created by the pandemic.

Death of the Employee

The death of the employee will frustrate the employment contract. This means that the employee's estate will have no entitlement to termination pay where the employment relationship ended with the employee's death. Thus, for example, the estate will not be entitled to termination pay even if the employee had received notice and died before the notice took effect, nor will the estate be entitled where the employee was part of a group of employees whose employment the employer was about to terminate if the employee's death intervenes.

Note that where the employee entitlement in issue is severance pay, rather than notice of termination or termination pay, the employer cannot rely on the frustration exemption if the employee died after receiving a notice of termination – see O Reg 288/01, s. 9(2)(a)(ii)**.**

Employee refuses offer of reasonable alternative employment

Pursuant to s. 2(1) paragraph 5, an employee whose employment is terminated after they refuse an employer's offer of reasonable alternative employment is not entitled to notice of termination or pay in lieu.

The effect of this exemption is to relieve the employer from the obligation to give notice of termination or termination pay where the employee refuses continued employment with the employer when the employer is offering reasonable alternative employment. As with all exemptions from minimum standards, the onus is on the employer to establish on a balance of probabilities that the exemption applies.

The rationale for this exemption is that the ESA 2000 of refusing an offer of reasonable alternative employment is tantamount to resigning.

In determining whether an employee has refused reasonable alternative employment, consideration should be given to the following five points:

Offer must be made

In order for there to be a refusal, the employer must first make a clear and unequivocal offer of reasonable alternative employment to the employee. See *Lauderdale Car Cleaners (1965) Limited v Metauro* (March 5, 1992), ES 24/92 (Randall), a decision under the former *Employment Standards Act*.

Offer must be for work with the employee's employer

The exemption uses the phrase "with the employer". The use of this phrase requires that the offer be for reasonable alternative work with the employer. An offer of reasonable alternative employment with a separate employer is not sufficient, even if that separate employer is a purchaser of the employer's business. However, an offer of employment from a "related employer" as defined in ESA Part III, s. 4 would satisfy this criterion.

Offer must be made before the employee's employment is terminated

The exemption applies only if the employee's employment is terminated "after" the employee has refused a reasonable alternative offer of employment. Accordingly, the employer must make the offer of reasonable alternative employment before the termination of the employment relationship in order for this exemption to apply.

Employee must be able to perform the work that is offered and refuse the offer

In order for there to be a refusal, the employee must be able to perform the work that is offered. There is a distinction between a refusal to do something, on the one hand, and an inability to do something, on the other hand. An employee who is unable to do something (for example, through lack of necessary credentials or disability) cannot be said to have refused to do it. Refusal involves declining to do something that one is able to do. *Black's Law Dictionary* states: ""Fail" is distinguished from "refuse" in that "refuse" involves an act of the will, while "fail" may be an act of inevitable necessity."

Alternative employment offered by the employer must be reasonable

In determining whether the alternative employment offered by the employer was reasonable, consideration must first be given to whether or not there was an actual or implied term of the contract that allowed the employer to make changes to the terms of employment. In that case, an employee cannot argue that such changes are unreasonable. See also the discussion of constructive dismissal at ESA Part XV, s. 56.

Barring a situation where the changes to the terms of employment are made in accordance with actual or implied terms in the contract, the primary factor in determining whether the alternative work offered to the employee is reasonable will be the rate of pay. However, other factors may be relevant as well, including benefits, location, hours and schedule of work, "perks", quality of working environment, degree of responsibility, job security and possibility of advancement. The question to be asked is would a reasonable employee in the circumstances of the employee in question consider the offer to be reasonable.

Remuneration

This is the most important of all the factors to be examined in considering whether or not the offer was reasonable. Generally speaking, offers of employment that entail pay cuts of less than 10 per cent will probably be considered as reasonable, although each case must be examined on its own merits, and the pay cut needs to be viewed in the context of any other changes to the employee's employment, e.g., duties, location etc. One decision from the Office of Adjudication indicated that a pay cut of 12.6 per cent was reasonable – see *Eng v Trigraph Inc.* (March 12, 1993), ES 93-47 (Blair), a decision under the former *Employment Standards Act*. However, this case was unique on its facts in that most of the other employees accepted a much larger cut of 20 per cent. The referee noted this in determining that the pay cut was reasonable. The test of whether the cut is reasonable is what a reasonable employee in the

circumstances would think of it, and the inference in the above-noted case was that the claimant was acting in an unreasonable manner in refusing to go along with the new arrangement.

When assessing whether or not the offer is reasonable, it is appropriate to consider the overtime possibilities available to the employee. See for example *Rowlands v Custom Design Installation Ltd.* (April 5, 2000), 4073-98-ES (ON LRB), a decision under the former *Employment Standards Act*, where the Board held that the employer's offer of a job that had little possibility of overtime was not reasonable when the employee had previously performed overtime on a regular basis.

Benefits

Benefits are to be included when calculating the amount of the pay cut. Some benefit packages are worth 15 per cent to 25 per cent of the employee's total remuneration. If the offer does not include such a package, then the offer may not be reasonable even though the basic wage or salary would remain the same.

Location

In determining whether the offer was unreasonable, the officer should look at how the change will be viewed by a reasonable employee in the circumstances. For example, if the offer involves a change of location from Toronto to Brampton, the offer may be a reasonable one for an employee who has a car and a driver's license, but may not be reasonable for another employee who is forced to rely on public transportation. The location of the employee's residence should also be considered.

Hours and Schedule of Work

For example, an offer that involves a change from the day shift to the night or "graveyard" shift may not be reasonable. Again, the question to ask is what a reasonable employee in the same circumstances as the employee in question would consider to be reasonable. A single mother, for example, who was on the day shift and is offered alternative employment on the night shift may validly consider such an offer to be unreasonable.

Perks

Such items as whether the employee is entitled to an expense account, to travel to business conferences, etc. may be relevant in determining whether an offer was reasonable.

Quality of Working Environment

For example, if an employee who has a job with a private office in an office tower is offered a position that comes with a clerical station located on the plant floor, this may be considered an adverse change in the attractiveness of the employee's working environment and militate against a finding that the offer was reasonable.

Degree of Responsibility

If the employee was in a managerial position and the employer proposes to place them in a non-managerial position, or if the employee was in a position where they could make significant decisions but is offered a job in which they could not, this will militate against a finding that the offer was reasonable.

Job Security

If an employee was in a position where there was a good chance of continuing employment for the foreseeable future and is offered a position where continuing employment is unlikely, this will militate against a finding that the offer was reasonable.

Possibility of Advancement

If the employee was in a job that was on the "fast track" and is offered one that is "dead end", this will militate against a finding that the offer was reasonable.

Decisions Regarding this Exemption

The following are some decisions regarding this exemption. While these decisions were issued under the former *Employment Standards Act*, they continue to be relevant:

- *Mid North Iron & Metal Limited o/a Northland Iron & Metal v Malott* (May 2, 1979), ESC 619 (Springate)
- *W&W Cartage Limited c.o.b.a. Standard Truck Leasing v Holland* (August 5, 1981), ESC 1047 (Betcherman)
- *Century Store Fixtures Limited v Toma* (October 9, 1987), ESC 2272 (Houston)
- *Evans Bakeries Ltd. v Ontario Ministry of Labour* (April 4, 1995) ESC 95-69 (Novick)
- *Duley v Intertec Security & Investigation Ltd.*, 2000 CanLII 12958 (ON LRB)

Employee refuses reasonable offer of alternative employment through seniority system

Pursuant to s. 2(1) paragraph 6, an employee whose employment is terminated after they refuse alternative employment that is made available through a seniority system is not entitled to notice of termination or pay in lieu.

The effect of the exemption is to relieve the employer from the obligation to give notice of termination or termination pay where the employee refuses alternate work that was made available through a seniority system.

Note that, unlike the exemption in paragraph 5 of s. 2(1), the word "reasonable" does not appear. Therefore, where an employee has refused alternative employment made available through a seniority system, the exemption will apply and the employee will be disentitled to termination notice or pay in lieu regardless of whether or not that alternative employment was reasonable.

The seniority system does not need to be established pursuant to a collective agreement in order for this exemption to apply. However, where the seniority system is not established pursuant to a collective agreement, the employer will have the onus of demonstrating that the seniority system was formalized and was not merely of an ad hoc nature. In this regard, see *Re Great Northern Apparel Inc*., a decision under the former *Employment Standards Act*.

In order for there to be a refusal, the employee must be able to perform the work that is made available. There is a distinction between a refusal to do something, on the one hand, and an inability to do something, on the other hand. An employee who is unable to do something (for example, through lack of necessary credentials or disability) cannot be said to have refused to do it. Refusal involves declining to

do something that one is able to do. *Black's Law Dictionary* states: ""Fail" is distinguished from "refuse" in that "refuse" involves an act of the will, while "fail" may be an act of inevitable necessity."

The exemption applies only when the employee's employment is terminated "after" they have refused alternative employment. Accordingly, the refusal must be made before the termination of the employment relationship and the position must be made available prior to the termination. Further, the exemption will apply only if there is a causal connection between the employee's refusal and the subsequent termination of the employee. In other words, if the termination of the employee had nothing to do with the refusal to accept alternative employment, the exemption will not apply, because it is only the employee's refusal to accept the alternative employment that relieves the employer from its obligation to give notice of termination or pay in lieu.

Employee on temporary lay-off and does not return to work in reasonable time

Pursuant to s. 2(1) paragraph 7, an employee who is on a temporary lay-off and does not return to work within a reasonable time after being requested to do so by the employer is not entitled to notice of termination or pay in lieu.

As with other exemptions from minimum standards, the employer has the onus of showing that the exemption applies. In this case, the employer must show that the offer of recall was made to the employee and that the employee clearly understood its terms. From the point of view of proof, the employer will satisfy the onus if it can show that a written notice of recall was received by the employee and that the employee could read and understand it. If the employer alleges that it orally recalled the employee and the employee denies it, it will, of course, be much more difficult for the employer to demonstrate that the employee was recalled. If the employee wilfully structures their affairs so that it is impossible for the employer, using its best efforts, to contact the employee for recall purposes, an employer who uses its best efforts to recall the employee but fails to reach them will be relieved its obligations to provide termination notice or pay in lieu.

The exemption only applies if the employee did not show up for work within a reasonable time after being recalled. This prevents the employer from recalling the employee with extremely short notice and then relying on the exemption when the employee is unable to respond so quickly. What is a reasonable time depends on the circumstances of each case, and will include factors such as where the employee was geographically when they received the recall.

If the employer recalls the employee for a very brief period of time, such as a few hours, it may be that the offer was not bona fide in that the employer made it for the sole purpose of attempting to disentitle the employee to termination notice or pay in lieu. In such a case, the employee who refuses such an offer may not be disentitled to notice or pay. See *Highland Cove Marina v Van Velden and Babcock* (December 22, 1983), ESC 1531 (Sheppard), a decision under the former *Employment Standards Act*.

The exemption only applies where the employee is on a temporary layoff. Since, pursuant to ESA Part XV, s. 56, a temporary lay-off does not include a week in which the employee was not able to work or was unavailable for work, the exemption will not apply where the employee is recalled to work during a sick leave or a pregnancy leave, for example.

Employment terminated because of strike or lock-out

Pursuant to s. 2(1) paragraph 8, an employee whose employment is terminated during a strike or lockout at the place of employment, or as a result of a strike or lock-out at the place of employment is not entitled to notice of termination or pay in lieu.

With respect to lock-outs, the exemption will apply only if the lock-out is a legal one under the *Labour Relations Act, 1995,* SO 1995, c 1, Sch A.

The exemption applies only if the strike or lock-out was at the employee's place of employment. The term "the place of employment" is not defined in the ESA 2000, and it is not the same as establishment as defined in ESA Part I, s. 1. When the employer has plants across the province, does a strike at a plant in Thunder Bay, for example, constitute a strike at "the place of employment" of an employee who works at the employer's Mississauga plant? The answer is no. The place of employment means the actual plant or office where the employee works.

The exemption applies when the employee's employment is terminated during a strike or lock-out, or as a result of a strike or lock-out. The meaning of "during" a strike or lock-out is self-evident. An employee terminated during a strike or lock-out, for whatever reason, would not be entitled to notice of termination or pay in lieu. Further, if an employee was given notice of termination prior to a strike or lock-out but was terminated (for example) during a subsequent strike and before the notice period had ended, this exemption would relieve the employer of any obligation with respect to the balance of the notice period or pay in lieu of notice. There is no requirement that the employee be a member of the striking or lock-out bargaining unit.

More difficult is the concept of "as a result of" a strike or lock-out. Can the employer rely on the exemption in a situation where the result of the strike is beneficial to the employer? For example, if the strike enables the employer to find a more efficient and profitable way of doing business without some of the employees, the employer might argue that the employees were terminated as a result of the strike in that their employment would have continued "but for" the strike. However, it is Program policy that in order to take advantage of the exemption, the employer must show that the strike had adverse consequences to its business and therefore necessitated the termination of the employees. In this regard, see *Hayes Danc Inc. operating as Spicer Reman Centre v 15 Employees* (December 29, 1989), ESC 2609 (Solomatenko), a decision under the former *Employment Standards Act*.

Furthermore, if the strike was little more than a catalyst, precipitating a closure that would have likely happened anyway, even without the strike, then the terminations will not be "as a result of" the strike within the meaning of the exemption. The strike must be the major cause of the terminations in order for the exemption to apply. If the major cause is instead, for example, lower demand, increased competition, or aging equipment and processes, and the strike is merely "the straw that broke the camel's back", then the exemption will not apply. See *Robson Lang Leathers Limited v Legacy et al* (January 19, 1979), ESC 574 (Picher), a decision under the former *Employment Standards Act*.

Construction employees

Pursuant to s. 2(1) paragraph 9, an employee who is a construction employee is not entitled to notice of termination or termination pay in lieu of notice. For purposes of this regulation, of O Reg 288/01, s. 1 provides that construction employee has the same meaning as in O Reg 285/01.

Note, however, there is an exception to this in the case of employees engaged in the maintenance of roads, based on principles of statutory interpretation. O Reg 288/01, s. 9(1) sets out exemptions from the right to severance pay; paragraph 7 of s. 9(1) exempts construction employees, while paragraph 8

exempts employees engaged in the on-site maintenance of, among other things, roads. This clearly indicates an intention on the part of the maker of the regulation that an employee employed in the maintenance of roads would not be considered to be a construction employee for purposes of O Reg 288/01, even though such an employee would be considered to be engaged in road building and thus be a construction employee for purposes of O Reg 285/01. It follows that because O Reg 288/01, s. 2(1), which sets out exemptions from the right to notice of termination or termination pay in lieu, contains no provision corresponding to paragraph 8 of O Reg 288/01, s. 9(1), an employee employed in the maintenance of roads is entitled to notice or termination pay.

See O Reg 288/01, s. 9 for a discussion of the severance pay exemption for road maintenance employees.

Employment terminated when employee reaches age of retirement

On December 12, 2006, O Reg 288/01, s. 2(1) paragraph 11 was amended so that it applies only if the termination does not contravene the *Human Rights Code,* RSO 1990, c H.19 (as amended by the *Ending Mandatory Retirement Statute Law Amendment Act, 2005*, SO 2005, c 29). Formerly, the exemption applied where an employee's employment was terminated in accordance with the employer's established practice regarding retirement.

The amendment reflects changes to the Ontario *Human Rights Code* made under the *Ending Mandatory Retirement Statute Law Amendment Act, 2005,* SO 2005, c 29 which came into force on December 12, 2006.

On that date, 65 was removed as the cap in the definition of "age" for the purpose of the prohibition against discrimination under the *Human Rights Code*. As a result, all employees aged 18 or over, including those aged 65 or more, are protected against discrimination on the basis of how old they are, and among other things, generally cannot be forced to retire merely because they are 65 years old or older. Note however that under the *Human Rights Code*, mandatory retirement polices that can be upheld on bona fide occupational requirement grounds are still lawful.

For example, a fire department's policy that requires firefighter employees to retire at a specific age (e.g., 60 years) would not contravene the *Human Rights Code* if being younger than that age constituted a bona fide occupational requirement for firefighters. In that case, the notice of termination exemption in O Reg 288/01 would apply to a firefighter whose employment was terminated at age 60 in accordance with that policy.

The rationale for this exemption is that where the employer has an established retirement policy that does not contravene the *Human Rights Code*, the employee has advance knowledge that their employment will end at a certain time, and there is therefore no need to receive notice of termination or pay in lieu. If the employer has a mandatory retirement policy that contravenes the *Human Rights Code*, the employer cannot lawfully terminate an employee's employment on the basis of that policy; therefore, the rationale is not applicable in such situations.

On the other hand, if an employer has a voluntary early retirement plan, and the employee chooses to take advantage of it, the employee will not be entitled to notice of termination or pay in lieu. This is not because the exemption applies but because the employee has resigned, rather than having their employment terminated by the employer. In determining whether such an early retirement plan was truly voluntary, one consideration would be what the employee was told would happen if they did not accept early retirement. If the employee was told that they would be fired if the early retirement package were not

accepted, then the employee may be considered to have been forced to resign, which is equivalent to a termination and would trigger a right to termination notice or pay in lieu.

Finally, note that even where a termination is effected pursuant to an alleged retirement practice that does not contravene the *Human Rights Code*, the employer must show that the practice is established for the exemption to apply. The Program's position is that this means it must have been in place for a reasonable period of time and must be known to the employees, especially the employee in question, for a reasonable period of time. If the employer, for example, institutes what is determined to be a bona fide retirement policy at age 60 a few days or weeks prior to the employee turning 60, the policy will not have been in place long enough to be established within the meaning of the exemption. This would be so even if the policy were a bona fide one.

Ship building and repair employees

Pursuant to s. 2(1) paragraph 12, an employee who meets the following conditions is exempted from termination pay or notice of termination:

- The employee's employer is engaged in the business of building, altering or repairing ships or vessels that have a gross tonnage of over ten tons and that are designed for or used in commercial navigation.
- The employee has access to a legitimate supplementary unemployment benefit plan that the employee (or their agent) agreed to. Pursuant to ESA Part 1, s. 1(3) the agreement must be in writing. Note that ESA Part 1, s. 1(3.1) addresses agreements in electronic form.
- The employee (or their agent) has agreed to have this exemption apply. Pursuant to ESA Part 1, s. 1(3) the agreement must be in writing. Note that ESA Part 1, s. 1(3.1) addresses agreements in electronic form.

Employees Not Entitled to Notice of Termination or Termination Pay – s. 2(2)

2(2) Paragraph 1 of subsection (1) does not apply if,

(a) the employment terminates before the expiry of the term or the completion of the task;

(b) the term expires or the task is not yet completed more than 12 months after the employment commences; or

(c) the employment continues for three months or more after the expiry of the term or the completion of the task.

This provision sets out exceptions to the application of the term or task exemption in paragraph 1 of s. 2(1). For a discussion of this provision refer to s. 2(1) para. 1 above.

Employees Not Entitled to Notice of Termination or Termination Pay – s. 2(3)

2(3) Paragraph 1 of subsection (1) does not apply if the impossibility or frustration is the result of an illness or injury suffered by the employee.

This provision sets out an exception to the application of the impossibility of performance or frustration of contract exemption in paragraph 4 of s. 2(1) of O Reg 288/01. It provides that the exemption does not apply where the impossibility of performance or frustration of contract is the consequence of an illness or injury suffered by the employee. It was added to O Reg 288/01 by O Reg 549/05, which was filed on October 28, 2005. Refer to s. 2(1) para. 4 above for a discussion of this provision.

O Reg 288/01 Section 3 - Notice, 50 or More Employees

Notice, 50 or More Employees - s. 3(1)

3(1) The following periods are prescribed for the purposes of subsection 58 (1) of the Act:

1. Notice shall be given at least eight weeks before termination if the number of employees whose employment is terminated is 50 or more but fewer than 200.

2. Notice shall be given at least 12 weeks before termination if the number of employees whose employment is terminated is 200 or more but fewer than 500.

3. Notice shall be given at least 16 weeks before termination, if the number of employees whose employment is terminated is 500 or more.

This section sets out the amount of notice employees are entitled to when there is a "mass" termination under s. 58(1) of the *Employment Standards Act, 2000*. These entitlements are the same as they were under the former *Employment Standards Act*.

In a mass termination, the amount of notice an employee is entitled to receive is determined by the number of employees whose employment is terminated, rather than by the employee's period of employment. It should be noted that in the *Employment Standards Act, 2000*, the application of the mass notice provisions depend upon the number of employees actually terminated in a four-week period rather than the number of terminations initiated in a four-week period as was the case under the former *Employment Standards Act*. See the discussion of mass notice under s. 58(1) at ESA Part XV, s. 58(1).

Notice, 50 or More Employees - s. 3(2)

3(2) The following information is prescribed as the information to be provided to the Director under clause 58 (2) (a) of the Act and to be posted under clause 58 (2) (b) of the Act:

1. The employer's name and mailing address.

2. The location or locations where the employees whose employment is being terminated work.

3. The number of employees working at each location who are paid,

- **i. on an hourly basis,**
- **ii. on a salaried basis, and**
- **iii. on some other basis.**

4. The number of employees whose employment is being terminated at each location who are paid,

i. **on an hourly basis,**

ii. **on a salaried basis, and**

iii. **on some other basis.**

5. The date or dates on which it is anticipated that the employment of the employees referred to in paragraph 4 will be terminated.

6. The name of any trade union local representing any of the employees whose employment is being terminated.

7. The economic circumstances surrounding the terminations.

8. The name, title and telephone number of the individual who completed the form on behalf of the employer.

This section sets out the information that is required to be provided to the Director of Employment Standards and posted in the employer's establishment under ss. 58(2)(a) and (b) of the Act. Please refer to ESA Part XV, s. 58 for a discussion of the requirements to provide and post this information.

Section 3(3) of O Reg 288/01 sets out the manner in which this information is to be provided to the Director.

Notice, 50 or More Employees - s. 3(3)

3(3) The employer shall provide the information referred to in subsection (2) to the Director by setting it out in the form approved by the Director under clause 58(2)(a) of the Act and delivering the form to the Employment Practices Branch of the Ministry of Labour between 9 a.m. and 5 p.m. on any day other than a Saturday, Sunday or other day on which the offices of the Branch are closed.

This section sets out the manner in which the information referred to in s. 3(2) of O Reg 288/01 is to be provided to the Director of Employment Standards. This section should also be read together with s. 58(4) of the Act, which provides that mass notice is deemed not to have been given until the information referred to in s. 3(2) of O Reg 288/01 has been received by the Director of Employment Standards. See the discussion of s. 58(4) of the Act at ESA Part XV, s. 58.

The prescribed information must be provided to the Director on the form approved by the Director. The form approved for this purpose is entitled "Form 1". The Form 1 may be downloaded from the Ministry of Labour's website at or may obtained from a Service Ontario Information Centre.

The Form 1 is to be delivered during the hours and on the days specified in s. 3(3) to:

Director of Employment Standards

Employment Practices Branch

Ministry of Labour

400 University Avenue, 9th Floor

Toronto, ON M7A 1T7

The Form 1 may be delivered by facsimile transmission to: (416) 326-7061.

Notice, 50 or More Employees - s. 3(4)

3(4) Section 58 of the Act does not apply to the employer and employees if,

(a) the number of employees whose employment is terminated at the establishment is not more than 10 per cent of the number of employees who have been employed there for at least three months; and

(b) the terminations were not caused by the permanent discontinuance of part of the employer's business at the establishment.

This section is similar to the corresponding provision (s. 5(1) of O Reg 327) under the former *Employment Standards Act*.

This section provides an exception to the application of the mass termination rules. Generally, the mass termination rules apply where the employment of 50 or more employees at an establishment is being terminated in the same four-week period. This section provides that those rules will not apply if the following two criteria are met:

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.

Both criteria must be met in order for this exception to apply. For example, in a situation where the employment of less than 10 per cent of the employees at an establishment is terminated, the mass terminations rules will apply if any of the terminations are caused by a permanent discontinuance of all or part of the business at the establishment.

If the exception in s. 3(4) applies, the individual notice provisions will apply instead of the mass termination rules.

Each criterion is discussed in more detail below.

The number of employees whose employment is being terminated is not more than 10 per cent of the employees who have been employed for at least three months at the establishment.

This is commonly referred to as the "10 per cent rule". This criterion will be met if the number of employees to be terminated represents 10 per cent or less of the number of employees who have been employed for at least three months at the establishment.

To determine whether this criterion applies, the first step is to determine the number of employees who have had their employment terminated (the numerator in the equation). All employees who are terminated, whether they are entitled to notice of termination or not under the Act, are included in counting the number of employees being terminated, including employees with less than three months of employment. A plain reading of the regulation suggests that these employees are excluded only when counting the number of employees employed at the establishment; they are not excluded when counting the number of employees whose employment is terminated.

The second step is to determine how many employees who have been employed for at least three months were employed at the employer's establishment (the denominator in the equation). The time at which this count is done is the day before the first day of the four-week period in question.

Consider the following example:

Number of employees whose employment is terminated:

- Less than three months - 10
- Three months or more - 95

TOTAL - 105

Number of employees at establishment:

- Less than three months - 150
- Three months or more - 950

The calculation to be performed to see if the 10 per cent criterion applies is as follows:

- The numerator (Number of employees to be terminated, including those that have been employed less than three months) - 105
- The denominator (Number of employees employed three months or more) - 950

105 divided 950 = 11.05%

Because this calculation results in a number greater than 10 per cent, the exception in s. 3(4) will not apply, and, consequently, the mass termination rules in s. 58 will apply.

None of the terminations are caused by the permanent discontinuance of part of the employer's business at the establishment.

This criterion will be met only if none of the terminations are caused by the permanent discontinuance of part or all of the employer's business at the establishment. If any of the terminations are caused by the permanent discontinuance of the employer's business at the establishment, the mass termination rules will apply.

Again, both this criterion and the 10 per cent criterion must be met in order for the exception to the application of the mass termination rules in s. 3(4) to apply.

The corresponding provision under the former *Employment Standards Act* (s. 5(1) of O Reg 327) referred to "all or part" of the employer's business. Section 3(4) of O Reg 288 has the same meaning even though it refers only to "part" of the employer's business. This is because, logically, where there is a discontinuance of all of the business there will necessarily be a discontinuance of part of the business.

The phrase "part of the employer's business" is not defined in the Act, and was the subject of some controversy under the former *Employment Standards Act*. There is not a body of case law from referees or adjudicators on the meaning of this phrase. However, there have been quite a few decisions from the Ontario Labour Relations Board on the issue of what constitutes "part of a business" within the meaning of the *Labour Relations Act, 1995,* SO 1995, c 1, Sch 1 ("LRA 1995") successorship provisions. Although these decisions have been decided in a context different from the ESA 2000 provisions, they may be helpful.

Generally, the LRA 1995 cases suggest that what is meant by "part of the business" is a coherent and severable part of the employer's economic organization, managerial or employee skills, plant, equipment, "know how" or goodwill. Thus, the closing of one of several stores in a chain, or the closing of one of several plants will amount to the discontinuance of part of the employer"s business at an establishment, provided, of course, that the stores or plants in question were all in the same "establishment" as that term is defined in s. 1 of the Act. See the discussion of this term in the mass termination context in ESA Part XV, s. 58. Also, where the employer conducts several types of operations at one location, e.g., it manufactures several types or brands of products at that location, and the employer discontinues one of those operations, there will be a discontinuance of part of the employer's business. However, where the employer is merely reducing its workforce by downsizing and continues to perform the same operations or functions as before, but on a smaller scale, there will not be a discontinuance of part of the business.

Some of the relevant LRA 1995 cases on what is "part of a business" are as follows:

- United Food & Commercial Workers' International Union, Local 633 v Vaunclair Meats Limited, 1981 CanLII 1020 (ON LRB)
- *Re Canac Shock Absorbers Ltd.*
- *Retail Clerks Union, Local 206 v Loblaws Groceries Co.*
- *Re The Borden Co.*
- *Re Automatic Fuels Ltd.*
- Amalgamated Meat Cutters and Butcher Workmen of North America v Beef Terminal (1979) Limited, 1980 CanLII 763 (ON LRB)

A discontinuance that is temporary in nature will not be permanent for the purposes of s. 3(4)(b), even if the discontinuance goes beyond 13 weeks. For example, where one of the employer's witnesses testified that the closure of a mine could last as long as three years, but that it intended to re-activate the mines at some future unknown date, it was held that the discontinuance was not a permanent one - see Re Falconbridge Nickel Mines Ltd. and Simmons et al., 1978 CanLII 1696 (ON SC), a decision under the former *Employment Standards Act.*

O Reg 288/01 Section 4 – Manner of Giving Notice

Manner of Giving Notice - s. 4(1)

4(1) Subject to section 5, a notice of termination shall be,

(a) given in writing;

(b) addressed to the employee whose employment is to be terminated; and

(c) served on the employee in accordance with section 95 of the Act.

This provision sets out the manner in which notice of termination required by ss. 57 or 58 must be provided. This section is subject to s. 5 of O Reg 288/01, which addresses the issue of providing notice where "bumping rights" apply. See O Reg 288/01, s. 5. It is substantially the same as the corresponding provision (s. 8(1) of O Reg 327) under the former *Employment Standards Act*.

In writing - s. 4(1)(a)

Notice of termination of employment must be in writing. It is Program policy that the notice must specify when the employment is to be terminated, even if the employee is made aware of the impending termination through other means. See for example Estimations Trimac Appraisals Inc. v Cholette (October 31, 2000), 2806-99-ES (ON LRB), a decision under the former *Employment Standards Act* in which an employee was aware of and actively involved in the employer's closure plans, including writing a letter to the landlord indicating the premises would be vacant on a particular date.

Although this provision requires notice in writing, it is Program policy that oral notice may be sufficient if the oral notice is clear and unequivocal and is greater in length than the notice required under ss. 57 or 58 and the minimum requirements concerning continuation of wages and benefits are met. The basis of this policy is that a greater right or benefit under s. 5(2) of the *Employment Standards Act, 2000* has been provided. This is supported by Fanaken v Bell, Temple, 1984 CanLII 1856 (ON SC), a court case decided under the former *Employment Standards Act*.

Where the employer is alleging that it gave oral notice greater in length than the required minimum written notice, the onus is on the employer to show that the employee received and understood the oral notice, and that the notice was specific as to the date of termination.

Addressed to the employee - s. 4(1)(b)

The notice of termination is to be addressed to the employee whose employment is to be terminated. Obviously, notice cannot be effective if it is not clear whose employment is to be terminated.

Served on the employee in accordance with section 95 - s. 4(1)(c)

This clause was amended by O Reg 397/09 to delete specific references to personal service. The amendment reflects the fact that the expanded methods of service listed in s. 95 (as amended by the *Employment Standards Amendment Act (Temporary Help Agencies), 2009,* SO 2009, c 9, in force on November 6, 2009) include personal service.

The written notice of termination must be served in accordance with s. 95 of the Act. For a discussion of the methods of service listed in s. 95(1), see ESA Part XXI.

Service of a written notice of termination by a method listed in s. 95(1) is effective in accordance with ss. 95(2), (3) or (4) depending on the method of service used.

Manner of Giving Notice - s. 4(2)

4(2) If an employer bound by a collective agreement is or will be laying off an employee for a period that will or may be longer than a temporary lay-off and the employer would be or might be in breach of the collective agreement if the employer advised the employee that his or her employment was to be terminated, the employer may provide the employee with a written notice of indefinite lay-off and the employer shall be deemed as of the date on which that notice was given to have provided the employee with a notice of termination.

This section applies in situations where an employer intends to lay off an employee for a period longer than a temporary lay-off but would be in breach of a collective agreement if it gave notice of termination of employment. (This situation arises, for example, where the collective agreement permits indefinite lay-offs but permits "terminations" only where there is just cause.) In this case only, the employer may give written notice of indefinite lay-off and be deemed to have provided the employee with notice of termination.

Subsection 56(4) of the Act states that an employer who lays an employee off without specifying a recall date shall not be considered to terminate the employment of the employee unless the lay-off is longer than a temporary lay-off - see ESA Part XV, s. 56. Accordingly, while the notice of indefinite lay-off is from the outset deemed to be a notice of termination, there is no termination of employment per se unless the lay-off goes on longer than a temporary lay-off.

If an employer gives working notice of indefinite layoff that is of sufficient length, there would be no termination pay liability in the event that the period of the lay-off ends up exceeding the period of a temporary lay-off, because the employer is deemed under s. 4(2) of O Reg 288/01 to have provided the employee with notice of termination. In such cases, the termination date is deemed under s. 56(5) to have been the first day of the lay-off. Because of s. 56(4) there will be a termination pay entitlement only if the layoff goes on longer than a temporary lay-off and the notice of indefinite layoff given under s. 4(2) was in some way deficient (e.g., notice not in writing, or notice to take effect immediately or prior to the expiry of the notice period that would otherwise have been applicable under s. 57).

Conversely, where notice of indefinite lay-off is given but the lay-off turns out not to exceed the period of a temporary lay-off, there would be no termination of employment and therefore no termination pay entitlement.

It should be noted, however, that an employer may run the risk that some employees may resign during the notice of indefinite layoff period in accordance with the condition described in s. 63(1)(e) of the Act and become entitled to severance pay. Clause 63(1)(e) of the Act provides that where an employee is given a notice of termination by the employer and resigns with at least two weeks' notice to take effect during the statutory notice period, his or her employment is severed. Since a notice of indefinite lay-off is deemed to be a notice of termination under s. 4(2), this means that the employee who receives a notice of indefinite lay-off and who responds with a notice of resignation meets all the specified conditions in order to be entitled to severance. The employment is deemed to have been severed on the termination date specified in the employer's notice, and the employer would have to pay the severance pay on the later of seven days after that date and the date that would have been the next pay for the employee. See ESA Part XV, s. 63.

O Reg 288/01 Section 5 – Notice of Termination Where Seniority Rights Apply

Notice of Termination Where Seniority Rights Apply - ss. 5(1), (2)

5(1) This section applies with respect to employees whose employment contracts provide seniority rights by which an employee who is to be laid off or whose employment is to be terminated may displace another employee.

5(2) If an employer who proposes to terminate the employment of an employee described in subsection (1) posts a notice in a conspicuous part of the workplace setting out the name, seniority, job classification and proposed lay-off or termination date of the employee, the notice shall constitute notice of termination as of the day of posting to any employee whom the employee named in the notice displaces.

These provisions are substantially the same as the corresponding provision (s. 7 of Reg 327) under the former *Employment Standards Act*.

This section applies where employees who are to be terminated have the right to "bump" another employee with less seniority out of their job and take that job.

Where an employee has the right to "bump" a more junior employee, the employer is deemed to have provided written notice of termination to the more junior employee who is ultimately terminated by posting a notice in a conspicuous part of the workplace indicating the seniority, job classification and proposed lay-off or termination date of the employee named in the notice (the "bumper"). The principle is that the employee who will be bumped out can determine his or her fate from the posted notice and the seniority list. Note, however, that if the employee originally identified in the posted notice does not "bump" a more junior employee, the employer will be required to comply with the notice requirements in s. 4(1) of O Reg 288/01 with respect to the employee named in the posted notice.

Finally, it should be noted that if read literally, this provision would appear to limit the application of s. 5 such that it would provide effective notice only to the first employee bumped by the employee named in the posted notice. If that were the case, the employer would have to comply with s. 4(1) with respect to the employee ultimately bumped (e.g., a second or third, etc. "bumpee"). However, it is the Program's policy (based on the principle of statutory interpretation that a literal interpretation should not be taken where the result would lead to an absurdity) that the section must be read broadly as if it were of the same purport as the corresponding provision (s. 7) in O Reg 327 under the former *Employment Standards Act*. As a result, it is the Program's policy that s. 5 will apply to provide effective notice to the employee ultimately displaced through the "bumping" process, even though he or she is not in fact displaced by the person named in the notice.

Notice of Termination Where Seniority Rights Apply - s. 5(3)

5(3) Clause 60(1)(a) of the Act does not apply to an employee who displaces another employee in the circumstances described in this section.

This section provides that s. 60(1)(a) of the *Employment Standards Act* does not apply to an employee who bumps another employee as described in ss. 5(1) and (2). Section 60(1)(a) provides that an employer shall not reduce the employee's wage rate or change a term or condition of employment during the statutory notice period. See ESA Part XV, s. 60.

Under this provision, an employee whose position is being terminated and who exercises his or her seniority rights to "bump" into a position of a more junior employee, may be paid the wage rate and be subject to the terms and conditions of employment of that new position during the statutory notice period.

O Reg 288/01 Section 6 – Temporary Work, 13-week Period

6(1) An employer who has given an employee notice of termination in accordance with the Act and the regulations may provide temporary work to the employee without providing a further notice of termination in respect of the day on which the employee's employment is finally terminated if that day occurs not later than 13 weeks after the termination date specified in the original notice.

6(2) The provision of temporary work to an employee in the circumstances described in subsection (1) does not affect the termination date as specified in the notice or the employee's period of employment.

This section provides that an employer who has given an employee notice of termination in accordance with the *Employment Standards Act, 2000* may provide the employee with temporary work during the 13-week period following the date the employee's employment was to end without affecting the employee's termination date or period of employment and without being required to provide any further notice when the employee's employment finally does end. In that regard, see Di Tomaso v Crown Metal Packaging Canada LP, 2011 ONCA 469 (CanLII), where the Court of Appeal held that s. 6 of O Reg 288/01

contemplates temporary work not exceeding 13 weeks in duration from the originally-specified termination date and that if the temporary work exceeds that duration, new notice is required. The employer was unsuccessful in arguing that s. 6 allowed successive periods of temporary work of 13 weeks or less without imposing an obligation on the employer to give new notice in respect of the date on which employment is finally ended. The court held that to interpret the section in that way would be inconsistent with the status of employment standards legislation as remedial, benefit-conferring legislation as characterized by the Supreme Court of Canada in Rizzo & Rizzo Shoes Limited (Re), [1998] 1 SCR 27.

O Reg 288/01 Section 7 – Inclusion of Vacation Time in Notice Period

7 The period of a notice of termination given to an employee shall not include any vacation time unless the employee, after receiving the notice, agrees to the inclusion of the vacation time in the notice period of the notice.

This section is substantially the same as the corresponding provision (s. 10 of O Reg 327) under the former *Employment Standards Act.*

This section states that the period of notice of termination given to an employee shall not include any vacation time unless the employee agrees to include the vacation time in the notice period. Under s. 1(3) of the *Employment Standards Act, 2000*, any such agreement must be in writing.

Note that if an employee had been scheduled to take a vacation before he or she was given notice of termination, and that vacation would now fall within the statutory notice period, this provision would require the employer to obtain the employee's agreement to take that previously scheduled vacation during the notice period.

O Reg 288/01 Section 8 – Period of Employment

Period of Employment – s. 8(1)

8(1) For the purposes of this Regulation and sections 54 to 62 of the Act, an employee's period of employment is the period beginning on the day he or she most recently commenced employment and ending on,

(a) if notice of termination is given in accordance with Part XV of the Act, the day it is given; and

(b) if notice of termination is not given in accordance with Part XV of the Act, the day the employee's employment is terminated.

This section is substantially the same as the corresponding provision (s. 14(1) of O Reg 327) of the former *Employment Standards Act*.

This section establishes the length of an employee's period of employment for the purpose of calculating the amount of notice of termination or termination pay owing to that employee. The period of employment is the period beginning on the date the employee most recently commenced employment with the employer, and ending:

- On the day notice of termination was given, if it was given in accordance with Part XV of the *Employment Standards Act, 2000*; or

- On the day the employment was terminated, if notice of termination was not given in accordance with Part XV of the Act.

This section must be read in conjunction with s. 8(2) of O Reg 288/01, which sets out circumstances in which two periods of employment are to be considered as one period of employment (see the discussion of subsection (2) below).

The period of employment will only include employment in Ontario or work that is a continuation of work in Ontario. For example, if an employee worked for ABC Inc. for five years in England, then was transferred to Ontario and worked in Ontario for two years before being terminated, his or her period of employment for the purposes of s. 54 to s. 62 of the Act and O Reg 288/01 would be two years.

This section should also be read in conjunction with s. 59 of the Act, which sets out time that is to be included and excluded from an employee's period of employment – see ESA Part XV, s. 59.

Note that this provision applies only for the purposes of ss. 54 to 62 of the Act (Termination of Employment). That is, it applies only for the purpose of calculating the amount of notice of termination or termination pay owing. It does not apply for the purpose of determining eligibility for notice of termination or for determining severance pay entitlements.

Eligibility for notice of termination is triggered by three months of continuous employment rather than the employee's "period of employment".

As a result, time on lay-off after the deemed termination date will be excluded in determining the "period of employment" under s. 59 of the Act but will be included when determining whether the employee had three months of continuous employment and was or was not eligible for notice of termination. See the discussion of eligibility for notice under s. 54 of the Act at ESA Part XV, s. 54.

Period of Employment – s. 8(2)

8(2) For the purposes of subsection (1), two successive periods of employment that are not more than 13 weeks apart shall be added together and treated as one period of employment.

Section 8(2) of O Reg 288/01 requires that successive periods of employment that are separated by 13 weeks or less be added together for the purpose of determining the period of employment under s. 8(1), which is used for calculating the amount of notice of termination or termination pay to which an employee is entitled. Bear in mind, however, s. 59 of the Act, under which inactive employment counts in determining an employee's period of employment, except for any part of a lay-off that falls after the deemed termination date. Where the periods of employment are more than 13 weeks apart, only the last period of employment will be counted for these purposes.

The application of s. 8(2) can be illustrated with the following example: an employee was employed by Company A from January 1, 2008, until December 31, 2013 (5 years), and from February 1, 2014, to April 30, 2015 (1.25 years). This employee will have a period of employment of 6.25 years for notice of termination and termination pay purposes. The first 5-year period of employment is added to the second 1.25 year period of employment since the two periods are not separated by more than 13 weeks.

Note that s. 8(2) will apply to add more than two periods of employment together if the periods are not separated by more than 13 weeks. For example, if an employee was employed by Company B from January 1, 2010 to December 31, 2010 (one year), then again from February 1, 2011 to October 31, 2011 (0.75 of a year) and then yet again from December 1, 2011 until February 28, 2014 (2.25 years), all the periods of employment will be added together since the intervals between the first and second periods

and between the second and third periods do not exceed 13 weeks. Thus, the employee's period of employment will be four years.

This provision will apply to tie together successive periods of employment that are separated by no more than 13 weeks regardless of the reason for the earlier period coming to an end, i.e., it is irrelevant that the earlier period ended because the employee quit or was fired (regardless of the reason for the firing). See for example Filter Dynamics v Couling (September 9, 1981), ESC 1061 (Davis).

Note that eligibility for notice of termination is triggered by three months of continuous employment (and not a period of employment of three months). See the discussion of eligibility for notice under s. 54 of the Act at ESA Part XV, s. 54.

Note also that this provision applies only for the purposes of calculating the notice of termination or termination pay entitlement. It does not apply for the purpose of determining severance pay entitlements.

O Reg 288/01 Section 9 – Severance of Employment

Employees Not Entitled to Severance Pay - s. 9(1)

This section sets out the exemptions from the severance provisions of the *Employment Standards Act, 2000*. The employees listed in this section are not entitled to severance pay. A discussion of each exemption appears below.

Permanent Discontinuance Caused by Strike - s. 9(1) para. 1

9(1) The following employees are prescribed for the purposes of subsection 64(3) of the Act as employees who are not entitled to severance pay under section 64 of the Act:

1. An employee whose employment is severed as a result of a permanent discontinuance of all or part of the employer's business that the employer establishes was caused by the economic consequences of a strike.

This provision has substantially the same effect as s. 58(5)(b) of the former *Employment Standards Act*

The effect of this exemption is to relieve an employer of its obligation to provide severance pay under s. 64 if an employee's employment is severed as a result of a permanent discontinuance of all or part of the employer's business that the employer establishes was caused by the economic consequences of a strike. Note that the exemption can apply only in the context of a strike, not a lock-out.

With respect to the phrase "permanent discontinuance of all or part of the employer's business", see the discussion of s. 3(4)(b) of O Reg 288/01. Although s. 3(4)(b) refers to a permanent discontinuance of only part of the employer's business rather than all or part, it is the Program's view that the two phrases have the same meaning. This is because, logically, where there is a discontinuance of all of the business, there will necessarily be a discontinuance of part of the business.

The test to be applied in determining whether the permanent discontinuance was caused by the economic consequences of the strike is whether or not the closure would have happened even if the strike had not occurred. If the answer is yes, then this exemption will not apply.

In determining whether the closure would have happened even in the absence of the strike, an employment standards officer considers whether the business would have continued to operate for a significant period of time beyond the closure if it were not for the strike. If, without the strike, the business would have closed soon after it actually did, then the employer cannot escape severance pay liability by

showing that the strike simply hastened a closure that would have happened in any event. If the seeds of a business demise are "planted and take root" before a strike, it cannot be said that the strike caused the closure within the meaning of the exemption. See Courtaulds Films Canada, division of International Paints (Canada) Limited v Amalgamated Clothing and Textile Workers' Union, Locals 1332 and 1675 (December 10, 1991), ESC 2949 (Bendel), a decision under the former *Employment Standards Act.* In applying the test noted above, consideration should also be given to whether the employer actually took into account the economic consequences of the strike in deciding to close its business. If the employer did not take those consequences into account, then it cannot later on, after the closure, look back in retrospect and say that the closure was actually caused by the strike for purposes of the exemption.

Other cases that dealt with s. 58(5)(b) of the former *Employment Standards Act* include:

- Hart and Cooley Manufacturing Co. of Canada v Lea (June 27, 1986), ESC 2135 (Brown)
- *Re Dominion Forge Co. Ltd.*

Contract Impossible to Perform or Frustrated - s. 9(1) para. 2

9(1) The following employees are prescribed for the purposes of subsection 64(3) of the Act as employees who are not entitled to severance pay under section 64 of the Act:

2. Subject to subsection (2), an employee whose contract of employment has become impossible to perform or has been frustrated.

The effect of this exemption is to relieve an employer of its obligation to provide severance pay under s. 64 in some situations where an employee's contract of employment has become impossible to perform or has been frustrated (see O Reg 288/01, s. 2(1) para. 4 for a discussion of the meaning of these terms). However, there are exceptions to the application of this exemption set out in s. 9(2) of O Reg 288/01, discussed below.

Employee Retires After Being Severed and Receives Actuarially Unreduced Pension - s. 9(1) para. 3

9(1) The following employees are prescribed for the purposes of subsection 64(3) of the Act as employees who are not entitled to severance pay under section 64 of the Act:

3. An employee who, on having his or her employment severed, retires and receives an actuarially unreduced pension benefit that reflects any service credits which the employee, had the employment not been severed, would have been expected to have earned in the normal course of events for purposes of the pension plan.

The effect of this exemption is to relieve an employer of its obligation to provide severance pay under s. 64 in some situations where an employee retires upon having his or her employment severed. The exemption will apply only if the employee receives an actuarially unreduced pension benefit that reflects any service credits the employee would have earned for the purposes of the pension plan had the employment not been severed. This exemption is substantially similar to the corresponding provisions (ss. 58(5)(g) and 58(6)(d)) under the former *Employment Standards Act*, as those provisions were interpreted in the case law.

In order for this pension exemption to apply, the pension must be provided by the employer that is severing the employee. Pensions from the Canada Pension Plan or from prior employers are not to be taken into consideration.

This exemption will not apply if the pension benefit is reduced (whether actuarially or otherwise) to an amount less than what the employee would have received had the employee been given the opportunity to stay until the normal retirement date.

It should be noted that although the term pension plan is defined very broadly in O Reg 286/01 (and encompasses such plans as deferred profit sharing plans, group RRSPs or retiring allowances) for the purposes of prohibiting differentiation in the provision of such plans (s. 44 of the Act and O Reg 286/01), they are not in fact true pension plans.

The Program's position is that it is appropriate in the context of prohibiting differentiation in the provision of benefits to construe the term "pension plan" broadly, but in the context of creating an exemption from an entitlement to severance under the Act that the term should be construed narrowly to include only plans that are registered under the *Pension Benefits Act,* RSO 1990, c P.8 and the federal *Income Tax Act,* RSC 1985, c 1 (5th Supp) as pension plans. The two main types of registered plans are defined benefit pension plans and defined contribution pension plans.

Further, of these two types of plans, the exemption in s. 9(1) paragraph 3 will apply only where the employee has a defined benefit pension plan. A defined benefit plan is one where the benefit is predetermined and the payout is dependent upon the accrual of service credits. It is the Program's view that the exemption can have no application where the employee has a defined contribution plan because such plans have a payout that is not dependent on years of service (i.e., the payouts are dependent on the total amount of contributions and investment income that has been earned).

The following are examples of a defined benefit pension plan:

The pension plan provides for a normal retirement date of age 65.

The monthly pension amount is calculated as $100 multiplied by the number of years of service; it also provides for a reduction in that amount of 5 per cent for each year between the actual retirement date and the normal retirement date. The employee was forced to retire at age 62 after fifteen years of employment.

Here the exemption cannot apply for two reasons. First, the penalty, typically imposed to reflect the fact that employees who retire before normal retirement age will collect their pensions for a longer time than those who do not retire until normal retirement age, means that the pension is not "actuarially unreduced". Second, because in the normal course of events the employee would not have retired until age 65, by which time he would have had eighteen years of employment, the pension does not reflect all the service credits that the employee, had his employment not been severed, would have been expected to have earned in the normal course of events.

The pension plan provides for a normal retirement date of age 65

The monthly pension is calculated as one-twelfth of the product of an employee's years of service multiplied by 2 per cent multiplied by the average of the employee's five highest years of salary. The employee was forced to retire at age 61 after 22 years of service. However, her pension was not subject to any penalty for early retirement because the plan provides that there will be no such penalty if the employee is at least 60 years of age and has at least 20 years of service credits.

Here, although the pension is actuarially unreduced, the exemption still cannot apply. This is because in the normal course of events she would not have retired until age 65 and would have been expected to have had 26 years of service credits rather than 22.

It is important to remember that there must be a severance of the employee's employment in order for the severance pay provisions to apply at all. An employee who voluntarily takes early retirement and receives a reduced pension has resigned and will not be entitled to severance pay. In determining whether or not the employee's decision to take early retirement was truly voluntary, the circumstances behind the decision must be considered. If the employer informed the employee that the only alternative to accepting the early retirement package would be dismissal or a change in the job that would amount to a constructive dismissal, then the employee's resulting acceptance of the early retirement package would not be considered to be truly voluntary. Where the employee retires at normal retirement age pursuant to a mandatory retirement provision in the contract of employment, the employment will be considered to have been severed, even if the employee does not expressly ask to be allowed to stay on past that age. Where, however, the employee is asked to stay on past the normal retirement age and refuses, the employee will either be considered to have resigned or to have refused reasonable alternative work and will therefore be disentitled to severance pay.

It should be noted that this exemption has no application where an employee whose employment is severed, retires with no pension provided by the employer. In such cases, the employee will be entitled to severance pay unless he or she is otherwise exempted. In this regard, see the following cases which were decided under the former *Employment Standards Act*: *Re Alexanian & Sons Ltd.*; Ascona Spinning Ltd. v Avery (March 21, 1990), ESC 2659 (Bendel); and D.H. Howden, Division of Sodisco-Howden Buying Group Inc. v Lines, 2000 CanLII 13255 (ON LRB).

Employee Refuses Reasonably Alternative Employment - s. 9(1) para. 4

9(1) The following employees are prescribed for the purposes of subsection 64 (3) of the Act as employees who are not entitled to severance pay under section 64 of the Act:

4. An employee whose employment is severed after refusing an offer of reasonable alternative employment with the employer.

The effect of this exemption is to relieve an employer of its obligation to provide severance pay under s. 64 where it severs the employment of an employee who has refused an offer of reasonable alternative employment with the employer. This exemption is substantially similar to the corresponding provision (s. 58(6)(a)) of the former *Employment Standards Act*.

This exemption is identical in wording and meaning to the corresponding termination notice/pay exemption in paragraph 5 of s. 2(1) of O Reg 288/01 - see the discussion in O Reg 288/01, s. 2(1), para. 5.

Employee Refuses Reasonable Alternative Employment Made Available Through Seniority System - s. 9(1) para. 5

9(1) The following employees are prescribed for the purposes of subsection 64 (3) of the Act as employees who are not entitled to severance pay under section 64 of the Act:

5. An employee whose employment is severed after refusing reasonable alternative employment made available through a seniority system.

The effect of this exemption is to relieve an employer of its obligation to provide severance pay under s. 64 where it severs the employment of an employee who has refused reasonable alternative employment that is made available through a seniority system. This exemption is substantially similar to the corresponding provision (s. 58(6)(b)) of the former *Employment Standards Act*.

With one important difference, this exemption is the same as the corresponding termination notice/pay exemption (paragraph 6 of s. 2(1) of O Reg 288/01). The only difference is that this exemption only applies if the alternative work offered is reasonable. With respect to the issue of whether an employee has refused alternative work made available through a seniority system, please refer to section O Reg 288/01, s. 2(1) para. 6. With respect to the issue of whether the alternative work was reasonable, please refer to O Reg 288/01, s. 2(1) para. 5.

Employee Guilty of Wilful Misconduct, etc. - s. 9(1) para. 6

9(1) The following employees are prescribed for the purposes of subsection 64(3) of the Act as employees who are not entitled to severance pay under section 64 of the Act:

6. An employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer.

An employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and that has not been condoned by the employer is not entitled to severance pay. This exemption is substantially the same as the corresponding provision (s. 58(6)(c)) of the former *Employment Standards Act* and the Program policy under that provision. The only difference between the wording of this exemption and its predecessor is the addition of the words "that is not trivial". This change codifies Program policy that applied under the former Act.

This exemption is identical in wording and meaning to the corresponding exemption for termination notice/pay in paragraph 3 of s. 2(1) of O Reg 288/01. Please refer to the discussion of that provision in O Reg 288/01, s. 2(1) para. 3.

For information on the application of the wilful disobedience exemption where an employee is not vaccinated against, or tested for, COVID-19 in accordance with the employer's policy, see "ESA Termination and Severance Liabilities Where an Employee is Not Vaccinated Against or Tested For COVID-19".

Construction Employee - s. 9(1) para. 7

9(1) The following employees are prescribed for the purposes of subsection 64(3) of the Act as employees who are not entitled to severance pay under section 64 of the Act:

7. A construction employee.

An employee who is a "Construction employee" is not entitled to severance pay. For purposes of O Reg 288/01, section 1 of the regulation provides that the term "construction employee" has the same meaning as in O Reg 285/01.

Note, however, there is an exception to this in the case of employees engaged in the maintenance of roads, based on principles of statutory interpretation. Employees who are engaged in road maintenance, although considered "construction employees" for the purposes of O Reg 285/01, are not treated as construction employees for the purposes of O Reg 288/01. See O Reg 288/01, s. 1 for a detailed explanation. Accordingly, employees who are engaged in road maintenance are not covered by the "construction employee" exemption from severance pay in paragraph 7 of s. 9(1). Nonetheless, they are not entitled to severance pay; this is because of paragraph 8 of s. 9(1), which exempts employees engaged in the on-site maintenance of, among other things, roads. See paragraph 9 below for detailed discussion of paragraph 9 of s. 9(1).

Employee Engaged in On-site Maintenance - s. 9(1) para. 8

9(1) The following employees are prescribed for the purposes of subsection 64(3) of the Act as employees who are not entitled to severance pay under section 64 of the Act:

8. An employee engaged in the on-site maintenance of buildings, structures, roads, sewers, pipelines, mains, tunnels or other works.

Employees who are engaged in the on-site maintenance of buildings, structures, roads, sewers, pipelines, mains, tunnels or other works are not entitled to receive severance pay.

Although employees who are engaged in the maintenance of roads are exempt from severance pay entitlements by virtue of this paragraph, they are entitled to the termination pay/notice provisions. See O Reg 288/01, s. 2(1), para. 9. Note that a decision under the former *Employment Standards Act* rejected the argument that office cleaners should be regarded as being engaged in on-site maintenance of buildings. The referee in Federated Building Maintenance Co. Ltd. v 195 Employees (September 23, 1988), ESC 2377 (Franks) held that cleaning was of a cosmetic and hygienic nature, whereas maintenance was an activity primarily aimed at preventing systems from falling into disrepair.

Exceptions to Employees Not Entitled to Severance Pay - s. 9(2)

9(2) Paragraph 2 of subsection (1) does not apply if,

(a) the impossibility or frustration is the result of,

- **i. a permanent discontinuance of all or part of the employer's business because of a fortuitous or unforeseen event,**
- **ii. the employer's death, or**
- **iii. the employee's death, if the employee received a notice of termination before his or her death; or**

(b) the impossibility or frustration is the result of an illness or injury suffered by the employee.

Section 9(1) para. 2 relieves an employer of its obligation to provide severance pay under s. 64 in some situations where an employee's contract of employment has become impossible to perform or has been frustrated. Section 9(2) sets out the exceptions to s. 9(1) para. 2. These two provisions mean that an employee whose employment has been severed (and who meets all the qualifying criteria for severance pay) will be entitled to severance pay even if the contract has become impossible to perform or frustrated, if the reason for the frustration or impossibility was because of:

1. A permanent discontinuance of all or part of the employer's business because of a fortuitous or unforeseen event;
2. The death of the employer;
3. The death of the employee and the employee received notice of termination before his or her death; or
4. The employee's illness or injury.

Each of these situations is described in more detail below.

The contract has become impossible to perform or frustrated because of a permanent discontinuance of all or part of the employer's business because of a fortuitous or unforeseen event.

An employee whose employment contract has become impossible to perform or frustrated because of a permanent discontinuance of all or part of the employer's business because of a fortuitous or unforeseen event will be entitled to severance pay (assuming the qualifying criteria for severance pay are met).

With respect to the phrase "permanent discontinuance of all or part of the employer's business", see the discussion of s. 3(4)(b) of O Reg 288/01.

The phrase "because of a fortuitous or unforeseen event" could include events such as the destruction of the employer's business (for example, by fire, tornado or flood), a supervening change in the law (for example, where a company manufactures cigarettes and it becomes illegal to manufacture tobacco products in Canada), or the loss by the employer of a licence that it must have in order to operate.

It should be noted that where a contract is frustrated or has become impossible of performance as a result of a permanent discontinuance of all or part of the business because of a fortuitous or unforeseen event, the employee is entitled to severance pay because of the application of s. 9(2)(a)(i), but he or she would not be entitled to notice of termination/termination pay under the Act (paragraph 4 of s. 2(1) of O Reg 288/01) because there is no corresponding exception to the "impossibility of performance/frustration of contract" exemption from notice of termination/termination pay.

The contract has become impossible to perform or frustrated because of the death of the employer.

An employee whose employment contract has become impossible to perform or frustrated because of the death of the employer will be entitled to severance pay (assuming the qualifying criteria for severance pay are met). Thus, where a business that had been carried on by a sole proprietor ceases to operate because of the employer's death and the employee's employment is severed as a result, the employee will (assuming that he or she otherwise qualifies) be entitled to severance pay, notwithstanding that the employer's death would have frustrated the employment contract as a matter of law.

Note the different results with respect to an employee's entitlement to termination pay/notice and their entitlement to severance pay where the contract has become impossible to perform or frustrated because of the employer's death. Whereas the death of the employer may, in some situations, disentitle an employee from notice of termination/termination pay as a fortuitous or unforeseeable event that frustrates the contract of employment or makes it impossible to perform - see the discussion of paragraph 4 of s. 2(1) of O Reg 288/01 - it will not disentitle an employee from severance pay.

The contract has become impossible to perform or frustrated because of the death of the employee and the employee received notice of termination before his or her death.

An employee whose employment contract has become impossible to perform or frustrated because of the employee's death will be entitled to severance pay (assuming the qualifying criteria for severance pay are met), so long as the employee received notice of the termination of his or her employment before his or her death.

For example, if an employee is given eight weeks' notice of termination and dies after six weeks of that notice have elapsed, the employee will be entitled to severance pay even though the employee's employment was not actually severed by the employer, in that the employee's death, having occurred during the notice period and before the notice took effect, ended the employment contract before severance by the employer could take place.

The contract has become impossible to perform or frustrated because of the employee's illness or injury.

The frustration exemption does not apply where the frustration of the employment contract is a result of employee injury or illness. An employee whose employment has been severed and whose employment contract has become impossible to perform or frustrated because of the employee's illness or injury will be entitled to severance pay (assuming the qualifying criteria for severance pay are met).

This exception to the exemption from severance entitlements was amended by O Reg 549/05. Prior to the amendment, the exception applied only if the employer was also prohibited from severing the employee's employment under the ***Human Rights Code,*** RSO 1990, c H.19. See the discussion of frustration and impossibility in disability situations in O Reg 288/01, s. 2(1) para. 4.

COVID Vaccines and Tests

ESA Termination and Severance Liabilities Where an Employee is Not Vaccinated Against or Tested For COVID-19

This section of the *Policy and Interpretation Manual* sets out the Employment Standards Program's policies about ESA termination and severance liabilities where an employee is not vaccinated against COVID-19 or tested for COVID-19 in accordance with the employer's policy.

Note:

- Issues regarding whether an employer ***can*** mandate vaccinations and/or testing and the limitations of such policies fall **outside** of the scope of the ESA. This includes:

- whether an employer can make the vaccination and/or testing mandatory for its employees
- what, if any, accommodations are necessary for employees who are unable or unwilling to be vaccinated for medical or other reasons; and
- whether the employer can ask an employee if they are vaccinated or to provide proof of vaccination.

- Other laws that the ES Program does not administer - such as the Human Rights Code and/or the *Occupational Health and Safety Act* - may also be relevant to the issues addressed in this document.

- In addition, employees may have greater rights than what the ESA provides under an individual employment contract or collective agreement, other laws, and/or pursuant to the common law.

Summary

The ESA does not prohibit employers from **terminating** employees for failing to get vaccinated against and/or tested for COVID-19. With respect to the ESA's termination notice/pay and/or severance pay requirements, if an employer terminates an employee for this reason, it is Program policy that:

a. written notice from the employer stating that the employee will be terminated on a particular day if the employee is not vaccinated ***can,*** if done correctly, count towards the ESA's required notice period.

b. the wilful disobedience exemption to the termination and severance pay obligations ***may apply*** where an employee does not comply with the employer's vaccination and/or testing policy.

c. whether or not the imposition of a policy requiring vaccination and/or testing constitutes constructive dismissal under the ESA will depend on the circumstances.

- The ESA does not prohibit employers from **suspending** employees who are not vaccinated against and/or tested for COVID-19 out of concern that the employee might expose others in the workplace to COVID-19. Such employees may have rights to paid or unpaid infectious disease emergency leave (IDEL) during their suspension. See the discussion of IDEL for information.

VACCINATION / TESTING ISSUES

ISSUE 1: TERMINATION / SEVERANCE OF EMPLOYMENT

An employer is not prohibited from terminating an employee under the ESA because the employee isn't vaccinated, refuses to be vaccinated, and/or refuses to be tested

- The ESA does not prohibit an employer from terminating an employee because the employee is not vaccinated, because the employee refuses to be vaccinated, or because the employee refuses to be tested. This is because not being vaccinated and refusing to be vaccinated or tested are not protected activities listed in s. 74 (the main anti-reprisal provision) of the ESA.

Employees cannot take unpaid infectious disease emergency leave (IDEL) and go on leave indefinitely for refusing to comply with the employer's vaccine or testing policy

- The ESA does not prohibit an employer from terminating an employee because the employee is not vaccinated, because the employee refuses to be vaccinated, or because the employee refuses to be tested. This is the case even if the employee is on IDEL or on any other leave at the time of the termination.

    - Note that if, for example, instead of terminating the employee, the employer initially chose to direct the employee to not come into work until the employee is vaccinated (or tested), out of a concern that the employee may expose others in the workplace to COVID-19, the employee would be entitled to unpaid IDEL (and paid IDEL if the other eligibility criteria were met).

      The ESA does not prohibit the employer from subsequently terminating the employee for being unvaccinated, even if the employee is on unpaid or paid IDEL for this reason (or for a different reason). The employer terminating the employee for being unvaccinated does not constitute a reprisal because the reason for the termination is not because the employee is on a leave, but rather is because the employee is not vaccinated, which is **not** protected by s. 74 of the Act.

Employees who are terminated because they are not vaccinated and/or not tested may or may not be entitled to termination and/or severance pay under the ESA – it depends on the circumstances

- Whether an individual employee is entitled to termination and/or severance pay under the ESA is determined on a case-by-case basis.

- The Program policy on how the ESA applies in three scenarios that have arisen is as follows:

Scenario 1: An employer gave an employee a written ultimatum providing that the employee had until a specified date to get vaccinated and stating that the employee would be terminated if not vaccinated by that date. The employee was not vaccinated by the specified date and was terminated. The employee files a claim for termination pay.

Question: Does written notice from the employer that the employee will be terminated on a particular day if the employee is not vaccinated count towards the ESA's required notice period?

Answer: Yes, so long as:

- the employer provides notice in writing clearly indicating that the employee must be vaccinated by a particular date and it is clear that if the employee does not do so the employment relationship will end, and
- the employer satisfies the ESA's s. 60 requirements during the statutory notice period.

Analysis

As set out in the discussion of s. 56 of the ESA, it is Program policy, as per the Wronko decision of the Court of Appeal, that written notice that is conditional on the employee's acceptance of a change of a term and condition of employment can constitute notice for the purposes of the ESA, **so long as it clear that a refusal to accept the change on that date will end the employment relationship**. (This is to be distinguished from written notice that is *conditional on an **event** occurring* – which does not constitute notice for the purposes of the ESA. An example of this is where the employer tells an employee that the employee's employment will be terminated if the employer does not win a contract. For further information, please refer to the discussion under ss. 56(1) of the P&I Manual.

As such, if an employer provides clear written notice that employees who refuse to accept the terms of a vaccination policy by getting vaccinated by a specified date will be terminated (and satisfies the s. 60 requirements that apply during the notice period), the notice counts towards the employer's ESA notice of termination obligations. (Severance pay may still be owing to eligible employees. However, see Scenario 2.)

Scenario 2: An employee was terminated because the employee did not comply with the employer's vaccination or testing policy. The employee files a claim for termination and/or severance pay.

Question: Does the wilful disobedience exemption to the termination and severance pay obligations apply?

Answer: Consistent with the Program's policy regarding the application of the wilful disobedience exemption, the exemption may apply.

Note: the answer below applies equally to the situation where the employee was terminated because the employee did not comply with the employer's policy that required the employee to get **tested** for COVID-19. This is the case whether the policy requires the employee to either be vaccinated or get tested, both vaccinated and tested, or only get tested.

Analysis

The criteria that the Program applies when determining whether the wilful disobedience exemption in O. Reg. 288/01, ss. 2(1), para. 3 and ss. 9(1), para. 6, apply are set out in the discussion of O. Reg. 288/01, ss. 2(1), para. 3.

The criteria, and their applicability to the scenario of termination because of non-compliance with an employer's requirement to be vaccinated, are:

a. The order or rule must have been clear and unequivocal.

- This is a factual determination.

b. The order or rule must not be minor (except perhaps in cases of repeated, uncondoned infractions)

- It is Program policy that a policy requiring vaccination against COVID-19 is not a minor rule, because of the significance of the pandemic including the very serious health implications of COVID-19, the importance of employers' ability to establish rules it considers appropriate for the management of COVID-19 and the potential for significant impact on a employer's business if an employee spreads COVID-19 in the workplace or to the employer's clients. (Even if the rule was considered to be minor, it is Program policy that a continuation of the employee's failure to be vaccinated or tested constitutes repeated infractions.)
- As such, it is Program policy that this criterion will be met in every case.

c. The order or rule must have been communicated to the employee.

- This is a factual determination.
- There is no requirement that the communication be in any particular form - it can be orally or in writing (including electronically).

d. The employee must know (or ought to know) in advance that the disobedience could lead to his or her termination

- This is a factual determination.

e. The order or rule must not require the employee to do anything illegal or unsafe.

- Because any policy requiring vaccination is made ***for*** safety reasons, and in light of the scientific evidence about the safety of COVID-19

vaccines, it is Program policy that this criterion ***will be satisfied in every case except where the employee has a medical reason, supported by evidence from a physician, for not getting the vaccine***.

- This criterion **will be met** with respect to employees who are not vaccinated because they object to the vaccine for religious or other non-medical reasons. The act of getting vaccinated is not illegal or unsafe even if the employee has religious or other non-medical objections against receiving it.

  Although an employee who objects to being vaccinated for religious reasons may believe that the employer is contravening the *Human Rights Code* when requiring the employee to be vaccinated, the ES Program does not take *Human Rights Code* reasons into account when assessing under this criterion. Whether the employer's rule or its application (e.g., whether the employer met its duty under the Code to accommodate) contravenes the Code is not a matter for the ES Program. An employee who is terminated and who objects to the vaccine for religious reasons may have a remedy through the *Human Rights Code*.

f. The employee's conduct is not trivial

- For the same reasons set out under the "rule must not be minor" heading, it is Program policy that the employee's failure to get a vaccine as required by the employer is not trivial and that this criterion will be satisfied in every case.

g. The EE's conduct has not been condoned by the ER

- This is a factual determination.

"**Wilful**"

- A key element to this exemption is that the actions or omissions must be wilful on the part of the employee.

- As set out in the discussion of this exemption under O. Reg. 288/01, s. 2, para. 3, "ordinarily, 'wilful' means that the employee intended the result that came to pass. Thus, poor work or conduct that is accidental or involuntary will generally not be considered to be wilful. However, an employee who is reckless in his or her conduct may be [found to have engaged in wilful disobedience] if that employee knew or ought to have know that his or her conduct would cause the result that came to pass."

- Whether or not an unvaccinated employee's failure to be vaccinated is wilful is a factual determination, although in the circumstances of a vaccination requirement this criterion is likely to be met in most cases.

    - It would not be met only in circumstances such as where the employee was sick or similarly unable to leave home to get the vaccination, the employee could attend the vaccination site but was unable to get vaccinated for reasons out of their control (e.g. if there was a shortage of vaccines and the employee was unable to get one), or the employer did not provide enough advance notice of the requirement to get vaccinated for the employee to make the necessary arrangements.

    - The wilful criterion **will** be met where an employee did not get the vaccine because of religious reasons. An employee who does not get a vaccine for religious reasons and is terminated for non-compliance with a vaccination policy may have a remedy through the Human Rights Tribunal.

Note:

- In the context of collective agreements, a rule unilaterally introduced by the employer (and not subsequently agreed to by the union) needs to pass a test of "reasonableness". **The reasonableness standard does not apply in the context of this ESA exemption in the non-unionized context.** In the non-unionized context, the relevant ESA criterion is that the rule or policy cannot require the employee to do anything illegal or unsafe. **The reasonableness of the rule is not at issue.** As such, context-driven questions that arbitrators may take into account when assessing whether an employer's vaccination policy is reasonable - such as the whether the employee works with vulnerable groups, the extent of local community spread, the vaccination rate in the workplace, the availability of other options to mitigate the risk of COVID-19 such as working from home, physical barriers or distancing, the frequency of contact an employee has with others, or whether the employee works from home - are not relevant here.

- Depending on the circumstances, the **frustration of contract exemptions** may also apply, as the situation may be akin to the Loss of Essential Licence scenario addressed in the discussion of this exemption in Reg. 288/01, s. 2, paragraph 4 of the Manual. Note, however, that one of the conditions that must be met in order for a contract to be frustrated is that the event or circumstance was caused through **no fault of the parties** and as such, there will not be frustration if the employer decides on its own accord – without being required to by law or, for example, by a client of the employer - to implement a mandatory vaccination policy. ES Program staff are asked to contact the Employment Practices Branch for assistance if the argument that the contract has been frustrated is made in a claim investigation.

Whether the employer's imposition of a vaccination policy constitutes constructive dismissal under the ESA depends on the circumstances

Scenario: An employer imposed any of these vaccination policies:

- unvaccinated employees will be terminated
- unvaccinated employees will be placed on leave (either paid, unpaid, or a combination of paid and unpaid)
- unvaccinated employees will be required to work from home
- unvaccinated employees will be required to undergo regular COVID-19 testing (either at their own expense, or at their employer's expense, and on their own time or on paid time).

The employee resigned in response to the policy within a reasonable period. The employee files an ESA claim for termination and/or severance pay, asserting that the policy constituted a constructive dismissal.

Question: Does the imposition of any of those vaccine policies constitute a constructive dismissal?

Answer: It will depend on the facts.

Note also that – as described earlier in Scenario 1 above – the employer may satisfy its ESA notice of termination obligations, rendering the constructive dismissal issue moot, if it provides notice in writing clearly indicating that it will be changing the employment contract at a future specified date by adopting this type of policy and it is clear that the employment relationship will end if the employee does not adhere to the policy - and satisfies the s. 60 requirements during the statutory notice period. In this case the employer is considered by the Program to have effectively provided notice of termination with an offer of re-employment on new terms and conditions.

Analysis

The following criteria must be met to establish a constructive dismissal as a result of a change to the employment contract:

1. the change is made unilaterally by the employer, i.e. without the employee's agreement.
2. the change is to a fundamental term or condition of the employee's employment.
3. the change is substantial and to the employee's disadvantage.

With respect to the first criterion, terms and conditions of employment may be implicit or explicit.

If the employment contract contains an explicit right for the employer to implement the policy at issue, the first criterion will not be met and as such the implementation of a mandatory COVID-19 vaccine / testing policy would not be done "unilaterally" so as to form the foundation for a constructive dismissal claim.

As the vast majority of employment contracts do not contain an express provision granting the employer the right to impose such a policy, the key issue will be whether there is an implied term.

The *Occupational Health and Safety Act* requires an employer to take every precaution reasonable in the circumstances to protect a worker (s. 25(2)(h)). This includes not only the employee but other employees with whom they come in contact.

Whether this general duty creates an **implied** right to impose a vaccination / testing policy will be determined on a case-by-case basis. For example, in a workplace where there has been a history of outbreaks, where employees have to work in close proximity, or the consequences of an outbreak are high (e.g. a long-term care home), it may be that there is an implied right to impose a vaccination / testing policy. Conversely, in a workplace where there have been no COVID cases and employees can be socially distanced or work outside, it may be that there is no implied right to impose a vaccination / testing policy.

ES Program staff are asked to contact the Employment Practices Branch for assistance when investigating claims from employees who claim constructive dismissal on the basis of a vaccination / testing policy.

ISSUE 2: SUSPENSION OF EMPLOYEES

Under the ESA, an employer is not prohibited from suspending an employee because the employee is not vaccinated, telling an employee not to come to work until vaccinated, or not scheduling that employee to work until vaccinated out of a concern that the unvaccinated employee may expose others in the workplace to COVID-19

- The ESA does not prevent an employer from temporarily reducing or temporarily eliminating an employee's hours of work because the employee has not been vaccinated. This is the case whether or not the reduction/elimination is in the form of a disciplinary suspension.

- Where an employer directs an employee not to perform their duties until the employee has been vaccinated, out of a concern that the unvaccinated employee may expose others in the workplace to COVID-19, the employee is entitled to IDEL: up to 3 days of Paid IDEL (if the other qualifying criteria are met, and during the period that Paid IDEL is available) and an unlimited number of days of Unpaid IDEL. (Note that "regular" Unpaid/Paid IDEL is the default in this circumstance versus "deemed" Unpaid IDEL. See ss. 50.1(1.7) of the ESA for more information). Employers may apply to the WSIB for reimbursement for payments made pursuant to the Paid IDEL provisions – see s. 50.1.1 of the ESA for more information.

Temporary layoff and Constructive Dismissal

- An employee who is on a temporary layoff (as defined in the ESA) that exceeds the maximum length set out in the ESA (a period of either 13 weeks in 20 or 35 weeks in 52, depending on the circumstances) is terminated and/or severed under the ESA.

- However, the temporary layoff rules have been modified by O. Reg. 228/20 for non-unionized employees in certain COVID-19 related situations.

- Per O. Reg. 228/20, during the defined "COVID-19 period", a non-unionized employee whose employer has temporarily reduced or temporarily eliminated their hours of work for reasons related to COVID-19 (which includes the employee not being vaccinated against COVID-19):
    - is not considered to be laid off under the ESA, and
    - is not considered to be constructively dismissed under the ESA

  (Note: Although the rules that apply during the COVID-19 period also provide that non-unionized employees whose hours are temporarily reduced or temporarily eliminated for reasons related to COVID-19 are **deemed** to be on unpaid IDEL, it is ES Program policy that the employee is entitled to "**regular**" paid and unpaid IDEL if the reason for the reduction/elimination is the employer's concern that the employee may expose others in the workplace to COVID-19. Note, however, that in this situation the rules in Reg. 228/20 about ESA layoffs and constructive dismissal still apply even if the employee is on "regular" IDEL rather than "deemed" IDEL.)

- Note that the ESA does not address issues about health and safety in the workplace nor does it address employers' authority to exclude employees from the workplace. As such, the question of whether it would be appropriate, or lawful under other laws, for an employer to exclude an employee from the workplace for not being vaccinated against COVID-19 is not a matter for the ES Program.

Ontario Regulation 289/01 – Enforcement

This regulation sets out which penalties are prescribed for notices of contravention as per ESA Part XXII, s. 113. It also sets out which provinces are reciprocating states for reciprocal enforcement of orders as per ESA Part XXIV, s. 130.

O Reg 289/01 Section 1 – Prescribed Penalties Re Notices of Contravention

1. The following penalties are prescribed for the purposes of subsection 113 (1) of the ESA 2000:

Item	Column 1 Contravention	Column 2 Penalty, in dollars
1.	If the notice relates to a contravention of section 2, 15, 15.1 or 16 of the Act	$250
2.	If the notice relates to the second contravention of section 2, 15, 15.1 or 16 of the Act in a three-year period	$500
3.	If the notice relates to the third or subsequent contravention of section 2, 15, 15.1 or 16 of the Act in a three-year period	$1000
4.	If the notice relates to a contravention of a provision of the Act other than section 2, 15, 15.1 or 16	$250
5.	If the notice relates to the second contravention of a provision of the Act other than section 2, 15, 15.1 or 16 in a three-year period	$500
6.	If the notice relates to the third or subsequent contravention of a provision of the Act other than section 2, 15, 15.1 or 16 in a three-year period	$1000
7.	If the notice relates to a contravention of a provision of the Act other than section 2, 15, 15.1 or 16 and the contravention affects more than one employee	$250, multiplied by the number of employees affected
8.	If the notice relates to the second contravention of a provision of the Act other than section 2, 15, 15.1 or 16 in a three-year period and the contravention affects more than one employee	$500, multiplied by the number of employees affected
9.	If the notice relates to the third or subsequent contravention of a provision of the Act other than section 2, 15, 15.1 or 16 in a three-year period and the contravention affects more than one employee	$1000, multiplied by the number of employees affected

ESA Part XXII, s. 113 permits an employment standards officer to issue a notice requiring payment of a prescribed penalty as set out in O Reg 289/01 to a person that the officer believes has contravened the ESA 2000. The officer's power to issue a notice of contravention is discretionary, like the ability to issue

other orders. However, if a notice of contravention is issued, the penalty amounts must be applied as set out within O Reg 289/01.

Note the penalties set out in O Reg 289/01 were higher from January 1, 2018 to December 31, 2018. During that period of time, the penalty amounts were $350/$700/$1500 instead of $250/$500/$1000. Pursuant to subsection 52(5) of the *Legislation Act**, the higher amounts apply only if the contravention relating to the Notice of Contravention occurred during the 2018 calendar year AND the Notice of Contravention was issued during the 2018 calendar year. Otherwise, the lower amounts set out in the current O Reg 289/01 apply.

**Subsection 52(5) of the Legislation Act provides that if an amendment lowers the amount of a penalty, that lower amount applies when a sanction is imposed (i.e. when the notice is issued) even if it is in respect of a contravention that happened before the amendment.*

Penalties for a contravention of ESA 2000 section 2, 15, 15.1 or 16:

Per items 1 to 3 in the chart above, the penalties for a contravention of one of these sections are as follows:

- $250
- $500 for a second contravention of the same provision within a three-year period, and
- $1000 for a third or subsequent contravention of the same provision in a three-year period.

Note that when determining the penalty for a contravention of section 2, 15, 15.1 or 16, the number of employees affected by the contravention is not relevant; the officer does **not** multiply the penalty by the number of employees affected.

Penalties for a contravention of any provision **other than** section 2, 15, 15.1 or 16 **affecting only one employee**:

Per items 4 to 6 of the chart above, the penalties in this context are as follows:

- $250
- $500 for a second contravention of the same provision within a three-year period, and
- $1000 for a third or subsequent contravention of the same provision in a three-year period.

Penalties for a contravention of any provision **other than** section 2, 15, 15.1 or 16 **affecting more than one employee**:

Per items 7 to 9 in the chart above, the penalties in this context are as follows:

- $250 multiplied by the number of affected employees
- $500 multiplied by the number of affected employees for a second contravention of the same provision within a three-year period, and
- $1000 multiplied by the number of affected employees for a third or subsequent contravention of the same provision in a three-year period.

When Penalty Amounts Escalate – "Second, Third or Subsequent Contravention"

Note that in order for the penalty amount to escalate (i.e. from $250 to $500, or from $500 to $1000), the same provision of the ESA 2000 must have been contravened for a second or third time within a three-

year period. This means that one or more NOCs must have previously been issued and have resulted in a deemed contravention under subsection 113(5) of the ESA 2000 in the previous three-year period.

Per ss. 113(5), a notice of contravention is deemed to have been contravened where the person against whom it was issued fails to make an application for a review of the notice within 30 days of the date of service, or, where a review was sought, the Ontario Labour Relations Board finds that the person contravened the provision set out in the notice.

When determining whether there is a prior deemed contravention that will cause the penalty amount to escalate, it is the three year period **prior to the date of the current contravention for which an NOC is being issued** that is reviewed, rather than the three year period prior to the date the current NOC is being issued.

"Person"

An officer may issue a notice of contravention to any person the officer believes has contravened the ESA 2000. "Person" is defined in ESA Part I, s. 1 to include a trade union. The word "person" indicates that the notice may be issued against persons other than an employer. For example, a notice of contravention could be issued against someone who is not the employer but who has custody of records or documents relevant to an investigation and who refuses to make them available for inspection contrary to ESA Part XXI, s. 91(8).

O Reg 289/01 Section 2 – Reciprocal Enforcement of Orders

2(1) Each state listed in Column 1 of the Table to this section is prescribed as a reciprocating state for the purposes of section 130 of the Act.

(2) Each authority listed in Column 2 of the Table to this section is prescribed as the designated authority for the state listed opposite it in Column 1.

Column 1	Column 2
Alberta	Director of Employment Standards for Alberta
British Columbia	Director of Employment Standards for British Columbia
Manitoba	Director of Employment Standards for Manitoba
New Brunswick	Director of Employment Standards for New Brunswick
Newfoundland and Labrador	Director of Labour Standards for Newfoundland and Labrador
Northwest Territories	Labour Standards Board of the Northwest Territories
Nova Scotia	Director of Employment Standards for Nova Scotia
Nunavut	Nunavut Labour Standards Board

Prince Edward Island	**Inspector of Labour Standards for Prince Edward Island**
Quebec	**Commission des normes du travail**
Saskatchewan	**Director of Labour Standards for Saskatchewan**
Yukon	**Director of Employment Standards for the Yukon**

Ontario Regulation 291/01 – Terms and Conditions of Employment in Defined Industries – Women's Coat and Suit Industry and Women's Dress and Sportswear Industry _ REVOKED

Effective, October 30, 2019, O Reg 291/01 - Terms and Conditions of Employment in Defined Industries - Women's Coat and Suit Industry and Women's Dress and Sportswear Industry is REVOKED. The special rules and terms and conditions for employees working in the women's coat and suit industry and the women's dress and sportswear industry no longer apply. Those employees previously captured by the Regulation will now be subject to the regular provisions of the Employment Standards Act.

This regulation sets out special rules and terms and conditions for employees working in the women's coat and suit industry and the women's dress and sportswear industry. In particular, the regulation addresses issues related to hours of work, including minimum pay for short periods of work, normal work day, normal work week, work schedule requirements, breaks relating to special rate work and vacation, etc.

O Reg 291/01 Section 1 – Definitions

1. In this Regulation,

"defined industries" means the women's coat and suit industry and the women's dress and sportswear industry;

"fur industry" means all work done in the manufacture, repair or remodelling, in whole or in part, of coats, jackets, similar garments, neck-pieces, cuffs and other pieces made of fur (not including imitation or simulated fur), except work done on the employer's premises by only one person;

"industry holiday" means,

(a) New Year's Day,

(a1) Family Day, being the third Monday in February,

(b) Good Friday,

(c) Victoria Day,

(d) Canada Day,

(e) Labour Day,

(f) Thanksgiving Day,

(g) Christmas Day, and

(h) Boxing Day, being December 26 or the Monday next following when Christmas falls on a Saturday;

"piece-work basis", in relation to how an employee is paid, means payment based on the number of articles or things that are manufactured, prepared, improved, repaired, altered, assembled or completed;

"special rate work" means,

(a) in relation to an employee who is not a homeworker, work described in clause 11 (1) (a), and

(b) in relation to a homeworker, work described in clause 11 (1) (b);

"women's coat and suit industry" means all work done in the manufacture anywhere in Ontario, in whole or in part, of cloaks, coats, suits, wraps, wind-breakers, skirts manufactured for use as part of a suit, jackets or blazers, manufactured from any material including suede, leather, simulated, synthetic, pile and fur fabrics, of any description, for female persons of all ages, but does not include work done in,

(a) the manufacture of,

i. ski-suits or skating suits, in whole or in part,

ii. athletic uniforms, in whole or in part,

iii. riding-coats, or

iv. lounging-robes, bathrobes, kimonos, pyjamas or beach wraps,

(b) the making of cloaks, coats, suits, wraps, wind-breakers, skirts manufactured for use as part of a suit, jackets or blazers, manufactured from any material including suede, leather, simulated, synthetic, pile and fur fabrics, of any description, for female persons of all ages by a custom tailor, who,

i. makes cloaks, coats, suits, wraps, wind-breakers, skirts manufactured for use as part of a suit, jackets or blazers individually for a retail customer, according to the measurements and specifications of the retail customer, and

ii. does not employ more than four persons in making cloaks, coats, suits, wraps, wind-breakers, skirts manufactured for use as part of a suit, jackets or blazers, or

(c) the receiving, warehousing, shipping or distributing of raw materials or manufactured products or in sales, design or administrative operations;

"women's dress and sportswear industry" means all work done in the manufacture in whole or in part of all types, kinds and styles of garments worn by female persons and includes, without limiting the generality of the foregoing, garments commonly known as dresses, gowns, sportswear, play clothes, skirts, trousers, pants, slacks, blouses, tops, vestees, at-home wear, pantsuits and jumpsuits, but does not include work done in a separate manufacturing area in,

(a) the manufacture of garments for female persons not over 14 years of age or of a size up to and including girls' Canada Standard Size 14,

(b) the making of such garments by a custom dressmaker or custom manufacturer who,

i. makes such garments individually for retail customers with whom the dressmaker or manufacturer deals directly according to the measurements and specifications of the retail customers, and

ii. does not employ more than four persons in making such garments,

(c) the manufacture of garments in the women's coat and suit industry,

(d) the manufacture of garments in the fur industry,

(e) the manufacture of undergarments and lingerie, namely, brassieres, slips, half-slips, panties, girdles and corsets,

(f) the manufacture of sleepwear, namely, garments intended to be and worn as sleeping garments, including peignoir sets consisting of an undergarment worn as a sleeping garment and an overgarment made of lightweight fabric,

(g) the manufacture of utility garments, namely, bathrobes, kimonos, housecoats, brunchcoats and terry cloth gowns, for utilitarian purposes and of a design, colour and pattern distinct from and not worn in conjunction with any other garment made by the manufacturer doing work within the designation or made by or for another manufacturer doing work within the designation or with whom such manufacturer is associated directly or indirectly in any manner whatsoever,

(h) the manufacture of cloth and fabric, including the spinning of yarn and knitting of fabric,

(i) the manufacture of such garments made from knitted material by a knitwear manufacturer who,

i. makes available to the Director on request, during reasonable business hours, all of the records pertaining to garments and material produced, purchased and sold by the manufacturer,

ii. manufactures such garments and the knitted material on the same premises, and

iii. does not manufacture such garments for another manufacturer doing work within the designation or with whom such manufacturer is associated directly or indirectly in any manner whatsoever,

(j) the manufacture of blouses, defined as a woman's tailored garment of a maximum length of 26 inches measured from the middle of the collar and of design, colour and pattern distinct from and not intended to be worn in conjunction with any other garments made by or for the manufacturer or made by or for a manufacturer with whom the manufacturer is associated directly or indirectly,

(k) the manufacture of bathing suits, knitted sweaters or any style of apron, or

(l) the receiving, warehousing, shipping or distributing of raw materials or manufactured products or in sales, design or administrative operations.

O Reg 291/01 Section 2 – Terms and Conditions of Employment

2(1) This Regulation sets out the terms and conditions of employment that apply to employees and employers in the defined industries.

2(2) Except as modified by this Regulation, the Act applies to employers and employees in the defined industries.

Section 2 states that O Reg 291/01 provides for terms and conditions of employment that apply to employers and employees in the defined industries; however, it also states that except as is otherwise indicated by the regulation, the *Employment Standards Act, 2000* applies to them.

O Reg 291/01 Section 3 – Minimum Pay for Short Periods of Work

3(1) Despite section 21.2 of the Act, if an employee is required to work for a period of less than four hours or is required to report to work but does not work any hours, the employee shall be deemed to have worked four hours and the employer shall pay the employee accordingly.

3(2) This section does not apply to homeworkers.

This provision was amended effective January 1, 2019 to reflect a change made to the "general" three-hour rule; the three-hour rule was previously found in section 5 of O Reg 285/01; however, effective January 1, 2019, the three-hour rule was revoked from s. 5 of O Reg 285/01 and a modified three-hour rule was introduced to section 21.2 of the ESA 2000.

Section 3(1) of O Reg 291/01 states that despite the three-hour rule as set out in section 21.2 of the ESA 2000, an employee in one of the defined industries who is required to work for a period of less than four hours or is required to report for work but does not work any hours, is deemed to have worked four hours, and is to be paid accordingly.

For a discussion on the three-hour rule, see ESA Part VII.1, section 21.2.

Subsection 3(2) states that the four-hour rule in O Reg 291/01, s. 3(1) does not apply to homeworkers.

O Reg 291/01 Section 4 – Non-Application of ss. 18 to 21 of Act

4 Sections 18 to 21 of the Act do not apply with respect to employees in the defined industries.

Section 4 of O Reg 291/01 states that ss. 18 to 21 of the *Employment Standards Act, 2000* do not apply to employees in the defined industries. Those sections deals with time free from work, exceptional

circumstances in which the limits on hours of work and the free time provisions do not apply and the rules concerning eating periods.

O Reg 291/01 Section 5 – When an Employee May not be Required to Work

5(1) An employer shall not require or allow an employee to perform work,

(a) on an industry holiday; or

(b) between midnight and 6:00 a.m.

5(1) Subsection (1) applies despite any agreement under subsection 17 (2) of the Act.

Section 5(1) of O Reg 291/01 sets out times when an employer cannot require an employee to perform work:

- On an industry holiday as defined in s. 1 of O Reg 291/01; and
- Between midnight and 6:00 a.m.

Section 5(2) states that s. 5(1) applies despite any agreements made under s. 17(2) of the *Employment Standards Act, 2000* to exceed the daily limit of eight hours in a day, or a regular work day of more than eight hours, as established by the employer. When O Reg 291/01 was made, s. 17(2) referred to both agreements to work in excess of the daily limit and agreements to work in excess of the weekly limit. Agreements to work in excess of the weekly limit are now dealt with in subsection 17(3) of the Act; however, by virtue of s. 59 of Part VI of the *Legislation Act, 2006*, SO 2006, c 21, Sch F, the reference in s. 5(2) of the regulation should be read as if it referred to both ss. 17(2) and 17(3) of the Act.

Under s. 1 of the regulation, an “industry holiday” is defined as meaning:

a) New Year’s Day
b) Good Friday
c) Victoria day
d) Canada Day
e) Labour Day
f) Thanksgiving Day
g) Christmas Day, and
h) Boxing Day, being December 26 or the Monday next following when Christmas falls on a Saturday.

O Reg 291/01 Section 6 – Normal Work Day and Normal Work Week

6(1) An employee’s normal work day shall not exceed 8 hours, including paid breaks but not including eating periods.

6(2) A normal work day shall not be on a Saturday or Sunday.

6(3) An employee's normal work week shall not exceed 40 hours, including paid breaks but not including eating periods.

6(4) A normal work week is determined on the basis of the period from midnight on Saturday to midnight on the following Saturday.

Section 6 of O Reg 291/01 establishes the normal work day and work week for employees in the defined industries. A normal work day is a day between Monday and Friday that does not exceed eight hours, including paid breaks but not including eating periods.

An employee's normal work week cannot be more than 40 hours, including paid breaks but not including eating periods, from a work week based on the period from midnight on Saturday to midnight on the following Saturday.

O Reg 291/01 Section 7 – Normal Work Day Under Work Schedule

7(1) If an employer establishes a work schedule in accordance with sections 8 and 9 and satisfies the requirements in those sections, an employee's normal work day is determined under the work schedule and not under section 10.

7(2) This section does not apply to homeworkers.

O Reg 291/01 Section 8 – Work Schedule

8 The following apply with respect to an employer's work schedule:

1. **The work schedule shall set out the starting time of the normal work day for all employees.**
2. **If the work schedule provides for a single shift, a normal work day shall not begin after 9:30 a.m.**
3. **A normal work day shall not be scheduled on a Saturday or Sunday.**
4. **Each employee shall have a half-hour eating period midway through the employee's normal work day.**
5. **The employer shall file the work schedule with the Director at least seven days before it becomes effective.**
6. **The employer shall post the work schedule at least seven days before it becomes effective, and shall keep it posted while the work schedule is in effect. The work schedule shall be posted in a conspicuous place or places in the workplace where it is most likely to come to the attention of the employees to whom it relates.**

O Reg 291/01 Section 9 – Work Schedule Requirements, Two Shifts

9 The employer's work schedule may provide for two shifts subject to the following:

1. **The employer shall file the work schedule with the Director at least 15 days before it becomes effective instead of as paragraph 5 of section 8 requires.**

2. **An employee shall be scheduled to work only the earlier shift or the later shift and shall not be required to change shifts unless the employee or the employee's agent agrees.**

3. **An employee who works on the later shift shall be paid at least 5 per cent more than the employee would be paid if the employee worked the earlier shift.**

4. **If immediately before the work schedule becomes effective the employer only had one shift,**

   i. **the work schedule shall not result in an employee who was working in that single shift working less than a normal work day or working fewer normal work days, and**

   ii. **an employee who was employed immediately before the work schedule became effective shall not be scheduled to work the later shift unless the employee or the employee's bargaining agent agrees.**

O Reg 291/01 Section 10 – Normal Work Day if No Work Schedule

10(1) If section 7 does not apply, the normal work day for an employee begins at 8:00 a.m. on each of Monday to Friday, with an unpaid half-hour eating period midway through the working day and two paid 10-minute breaks, one before and one after the eating period.

(2) This section does not apply with respect to employees who are homeworkers.

Section 10(1) of O Reg 291/01 provides that where the employer has not established a work schedule in accordance with ss. 8 and 9, s. 10 applies to establish a "normal work day" for employees in the defined industries.

In that case, the normal work day commences at 8:00 a.m. Monday through Friday with one unpaid half-hour eating period midway through the work day and a paid 10-minute break both before and after the eating period (that is, one before and one after the eating period).

Section 10(2) states that s. 10(1) does not apply with respect to employees who are homeworkers.

O Reg 291/01 Section 11 – Special Rate Work

11(1) An employer shall not require or allow an employee who is not a home-worker to perform work,

(a) in excess of 8 hours, including paid breaks but not including eating periods, on any of Monday to Friday; or

(b) on Saturday or Sunday.

11(2) An employer shall not require or allow an employee who is a homeworker to perform work in excess of 40 hours in a week, determined on the basis of the period from midnight on Saturday to midnight on the following Saturday.

11(3) Subsections (1) and (2) apply instead of subsection 17 (1) of the Act.

11(4) Subsection 17 (2) of the Act applies, but shall be read as if the words "in excess of an amount set out in subsection (1)" were struck out and "in excess of an amount set out in subsection 11 (1) or (2) of Ontario Regulation 291/01 (Terms and Conditions of Employment in Defined Industries)" substituted.

O Reg 291/01 Section 12 – Breaks Relating to Special Rate Work After Normal Work Day

12(1) Despite section 20 of the Act, before an employee performs more than two hours of special rate work after the end of a normal work day, the employer shall give the employee a paid 15-minute break.

12(2) The break under subsection (1) shall be paid at the special rate determined under section 14.

12(3) If an employee performs more than five hours of special rate work on a Saturday or Sunday, the employer shall permit the employee a half-hour eating period so that the employee does not work more than five consecutive hours without an eating period.

12(4) This section does not apply with respect to employees who are homeworkers.

O Reg 291/01 Section 13 – Pay for Special Rate Work

13 Despite Part VIII of the Act, the employer shall pay an employee the special rate determined under section 14 for all special rate work.

Section 13 of O Reg 291/01 states that despite Part VIII of the *Employment Standards Act, 2000* dealing with overtime, the employer shall pay an employee the special rate determined under s. 14 for all special rate work.

O Reg 291/01 Section 14 – Special Rate

14(1) The special rate is an hourly rate for all employees, even for those employees who are not normally paid on an hourly basis.

14(2) The special rate is one and one-half times the following:

1. **For an employee who is not paid on a piece-work basis, the hourly average of the wages paid to him or her during the most recent pay period in which the employee worked normal work days before the pay period in which he or she performed special rate work.**
2. **For an employee who is paid on a piece-work basis, the hourly average of the wages paid to him or her,**
    i. **during the months from July to December in the previous year, in the case of special rate work performed during the months from January to June, and**
    ii. **during the months from January to June in the same year, in the case of special rate work performed during the months from July to December.**
3. **The special rate for an employee who is a homeworker shall be determined under paragraph 2 of subsection (2) whether or not the employee is paid on a piece-work basis.**
4. **The following shall not be considered in determining an employee's special rate under subsection (1):**
    1. **Pay at the special rate.**

2. **Vacation pay and year-end vacation payments.**
3. **Industry holiday pay under subsection 18 (3).**
4. **Termination pay and severance pay.**
5. **Entitlements under a provision of the employment contract that, under subsection 5 (2) of the Act, prevails over Part VIII, X, XI or XV of the Act.**

O Reg 291/01 Section 15 – Vacation

15(1) Despite Part XI of the Act, the employer shall give a vacation of two weeks to an employee upon the completion of each 12-month period of employment, whether or not the employment was active employment.

15(2) The employer shall determine the period when an employee may take the vacation to which he or she is entitled under subsection (1), which may be a two-week period or two periods of one week each, but in any case the employee shall be given the vacation not later than 10 months after the end of the 12-month period for which it is given.

15(3) A week of vacation is calculated on the basis of the period from midnight on Saturday to midnight on the following Saturday.

O Reg 291/01 Section 16 – Vacation Pay

16(1) Despite Part XI of the Act, the employer shall pay an employee vacation pay for the employee's vacation.

16(2) An employee's vacation pay shall be equal to 4 per cent of all wages, not including vacation pay or any year-end vacation payment, earned by the employee during the period for which the vacation is given.

O Reg 291/07 Section 17 – Year-end Vacation Payment

17(1) Despite Part XI of the Act, the employer shall pay an employee, in addition to vacation pay under section 16, a year-end vacation payment in accordance with this section.

17(2) An employee who has been employed by an employer for at least three continuous months is entitled to a year-end vacation payment equal to 2 per cent of all wages, excluding vacation pay, earned during the year to which the year-end vacation payment applies.

17(3) For the purpose of this section, the year to which a year-end vacation payment applies shall be,

(a) the 12-month period established for the purpose by the practice of the employer; or

(b) if the employer has not established such a year, the 12-month period beginning on December 1 in a year and ending on November 30 in the following year.

17(4) Subject to subsection (5), the employer shall pay the year-end vacation payment no later than six weeks after the end of the year to which it applies.

17(5) If the employment of the employee is terminated in a year, the employer shall pay the year-end vacation payment for that year no later than seven days after the termination.

O Reg 291/01 Section 18 – Industry Holiday Pay

18(1) Despite Part X of the Act, the employer shall pay an employee for each industry holiday, unless,

- **(a) the employee has been employed by the employer for less than three months; or**
- **(b) the employee was scheduled to work on the first normal work day either before or after the industry holiday and the employee failed to work that day as scheduled.**

18(2) The amount the employer shall pay an employee for an industry holiday is,

- **(a) if the employee is not paid on a piece-work basis, the average of the wages paid for the days the employee works during the two-month period before the industry holiday; and**
- **(b) if the employee is paid on a piece-work basis, the hourly average of the wages paid,**
  - **(i) for the days the employee works during the months from July to December in the previous year, in the case of an industry holiday that falls in the months from January to June, and**
  - **(ii) for the days the employee works during the months from January to June in the same year, in the case of an industry holiday that falls in the months from July to December.**

18(3) The industry holiday pay for an employee who is a homeworker shall be determined under clause (2) (b) whether or not the employee is paid on a piece-work basis.

18(4) The following shall not be considered in determining the amount of an employee's industry holiday pay:

1. **Pay at the special rate.**
2. **Vacation pay and year-end vacation payments.**
3. **Industry holiday pay under subsection (3).**
4. **Termination pay and severance pay.**
5. **Entitlements under a provision of the employment contract that, under subsection 5 (2) of the Act, prevails over Part VIII, X, XI or XV of the Act.**

O Reg 291/01 Section 19 – Special Rules for Victoria Day and Canada Day

19(1) Despite Part X of the Act and section 5, an employer may require an employee to work a normal work day on Victoria Day or Canada Day if the employee or the employee's agent agrees and the holiday does not fall on a Saturday or Sunday.

19(2) The normal work day that the employer may require an employee to work under subsection (1) is the normal work day that would have applied if the day were not Victoria Day or Canada Day.

19(3) Subject to subsection (4), if an employee works a normal work day on Victoria Day or Canada Day, the following apply:

1. **The employer shall pay the employee industry holiday pay under section 18 if the employee is entitled to industry holiday pay.**
2. **The employer shall pay the employee the special rate determined under section 14 for the work on the holiday.**

19(4) If an employee works a normal work day on Victoria Day or Canada Day, the employer may, if the employee or the employee's agent agrees, substitute a normal work day for the industry holiday and the following apply:

1. **The industry holiday shall be deemed to be a normal work day.**
2. **The substituted normal work day shall be deemed to be the industry holiday.**
3. **The substituted normal work day shall be before the employee's next paid vacation day.**

19(5) If an employee is required to work a normal work day on Victoria Day or Canada Day but fails, without reasonable cause, to report for work, the employee is not entitled to industry holiday pay under section 18.

O Reg 291/01 Section 20 – Industry Review Committee

20(1) The Minister may establish a committee to advise the Minister on matters related to employment standards within the Ontario garment manufacturing industry.

20(2) The committee shall be composed of a chair, and as many members equal in number representative of employers and employees respectively as the Minister considers proper, all of whom shall be appointed by the Minister.

20(3) The members of the committee shall be appointed for a term not exceeding one year and are eligible for reappointment.

20(4) The Minister may fill a vacancy in the membership of the committee by appointing a person to fill the unexpired term.

Ontario Regulation 390/05 – Terms and Conditions of Employment in Defined Industries – Public Transit Services

This regulation sets out special rules regarding the terms and conditions of employment for employees employed in public transit services. Currently, the regulation's scope is limited to hours free from work and eating periods.

O Reg 390/05 Section 1 – Definitions

O Reg 390/05 came into effect on June 24, 2005.

Defined Industry

1 In this Regulation,

"defined industry" means the industry of providing public transit services;

Section 1(1) defines the industry to which O Reg 390/05 applies to mean the industry of providing public transit services.

Public Transit Services

1 In this Regulation,

"public transit service" means any service for which a fare is charged for transporting the public by vehicles operated by or on behalf of a municipality or a local board, or under an agreement with a municipality or a local board;

"Public transit services" is defined to mean any fare-charging service for transporting the public by vehicles that are operated by or on behalf of a municipality or a local board, or under an agreement with a municipality or a local board.

Vehicle

1 In this Regulation,

"vehicle" includes transportation facilities for the physically disabled, but does not include,

(a) vehicles and marine vessels used for sightseeing tours;

(b) buses used to transport pupils, including buses owned and operated by, or operated under a contract with, a school board, private school or charitable organization;

(c) buses owned and operated by a corporation or organization solely for its own purposes without compensation for transportation;

(d) taxicabs;

(e) railway systems of railway companies incorporated under federal or provincial statutes;

(f) ferries;

(g) aviation systems; or

(h) ambulances.

The term "vehicle", which might be operated by the public transit service, is defined to include transportation facilities for the physically disabled, but not to include: vehicles and marine vessels for sightseeing tours, school buses, buses owned and operated by a corporation or organization solely for its own purposes without compensation for transportation, taxicabs, railway systems (whether incorporated under federal or provincial statutes), ferries, aviation systems or ambulances.

It should be noted that, in addition to listing these exceptions, the definition of "vehicle" is inclusive rather than exhaustive. Other kinds of vehicles (e.g., subway trains and street cars) might qualify as a vehicle operated by a public transit service even though they are not listed in this s. 1 definition, if they are not specifically excluded.

O Reg 390/05 Section 2 – Scope

2 This Regulation is restricted in its application to,

(a) employees in the defined industry who operate public transit vehicles or who work as collectors; and

(b) employers of the employees described in clause (a).

Section 2 narrows the scope of O Reg 390/05, by restricting it in its application to employees in the defined industry who operate public transit vehicles or who work as collectors and to their employers.

The terms “defined industry” and “vehicle” are both defined in s. 1 of O Reg 390/05.

O Reg 390/05 Section 3 – Terms and Conditions of Employment

3 This Regulation sets out terms and conditions of employment that apply to employees and employers described in section 2.

Section 3 simply states that O Reg 390/05 sets out terms and conditions of employment that apply to employers and employees in the defined industry of providing public transit services.

O Reg 390/05 Section 4 – Hours Free from Work

Hours Free From Work – ss. 4(1) & (2)

4(1) If the employer and employee agree, subsection (2) applies instead of subsection 18 (1) of the Act.

4(2) An employer shall give an employee a period of at least eight consecutive hours free from performing work in each day.

Section 4(1) of O Reg 390/05 provides that, where the employer and employee in the defined industry agree, s. 4(2) applies instead of s. 18(1) of the ESA 2000. Section 18(1) reads as follows:

18(1) An employer shall give an employee a period of at least 11 consecutive hours free from performing work in each day.

Under s. 4(2) of O Reg 390/05, the period of at least 11 consecutive hours free from performing work in each day (in s. 18(1) of the ESA 2000) is replaced by a period of at least eight consecutive hours free from performing work in each day. See ESA Part VII, s. 18(1) for a discussion of the meaning of "day".

There can be no substitution of s. 4(2) for s. 18(1) of the ESA 2000 unless the employer and employee (or union) agree. Agreements to substitute s. 4(2) for s. 18(1) of the ESA 2000 must be in writing in order to be valid. See ESA Part I, s. 1(3) and s. 1(3.1) for a full discussion of the requirements regarding written agreements.

Like s. 18(1) of the ESA 2000 which it replaces, the provision for daily rest in s. 4(2) of O Reg 390/05 is an employment standard as defined in s. 1(1) of the ESA 2000 and cannot be contracted out of or waived (s. 5(1)). The employer and employee could not, for example, agree to a daily rest period of six hours.

For a discussion of how the 11-hour daily rest operates, see ESA Part VII, s. 18(1). Substitute "8 hours" for "11 hours" each time it appears in order to understand the operation of the eight-hour daily rest period under s. 4(2) of O Reg 390/05.

Interaction With Other Hours of Work Provisions

The requirement in s. 4(2) for at least eight consecutive hours off work in each day operates together with the hours of work provisions in Part VII of the ESA 2000 and s. 5 of O Reg 390/05, as follows:

On-Call Exception

Section 18(2) of the ESA 2000 sets out an "on-call exception" to s. 18(1) of the ESA 2000. This exception also applies if the daily rest period is eight consecutive hours as per s. 4(2) of O Reg 390/05, when it replaces the 11-hour daily rest requirement in s. 18(1) in the defined industry.

Under s. 18(2), the requirement that an employee have at least 11 hours free from performing work in each day (in accordance with s. 18(1) of the ESA 2000) or at least eight hours free from performing work in each day (in accordance with s. 4(2) of O Reg 390/05) does not apply to an employee who is on call and is called in during a period they would not otherwise have been expected to work. The on-call exception is an exception only to the requirement to provide 11 or eight consecutive hours free from work each day as per s. 18(1) of the ESA 2000 or s. 4(2) of O Reg 390/05. It does not operate as an exception to any other hours of work provisions.

For a discussion of the on-call exception, see ESA Part VII, s. 18(2). Substitute s. 4(2) of O Reg 390/05 for s. 18(1) of the ESA 2000, and substitute eight hours for 11 hours, wherever the references appear.

Maximum Daily Hours

Section 17(1) of the ESA 2000 provides for maximum daily hours of work of eight hours per day or, if there is an established workday that is longer than eight hours, the number of hours in that work day. However, under s. 17(2) of the ESA 2000, employers and employees can agree, in writing, that the employee will work up to a specified number of hours in excess of the daily limit. For such an agreement to be valid, s. 17(5) requires that non-unionized employees first be provided with a copy of the Ministry of Labour's information sheet on hours of work and overtime and that the agreement contains a statement by the employee acknowledging such receipt.

For further details about the maximum daily hours of work, agreements to vary from the maximum daily hours and the requirement to provide the Ministry's information sheet, see ESA Part VII, s. 17.

Maximum Weekly Hours

Section 17(1) of the ESA 2000 provides for maximum weekly hours of work of 48 hours. However, under s. 17(3) of the ESA 2000, employers and employees can agree, in writing, that the employee will work up to a specified number of hours in excess of the weekly limit. For such an agreement to be valid, s. 17(5) requires that non-unionized employees first be provided with a copy of the Ministry of Labour's information sheet on hours of work and overtime and that the agreement contains a statement by the employee acknowledging such receipt.

For further details about the maximum weekly hours, agreements to vary from the maximum weekly hours and the requirement to provide the Ministry's information sheet, see ESA Part VII, s. 17.

Free From Work Between Shifts

Section 18(3) of the ESA 2000 requires employers to provide employees with a minimum period free from work of eight hours between successive shifts, with two exceptions. First, an employee may work successive shifts without the eight-hour free period if the total number of hours worked on the successive shifts is 13 or less. Second, the employer and employee can agree, in writing, to forego the eight-hour period entirely or to reduce its length. For a discussion of the interaction of s. 18(3) with the required daily rest in s. 18(1) of the ESA 2000, see ESA Part VII, s. 18(3).

Per s. 4 of O Reg 390/05, an employee and employer in the defined industry could agree in writing to a minimum daily rest of eight hours (instead of the 11 hours in s. 18(1) of the ESA 2000). That employee could then agree in writing to work an eight and a 10-hour shift back to back, without any break between them. The agreement in writing would comply with s. 18(3) of the ESA 2000, but if it resulted in the employee receiving a daily rest of less than eight consecutive hours (per the agreement under s. 4 of the Regulation), the schedule would be in violation of the Regulation and, therefore, would not be permitted. In other words, an employee in the defined industry cannot agree to work hours under s. 18(3) of the ESA 2000 that would result in the employee getting less than the eight consecutive hours free from work each day stipulated in s. 4(2) of O Reg 390/05.

Weekly/Bi-weekly Rest Periods

Section 18(4) of the ESA 2000 establishes weekly or bi-weekly free time requirements for employees. The free time periods must be at least either 24 consecutive hours in every "work week" or 48 consecutive hours in every two consecutive "work weeks".

See ESA Part VII, s. 18(4) for a discussion of the weekly/bi-weekly rest period provisions.

Exceptional Circumstances

Section 19 of the ESA 2000 allows employers to require employees to work more daily or weekly hours than are permitted under s. 17 of the ESA 2000, or to work during a free period (daily, in between shifts and weekly or biweekly) as required by s. 18 of the ESA 2000 (and s. 4(2) of O Reg 390/05) in any of the specified circumstances, but only so far as is necessary to avoid serious interference with the ordinary working of the employer's establishment or operations.

For a discussion of the exceptional circumstances, see ESA Part VII, s. 19.

Eating Periods

Under s. 20 of the ESA 2000, an employer is required to provide an eating period of at least 30 minutes, timed so that no employee works longer than five consecutive hours without receiving an eating period, or, if the employer and employee agree (not necessarily in writing), two eating periods that together total at least 30 minutes within the same period of five consecutive hours.

For further details about eating periods, see ESA Part VII, s. 20.

However, under s. 5 of O Reg 390/05, there are circumstances in which the eating periods provision of the ESA 2000 do not apply.

O Reg 390/05 Section 5 – Eating Periods

5 Section 20 of the Act does not apply to an employee who,

(a) is working a straight shift, and has chosen to work that shift;

(b) is working a split shift for which no meal break that complies with section 20 of the Act is provided, and has chosen to work that shift; or

(c) is working a straight shift, or a split shift for which no meal break that complies with section 20 of the Act is provided, and has chosen to work whatever shift the employer assigns.

Section 5 of O Reg 390/05 provides that s. 20 of the *Employment Standards Act, 2000* does not apply in certain circumstances.

Section 20 of the ESA 2000 states:

20(1) An employer shall give an employee an eating period of at least 30 minutes at intervals that will result in the employee working no more than five consecutive hours without an eating period.

Under s. 20, an employer is required to provide an eating period of at least 30 minutes, timed so that no employee works longer than five consecutive hours without receiving an eating period, or, if the employer and employee agree (not necessarily in writing), two eating periods that together total at least 30 minutes within the same period of five consecutive hours.

Under s. 5 of O Reg 390/05, s. 20 of the Act does not apply to an employee who:

1. Is working a straight shift, and who has chosen to work that shift;
2. Is working a split shift that does not have a meal break that complies with s. 20, and who has chosen to work that shift; and
3. Has chosen to work whatever shift the employer assigns and is working either a straight shift or split shift for which no meal break that complies with s. 20 of the Act is provided.

If an employee working a straight shift or a split shift did not either choose to work that shift or choose to work whatever shift the employer assigned, s. 20 would still apply and he or she would be entitled to a meal break in accordance with that section.

Note that, unlike the operation of s. 4 of O Reg 390/05, there is no requirement under s. 5 that the employer and employee (or union) agree that s. 5 of O Reg 390/05 will apply instead of s. 20 of the ESA 2000.

Ontario Regulation 398/09 – Terms and Conditions of Employment in Defined Industries – Temporary Help Agency Industry

O Reg 398/09 sets out transitional rules for the application of the termination and severance provisions to assignment employees under Part XVIII.1 of the *Employment Standards Act, 2000*. While most of the regulation is now of historical interest only, it is important to note that the regulation provides that time on lay-off prior to November 6, 2009 is excluded for the purposes of determining when a termination/severance occurs under Part XV but clarifies that time employed prior to November 6, 2009 is included when determining entitlements under Part XV.

O Reg 398/09 Section 1 – Definition

1 In this Regulation,

"defined industry" means the temporary help agency industry.

O Reg 398/09 is a defined industry regulation for the temporary help agency industry.

O Reg 398/09 Section 2 – Scope

2 This Regulation is restricted in its application to temporary help agencies and their assignment employees.

Section 2 provides that the scope of the regulation is limited to temporary help agencies and their assignment employees. The terms "temporary help agency" and "assignment employee" are defined in ESA Part I, s. 1(1).

O Reg 398/09 Section 3 – Transitional Terms and Conditions of Employment

3 This Regulation sets out transitional terms and conditions of employment that apply to employers and employees described in section 2 following the coming into force of the *Employment Standards Amendment Act (Temporary Help Agencies), 2009*.

Section 3 states that the regulation sets out transitional terms and conditions for applying Part XVIII.1 of the *Employment Standards Act, 2000*.

O Reg 398/09 Section 4 – Determination of Temporary Lay-off

4 For the purposes of subsection 56 (2) of the Act, the following rules apply:

1. Only a period of 20 consecutive weeks or 52 consecutive weeks, as the case may be, that begins after November 5, 2009 shall be taken into account.

2. In the case of a lay-off that begins on or before November 5, 2009, only the part of the lay-off, if any, that occurs after November 5, 2009, shall be taken into account.

Section 4 provides that for the purposes of defining a temporary lay-off in s. 56(2), only a lay-off or part of a lay-off that occurs after November 5, 2009 is to be taken into account. As a result, only weeks of lay-off

that commence on or after November 6, 2009 are counted for the purposes of determining whether a lay-off exceeds a period of temporary lay-off, thereby triggering a termination under s. 56(1)(c).

Similarly, for the purposes of the 20-consecutive week period or 52-consecutive week period within which more than 13 or 35 weeks or more of lay-off respectively must fall, only those weeks that begin on or after November 6, 2009 are taken into account.

O Reg 398/09 Section 5 – Deemed Termination Date

5 For the purposes of subsection 56 (5) of the Act, if part of a lay-off is taken into account under paragraph 2 of section 4, the employment is deemed to be terminated on November 6, 2009.

Section 5 clarifies that for the purposes of s. 56(5), in cases where a layoff commenced prior to November 6, 2009, the deemed termination date will be November 6, 2009.

Section 56(5) of the *Employment Standards Act, 2000* provides that where a termination is triggered because of a lay-off that exceeds a period of temporary lay-off, the employment is deemed to have been terminated on the first day of the lay-off.

As a result, if a lay-off commenced prior to November 6, 2009 and the number of weeks of lay-off that occurred on or after November 6, 2009 are sufficient to trigger a termination in accordance with s. 56(1)(c) (i.e., more than 13 weeks in a period of 20 consecutive weeks or 35 weeks in a period 52 consecutive weeks) the deemed termination date will be November 6, 2009 rather than the first day of the lay-off.

O Reg 398/09 Section 6 – Mass Termination Provisions, Notice

6 For the purposes of the provisions of the Act that require an employer to provide notice otherwise than in accordance with section 57 of the Act if the employment of 50 or more employees is terminated in the same four-week period, only four-week periods that end before November 6, 2009 or begin after November 5, 2009 shall be taken into account.

Section 6 provides that with respect to applying the mass notice provisions to assignment employees, the four-week periods within which the 50 or more terminations must occur in order to trigger mass notice entitlements must end before November 6, 2009 or begin on or after November 6, 2009.

As a result of this section and paragraphs 4.1 through 4.3 of s. 74.11, s. 58(1) of the *Employment Standards Act, 2000* and s. 3(1) of O Reg. 288/01 would apply to determine the mass notice entitlements of assignment employees if they were one of at least 50 employees terminated in a four-week period ending before November 6, 2009, assuming they were not exempt from notice because they were an "elect to work" employee. Paragraphs 4.2 and 4.3 of s. 74.11 would apply to determine the mass notice entitlements of assignment employees if they were terminated in a four-week period beginning on or after November 6, 2009. For a discussion of how mass notice entitlements are triggered pursuant to s. 58(1) of the Act see ESA Part XV, s. 58. For a discussion of how mass notice entitlements are triggered pursuant to paragraphs 4.2 and 4.3 of s. 74.11, see ESA Part XVIII.1, s. 74.11.

O Reg 398/09 Section 7 – Severance

Severance - s. 7(1)

7(1) For the purposes of clause 63 (1) (c) of the Act, the following rules apply:

1. Only a period of 52 consecutive weeks that begins after November 5, 2009 shall be taken into account.

2. In the case of a lay-off that begins on or before November 5, 2009, only the part of the lay-off, if any, that occurs after November 5, 2009, shall be taken into account.

Subsection 7(1) provides that for the purposes of determining whether a severance of employment has been triggered in accordance with s. 63(1)(c), only a lay-off or part of a lay-off that occurs after November 5, 2009 is to be taken into account. Section 63(1)(c) defines a severance as occurring when an employer lays an employee off for 35 weeks or more in any period of 52 consecutive weeks. Similarly, for the purposes of the 52-consecutive week period within which the 35 weeks of lay-off must fall, only those weeks that begin on or after November 6, 2009 are taken into account.

Section 7(2)

7(2) For the purposes of clause 63 (1) (d) of the Act, only a lay-off of an employee that begins after November 5, 2009 because of a permanent discontinuance of all of a temporary help agency's business at an establishment of the agency after that date results in a severance of the employee's employment.

Subsection 7(2) provides that for the purposes of determining whether a severance has been triggered in accordance with s. 63(1)(d), only a lay-off that occurs after November 5, 2009 is to be taken into account. Section 63(1)(d) defines a severance as occurring when an employee lays an employee off because of a permanent discontinuance of all of the employer's business at an establishment.

Section 7(3)

7(3) For the purposes of clause 63 (1) (e) of the Act, only a notice of termination given after November 5, 2009 shall be taken into account.

Finally, s. 7(3) provides that where a severance is triggered under s. 63(1)(e), only a notice of termination given after November 5, 2009 is to be taken into account. Section 63(1)(e) defines a severance as occurring when an employer gives an employee notice of termination as required under s. 57 or s. 58 of the *Employment Standards Act, 2000* and the employee resigns, giving the employer at least two weeks' written notice of the resignation, with such notice to take effect during the statutory notice period.

O Reg 398/09 Section 8 – Length of Employment

Length of Employment - s. 8(1)

8(1) Where the entitlement of an assignment employee under a provision of Part XV of the Act is dependent on or varies with how long he or she has been employed by a temporary help agency, nothing in this Regulation shall be construed to exclude time spent in the employ of the agency before November 6, 2009.

Subsection 8(1) clarifies that nothing in this regulation can be construed to exclude time spent with an agency prior to November 6, 2009 for the purposes of determining entitlements under Part XV that vary with or are dependent on how long an assignment employee has been employed by a temporary help agency.

Section 8(2)

8(2) Subsection (1) applies in respect of any provision of Part XV of the Act or the regulations that makes reference to length of employment, however expressed, and, without restricting the generality of the foregoing, applies in respect of,

(a) a reference to a period of employment;

(b) a reference to continuous employment;

(c) a reference to employment whether or not continuous and whether or not active; and

(d) a reference to a number of years or months of employment.

Subsection 8(2) states that as a result, references to "period of employment", "continuous employment" or "employment, whether or not continuous and whether or not active" and references to "number of years or months of employment" in Part XV will include employment with an agency prior to November 6, 2009.

Ontario Regulation 476/06 – Family Medical Leave – Prescribed Individuals - REVOKED

Ontario Regulation 477/18 – Non-Application of Act

This regulation came into effect on November 15, 2018.

Pursuant to this regulation, the ESA 2000 does not apply to a “player on a major junior ice hockey team”, if the conditions set out in subsection (2) are met.

Player on a Major Junior Ice Hockey team – s. 1(1)

1(1) A player on a major junior ice hockey team is prescribed for the purposes of paragraph 12 of subsection 3 (5) of the Act if the conditions described in subsection (2) are met.

The regulation applies only to the major junior ice hockey team’s *hockey players.* It does not apply to any other individual on a major junior ice hockey team (e.g. equipment managers, trainers, coaches).

The Program is aware of major junior ice hockey teams in the Ontario Hockey League, although there may be others. **However, in order for the ESA 2000 to not apply pursuant to this regulation, the condition in subsection (2) must be met**.

Scholarship Condition – s. 1(2)

(2) Subsection (1) applies if there is an agreement between the player and the team, or the league of which the team is a member, that provides that the player is entitled to receive a scholarship for a post-secondary educational program for each hockey season the player plays, which may be conditional on the player meeting any eligibility criteria set out in the agreement.

The ESA 2000 will not apply only if the player on a major junior ice hockey team and the team – or the league in which the team is a member – have entered into an agreement (which pursuant to s. 1(3) of the ESA 2000 must be in writing) that provides that the player is entitled to receive a scholarship for a post-secondary educational program.

The agreement must provide a scholarship for each season the player plays on the team for the condition to be met.

The condition can be met even if the agreement contains eligibility criteria that the player must meet in order to qualify for the scholarship. The regulation does not establish any restrictions on the eligibility criteria that can be included in the agreement and does not establish any minimum amount of money that must be paid in order to qualify as a scholarship.

The condition will be met *so long as there is a written agreement in place* that contains provisions that provide for the scholarship; it does not matter whether the player ultimately meets the criteria and receives a scholarship.

There may be a period of time where an individual is a player on a major junior ice hockey team but has not entered into a written agreement that meets the condition set out in subsection (2). If there is an employment relationship during that period of time, the ESA 2000 will apply during that period.

Ontario Regulation 491/06 – Terms and Conditions of Employment in Defined Industries – Ambulance Services

This regulation sets out special rules regarding the terms and conditions of employment for employees employed in in the provision of land ambulance services or air ambulance services as defined in the *Ambulance Act,* RSO 1990, c A.19. Currently, the regulation's scope is limited to hours free from work and eating periods.

O Reg 491/06 Section 1 – Definitions

O Reg 491/06 came into effect on October 20, 2006.

Defined Industry

1 In this Regulation,

"defined industry" means the industry of providing land ambulance services or air ambulance services, as defined in the *Ambulance Act*;

Section 1 defines the industry to which O Reg 491/06 applies to mean the industry of providing land or air ambulance services as defined in the *Ambulance Act,* RSO 1990, c A.19.

"Land ambulance services" and "air ambulance services" as defined in s. 1 of the *Ambulance Act* includes all services provided by an ambulance service in connection with the transportation of persons by land and air respectively. The definitions would not include a patient transfer service that provides transportation only for medically stable patients not suffering from a trauma or an acute onset of illness that could endanger their life, limb or function.

Emergency Medical Attendant

1 In this Regulation,

"emergency medical attendant" and "paramedic" have the same meanings as in the *Ambulance Act*.

Section 1 of the *Ambulance Act* defines "emergency medical attendant" as a person employed by or a volunteer in an ambulance service who meets the qualifications for an emergency medical attendant as set out in the regulations, but does not include a paramedic or a physician, nurse or other health care provider who attends on a call for an ambulance.

Paramedic

1 In this Regulation,

"emergency medical attendant" and "paramedic" have the same meanings as in the *Ambulance Act*.

Section 1 of the *Ambulance Act* defines "paramedic" as a person employed by or a volunteer in an ambulance service who meets the qualifications for an emergency medical attendant as set out in the regulations, and who is authorized to perform one or more controlled medical acts under the authority of a base hospital medical director, but does not include a physician, nurse or other health care provider who attends on a call for an ambulance.

O Reg 491/06 Section 2 – Scope

2 This Regulation is restricted in its application to,

(a) employees in the defined industry who work as emergency medical attendants and are represented by a bargaining agent under the *Labour Relations Act, 1995*;

(b) employees in the defined industry who work as paramedics and are represented by a bargaining agent under the *Labour Relations Act, 1995*; and

(c) employers of employees described in clauses (a) and (b).

Section 2 narrows the scope of O Reg 491/06 by restricting its application to unionized employees who work as emergency medical attendants or paramedics as defined in the *Ambulance Act,* RSO 1990, c A.19. The regulation does not apply to other employees in the industry such as dispatchers or clerical workers, and would not apply to emergency medical attendants or paramedics who are not represented by a union.

O Reg 491/06 Section 3 – Terms and Conditions of Employment

3 This Regulation sets out terms and conditions of employment that apply to employees and employers described in section 2.

Section 3 states that O Reg 491/06 sets out terms and conditions of employment that apply to employers and employees in the defined industry of ambulance services.

O Reg 491/06 Section 4 – Hours Free from Work

Hours Free From Work – ss. 4(1) & (2)

4(1) If an employer and the bargaining agent that represents an employee agree, subsection (2) applies to that employer and employee instead of subsection 18 (1) of the Act.

4(2) An employer shall give an employee a period of at least eight consecutive hours free from performing work in each day.

Section 4(1) of O Reg 491/06 provides that, where the employer and the bargaining agent in the defined industry agree, s. 4(2) applies instead of s. 18(1) of the ESA 2000. Section 18(1) reads as follows:

18(1) An employer shall give an employee a period of at least 11 consecutive hours free from performing work in each day.

Under s. 4(2) of O Reg 491/06, the period of at least 11 consecutive hours free from performing work in each day (in s. 18(1) of the ESA 2000) is replaced by a period of at least eight consecutive hours free from performing work in each day. See ESA Part VII, s. 18(1) for a discussion of the meaning of "day".

There can be no substitution of s. 4(2) for s. 18(1) of the ESA 2000 unless the employer and the bargaining agent agree. Agreements to substitute s. 4(2) for s. 18(1) of the ESA 2000 must be in writing in order to be valid. See ESA Part I, s. 1(3) and s. 1(3.1) for a discussion of the requirements regarding written agreements.

Like s. 18(1) of the ESA 2000, which it replaces, the provision for daily rest in s. 4(2) of O Reg 491/06 is an employment standard as defined in s. 1(1) of the ESA 2000 and cannot be contracted out of or waived (s. 5(1)). The employer and the bargaining agent could not, for example, agree to a daily rest period of six hours.

For a discussion on how the 11-hour daily rest operates, see ESA Part VII, s. 18(1). Substitute "8 hours" for "11 hours" each time it appears in order to understand the operation of the eight-hour daily rest period under s. 4(2) of O Reg 491/06.

Interaction With Other Hours of Work Provisions

The requirement in s. 4(2) for at least eight consecutive hours off work in each day operates together with the hours of work provisions in sections 17, 18 and 19 of Part VII of the ESA 2000.

On-Call Exception

Section 18(2) of the ESA 2000 sets out an "on-call exception" to s. 18(1) of the ESA 2000. This exception also applies if the daily rest period is eight consecutive hours as per s. 4(2) of O Reg 491/06, when it replaces the 11-hour daily rest requirement in s. 18(1) in the defined industry.

Under s. 18(2), the requirement that an employee have at least 11 hours free from performing work in each day (in accordance with s. 18(1) of the ESA 2000) or at least eight hours free from performing work in each day (in accordance with s. 4(2) of O Reg 491/06) does not apply to an employee who is on call and is called in during a period the employee would not otherwise have been expected to work. The on-call exception is an exception only to the requirement to provide 11 or eight consecutive hours free from work each day as per s. 18(1) of the ESA 2000 or s. 4(2) of O Reg 491/06. It does not operate as an exception to any other hours of work provisions.

For a discussion of the on-call exception, see ESA Part VII, s. 18(2). Substitute s. 4(2) of O Reg 491/06 for s. 18(1) of the ESA 2000, and substitute eight hours for 11 hours, wherever the references appear.

Maximum Daily Hours

Section 17(1) of the ESA 2000 provides for maximum daily hours of work of eight hours per day or, if there is an established workday that is longer than eight hours, the number of hours in that work day.

However, under s. 17(2) of the ESA 2000, employers and employees (or bargaining agents) can agree, in writing, that the employee will work up to a specified number of hours in excess of the daily limit. For such an agreement to be valid, s. 17(5) requires that non-unionized employees first be provided with a copy of the Ministry of Labour's information sheet on hours of work and overtime and that the agreement contains a statement by the employee acknowledging such receipt.

For further details about the maximum daily hours of work, agreements to vary from the maximum daily hours and the requirement to provide the Ministry's information sheet, see ESA Part VII, s. 17.

Maximum Weekly Hours

Section 17(1) of the ESA 2000 provides for maximum weekly hours of work of 48 hours. In order for hours in excess of 48 hours to be worked, the employer and employee (or bargaining agent) must agree, in writing, that the employee will work up to a specified number of hours in excess of the weekly limit. For such an agreement to be valid, s. 17(5) requires that non-unionized employees first be provided with a copy of the Ministry of Labour's information sheet on hours of work and overtime and that the agreement contains a statement by the employee acknowledging such receipt.

For further details about the maximum weekly hours, agreements to vary from the maximum weekly hours and the requirement to provide the Ministry's information sheet, see ESA Part VII, s. 17.

Free From Work Between Shifts

Section 18(3) of the ESA 2000 requires employers to provide employees with a minimum period free from work of eight hours between successive shifts, with two exceptions. First, an employee may work successive shifts without the eight-hour free period if the total number of hours worked on the successive shifts is 13 or less. Second, the employer and employee (or bargaining agent) can agree, in writing, to forego the eight-hour period entirely or to reduce its length. For a discussion of the interaction of s. 18(3) with the required daily rest in s. 18(1) of the ESA 2000, see ESA Part VII, s. 18(3).

Per s. 4 of O Reg 491/06, a bargaining agent and employer in the defined industry could agree in writing to a minimum daily rest of 8 eight hours (instead of the 11 hours in s. 18(1) of the ESA 2000). The bargaining agent could then agree in writing to work an eight and a 10-hour shift back to back, without any break between them. The agreement in writing would comply with s. 18(3) of the ESA 2000, but if it resulted in employees receiving a daily rest of less than eight consecutive hours (per the agreement under s. 4 of O Reg 491/06), the schedule would be in violation of O Reg 491/06 and, therefore, would not be permitted. In other words, the bargaining agent in the defined industry cannot agree to have employees work hours under s. 18(3) of the ESA 2000 that would result in the employee getting less than the eight consecutive hours free from work each day stipulated in s. 4(2) of O Reg 390/05.

Weekly/Bi-weekly Rest Periods

Section 18(4) of the ESA 2000 establishes weekly or bi-weekly free time requirements for employees. The free time periods must be at least either 24 consecutive hours in every "work week" or 48 consecutive hours in every two consecutive "work weeks".

See ESA Part VII, s. 18(4) for a discussion of the weekly/bi-weekly rest period provisions.

Exceptional Circumstances

Section 19 of the ESA 2000 allows employers to require employees to work more daily or weekly hours than are permitted under s. 17 of the ESA 2000, or to work during a free period (daily, in between shifts and weekly or bi-weekly) as required by s. 18 of the ESA 2000 (and s. 4(2) of O Reg 491/06) in any of the specified circumstances, but only so far as is necessary to avoid serious interference with the ordinary working of the employer's establishment or operations.

For a discussion of the exceptional circumstances, see ESA Part VII, s. 19.

O Reg 491/06 Section 5 – Eating Periods

5(1) If an employer and the bargaining agent that represents an employee agree to a term that addresses the employee's entitlement to an eating period as described in subsection (2), that term applies to that employer and employee instead of section 20 of the Act.

5(2) For the purpose of subsection (1), an employer and bargaining agent may agree to any of the following terms:

1. **A term that entitles an employee to one or more eating periods that are or may be shorter than or at intervals that are or may be longer than are required by section 20 of the Act, including a term that does not specify the intervals.**
2. **A term that entitles an employee to fewer eating periods than are required by section 20 of the Act.**
3. **A term that entitles an employee to eating periods or to compensation or time free from performing work if the employee does not receive an eating period.**
4. **A term that provides that an employee is not entitled to eating periods, but provides that the employer shall make efforts to enable the employee to receive eating periods, whether or not the term entitles the employee to compensation or time free from performing work if the employee does not receive an eating period.**
5. **A term that provides that an employee is not entitled to eating periods.**
6. **A term that entitles an employee to eating periods or provides that an employee may be given an eating period, but provides that any eating period may be interrupted or missed.**
7. **A term that combines elements of two or more terms described in paragraphs 1 to 6.**

Section 5 of O Reg 491/06 provides that s. 20 of the *Employment Standards Act, 2000* does not apply in certain circumstances. Section 20 of the ESA 2000 states:

20(1) An employer shall give an employee an eating period of at least 30 minutes at intervals that will result in the employee working no more than five consecutive hours without an eating period.

Under s. 20, an employer is required to provide an eating period of at least 30 minutes, timed so that no employee works longer than five consecutive hours without receiving an eating period, or, if the employer and employee agree (not necessarily in writing), two eating periods that together total at least 30 minutes within the same period of five consecutive hours.

Section 5(1) of O Reg 491/06 provides that the requirement under s. 20 of the ESA 2000 does not apply if the employer and bargaining agent agree in writing to a term that addresses the employees' entitlements to an eating period in one of the ways described in s. 5(2).

Ontario Regulation 502/06 – Terms and Conditions of Employment in Defined Industries – Automobile Manufacturing, Automobile Parts Manufacturing, Automobile Parts Warehousing and Automobile Marshalling

This regulation sets out special rules regarding the terms and conditions of employment for employees employed in the automobile manufacturing, automobile parts manufacturing, automobile parts warehousing and automobile marshalling industries. Currently, the regulation's scope is limited to hours free from work and personal emergency leave.

O Reg 502/06 Section 1 – Definitions

Definitions – s. 1(1)

O Reg 502/06 came into effect on November 3, 2006. Section 1(1) sets out the definitions for the purposes of the regulation.

Defined Industries

"defined industries" means the automobile manufacturing industry, the automobile parts manufacturing industry, the automobile parts warehousing industry and the automobile marshalling industry;

Section 1(1) defines the industries to which O Reg 502/06 applies, to mean the industries of automobile manufacturing, automobile parts manufacturing, automobile parts warehousing, and automobile marshalling. See, however, O Reg 502/06, s. 2, which narrows the scope of application of the regulation to employees in the defined industries who are directly involved in the activities set out in the industry definitions.

Automobile Manufacturing

"automobile manufacturing" means assembling automobiles;

Section 1(1) defines "automobile manufacturing" to mean assembling automobiles. Automobile has its regularly understood meaning, but also includes vans and trucks with a Gross Vehicle Weight Rating of 14,000 pounds (6350 kg) or less.

Automobile Marshalling

"automobile marshalling" means receiving assembled automobiles from employers in the automobile manufacturing industry, storing the automobiles before delivery to purchasers or persons who sell to purchasers, organizing them for delivery and arranging for delivery;

Section 1(1) defines "automobile marshalling" to mean the receiving of assembled automobiles from automobile manufacturers, storing the automobiles before delivery to purchasers or persons who sell to purchasers, organizing automobiles for delivery and arranging for delivery.

Automobile Parts Manufacturing

"automobile parts manufacturing" means,

(a) producing automobile parts that are supplied directly to employers in the automobile manufacturing industry or in the automobile parts warehousing industry, and

(b) producing elements of automobile parts where those elements are supplied directly to employers who produce automobile parts as described in clause (a);

Section 1(1) defines "automobile parts manufacturing" to mean producing automobile parts that are supplied directly to employers in the automobile manufacturing industry or the automobile parts warehousing industry. It also includes producing elements of automobile parts that are supplied directly to automobile parts producers. An example of a part supplied to an automobile manufacturer might be a tire. An example of an element of a part supplied to parts manufacturer might be a rim that is supplied to the tire manufacturer. In the industry, those who produce parts supplied directly to automobile manufacturers are commonly called "Tier One" parts manufacturers, while those who produce elements of parts supplied to Tier One manufacturers are commonly called "Tier Two" parts manufacturers.

Automobile Parts Warehousing

"automobile parts warehousing" means receiving automobile parts from employers in the automobile parts manufacturing industry, storing the parts before delivery to employers in the automobile manufacturing industry, organizing them for delivery, and delivering them or arranging for delivery;

Section 1(1) defines "automobile parts warehousing" to mean receiving automobile parts from automobile parts manufacturers, storing the parts before delivery to employers in the automobile manufacturing industry, organizing the parts for delivery and delivering them or arranging for delivery.

Qualified Health Practitioner (Revoked)

The definition of “Qualified Health Practitioner” was revoked effective January 1, 2019. The discussion of this definition is being maintained in this publication since employees may still have a complaint relating to a situation that arose when the definition was in force. The text appears in red to highlight that it has been revoked.

“qualified health practitioner” means a person who is qualified to practise as a physician, a registered nurse or a psychologist under the laws of the jurisdiction in which care or treatment is provided to the employee or to an individual described in subsection 4(4).

Section 1(1) defines “qualified health practitioner” to mean a person who is qualified to practise as a physician (a medical doctor), a registered nurse or a psychologist either under the laws of Ontario or another jurisdiction in which care or treatment is being provided to the employee or a relative of the employee.

Where care or treatment is provided in Ontario:

- "A person who is qualified to practise as a physician" means a member of the College of Physicians and Surgeons of Ontario (this includes psychiatrists);
- "A person who is qualified to practise as a registered nurse" means, pursuant to O Reg 275/94 of the Nursing Act, 1991, SO 1991, c 32, a member of the College of Nurses of Ontario who holds a general or extended certificate of registration as a registered nurse (nurse practitioners hold extended certificates); and
- "A person who is qualified to practise as a psychologist" means an individual who is a member of the College of Psychologists of Ontario.

Where care or treatment is provided in a jurisdiction other than Ontario, the question of whether the person providing it is a “qualified health practitioner” is determined with reference to the laws of that other jurisdiction.

Definitions for the Purposes of O Reg 502/06 – s. 1(2)

1(2) For the purposes of this Regulation,

(a) an employee of an employer who carries on any activity described in the definition of "automobile marshalling" in subsection (1) is employed in the automobile marshalling industry even if other activities constitute the majority of the employer's activities;

(b) an employee of an employer who produces any automobile parts or elements of automobile parts that are supplied as described in clauses (a) and (b) of the definition of "automobile parts manufacturing" in subsection (1) is employed in the automobile parts manufacturing industry even if the production of other things constitutes the majority of the employer's production; and

(c) an employee of an employer who carries on any activity described in the definition of "automobile parts warehousing" in subsection (1) is employed in the automobile parts warehousing industry even if other activities constitute the majority of the employer's activities.

Section 1(2) states that for the purposes of O Reg 502/06, a person is employed in the defined industries if their employer engages in the activities as set out in the definition of automobile marshalling industry and the automobile parts warehousing industry, even if other activities constitute the majority of the employer's activities. It similarly states that a person is employed in the automobile parts manufacturing industry if their employer produces any automobile parts or elements of automobile parts that are supplied as described in the definition of automobile parts manufacturing, even if the production of other things constitutes the majority of the employer's production.

O Reg 502/06 Section 2 – Scope

2 This Regulation is restricted in its application to,

(a) employees employed in the defined industries,

(i) who are directly involved in any of the activities mentioned in the definition of the respective defined industry, or

(ii) whose attendance at the workplace during any of the activities mentioned in the definition of the respective defined industry is essential to that activity; and

(b) employers of the employees described in subclauses (a)(i) and (ii).

Section 2 narrows the scope of O Reg 502/06 by restricting its application to employees employed in the defined industries:

- Who are directly involved in any of the activities set out in the definition of the defined industry; or
- Whose attendance at the workplace during such activities is essential to the activity.

While generally it will be fairly obvious whether an employee is directly involved in an activity referred to in the industry definition, determining whether an employee who is not directly involved is nevertheless doing work that is essential to such an activity can be more difficult. Examples of employees who may be considered to be doing such work include:

- Skilled tradespeople or others involved in the maintenance or repair of equipment; and
- Employees who collect the debris from around the assembly lines in order to keep the lines running.

Examples of employees who would generally not be considered to be doing work that is essential to activity referred to in the industry definition include employees who:

- Work in the workplace cafeteria; or
- Work as a janitor/custodian.

O Reg 502/06 Section 3 – Hours Free from Work

Hours Free from Work – ss. 3(1), (2) & (3)

3(1) If an employer and an employee agree, subsections (2) and (3) apply instead of subsection 18 (1) of the Act.

3(2) The employer shall give the employee a period of at least 11 consecutive hours free from performing work in each day, subject to subsection (3).

3(3) On one day in each work week, the period that is free from performing work may be shorter than 11 consecutive hours but shall be at least eight consecutive hours.

Section 3(1) of O Reg 502/06 provides that, where the employer and employee in the defined industries agree, ss. 3(2) and (3) applies instead of s. 18(1) of the ESA 2000. Section 18(1) reads as follows:

18(1) An employer shall give an employee a period of at least 11 consecutive hours free from performing work in each day.

Under ss. 3(2) and (3), if the employer and the employee (or bargaining agent representing employees) agree in writing, the daily rest period on one day in each work week may be shorter than eleven consecutive hours but must be at least eight consecutive hours. On all other days of the work week, the daily rest period must be at least eleven consecutive hours.

Like s. 18(1) of the ESA 2000, the daily rest requirements in s. 3(2) and s. 3(3) of O Reg 502/06 constitute an employment standard as defined in s. 1(1) of the ESA 2000 and cannot be contracted out of or waived (s. 5(1)). For example, an employer and employee (or bargaining agent) in the defined industries could not agree to a six-hour daily rest period on one day in each work week or to have two days each work week with an eight-hour daily rest period.

For a discussion on how the 11-hour daily rest operates, see ESA Part VII, s. 18(1).

Interaction with other Hours of Work Provisions

The requirement in s. 3(2) and s. 3(3) to allow for at least eight consecutive hours off work on one day in a work week and 11 consecutive hours off on all other days in that work week operates simultaneously with the hours of work provisions in Part VII of the ESA 2000, as follows:

On-Call Exception

Section 18(2) of the ESA, 2000 sets out an "on-call exception" to s. 18(1) of the ESA 2000. This exception also applies if the daily rest period for one day in the work week is between eight and 11 consecutive hours and 11 consecutive hours for all other days in the work week in accordance with s. 3(2) and s. 3(3) of O Reg 502/06.

Under s. 18(2), the requirement that an employee have at least 11 hours free from performing work in each day (in accordance with s. 3(2) of O Reg 502/06) and at least eight hours free from performing work on one day each work week (in accordance with s. 3(3) of O Reg 502/06) does not apply to an employee who is on call and is called in during a period the employee would not otherwise have been expected to work. The on-call exception is an exception only to the requirement to provide 11 or eight consecutive hours free from work each day as per s. 18(1) of the ESA 2000 or s. 3(2) and s. 3(3) of O Reg 502/06. It does not operate as an exception to any other hours of work provisions.

For a discussion of the on-call exception, see ESA Part VII, s. 18(2).

Maximum Daily Hours

Section 17(1) of the ESA 2000 provides for maximum daily hours of work of eight hours per day or, if there is an established workday that is longer than eight hours, the number of hours in that work day. However, under s. 17(2) of the ESA 2000, employers and employees can agree, in writing, that the employee will work up to a specified number of hours in excess of the daily limit. For such an agreement to be valid, s. 17(5) requires that non-unionized employees first be provided with a copy of the Ministry of Labour's information sheet on hours of work and overtime and that the agreement contains a statement by the employee acknowledging such receipt.

For further details about the maximum daily hours of work, agreements to vary from the maximum daily hours and about the requirement to provide the Ministry's information sheet, see ESA Part VII, s. 17.

Maximum Weekly Hours

Section 17(1) of the ESA 2000 provides for maximum weekly hours of work of 48 hours. However, under s. 17(3) of the ESA 2000, employers and employees can agree, in writing, that the employee will work up to a specified number of hours in excess of the weekly limit. For such an agreement to be valid, s. 17(5) requires that non-unionized employees first be provided with a copy of the Ministry of Labour's information sheet on hours of work and overtime and that the agreement contains a statement by the employee acknowledging such receipt.

For further details about the maximum weekly hours, see ESA Part VII, s. 17(1). For a discussion of agreements to work in excess of 48 hours per week, agreements to vary from the maximum weekly hours and about the requirement to provide the Ministry's information sheet, see ESA Part VII, s. 17.

Free From Work Between Shifts

Section 18(3) of the ESA 2000 requires employers to provide employees with a minimum period free from work of eight hours between successive shifts, with two exceptions. First, an employee may work successive shifts without the eight-hour free period if the total number of hours worked on the successive shifts is 13 or less. Second, the employer and employee can agree, in writing, to forego the eight-hour period entirely or to reduce its length. For a discussion of the interaction of s. 18(3) with the required daily rest in s. 18(1) of the ESA 2000, see ESA Part VII, s. 18(3).

Per s. 3 of O Reg 502/06, an employee and employer in the defined industry could agree in writing to a minimum daily rest of 8 eight hours on one day during each work week and 11 hours of daily rest on all other days in the work week (instead of the 11 hours in s. 18(1) of the ESA 2000). That employee could, under s. 18(3) of the ESA 2000, then agree in writing to work an eight and a 10-hour shift back to back, without any break between them. The agreement in writing would comply with s. 18(3) of the ESA 2000, but if it resulted in the employee receiving a daily rest of less than eight consecutive hours on the one day or 11 consecutive hours on the other days in the work week (per the agreement under s. 3 of O Reg 502/06), the schedule would be in violation of O Reg 502/06 and, therefore, would not be permitted. In other words, an employee in the defined industry cannot agree to work hours under s. 18(3) of the ESA 2000 that would result in the employee getting less than the eight consecutive hours free from work on one day and 11 consecutive hours free from work on all other days during the work week as stipulated in s. 3(2) and s. 3(3) of O Reg 502/06.

Weekly/Bi-weekly Rest Periods

Section 18(4) of the ESA 2000 establishes weekly or bi-weekly free time requirements for employees. The free time periods must be at least either 24 consecutive hours in every "work week" or 48 consecutive hours in every two consecutive "work weeks".

See ESA Part VII, s. 18(4) for a discussion of the weekly/ biweekly rest period provisions.

Exceptional Circumstances

Section 19 of the ESA 2000 allows employers to require employees to work more daily or weekly hours than are permitted under s. 17 of the ESA 2000, or to work during a free period (daily, in between shifts and weekly or biweekly) as required by s. 18 of the ESA 2000 (and s. 3(2) and 3(3) of O Reg 502/06) in any of the specified circumstances, but only so far as is necessary to avoid serious interference with the ordinary working of the employer's establishment or operations.

For a discussion of the exceptional circumstances, see ESA Part VII, s. 19.

Eating Periods

Under s. 20 of the ESA 2000, an employer is required to provide an eating period of at least 30 minutes, timed so that no employee works longer than five consecutive hours without receiving an eating period, or, if the employer and employee agree (not necessarily in writing), two eating periods that together total at least 30 minutes within the same period of five consecutive hours.

For further details about eating periods, see ESA Part VII, s. 20.

O Reg 502/06 Section 4 – Personal Emergency Leave (REVOKED)

Note that this section was revoked effective January 1, 2019. As of January 1, 2019, the provisions of s. 50 (sick leave), s. 50.0.1 (family responsibility leave) and s. 50.0.2 (bereavement leave) apply to employees within the defined industries as established by s. 1.

The discussion of this section – which established special rules relating to the now-repealed personal emergency leave standard that was formerly in s. 50 – is being maintained in this publication since employees may still have a complaint relating to a situation that arose when section 4 was in force. The text appears in red to highlight that this section has been revoked.

Note that this text relates to s. 4 as it read from January 1, 2018 to December 31, 2018. (Section 4 read differently prior to January 1, 2018.)

Section 4(1)

4(1) This section modifies the application of section 50 of the Act.

Subsection 4(1) of O Reg 502/06 specifies that s. 4 creates special rules relating to personal emergency leave for employees employed in the defined industries.

For employees in the defined industries who are eligible for personal emergency leave, the special rules modify the number of days to which they are entitled and provides an exemption from the right to be paid for the first two days of personal emergency leave in each calendar year if certain criteria are met. All the other aspects of personal emergency leave will apply, such as the right of reinstatement to the same job after the leave, anti-reprisal protection and the requirement of the employer to continue benefit contributions, etc., as specified in ESA Part XIV, ss. 51-53.

Like ESA Part XIV, s. 50, which it modifies, the provision for personal emergency leave in O Reg 502/06, s. 4 is an employment standard as defined in ESA Part I, s. 1(1) and cannot be contracted out of or waived as per ESA Part III, s. 5(1). However, this prohibition is subject to the greater right or benefit provision established by ESA Part III, s. 5(2). Accordingly, an employment standard need not be complied with if the employee is receiving a greater right or benefit with respect to that particular standard. The principle that applies in making the determination is the same principle that governs in any greater right or benefit determination, i.e., do the relevant contractual provisions, taken in their entirety, give the employee a better deal than the corresponding employment standard taken in its entirety.

If an employer's benefit is considered a greater right or benefit than that created under O Reg 502/06 it will be enforced by the Program. For more information on the greater right or benefit analysis, see ESA Part III, s. 5(2) and the specific commentary on greater right or benefit in the context of personal emergency leave.

Note that if an employer offers a benefit plan for sick days, bereavement days, etc., and the employee opts to claim benefits under that plan, it is Program policy that the employee has in effect designated the absence also as a personal emergency leave day (unless the employee is also entitled to another leave under the ESA 2000, e.g., domestic or sexual violence leave. In that case, the employee is free to decide which leave to designate) and it will reduce the employee's personal emergency leave entitlement accordingly. For example, if an employer offers three paid sick days under a benefits plan and the employee is absent three days because of the flu and claims benefits under the plan, the employee is considered to have used three of their personal emergency leave days.

Note also that there is nothing in the ESA 2000 or O Reg 502/06 that would prohibit an employer from subtracting any personal emergency leave days that are taken from any paid days provided by a benefit plan offered by an employer. Notably, while this is not prohibited under the ESA 2000, an employment contract may address the issue of whether any personal emergency days count against any contractual leave entitlements.

Section 4(2)

4(2) An employee is entitled to take a total of seven days of leave in each calendar year because of any of the following:

1. A personal illness, injury or medical emergency.

2. The illness, injury or medical emergency of an individual described in subsection (4).

3. An urgent matter that concerns an individual described in subsection (4).

Employees in the defined industries are entitled to a maximum limit of seven days of personal emergency leave per calendar year as a result of any of the events in paragraphs 1, 2 and 3 occurring. The triggering events are the same as those established in ESA Part XIV, s. 50. For more information regarding the definition of a "personal illness, injury or medical emergency" or "urgent matter", please refer to ESA Part XIV, s. 50(1), paras 1 to 3.

The question arises as to whether the seven day entitlement should be prorated for employees who started their employment partway through a calendar year. As per ESA Part XIV, s. 50, which it modifies, there is nothing in O Reg 502/06, s. 4 to suggest that employees who are eligible for personal emergency leave should be entitled to less than seven days a calendar year in this situation. Accordingly, it is Program policy that there should be no pro-rating of the seven day entitlement.

Section 4(3)

4(3) In addition to the entitlement under subsection (2), an employee is entitled to take up to three days of leave because of the death of an individual described in subsection (4) each time there is such a death.

In addition to the entitlement of up to seven days of personal emergency leave within a calendar year because of personal illness, injury or medical emergency, or the illness, injury, medical emergency or urgent matter of a specified list of relatives, employees are entitled to take personal emergency leave of up to 3 days because of the death of a person described in paragraphs 1 to 7 of s. 4(4). Note that as in the general personal emergency leave provisions outlined in ESA Part XIV, s. 50, this group of relatives does not include an uncle or an aunt of the employee, unless that individual is dependent on the employee for care and assistance.

The entitlement to a leave "because of the death of an individual" is up to three days per incident: if an employee's brother and parent died in the same calendar year, the employee would be entitled to up to six days of unpaid personal emergency leave. If the same employee had a health crisis and needed to take seven days of leave due to a medical emergency, they would be entitled to a total of 13 days of personal emergency leave within a calendar year, instead of the 10 days that the employee would have normally been entitled to per ESA Part XIV, s. 50. If no death of any person described in s. 4(4) occurs within a calendar year, the maximum entitlement to personal emergency leave for reasons other than a death as specified in s. 4(2) is seven days. The employee would not be entitled to "use" the bereavement portion of the personal emergency leave for any other purpose than the death of an individual described in s. 4(4).

Section 4(4)

4(4) Paragraphs 2 and 3 of subsection (2) and subsection (3) apply with respect to the following individuals:

1. The employee's spouse.

2. A parent, step-parent or foster parent of the employee or the employee's spouse.

3. A child, step-child or foster child of the employee or the employee's spouse.

4. A grandparent, step-grandparent, grandchild or step-grandchild of the employee or of the employee's spouse.

5. The spouse of a child of the employee.

6. The employee's brother or sister.

7. A relative of the employee who is dependent on the employee for care or assistance.

This subsection defines the group of individuals who will be considered a "relative" for the purposes of O Reg 502/06. It is identical to the list of relatives found at ESA Part XIV, s. 50(2).

Sections 4(5) & (6)

(5) An employee who wishes to take leave under this section shall advise his or her employer that he or she will be doing so.

(6) If the employee must begin the leave before advising the employer, the employee shall advise the employer of the leave as soon as possible after beginning it.

Subsection 4(5) requires employees to notify their employers ahead of time that they will be taking personal emergency leave. If the employee is not able to provide notice before taking the leave, they will be required to notify the employer "as soon as possible" after commencing the leave. The same requirements exist in relation to the general provisions of personal emergency leave at ESA Part XIV, s. 50; similarly, the Program takes the position that if an employee fails to provide notice to the employer (either before or after starting the leave), the entitlement to the leave will not be invalidated. For more information on these sections, please see the commentary at ESA Part XIV, s. 50(3).

Sections 4(7), (8) and (9)

4(7) Subject to subsection (8), an employee is entitled to take a total of two days of paid leave under this section in each calendar year and the balance of his or her entitlement under this section as unpaid leave.

4(8) If an employee has been employed by an employer for less than one week, the following rules apply:

1. **The employee is not entitled to days of paid leave under this section.**
2. **Once the employee has been employed by the employer for one week or longer, the employee is entitled to days of paid leave under subsection (7), and any days of unpaid leave that the employee has already taken in the calendar year shall be counted against the employee's entitlement under that subsection.**

3. **Subsection (9) does not apply until the employee has been employed by the employer for one week or longer.**

4(9) The two days of paid leave mentioned in subsection (7) must be taken first in a calendar year before any of the days of unpaid leave can be taken under this section.

Subsections (7), (8) and (9) are nearly identical to ESA Part XIV, ss. 50(5), (6) and (8). Subsection 4(7) specifies that the first two days of personal emergency leave taken in the calendar year must be paid, while the remainder of the days taken are unpaid. Subsection 4(8) establishes the rule for new employees who have been employed by the employer for less than one week, and s. 4(9) clarifies that the paid days of leave are to be taken before the unpaid days in a calendar year in the case of employees who have been employed for one week or longer. See the commentary at ESA Part XIV, ss. 50(5), (6) and (8).

Section 4(10)

4(10) Despite subsections (7) and (8), an employee is not entitled to take two days of paid leave under this section if the following applies under the terms and conditions of his or her employment:

1. **The employee is entitled to receive a total of two or more days as one or more of the following:**
    i. **Vacation days in excess of the employee's entitlement under Part XI of the Act.**
    ii. **Holidays in excess of the employee's entitlement under Part X of the Act.**
    iii. **Days off for personal illness or personal medical appointments in each calendar year.**
2. **The employee is entitled to be paid, for at least two of the days described under paragraph 1, an amount for each day equal to,**
    i. **The total amount of regular wages earned in the pay period immediately preceding that day, divided by the number of days the employee worked in that period, or**
    ii. **If the employee was on vacation for the entire pay period referred to in subparagraph i, the total amount of regular wages earned in the pay period immediately preceding the vacation, divided by the number of days the employee worked in that period.**

Subsection 4(10) provides a special rule that applies when a contract of employment contains particular terms. If the contract of employment provides for the entitlements in ss. 4(10) paragraphs 1(i), 1(ii) or 1(iii), paid in accordance with paragraph 2, then the employer is not obligated to pay the employee for the first two days of personal emergency leave taken within a calendar year.

Note that the contract of employment may contain "two or more days as one or more of the following", meaning that the contract can "mix and match", and meet the requirement by providing one extra day of vacation and one personal sick day, for example. At least two days in total must be given by the contract, but they can be any combination of vacation, holiday or days for personal illness/personal medical appointments so long as they are paid in accordance with s. 4(10) paragraph 2.

Vacation days

Section 4(10) paragraph 1(i) refers to paid vacation days in excess of the basic entitlements of ESA Part XI. If a contractual entitlement provides something less than what an employee would get under ESA Part XI in terms of the number of days (for example, a paid vacation day subject to a "use it or lose it" requirement), then it will not meet the requirements of s. 4(10) paragraph 1(i) and those days cannot be used when determining whether this special rule applies to disentitle the employee from paid personal emergency leave.

Holidays

Section 4(1) paragraph 1(ii) refers to "holidays in excess of the employee's entitlement under Part X of the Act". This may include additional holidays that are not defined public holidays under the ESA 2000, such as the August Civic holiday or Remembrance Day, or company holidays, for example, when an employer shuts down operations between Christmas Day and New Year's Day, or provides an additional company-wide holiday on the Friday before a public holiday under the ESA 2000.

However, for an employer to rely on s. 4(10) paragraph 1(ii), note that the employee must be entitled to be paid at least the amount specified in the formula set out in s. 4 (10) paragraph 2. The formula set out in this provision is an “averaging” formula, while the public holiday pay formula under Part X of the ESA 2000 is a “pro-rating” formula. Accordingly, employees who are subject to this regulation must be entitled to an “average” day’s pay as described in s. 4(10), paragraph 2 for any extra holidays that the employer is relying on in order to have the special rule for personal emergency leave pay to apply, while the employee is entitled to a “pro-rated” amount of a day’s pay for public holidays under Part X.

It is Program policy that extra holidays that have conditions attached to them will not count towards having the special personal emergency leave pay rule apply. For example, if an employee is entitled to the Civic Holiday only if they work the day before or after that day (or have reasonable cause if they fail to do so) the Civic Holiday will not be considered to be a holiday in excess of the employee’s entitlement under Part X because the employee is not automatically “entitled” to receive that day off.

Days off for personal illness or personal medical appointments

If the contract of employment contains one or more days for the employee to take a day off due to personal illness or to attend a personal medical appointment, and the day is paid in accordance with s. 4(10) paragraph 2, the employee will not be entitled to paid personal emergency leave. In order to qualify, the day or days provided by the contract of employment must include personal illness or a personal medical appointment as a valid use, but can include other purposes (for example, for the illness of a child or for a non-medical use).

Amount paid in order for a day under paragraph 1 of s. 4(10) to qualify for special rule

If an employment contract provides for excess vacation days, company holidays or personal illness days, the employer will not be able to rely on the exemption from paid days of personal emergency leave unless the days provided by the contract are paid. Section 4(10) paragraph 2 specifies how much the employee must be paid for these days in order for them to qualify. The amount of pay for the day must be something similar to what the employee would be paid for a regular day of work: it must be no less than the regular wages earned in the pay period before the day (whether it is a company holiday, vacation day, or personal illness day) divided by the number of days the employee worked in that period.

As per s. 4(10), paragraph 2(ii), if the employee was on vacation for the entire pay period prior to the day off, the employee must be entitled to be paid the amount of regular wages earned in the pay period immediately preceding the vacation, divided by the number of days the employee worked in that period. Paragraph 2(ii) applies only if the employee is on *vacation* the entire pay period. If the employee is away from work for any other reason, the formula set out in 2(i) applies. For example, an employee is entitled to the Civic Holiday and was on unpaid leave the entire pay period prior to the Civic Holiday and did not earn any regular wages. The employer could count the Civic Holiday towards paragraph 1(ii) as a "holiday in excess of the employee's entitlement under Part X of the Act" in applying the exemption even though the employee would not be entitled to be paid anything for that day under this formula.

As "regular wages" is a defined term and does not include vacation pay, if the employee is on vacation for the entire pay period preceding the day, then the amount the employee must be paid will be based on the regular wages earned in pay period prior to the vacation.

Section 4(11)

4(11) An employee who is not entitled to take two days of paid leave because of subsection (10) continues to be entitled under subsections (2) and (3) to take the leave as unpaid leave.

This subsection clarifies that if an employee is not entitled to be paid for the first two days of personal emergency leave taken in the calendar year because the employee's contract of employment contains at least two of the days described in s. 4(10), the employee still has the right to take personal emergency leave without pay.

Section 4(12)

4(12) If an employee takes any part of a day as paid or unpaid leave under this section, the employer may deem the employee to have taken one day of paid or unpaid leave on that day, as applicable, for the purposes of subsections (7) and (8).

This subsection allows the employer to count any part of a day taken as personal emergency leave as a full day for the purpose of determining how much leave an employee has taken, and how much leave they have remaining in a calendar year. The employer is not obligated to do so: for example, if an employee takes half of a day to attend a funeral of a relative who meets any of the requirements determined by O Reg 502/06, the employer may either consider the employee to have taken the exact number of hours the employee was absent, or the entire day. If the employer chooses to designate the absence as a full day of personal emergency leave, the employee would, of course, remain entitled to be paid wages for any hours actually worked on the day of deemed leave. If the day of leave was one of the first two taken in the calendar year, the employee would be entitled to be paid personal emergency leave pay only for the hours taken as leave.

This subsection is identical to ESA Part XIV, s. 50(7) – refer to commentary on that section for more information.

Section 4(13)

4(13) Subject to subsections (14) and (15), if an employee takes a day of paid leave under this section, the employer shall pay the employee either,

a. the wages the employee would have earned had they not taken the leave; or

b. if the employee receives performance-related wages, including commissions or a piece work rate, the greater of the employee's hourly rate, if any, and the minimum wage that would have applied to the employee for the number of hours the employee would have worked had they not taken the leave.

This subsection defines the amount of personal emergency leave pay an employee who is eligible for paid leave is entitled to.

Subsection 4(13) is identical to the provisions of ESA Part XIV, s. 50(9). For more information on this section and examples of personal emergency leave pay calculation, see the commentary at ESA Part XIV, s. 50(9).

Sections 4(14) and (15)

4(14) If a day of paid leave under this section falls on a day or at a time of day when overtime pay, a shift premium or both would be payable by the employer,

a. the employee is not entitled to more than his or her regular rate for any leave taken under this section; and

b. the employee is not entitled to the shift premium for any leave taken under this section.

4(15) If a day of paid leave under this section falls on a public holiday, the employee is not entitled to premium pay for any leave taken under this section.

Subsection 4(14) excludes overtime pay or a shift premium (for example, an extra amount paid for working evenings or weekends) from inclusion when calculating personal emergency leave pay. The employee would be entitled to be paid for hours of personal emergency leave using their regular rate of pay, and not for example 1.5 times their regular rate per the overtime provisions of the ESA 2000.

Under ESA Part X Public Holidays, employees who agree to, or are required to work on a public holiday may be entitled to receive premium pay of at least one and one half times their regular rate for hours worked on that day. The effect of this subsection is that, despite the entitlement in s. 4(13) to be paid "the wages the employee would have earned had they not taken the leave", the employee is not entitled to any premium pay that they would have earned by working on the public holiday had the leave not been taken.

Subsections 4(14) and (15) are identical to the provisions of ESA Part XIV, s. 50(10) and (11). For more information on these sections and examples of personal emergency leave pay calculations involving overtime pay and shift premiums, see the commentary at ESA Part XIV, s. 50(10) and for examples of personal emergency leave pay calculations involving public holiday premium pay, see the commentary at ESA Part XIV, s. 50(11).

Sections 4(16) and (17)

4(16) Subject to subsection (17), an employer may require an employee who takes leave under this section to provide evidence reasonable in the circumstances that the employee is entitled to the leave.

4(17) An employer shall not require an employee to provide a certificate from a qualified health practitioner as evidence under subsection (16).

These subsections are identical to ESA Part XIV s. 50(12) and (13) – refer to "personal emergency leave" commentary on those sections for more information.

Ontario Regulation 535/17 – Family Medical Leave and Critical Illness Leave

This regulation sets out the conditions for when an employee takes family medical leave or critical illness leave with respect to a person who considers the employee to be like a family member.

O Reg 535/17 Section 1 – Condition re Family Member

1 For the purposes of paragraph 12 of subsection 49.1 (3) of the Act and paragraph 12 of the definition of "family member" in subsection 49.4 (1) of the Act, the prescribed condition is that the employee must, on the employer's request, provide the employer with a copy of the document provided to an agency or department of the Government of Canada for the purpose of claiming benefits under the *Employment Insurance Act* (Canada) in which it is stated that the employee is considered to be like a family member.

The family medical leave provision in ESA Part XIV, s. 49.1(3) paragraph 12 and critical illness leave in the definition of family member at ESA Part XIV, s. 49.4(1) both define "family member" for the purpose of determining eligibility for the leave, and include "a person who considers the employee to be like a family member."

If an employee wishes to take either critical illness leave or family medical leave to care for such a person, the employee must provide a copy of a "document provided to an agency or department of the Government of Canada for the purposes of claiming benefits under the *Employment Insurance Act"* to the employer if the employer requests it. At the time of writing, the Employment Insurance ("EI") benefit that is available to employees who wish to take family medical leave is the compassionate care EI benefit, and in order to qualify for EI benefits when an employee takes family medical leave to care for someone who considers the employee to be like a family member, the employee must complete an attestation form for Service Canada. Whether or not the employee intends to apply for the EI benefit, it is this form that must be provided to the employer if the employer asks for it.

In the case of critical illness leave, the requirement is the same: if the employer requests a copy of the document that the employee provided to Service Canada to support an application for EI benefits to care for a critically ill family member when that person is someone who considers the employee to be like a family member, then the employee must provide it to the employer.

Ontario Regulation 764/20 - Terms and conditions of employment in defined industries - hospitality, tourism and convention and trade show industries

O. Reg. 764/20 – Terms and Conditions of Employment in Defined Industries – Hospitality, Tourism and Convention and Trade Show Industries– came into effect on December 17, 2020. It was originally set to self-revoke on December 17, 2021, but was later extended to self-revoke on July 31, 2022.

O. Reg. 764/20 applies only to employees who are represented by a trade union, and employers of those employees, in the following industries: hospitality, tourism, and convention and trade show industries. It does not apply to the Crown and certain public bodies as defined in the regulation.

O. Reg. 764/20 creates a special rule that permits employers and trade unions to agree that the regulation applies instead of some of the provisions in s. 67 of the ESA. Section 67 of the ESA governs the interaction between recall rights, termination and severance pay and establishes a requirement for payment of termination pay and severance pay into trust where recall rights are retained. The agreement can be made with respect to a single employee, a group or groups of employees, or all employees.

Regulation Does Not Require Payment Into Trust

If the employer and the trade union agree to have the regulation apply with respect to an employee, the requirement in s. 67(7) of the ESA that the employer pay the termination pay and severance pay to which the employee is entitled into trust will not apply. This exemption from the requirement to pay the money into trust happens automatically when the employer and trade union agree to apply the special industry rule.

Note that although the regulation does not require the employer to pay into trust the termination pay and severance pay to which the employee is entitled, the trade union and employer are not prohibited by the regulation from bargaining a trust arrangement with respect to any or all of the pay to which the employee is entitled. Unlike s. 67(7), the regulation does not contemplate that any such trust arrangement would involve paying the money into trust with the Director of Employment Standards. Therefore, the Director will not accept any money into trust where the regulation applies.

Scheme re: Retention of Recall Rights

In addition, where the employer and the trade union agree to have the regulation apply with respect to an employee:

- the trade union may elect to retain recall rights on behalf of some or all of the employees it represents, so long as the employee has not already elected to be paid termination and severance pay and abandon their recall rights. **The union may make this election even if the employee had already elected to retain recall rights**.
- if the trade union on behalf of the employee elects to retain recall rights, the employee may not renounce the right to be recalled – and be paid termination and severance pay - before a date agreed upon by the union and employer.
- the trade union may not renounce the recall right on behalf of an employee.

Where a trade union and employer agree to have the regulation apply with respect to an employee, if the **employee individually** elects to retain recall rights and the **trade union does not** elect to retain the right to recall on behalf of that employee, the only practical difference for that employee between being subject to the regulation and being governed by s. 67 is that there is no obligation on the employer to pay into trust the termination pay and severance pay to which the employee is entitled. (Note, however, that if the employee elected to retain recall rights **before** the trade union and employer agreed to have the regulation apply to that employee, the employer may have already paid the termination pay and severance pay into trust. In that case, where the money was paid to the Director of Employment Standards in trust, it will be held and released in accordance with s. 67 of the ESA. Where the money is being held in a private trust, it will be held and paid in accordance with the trust arrangement.)

O. Reg. 764/20 – Section 1 – Definitions

1. In this Regulation,

“convention and trade show industry” includes businesses engaged in organizing, promoting or supporting conventions or trade shows, whether or not they operate the facilities in which these events take place;

“defined industries” means the hospitality industry, the tourism industry and the convention and trade show industry;

“hospitality industry” includes businesses that provide accommodation, lodging, meals or beverages for payment, and includes hotels, motels, motor hotels, tourist homes, tourist camps, tourist cabins and cottages, tourist inns, restaurants, bars, catering services and all other businesses of a similar nature;

“tourism industry” includes businesses engaged in,

(a) travel arrangement, reservation services or tour operations,

(b) producing, organizing or promoting live presentations that involve the performances of actors, singers, dancers, musical groups, artists, athletes or other entertainers,

(c) preserving or exhibiting objects, sites or natural wonders of historical, cultural or educational value, or

(d) operating recreation, amusement or gambling facilities or services, including casinos.

Section 1 defines the industries to which O. Reg 764/20, pursuant to s. 2, applies.

Section 1 provides a definition of “defined industries” (as referenced in s. 2) to mean the hospitality industry, the tourism industry and the convention and trade show industry. It also defines each of those industries.

The definitions of those three industries are inclusive. This means that there may be activities or businesses that are not explicitly set out within the definitions that fall within them.

O. Reg. 764/20 – Section 2 - Scope

2. (1) This Regulation is restricted in its application to,

(a) employees in the defined industries who are represented by a trade union; and

(b) employers of employees described in clause (a).

(2) This Regulation does not apply to the Crown, a Crown agency or an authority, board, commission or corporation at least one of whose members is appointed by the Crown, or to any employees of such an employer.

Subsection 2(1) narrows the scope of O. Reg. 764/20 by restricting its application to employees in the defined industries who are represented by a trade union, and to their employers.

It does not matter for the purpose of s. 2 whether or not the unionized employees are covered by a collective agreement. So long as the employees are represented by a trade union, the regulation applies.

If a trade union representing employees in one of the defined industries enters into an agreement with the employer pursuant to ss. 4(1) of this regulation and is subsequently decertified while this regulation is still in effect, the regulation would stop applying with respect to the employees who are no longer represented by a trade union on the date of the decertification, and s. 67 of the ESA 2000 would apply to the employees and employer as of that date.

Section 1 of the ESA 2000 defines "trade union" to be an organization that represents employees in collective bargaining under a number of labour relations statutes. See s. 1 of the ESA 2000 for details.

Subsection 2(2) further narrows the scope of O. Reg. 764/20 by providing that it does not apply to the Crown, a Crown agency or an authority, board, commission or corporation, at least one of whose members is appointed by the Crown, or to any employees of such an employer.

For a discussion of the exemption that applies to the Crown and certain public bodies in the context of ss. 4(4.1) of the ESA 2000 and s. 2.1 of O. Reg. 285/01, see O Reg 285/01 s. 2.1. Note, however, that the exemption in this regulation differs from the exemptions for the Crown and certain public bodies in the context of ss. 4(4.1) of the ESA 2000 and s. 2.1 of O. Reg. 285/01. In those contexts, **all** of the members of an authority, board, commission or corporation must be appointed by the Crown for the exemption to apply. Here, the regulation will not apply so long as at least one of the members has been appointed by the Crown.

O. Reg. 764/20 – Section 3 – Terms and conditions of employment

3. This Regulation sets out terms and conditions of employment that apply to employees and employers described in section 2.

Section 3 states that O. Reg. 764/20 sets out terms and conditions of employment that apply to unionized employees and their employers in the industries defined in s. 1.

This section must be read in conjunction with ss. 4(1) of O. Reg. 764/20, which provides that the special rules regarding the application of recall rights in the regulation applies with respect to an employee only if the trade union and employer agree that it applies. If there is no such agreement, s. 67 of the ESA 2000 applies with respect to that employee. Depending on the agreement negotiated by the employer and trade union, it is possible that some unionized employees of an employer are governed by this regulation while other employees of the employer who are represented by the same trade union are governed by s. 67 of the ESA 2000.

O. Reg. 764/20 – Section 4 - Elections re recall rights

4. (1) If an employer and the trade union that represents an employee agree, subsections (2) to (7) apply to that employer and employee instead of subsections 67 (3) to (5) and (7) to (9) of the Act.

Subsection 4(1) of O. Reg. 764/20 provides that, if the employer and the trade union that represents an employee in the defined industries agree, subsections (2) to (7) of this regulation apply to that employer and employee instead of subsection 67 (3), (4), (5), (7), (8) and (9).

The trade union and employer can enter into an agreement with respect to a single employee, a group or groups of employees, or all employees: the regulation does not impose any restrictions in this regard.

Regulation Does Not Require Payment Into Trust Where Election made to Retain Recall Rights

If the employer and the trade union agree to have the regulation apply with respect to an employee, where an election to retain recall rights has been made the requirement in s. 67(7) of the ESA that the employer pay the termination pay and severance pay to which the employee is entitled into trust will not apply. This exemption from the requirement to pay money into trust happens automatically when the employer and trade union agree to apply the special industry rule.

Note that although the regulation does not require the employer to pay into trust the termination pay and severance pay to which the employee is entitled, the trade union and employer are not prohibited by the regulation from bargaining a trust arrangement with respect to any or all of the pay to which the employee is entitled. Unlike s. 67(7), the regulation does not contemplate that any such trust arrangement involves paying the money into trust with the Director of Employment Standards. Therefore, the Director will not accept any money into trust where the regulation applies.

Scheme re: Retention of Recall Rights

In addition, where the employer and the trade union agree to have the regulation apply with respect to an employee:

- the trade union may elect to retain recall rights on behalf of some or all of the employees it represents, so long as the employee has not already elected to be paid termination and severance pay and abandon their recall rights. **The union may make this election even if the employee had already elected to retain recall rights**.
- if the trade union on behalf of the employee elects to retain recall rights, the employee may not renounce the right to be recalled – and be paid termination and severance pay - before a date agreed upon by the union and employer.
- the trade union may not renounce the recall right on behalf of an employee.

Where a trade union and employer agree to have the regulation apply with respect to an employee, if the **employee individually** elects to retain recall rights and the **trade union does not** elect to retain the right to recall on behalf of that employee, the only practical difference for that employee between being subject to the regulation and being governed by s. 67 is that there is no obligation on the employer to pay into trust the termination pay and severance pay to which the employee is entitled.

The employer and trade union can enter into an agreement under this subsection with respect to an employee even if that employee already made an election to retain recall rights, and even if that employee made the election before O. Reg. 764/20 came into force. For example, if an employee elected to retain recall rights while subject to s. 67, the employer and trade union can subsequently enter into an agreement under this subsection with respect to that employee. If they do, the regulation applies rather than the system set out in s. 67. This means, for example, that upon entering into the agreement the employer is no longer subject to the requirement in ss. 67(7) to pay the employee's termination and severance pay into trust, and as per ss. 4(4) of this regulation, where the union has made an election on behalf of some or all of the employees it represents, the employees may not renounce the employees' right to be recalled and be paid termination and severance pay to which the employee is entitled before the date agreed to by the employer and union. Note that where money is already being held in trust by the Director of Employment Standards pursuant to s. 67 in respect of a particular employee, there is no authority for the Director to return those funds to the employer if the employer and union come to an

agreement under this regulation in respect of that employee's recall rights; the Director can only pay out the funds in accordance with s. 67 of the Act. Where money is being held in a private trust, it will be held and paid in accordance with the trust arrangement.

Consolidation of the Provisions of s. 67 of the ESA 2000 and of O. Reg. 76420 that Apply <u>if the Union and Employer Enter into an Agreement under ss. 4(1)</u> of O. Reg. 764/20

If the employer and trade union enter into an agreement under ss. 4(1) with respect to an employee, the provisions of the ESA 2000 and this regulation governing the interaction between recall rights and termination pay and severance pay that would apply to the employer and employee affected by the agreement are as set out below.

(Note: although ss. 67(6) of the ESA 2000 is **not** displaced when the employer and trade union enter into an agreement under ss. 4(1) of O. Reg. 764/20, the text of ss. 67(6) is not set out below because it applies only to non-unionized employees and as such is not relevant.)

Where election may be made

ss. 67(1) of ESA 2000 *This section** applies if an employee who has a right to be recalled for employment under his or her employment contract is entitled to,*

(a) termination pay under section 61 because of a lay-off of 35 weeks or more; or

(b) severance pay.

Exception

ss. 67(2) of ESA 2000 *Clause (1) (b) does not apply if the employer and employee have agreed that the severance pay shall be paid in instalments under section 66.*

4. (2) *Subject to subsections (3) and (4), the employee may elect to be paid the termination pay or severance pay forthwith or to retain the right to be recalled.*

4. (3) *If the employee is entitled to both termination pay and severance pay, the same election shall be made in respect of each.*

4. (4) *A trade union may elect to retain the right to be recalled on behalf of some or all of the employees it represents and if such an election is made, the following rules apply:*

1. The election is binding on the employee in respect of whom it is made unless the employee elected to be paid prior to the trade union's election.

2. The employee may not renounce the right to be recalled before the date agreed to by the employer and the trade union.

3. The trade union may not renounce the right to be recalled on behalf of the employee.

4. (5) *If no election is made on an employee's behalf under subsection (4) and the employee elects to be paid under subsection (2), the employee shall be deemed to have abandoned the right to be recalled.*

4. (6) *If the employee accepts employment made available under the right of recall, the employee shall be deemed to have abandoned the right to termination pay and severance pay.*

4. (7) *Subject to the limit set out in paragraph 2 of subsection (4), if the employee renounces the right to be recalled or the right expires, the employer shall pay the termination pay and severance pay to which the employee is entitled forthwith to the employee and, if the right to be recalled had not expired, the employee shall be deemed to have abandoned the right.*

Because ss. 4 (2)-(7) of O. Reg. 764/20 **replace** certain subsections of s. 67, the reference in ss. 67(1) of the ESA to "This section" means s. 67 **and** ss. 4(2)-(7) of O. Reg. 764/20.

Section 67 of ESA 2000 - Where Election May Be Made

67(1) This section applies if an employee who has a right to be recalled for employment under his or her employment contract is entitled to,

(a) termination pay under section 61 because of a lay-off of 35 weeks or more; or

(b) severance pay.

Subsection 67(1) sets out the circumstances in which the provisions regarding the election of recall rights apply. This section is subject to s. 67(2) of the *Employment Standards Act, 2000*, discussed in subsection (2) below.

Subsection 67(1) states that s. 67 will apply where an employee has the right to be recalled for employment under a contract of employment (which includes a collective agreement) and either a) or b) below applies. (Where a trade union and employer agree to have O. Reg. 764/20 apply to an employee who falls under ss. 67(1), the reference in ss. 67(1) to "This section" means ss. 67(1), (2) **and** ss. 4(2)-(7) of O. Reg. 764/20.)

Termination pay is due under section 61 because of a lay-off of 35 weeks or more - s. 67(1)(a)

Employees who are entitled to termination pay because of a temporary lay-off that equals or exceeds 35 weeks in a period of 52 consecutive weeks (ss. 56(2)(b) or ss. 56(2)(c)) are subject to s. 67. In that case, the employer of such an employee is also subject to s. 67.

This section does not apply if the termination pay comes due for reasons other than as a result of a lay-off that equals or exceeds 35 weeks in a period of 52 consecutive weeks. Therefore, it will not apply where, for example, there is a termination because of a lay-off that exceeds 13 weeks in a 20-week consecutive

period (ss. 56(2)(a)). In that case, the employee is not required under the Act to make an election in order to receive termination pay after 13 weeks of lay-off and will not be deemed under the Act to have abandoned the right to be recalled in accepting that payment. If the employee is entitled to severance pay, however, he or she will be required to make an election with respect to the payment of the severance pay and the retention of recall rights. It should also be noted that a collective agreement or contract of employment may provide for the loss of recall rights as a consequence of an employee's acceptance of termination pay that comes due other than as a result of a lay-off that equals or exceeds 35 weeks in a period of 52 consecutive weeks.

Severance pay is due – s. 67(1)(b)

Subject to ss. 67(2), employees who are entitled to severance pay under ss. 64(1) of the Act are subject to the provisions of s. 67. The employee's employer is likewise subject to the provisions of s. 67.

Exception - s. 67(2) of ESA 2000

67(2) Clause (1)(b) does not apply if the employer and employee have agreed that the severance pay shall be paid in instalments under section 66.

Section 67(2) provides that, despite ss. 67(1)(b), the provisions of s. 67 (and of ss. 4(2)-(7) of O. Reg. 764/20) will not apply with respect to the severance entitlement where an employer and an employee have agreed to pay an employee severance pay in instalments under s. 66. See ESA Part XV, s. 66 for a detailed discussion of severance instalment plans under s. 66 of the Act. As such, an employee who agrees to accept severance pay by instalment will not be required to make an election as between the payment of his or her severance pay and retaining the right to recall, and the employer will not be required to pay the severance pay into trust.

However, s. 67 and ss. 4(2)-(7) of O. Reg. 764/20 will apply where an instalment plan is in place because the Director has approved the payment of severance pay by instalments (as opposed to it being in place as a result of employee agreement). Accordingly, in that case, the employee must elect either to be paid the severance pay (by instalment) or retain his or her recall rights. If that employee also has the right to termination pay because of a lay-off of 35 weeks or more, the same election must be made with respect to both the termination pay and severance pay entitlements - see ss. 4(3) of O. Reg. 764/20. Note that if that employee does not make an election, or elects to be recalled, it is Program Policy that the employee has not abandoned the right to be recalled even though the employer pays the employee severance pay by instalment under a plan approved by the Director, since the employee has not expressly elected to be paid the severance pay under ss. 4(2) of O. Reg. 764/20.

4. (2) Subject to subsections (3) and (4), the employee may elect to be paid the termination pay or severance pay forthwith or to retain the right to be recalled.

This subsection provides that subject to ss. 4(3) and (4) of O. Reg. 764/20, an employee may choose to have the termination pay or severance pay to which the employee is entitled paid to him or her immediately, or instead may choose to retain the right to be recalled.

Subsection (3) provides that where an employee is entitled to both termination pay and severance pay, the employee must make the same election in respect of both of those payments.

Subsection (4) provides that a trade union may elect to retain the right to be recalled on behalf of some or all of the employees it represents, so long as the employee has not already elected to be paid termination or severance pay.

This provision does not apply with respect to the employee's severance pay entitlement if the employee and employer have agreed to (as opposed to the Director approving) the payment of severance pay by instalment under s. 66 of the Act. In that event, ss. 67(2) of the Act provides that the provisions of s. 67 - and ss. 4(2) of this regulation since it only applies where s. 67 is triggered - do not apply with respect to the severance pay entitlement.

As noted earlier, there is no provision in the regulation corresponding to the obligation in ss. 67(7) of the ESA 2000 requiring that, where recall rights are retained, the employer pay the termination pay and severance pay to which the employee is entitled into trust.

4. (3) If the employee is entitled to both termination pay and severance pay, the same election shall be made in respect of each.

This subsection, combined with ss. 67(1), provides that if an employee is entitled to termination pay on or after 35 weeks of lay-off in a period of 52 consecutive weeks and to severance pay, the employee must make the same election with respect to both.

Note, however, that this requirement does not apply if the employee and employer have agreed to (as opposed to the Director approving) the payment of severance pay by instalment under s. 66 of the Act. In that event, ss. 67(2) of the Act provides that the provisions of s. 67 - and ss. 4(2) of this regulation since it only applies where s. 67 is triggered - do not apply with respect to the severance pay entitlement.

4. (4) A trade union may elect to retain the right to be recalled on behalf of some or all of the employees it represents and if such an election is made, the following rules apply:

1. The election is binding on the employee in respect of whom it is made unless the employee elected to be paid prior to the trade union's election.

2. The employee may not renounce the right to be recalled before the date agreed to by the employer and the trade union.

3. The trade union may not renounce the right to be recalled on behalf of the employee.

This subsection provides that the trade union may elect to retain the recall rights on behalf of one, some or all of the employees it represents, and establishes rules in paragraphs 1-3 with respect to that election.

Paragraph 1 of ss. 4(4) provides that such an election is binding on the employee in respect of whom the election is made unless the employee elected to be paid the termination and severance pay to which the employee is entitled **before** the trade union made the election. If an employee made the election to be paid first, that election stands and cannot be overridden by the trade union's election.

That is the only situation under the regulation where the trade union's election to retain the right of recall on behalf of an employee is not binding. A trade union may elect to retain the right of recall on behalf of an employee – and have the rules set out in paragraphs 1, 2 and 3 of this subsection apply – even if the

employee had already elected to retain those rights pursuant to ss. 4(2) of this regulation or ss. 67(3) of the ESA (in the case where the employee made the election before the trade union and employer entered into an agreement under ss. 4(1) of this regulation to have the regulation apply to that employee, including a situation where the election was made before this regulation came into force).

Paragraph 2 of ss. 4(4) provides that if the trade union elects to retain the right to be recalled on behalf of an employee, that employee cannot renounce the right to be recalled before the date agreed to by the employer and the trade union.

If the employer and trade union do not agree on such a date, the employee may renounce the recall right and elect to be paid termination pay and severance pay at any time.

Because this regulation revokes on July 31, 2022 as per s. 5 of the regulation, an employee will be able to renounce the recall rights as of July 31, 2022. An employer and trade union cannot agree to restrict the ability to renounce recall rights beyond that date. See the discussion of s. 5 below.

Paragraph 3 of ss. 4(4) provides that the trade union cannot renounce an employee's right of recall on behalf of that employee. The regulation only authorizes the trade union to retain an employee's right of recall on the employee's behalf.

Note that although there is no requirement in the regulation corresponding to the requirement in ss. 67(7) of the ESA 2000 that the employer pay the termination pay and severance pay to which the employee is entitled into trust where either the employee or the union on behalf of an employee elects to retain recall rights under this regulation, the trade union and employer are not prohibited by the regulation from bargaining a trust arrangement with respect to any or all of the pay to which the employee is entitled. Unlike s. 67(7), the regulation does not contemplate that any such trust arrangement would involve paying the money into trust with the Director of Employment Standards. Therefore, the Director will not accept any money into trust where the regulation applies.

4. (5) If no election is made on an employee's behalf under subsection (4) and the employee elects to be paid under subsection (2), the employee shall be deemed to have abandoned the right to be recalled.

Subsection 4(5) provides that where the union did not elect to retain recall rights on an employee's behalf and the employee elects to be paid termination pay that became due because of a lay-off of 35 weeks in a period of 52 consecutive weeks, or severance pay, the employee will be deemed to have abandoned his or her right to be recalled.

Note, however, that this provision does not apply if the employee and employer have agreed to (as opposed to the Director approving) the payment of severance pay by instalment under s. 66 of the Act. In that event, ss. 67(2) provides that the provisions of s. 67 (including ss. 4(5) of this regulation) do not apply with respect to the severance pay entitlement.

4. (6) If the employee accepts employment made available under the right of recall, the employee shall be deemed to have abandoned the right to termination pay and severance pay.

Subsection (6) provides that where the employee accepts a recall to work, the employee is deemed to have abandoned the right to termination pay and severance pay.

Subsection (6) deals only with the issue of what happens to the entitlement to termination and severance pay when an employee accepts a recall; neither it, nor any other provision in s. 67 or Reg. 764/20, has any bearing on what constitutes a termination within the meaning of s. 56 or what constitutes a severance within the meaning of s. 63. See the Court of Appeal decision in *United Steel v National Steel Car Limited,* 2013 ONCA 401 (CanLII), where the Court rejected the employer's argument that s. 67 means that an employee who accepts a recall cannot have any of the time spent on lay-off prior to the recall taken into account in determining whether there was a subsequent termination or severance. See ESA Part XV, s. 63(1) of the Manual for further discussion of this case.

Employee Refuses to Return to Work

Sometimes situations will arise in which the employer recalls an employee who had elected to retain recall rights – or on whose behalf the union had elected to retain recall rights - and the employee refuses to return to work. Because the employee's refusal occurs after the point at which the employee became entitled to termination pay or severance pay, the employee's refusal to accept the recall cannot disentitle him or her to that termination pay or severance pay. Specifically, none of the exemptions in ss. 2(1) or 9(1) of O. Reg 288/01 apply to exempt such an employee from termination or severance pay to which he or she is already entitled. While paragraph 7 of s. 2(1) of O. Reg 288/01 provides that an employee on a temporary lay-off is exempt from the termination provisions if he or she does not return to work when recalled, it does not apply to a refusal to return to work that occurs after the point at which the right to termination pay has crystallized. Further, there is no exemption from severance pay in O. Reg 288/01 that corresponds to paragraph 7 of s. 2(1) of that regulation.

Accordingly, an employee who has been recalled after his or her termination or severance entitlements have crystallized may refuse to return to work and then - subject to the restriction in paragraph 2 of ss. 4(4) of this regulation that prevents an employee on whose behalf the trade union elected to retain the right to be recalled from renouncing that right before the date agreed upon by the employer and trade union – the employee may renounce his or her recall rights, in which case he or she will be entitled to receive his or her termination or severance pay.

Alternatively, an employee could refuse the recall but retain the recall rights (if he or she did not lose them under the terms of the contract or collective agreement for having refused to return to work when recalled). If the employee's refusal resulted in the automatic termination of recall rights under the terms of the contract or collective agreement, then the result would be the same as if the recall rights had expired, i.e., the employer would have to pay the employee the termination and severance pay to which the employee is entitled.

Period of Employment Calculation When Termination After Recall

Situations may also arise in which a long service employee who had been laid off for 35 weeks in a period of 52 consecutive weeks elects to retain recall rights - or the union elects to retain them on the

employee’s behalf - and then, after more than 13 weeks elapse, accepts a recall, only to have the employer terminate the employee's employment two weeks later. How is the employee's length of service calculated for purposes of notice of termination in this case? Because of the "period of employment" rule in s. 8 of O Reg 288/01, only the last two weeks of employment would be considered in calculating the employee's period of employment. As a result, the employee would be entitled under the ESA to **one** week's notice or one week's termination pay. (Note: While the employee's period of employment is only two weeks, the employee was "continuously employed for three months or more" within the meaning of s. 54 and so meets the s. 54 threshold for being ~~is~~ entitled to notice or termination pay in accordance with s. 57(a).)

4. (7) Subject to the limit set out in paragraph 2 of subsection (4), if the employee renounces the right to be recalled or the right expires, the employer shall pay the termination pay and severance pay to which the employee is entitled forthwith to the employee and, if the right to be recalled had not expired, the employee shall be deemed to have abandoned the right.

Subsection 4(7) provides that where the employee renounces the right to be recalled (subject to the restriction in paragraph 2 of ss. 4(4) that prevents an employee on whose behalf the trade union elected to retain the right to be recalled from renouncing that right before the date agreed upon by the employer and trade union), or the rights expire, the employer is required to pay the employee the termination pay and severance pay to which the employee is entitled immediately, and the employee is deemed to have abandoned the right to be recalled.

O. Reg. 764/20 – Section 5 - Revocation

5. This Regulation is revoked on July 31, 2022.

Section 5 of O. Reg. 764/20 provides that Reg. 764/20 is revoked on July 31, 2022.

The regulation was originally set to automatically revoke on December 17, 2021 (the first anniversary of the day the regulation was filed) but was later extended.

As such, employees, unions and employers who had been operating under the terms of this regulation will be subject to the provisions in s. 67 of the ESA 2000 as of July 31, 2022.

This means, for example, that as of July 31, 2022, employees have the exclusive right to elect to retain their recall rights, employers are required to pay the termination pay and severance pay of employees who have retained their recall rights into trust in accordance with s. 67(7), and employees’ ability to renounce their recall rights and be paid termination and severance pay will no longer be restricted by any agreement that may have been entered into by the union and the employer under this regulation establishing a date before which those rights could not be renounced.

O. Reg. 764/20 – Section 6 - Commencement

6. This Regulation comes into force on the day it is filed.

Employment Protection for Foreign Nationals Act, 2009 (EPFNA)

EPFNA Section 1- Interpretation

Definitions - s. 1(1)

This section contains definitions for certain terms used in the *Employment Protection for Foreign Nationals Act, 2009.*

Note that EPFNA was amended effective November 20, 2015 by the *Stronger Workplaces for a Stronger Economy Act, 2014,* SO 2014, c 10 to broaden the scope of the legislation. Prior to November 20, 2015, EPFNA's name was the *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others), 2009*, and it applied only to foreign nationals employed or attempting to find employment in Ontario as live-in caregivers. Effective November 20, 2015, the newly named EPFNA applies to all foreign nationals employed in Ontario or attempting to find employment in Ontario pursuant to an immigration or foreign temporary employee program.

Some of the defined terms in the EPFNA have the same meaning as in the *Employment Standards Act, 2000*.

Director

"director" means a director of a corporation and includes a shareholder who is a party to a unanimous shareholder agreement;

For the purposes of EPFNA, the term "director" is defined in the same way as in ESA Part XX, s. 79. See ESA Part XX, s. 79.

Director of Employment Standards

"Director of Employment Standards" has the same meaning as in the *Employment Standards Act, 2000*;

Similarly, the use of the term "Director of Employment Standards" in EPFNA has the same meaning as "Director" in the ESA 2000. See ESA Part I, s. 1 for more information.

Employment Standards Officer

"employment standards officer" has the same meaning as in the *Employment Standards Act, 2000*;

"Employment standards officer" has the same meaning in both acts. An employment standards officer is someone appointed under Part III of the *Public Service of Ontario Act, 2006,* SO 2006, c 35, Sch A. For a discussion on the authority to appoint employment standards officers, please see ESA Part XXI, s. 86.

Foreign National

"foreign national" means an individual who is not,

(a) a Canadian citizen, or

(b) a permanent resident within the meaning of the Immigration and *Refugee Protection Act (Canada)*;

A "foreign national" is defined as an individual who is neither a Canadian citizen nor a permanent resident within the meaning of the federal *Immigration and Refugee Protection Act,* SC 2001, c 27 ("IRPA"). IRPA defines a permanent resident as a person who has acquired permanent resident status and has not subsequently lost that status per s. 46 of IRPA. The issue of whether a person is a Canadian citizen or a permanent resident can be assessed by requesting and reviewing certain documentation.

Prescribed

"prescribed", unless otherwise indicated, means prescribed by the regulations made under this Act;

EPFNA defines the term "prescribed" as meaning established by regulations under EPFNA.

Recruiter

"recruiter" means a person who is acting as a recruiter as described in section 2.

The term "recruiter" means a person who meets the criteria of acting as a recruiter as described in s. 2 of EPFNA. See the discussion of s. 2 of EPFNA for more information.

Incorporation by Reference – s. 1(2)

1(2) Where this Act incorporates by reference a provision of the *Employment Standards Act, 2000*, the provision is incorporated with necessary modifications that include the following:

1. References in that Act to a complaint filed under section 96 of that Act shall be read as references to a complaint filed under section 20 of this Act.

2. References in that Act to an order under section 103, 104, 106, 107 or 108 of that Act shall be read as references to the corresponding order described in section 24 of this Act.

3. For greater certainty, references in that Act to an order to pay wages owing by an employer shall be read as references to the following in this Act:

- **i. In connection with the prohibitions in section 7 of this Act against a recruiter charging fees or another person collecting fees, the references shall be read as an order to repay fees charged by a recruiter or collected by a person on behalf of a recruiter, and read as if the fees were wages under that Act and as if the recruiter or person were an employer under that Act.**
- **ii. In connection with the prohibition in section 8 of this Act against an employer recovering costs, the references shall be read as an order to repay costs recovered by an employer, and read as if the costs were wages under that Act.**

4. For greater certainty, references in section 88 of that Act to an amount owing under the provisions of that Act or the regulations shall be read as references to an amount owing under the provisions of this Act or its regulations.

Subsection 1(2) clarifies how certain provisions of the ESA 2000, which are incorporated into EPFNA by reference, are to be interpreted. The subsection provides that where EPFNA incorporates a reference to a provision of the ESA 2000, the provision must be incorporated with necessary modifications. Subsection 1(2) goes on to specify that those modifications include the following:

- References in the ESA 2000 to a complaint filed under ESA Part XXII, s. 96 are to be read as references to a complaint filed under s. 20 of EPFNA;
- References in the ESA 2000 to an order issued under any of the ESA 2000 sections outlined below are to be read as references to the corresponding order set out in s. 24 of EPFNA:
    - Section 103 order to pay wages;
    - Section 104 order to reinstate, pay compensation or both;
    - Section 106 or 107 order to pay wages against directors; or
    - Section 108 order to comply;
- References in the ESA 2000 to an order to pay wages owed by an employer, when read in the context of a prohibition under s. 7 of EPFNA, are to be read as an order to repay fees charged by a recruiter or collected by a person on behalf of a recruiter as if the fees were wages under the ESA 2000. Furthermore, when applying s. 7 of EPFNA, references to an employer under the ESA 2000 are to be read as a reference to a recruiter or other person.
- References in the ESA 2000 to an order to pay wages owed by an employer, when read in the context of a prohibition under s. 8 of EPFNA, are to be read as an order to repay costs recovered by an employer as if the costs were wages under the ESA 2000.
- ESA Part XX, s. 88(5) allows the Director of Employment Standards to set multiple rates of interest for any amounts owing under the ESA 2000 and its regulations, as well as money held in trust by the Director. This section is incorporated for the purposes of amounts owing under the EPFNA.

Delegation of Powers (EPFNA)

For more information on the Director of Employment Standard's ability to delegate under EPFNA, see Delegation of Powers for further information.

EPFNA Section 2 – Acting as Recruiter

2. For the purposes of this Act, a person is acting as a recruiter,

(a) if the person finds, or attempts to find, an individual for employment;

(b) if the person finds, or attempts to find, employment for an individual;

(c) if the person assists another person in doing the things described in clause (a) or (b); or

(d) if the person refers an individual to another person to do any of the things described in clause (a) or (b).

Section 2 establishes when a person is "acting as a recruiter" for the purposes of the Act. A person is acting as a recruiter for the purposes of the *Employment Protection for Foreign Nationals Act, 2009* if he or she:

- Finds or attempts to find an individual for employment or assists another person in doing so;
- Finds or attempts to find employment for an individual or assists another person in doing so; or

- Refers an individual to another person to find or to attempt to find an individual for employment or to find or attempt to find employment for an individual.

In terms of distinguishing the first two bullets above, the first relates to a person finding or attempting to find or assisting in finding or attempting to find an individual for a position, whereas the second bullet relates to a person finding or attempting to find or assisting in finding or attempting to find a position for an individual.

As set out in clause (d), a person is acting as a recruiter for the purposes of EPFNA if he or she refers another person to someone who finds, or attempts to find, either an individual for employment or employment for an individual. This may arise, for example, where a person refers a potential employer to a recruitment agency for assistance in finding a foreign national for employment as a live-in caregiver.

EPFNA Section 3 – Application

Application - s. 3(1)

3(1) This Act applies to the following persons:

1. Every foreign national who, pursuant to an immigration or foreign temporary employee program, is employed in Ontario or is attempting to find employment in Ontario.

2. Every person who employs a foreign national in Ontario pursuant to an immigration or foreign temporary employee program.

3. Every person who acts as a recruiter in connection with the employment of a foreign national in Ontario pursuant to an immigration or foreign temporary employee program.

4. Every person who acts on behalf of an employer described in paragraph 2 or a recruiter described in paragraph 3.

This provision was amended by the ***Stronger Workplaces for a Stronger Economy Act, 2014,*** SO 2014, c 10, effective November 20, 2015 to reflect the broadened scope of the ***Employment Protection for Foreign Nationals Act, 2009***. EPFNA formerly applied only to foreign nationals employed or attempting to find employment as live-in caregivers. (Prior to its amendment, this section also provided for the application of the Act to foreign nationals in other prescribed employment but none was prescribed prior to the amendment of this section.)

This provision lists the persons to whom the EPFNA applies. It must be read in conjunction with ss. 3(2) and 3(3) which provide that the EPFNA does not apply to employers or recruiters if the ***Employment Standards Act, 2000*** would not apply in respect of the employment of the foreign national. Note also that s. 3(4) provides that EPFNA applies to the Crown only in such circumstances as are prescribed, and that at the time of writing, no regulation to prescribe such application has been made.

Subsection 3(1) sets out the persons to whom the EPFNA applies (subject to ss. 3(2), (3) and (4)) as follows:

- Every foreign national who is employed in Ontario pursuant to an immigration or foreign temporary employee program;
- Every foreign national who is attempting to find employment in Ontario pursuant to an immigration or foreign temporary employee program;
- Every person who employs a foreign national in Ontario pursuant to an immigration or foreign temporary employee program;
- Every person who acts on behalf of an employer described in the immediately preceding bullet;
- Every person who acts as a recruiter in connection with the employment of a foreign national in Ontario pursuant to an immigration or foreign temporary employee program; and
- Every person who acts on behalf of a recruiter described in the immediately preceding bullet.

Subsection 3(1) is intended to capture employment that is or would be permitted to be performed by a foreign national in Ontario under an immigration or temporary foreign employee program. It therefore refers to foreign nationals who are employed pursuant to such programs or who are attempting to find employment pursuant to such programs.

Employed Pursuant to an Immigration or Temporary Foreign Employee Program

Generally, foreign nationals employed in Ontario pursuant to an immigration or foreign temporary employee program will require a work permit to work in Ontario. As a result, a foreign national as defined in s. 1(1) of the EPFNA who has a work permit allowing him or her to work in Ontario would be covered under the EPFNA (subject to ss. 3(2), 3(3) and 3(4)).

Immigration programs are administered by the federal government and would generally refer to programs that enable foreign nationals to obtain permanent residency in Canada. Under these programs, a foreign national may be permitted to apply for a work permit while their Permanent Resident (PR) application is being finalized, which would enable them to obtain employment in Ontario. For example, this would include the Family Sponsorship Program.

It should be noted that there may be immigration programs that permit a foreign national to work in Ontario without a work permit. Whether or not such a foreign national is working pursuant to an "immigration program" would have to be determined on a case by case basis. Further, even where the work is performed pursuant to an immigration program, the application of EPFNA is subject (as noted above) to ss. 3(2), 3(3) and 3(4). Of particular note in these situations would be ss. 3(2) and 3(3), which limit the application of EPFNA to foreign nationals whose employment would be covered under the ESA 2000. See above and below sections for a discussion of those subsections.

Foreign temporary employee programs refer generally to programs administered by the federal government intended to enable foreign nationals to obtain work permits so that they may legally perform work in Ontario on a temporary basis. A work permit will therefore be determinative evidence that a foreign national is employed pursuant to such a program. Some of the foreign temporary employee programs administered by the federal government at the time of writing are described below:

1. Seasonal Agricultural Program ("SAWP"): This program is based on bilateral agreements with Mexican and Caribbean governments and allows employers engaged in the production of specific agricultural products to hire foreign nationals for up to 8 months per year for on-farm work.
2. Agricultural Stream: This program allows employers engaged in the production of specific agricultural products to hire foreign nationals for a maximum of 24 months for on-farm work.
3. In-Home Caregiver Program: This program provides employment positions for foreign nationals who work in a home providing care for children, elderly family members, or family members with disabilities. They may be live-in or live-out. Formerly, the federal program for caregivers required such employees to live in the residence of the employer. These employees were captured under the former EPFNA as live-in caregivers. However, with the expanded scope of EPFNA, both live-in and live-out caregivers under the "new" federal program now fall under EPFNA.
4. Stream for Low-wage Positions: This category includes positions that are below the provincial/territorial median wage. Examples of low-wage occupations include general labourers, food counter attendants, and sales and service personnel.
5. Stream for High-wage Positions: This category includes positions at or above the provincial/territorial median wage. Examples of high-wage occupations include managerial, scientific, professional and technical positions as well as the skilled trades.
6. International Mobility Program: This program allows employers to hire or bring in temporary foreign workers without the need to obtain a Labour Market Impact Assessment ("LMIA").

Attempting to Find Employment Pursuant to an Immigration or Foreign Temporary Employee Program

The Program's position is that a foreign national as defined in s. 1(1) of EPFNA will be considered to be attempting to find employment pursuant to an immigration or foreign temporary employee program if the individual possesses a work permit, has made an application for a work permit or there is evidence to demonstrate that the foreign national has communicated with a recruiter about finding employment in Ontario.

Every person who employs a foreign national in Ontario pursuant to an immigration or foreign temporary employee program and every person acting on behalf of such an employer

In order for the EPFNA to apply to an “employer”, that employer must ultimately employ a foreign national pursuant to an immigration or temporary foreign national employee program (or person acting on their behalf).

In other words, the obligations of an employer under the EPFNA apply only with respect to foreign nationals that are actually employed by the employer. For example, the prohibitions against cost recovery in s. 8 apply only to prohibit an employer from recovering costs incurred in employing or attempting to employ a foreign national who is (or was) in fact employed by the employer.

Every person who acts as a recruiter in connection with the employment of a foreign national in Ontario pursuant to an immigration or foreign temporary employee program and every person acting on behalf of such a recruiter

In order for the EPFNA to apply to a “recruiter”, that recruiter must be acting as such in connection with the employment of a foreign national in Ontario pursuant to an immigration or foreign temporary employee program.

One question that has arisen related to the application of the EPFNA to “recruiters” is whether a foreign government that participates in arranging for its own citizens to work in Ontario as foreign nationals could be considered a “recruiter” and therefore subject to the EPFNA as such. While a foreign government could, depending on the circumstances, be considered a “recruiter” as described in the EPFNA, the EPFNA (as provincial legislation) cannot generally be enforced against a foreign government because of the application of the federal *State Immunity Act,* RSC 1985, c S-18.

Prerequisite - s. 3(2)

3(2) This Act applies to an employer described in paragraph 2 of subsection (1) unless the *Employment Standards Act, 2000* does not apply in respect of the employment.

Subsection 3(2) specifies that EPFNA applies to every person who employs a foreign national in Ontario pursuant to an immigration or foreign temporary employee program if the ESA 2000 applies or would apply in respect of the employment of the foreign national. In determining whether the ESA 2000 applies or would apply in respect of employment, reference must be made to s. 3 of the ESA 2000, which sets out to whom the Act applies. Generally, the ESA 2000 applies with respect to an employee and his or her employer if the employee's work is performed in Ontario or if work outside of Ontario is a continuation of the work performed in Ontario, and the employer's undertaking falls within provincial employment law

jurisdiction and the employer does not enjoy diplomatic immunity. See ESA Part III, s. 3 for more information on the application of the ESA 2000.

Application to Recruiters - s. 3(3)

3(3) This Act applies to a recruiter described in paragraph 3 of subsection (1) unless the *Employment Standards Act, 2000* would not apply in respect of the employment.

Subsection 3(3) specifies that EPFNA applies to every person who acts as a recruiter in connection with the employment of a foreign national in Ontario pursuant to an immigration or foreign temporary employee program if the ESA 2000 would apply in respect of the employment of the foreign national. In determining whether the ESA 2000 applies or would apply in respect of employment, reference must again be made to s. 3 of the ESA 2000 which sets out to whom the Act applies. Generally, the ESA 2000 applies with respect to an employee and his or her employer if the employee's work is performed in Ontario or if work outside of Ontario is a continuation of the work performed in Ontario, and the employer's undertaking falls within provincial employment law jurisdiction and the employer does not enjoy diplomatic immunity. See ESA Part III, s. 3 for more information on the application of the ESA 2000.

Application to the Crown - s. 3(4)

3(4) This Act applies to the Crown in such circumstances as may be prescribed.

Subsection 3(4) establishes that EPFNA applies to the Crown in such circumstances as may be prescribed by regulation. However, at the time of writing, no regulations have been made pursuant to this provision; therefore, unless a regulation is made, EPFNA does not apply to employment with the Crown. For information on the meaning of the Crown, see ESA Part III, s. 3(4).

EPFNA Section 4 – Separate Persons Treated as One Entity

4(1) Subsection (2) applies if associated or related activities or businesses are or were carried on by or through an employer or recruiter and one or more other persons.

(2) The employer or recruiter, as the case may be, and the other person or persons described in subsection (1) shall all be treated as a single entity for the purposes of this Act, even if the activities or businesses are not carried on at the same time.

(3) Subsection (2) does not apply with respect to a corporation and an individual shareholder of the corporation unless the individual is a member of a partnership and the shares are held for the purposes of the partnership.

(4) Persons who are treated as one entity under this section are jointly and severally liable for any contravention of this Act and for any amounts owing to a foreign national by any of them for the contravention.

On January 1, 2018, the *Fair Workplaces, Better Jobs Act, 2017,* SO 2017, c 22 amended s. 4 of the *Employment Protection for Foreign Nationals Act, 2009* to remove the requirement that the intent or effect of the arrangement as previously described in s. 4(1) must be to defeat, either directly or indirectly, the purpose of the EPFNA. This provision is analogous to ESA Part III, s. 4 which the *Fair Workplaces, Better Jobs Act, 2017* similarly amended. Some small differences in wording are as follows:

- EPFNA s. 4 makes reference to recruiters in addition to employers
- EPFNA s. 4(2) combines the substance of ESA Part III, s. 4(2) and 4(3) into one provision (this is not legally significant)
- EPFNA refers to "amounts owing" versus "wages", which is the term used in the ESA 2000.

Because of the substantial similarity between EPFNA s. 4 and ESA Part III, s. 4, the Program's policies with respect to the interpretation of ESA Part III, s. 4 may be applied to this provision with necessary modifications.

EPFNA Section 5 – No Contracting Out

No Contracting Out - s. 5(1)

5(1) No person shall contract out of or waive a protective measure under this Act and any such contracting out or waiver is void.

Subsection 5(1) prohibits contracting out of or waiving of any requirement or prohibition in the *Employment Protection for Foreign Nationals Act, 2009* that is for the benefit of a foreign national. Any such contracting out or waiver would be void. This provision must be read in conjunction with s. 5(2), which defines the term "protective measure".

For a discussion of the similarly-worded "no contracting out" provision in the *Employment Standards Act, 2000*, see ESA Part III, s. 5 of this Manual; that discussion applies to the interpretation of this provision with necessary modifications.

Definition - s. 5(2)

5(2) In this section, "protective measure" means a requirement or prohibition under this Act that applies to an employer, recruiter or person acting on behalf of an employer or recruiter for the benefit of a foreign national.

This provision defines the term "protective measure" to mean a requirement or prohibition under EPFNA that applies to an employer, recruiter or person acting on behalf of an employer or recruiter, for the benefit of a foreign national.

The protective measures are found in ss. 7 to 13 of EPFNA.

EPFNA Section 6 – Civil Proceedings Not Affected

6(1) Subject to section 21, no civil remedy of a foreign national against his or her employer or against a recruiter is affected by this Act.

(2) If a foreign national commences a civil proceeding against his or her employer or against a recruiter under this Act, notice of the proceeding shall be served on the Director of Employment Standards on a form approved by the Director on or before the date the civil proceeding is set down for trial.

(3) Subsections 8 (3) to (5) of the Employment Standards Act, 2000 apply with respect to service of the notice.

The provisions in s. 6 of the *Employment Protection for Foreign Nationals Act, 2009* are analogous to those contained in s. 8 of the *Employment Standards Act, 2000*. Subsection 6(1) provides that subject to s. 21, EPFNA does not affect any civil remedy available to a foreign national against his or her employer or against a recruiter. Subsection 6(2) establishes the requirement that notice of a civil proceeding against an employer or recruiter under EPFNA be served on the Director of Employment Standards on an approved form before the proceeding is set down for trial. Subsection 6(3) incorporates provisions of the ESA 2000 which set out how the notice of civil proceeding must be served and when the service is effective.

The Program's policy with respect to the interpretation of s. 8 of the ESA 2000 applies to s. 6 of EPFNA with necessary modifications. See ESA Part III, s. 8 for more information.

EPFNA Section 7 – Prohibition Against Charging Fees

Prohibition Against Charging Fees - s. 7(1)

7(1) No person who acts as a recruiter in connection with the employment of a foreign national shall directly or indirectly charge the foreign national or such other persons as may be prescribed a fee for any service, good or benefit provided to the foreign national.

Subsection 7(1) prohibits a recruiter from directly or indirectly charging any fee to a foreign national employed or attempting to find employment pursuant to an immigration or foreign temporary employee program for any service, good or benefit provided to the foreign national. This prohibition therefore includes fees charged by a recruiter for both "optional" and "mandatory" services such as orientation sessions, assistance or instruction with respect to resume or job interview preparation, image consulting, first aid training sessions, and cooking classes. Where such services are provided by a recruiter to a foreign national, they must be provided free of charge.

The Act does not restrict recruiters from charging fees to employers or prospective employers for recruitment services or for other services. Note, however, where such arrangements are made, the fees must be recorded in compliance with the record-keeping requirements as set out in ss. 14 and 15 of the *Employment Protection for Foreign Nationals Act, 2009*.

As noted, s. 7(1) prohibits recruiters from “directly” charging any fee as well as “indirectly” charging any fee to a foreign national. An example of a situation where a recruiter “indirectly” charges a fee would include a situation where the recruiter charges a fee for services related to obtaining a work permit for the foreign national but asks the employer of the foreign national to collect those fees on its behalf through payroll deductions. Not only would the recruiter in this situation be in contravention of s. 7(1) but the employer making the deductions on behalf of the recruiter would be in contravention of s. 7(3).

Finally, as noted in the discussion of the scope of the EPFNA and specifically, s. 3(1) of the Act, a foreign government acting as a “recruiter” as described in the EPFNA is (unless certain exceptions under the *State Immunity Act* apply) immune from liability for any contraventions of the EPFNA including the prohibition against charging fees. As a result, a foreign government charging fees to its citizens who, as foreign nationals are seeking employment in Ontario pursuant to an immigration or temporary foreign employee program, would not be liable for a contravention of s. 7(1). In addition, a person acting on behalf of such a foreign government is likewise immune. (See the discussions at section 3(1) of the EPFNA and subsection 7(3) below.)

Prescribed Exceptions - s. 7(2)

7(2) Subsection (1) does not apply with respect to such fees as may be prescribed.

Subsection 7(2) provides that a recruiter would be permitted to charge a fee if it was permitted by regulation.

At the time of writing, no fees have been prescribed. Recruiters are therefore prohibited from charging fees of any kind to any foreign nationals employed or seeking employment pursuant to an immigration or foreign temporary employee program.

Prohibition Against Collecting Fees - s. 7(3)

7(3) No person acting on behalf of a recruiter shall collect a fee charged by the recruiter in contravention of subsection (1).

Subsection 7(3) prohibits a person acting on behalf of a recruiter from collecting a fee illegally charged by the recruiter. Whether a person is acting on behalf of a recruiter is a question of fact.

At the time of writing, recruiters are prohibited from charging fees of any kind to foreign nationals employed or attempting to find employment pursuant to an immigration or foreign temporary employee program. Therefore, persons acting on behalf of a recruiter are prohibited from collecting any fee on behalf of the recruiter.

An example of someone acting on behalf of a recruiter would arise where a recruiter charges a fee for services related to obtaining a work permit for a foreign national but asks the employer of the foreign national to collect those fees on its behalf through payroll deductions. In that case, the employer making the deductions on behalf of the recruiter would be in contravention of s. 7(3). (Note as well the recruiter in this situation would be in contravention of s. 7(1).

Finally, as noted in the discussion of the scope of the EPFNA and specifically, s. 3(1) of the Act, a foreign government acting as a "recruiter" as described in the EPFNA is (unless certain exceptions under the *State Immunity Act* apply) immune from liability for any contraventions of the EPFNA including the prohibition against charging fees. Further, a person acting on behalf of such a foreign government is similarly immune from liability under s. 7(3). (See the discussions at section 3(1) of the EPFNA and subsection 7(1) above.)

EPFNA Section 7.1 – Prohibition against using recruiters that charge fees

7.1 No recruiter or employer shall, in connection with the recruitment or employment of a foreign national, knowingly use the services of a recruiter who has charged a fee to a foreign national in contravention of subsection 7 (1).

Section 7.1 was added to the EPFNA by the *Working for Workers Act, 2021*, effective December 2, 2021.

Subsection 7.1 prohibits employers and recruiters from using the services of a recruiter in connection with the recruitment or employment of a foreign national where the employer or recruiter knows that the recruiter providing them services has charged a fee to a foreign national in contravention of ss. 7(1).

The prohibition applies regardless of whether the foreign national that was charged a fee in contravention of ss. 7(1) was the same foreign national the recruiter or employer is recruiting, or a different foreign national.

Note that the phrase "in connection with **the recruitment or** employment of a foreign national" is used in this provision, while other EPFNA provisions use the phrase "in connection with the employment of a foreign national" without explicit reference to "recruitment" – see for example ss. 7(1), 9(2), and 10(2). The Program has not identified any activities that are captured by "recruitment" that would not already have been captured by "employment" in the EPFNA context and considers the explicit inclusion of "recruitment" in s. 7.1 to be for greater certainty. As such it is Program policy that the inclusion of "recruitment' here does not change the interpretation of the scope "in connection with the employment of a foreign national" in the other EPFNA provisions.

EPFNA Section 8 – Prohibition Against Cost Recovery by Employers

Prohibition Against Cost Recovery by Employers - s. 8(1)

8(1) No employer shall directly or indirectly recover or attempt to recover from a foreign national or from such other persons as may be prescribed,

(a) any cost incurred by the employer in the course of arranging to become or attempting to become an employer of the foreign national; or

(b) any other cost that is prescribed.

This provision prohibits employers from recovering or attempting to recover (either directly or indirectly), any costs incurred in hiring, or attempting to hire, a foreign national pursuant to an immigration or foreign temporary employee program. Employers are therefore prohibited from passing on to the foreign national any recruitment costs and other costs incurred in arranging to become or attempting to become the foreign national's employer; employers would also be prohibited from recovering any prescribed costs (though no other costs have been prescribed as of the time of writing). The provision must be read subject to s. 8(2) which permits costs prescribed by regulation to be recovered. Ontario Regulation 348/15, which came into force on November 26, 2015, provides certain exceptions to the prohibition against cost recovery by employers.

Recovering or attempting to recover a cost indirectly could include, for example, ostensibly charging the foreign national a fee for something that was not a cost incurred in the course of arranging to become the employer but which in fact was intended to reimburse the employer for such a cost under another name. It could also include having another person recover the cost on behalf of an employer.

It should be noted that although the provision states that it prohibits recovery of costs incurred in "attempting to become an employer," the prohibition does not apply with respect to costs incurred by a prospective employer unless the employer ultimately employs the foreign national. That is because the scope of the *Employment Protection for Foreign Nationals Act, 2009* is limited in its application under paragraph 2 of s. 3(1) to "a person who employs a foreign national."

Prescribed Exceptions - s. 8(2)

8(2) Subsection (1) does not apply with respect to such costs as may be prescribed.

Subsection 8(2) provides that the prohibition against cost recovery by employers would does not apply with respect to costs that are permitted by regulation. Ontario Regulation 348/15, which came into force on November 26, 2015, provides that employers who employ a foreign national in Ontario under an employment contract made pursuant to the federal government's "Seasonal Agricultural Worker Program" (SAWP) are permitted to recover from the foreign national costs of air travel and of work permits, if the contract allows for these deductions. Please note that any such cost recovery is limited to the amounts as specified within the contract.

EPFNA Section 9 – Prohibitions Against Taking, Retaining Property

Employer - s. 9(1)

9(1) No person who employs a foreign national, and no person acting on the employer's behalf, shall take possession of, or retain, property that the foreign national is entitled to possess.

Subsection 9(1) provides that an employer of a foreign national employed pursuant to an immigration or foreign temporary employee program, or anyone acting on the employer's behalf, is prohibited from taking or keeping property that the foreign national is entitled to possess. The prohibition in s. 9(1) applies even if the property is taken or retained with the consent of the employee. Subsection 9(3) gives two examples of property that cannot be taken or kept: a passport and a work permit.

Subsection 9(2) establishes the same prohibition against taking and retaining property for a recruiter or person acting on the recruiter's behalf.

Recruiter - s. 9(2)

9(2) No person acting as a recruiter in connection with the employment of a foreign national, and no person acting on the recruiter's behalf, shall take possession of, or retain, property that the foreign national is entitled to possess.

Subsection 9(2) provides that a recruiter, or anyone acting on the recruiter's behalf in connection with the employment of a foreign national pursuant to an immigration or foreign temporary employee program, is prohibited from taking or keeping property that the foreign national is entitled to possess. This prohibition applies even if the property is taken or retained with the consent of the employee. Subsection 9(3) gives two examples of property that cannot be taken or kept: a passport and a work permit.

Subsection 9(1) establishes the same prohibition against taking and retaining property for an employer or person acting on the employer's behalf.

Example: Passports, etc. - s. 9(3)

9(3) For example and without limiting the generality of subsections (1) and (2), a person described in subsection (1) or (2) is not permitted to take possession of, or retain, a foreign national's passport or work permit.

Subsection 9(3) provides two examples of property that employers, recruiters, and persons acting on their behalf are prohibited from taking or keeping from a foreign national who is employed or attempting to find employment pursuant to an immigration or foreign temporary employee program. The examples provided are a passport and work permit. It is important to note that this provision does not purport to limit the property described in ss. (1) and (2) to these two documents. Employers, recruiters, and those acting on their behalf are prohibited from taking or keeping any property the foreign national is entitled to possess.

While a passport may be the property of the issuing country, the person to whom the passport is issued is generally entitled to possess the document.

EPFNA Section 10 – Prohibitions Against Reprisal

Reprisal by Employer - s. 10(1)

10(1) No person who employs a foreign national, and no person acting on the employer's behalf, shall intimidate or penalize or attempt or threaten to intimidate or penalize the foreign national because he or she,

(a) asks any person to comply with this Act;

(b) makes inquiries about his or her rights under this Act;

(c) files a complaint with the Ministry under this Act;

(d) exercises or attempts to exercise a right under this Act;

(e) gives information to an employment standards officer; or

(f) testifies or is required to testify or otherwise participates or is going to participate in a proceeding under this Act.

Subsection 10(1) prohibits employers and anyone acting on their behalf from reprising against foreign nationals employed pursuant to an immigration or foreign temporary employee program for asking a person to comply with the *Employment Protection for Foreign Nationals Act, 2009*, for making inquiries about, exercising or seeking the enforcement of their rights under EPFNA, for giving information to an employment standards officer or for participating in a proceeding under EPFNA. This includes intimidating, penalizing or attempting or threatening to intimidate or penalize the employee for doing any of the activities listed in clauses (a) to (f) above.

Subsection 10(1) is very similar to s. 74 of the *Employment Standards Act, 2000*, except that it contains no clauses corresponding to those ESA 2000 clauses that are not relevant to EPFNA (i.e., the clauses dealing with proceedings under the *Retail Business Holidays Act*, RSO 1990, c R.30, leaves of absence and garnishment orders).

It is important to note that foreign nationals who are employed pursuant to an immigration or foreign temporary employee program have protection from reprisals related to the ESA 2000 (including the provisions related to the *Retail Business Holidays Act,* etc.) through s. 74 of the ESA 2000 because they are "employees" under the ESA 2000.

In the ESA 2000 context, the Program applies a four-step test for determining whether an employer or a person acting on behalf of the employer has committed an act of reprisal. The test has been modified to fit the context of EPFNA as set out below:

1. Is the person alleged to have been the subject of a reprisal a foreign national employed in Ontario pursuant to an immigration or foreign temporary employee program?
2. Is the person alleged to have committed an act of reprisal the foreign national's employer or a person acting on behalf of his or her employer?
3. Did the employer intimidate or penalize or attempt or threaten to intimidate or penalize the foreign national?
4. Did the foreign national engage in any of the protected activities set out paragraphs (a) to (f) of s. 10(1)?

5. Did the employer or person acting on behalf of the employer intimidate or penalize or attempt or threaten to intimidate or penalize the foreign national because he or she engaged in the protected activities referred to in step 4?

If all five questions are answered in the affirmative, a breach of s. 10(1) is established. (Note that s. 10(3) places the burden of proof on the employer in a proceeding involving an alleged reprisal, except where the burden of proof relates to a review of a notice of contravention at the Ontario Labour Relations Board or a prosecution in court).

Information on ESA 2000 reprisal can be found in ESA Part XVIII of this Manual. In particular, four of the five steps outlined here are discussed in further detail. The discussion of reprisals under the ESA 2000, including the discussion of enforcement and heads of damage, can be applied to this provision with necessary modifications.

Reprisal by Recruiter - s. 10(2)

10(2) No person acting as a recruiter in connection with the employment of a foreign national, and no person acting on the recruiter's behalf, shall intimidate or penalize or attempt or threaten to intimidate or penalize the foreign national because he or she,

(a) asks any person to comply with this Act or the *Employment Standards Act, 2000*;

(b) makes inquiries about his or her rights under this Act or the *Employment Standards Act, 2000*;

(c) files a complaint with the Ministry under this Act or the *Employment Standards Act, 2000*;

(d) exercises or attempts to exercise a right under this Act or the *Employment Standards Act, 2000*;

(e) gives information to an employment standards officer; or

(f) testifies or is required to testify or otherwise participates or is going to participate in a proceeding under this Act or the *Employment Standards Act, 2000*.

Subsection 10(2) establishes an anti-reprisal scheme respecting recruiters and those acting on their behalf. It prohibits recruiters and anyone acting on their behalf from reprising against foreign nationals employed or seeking employment pursuant to an immigration or foreign temporary employee program for asking a person to comply with EPFNA or the ESA 2000, for making inquiries about, exercising or seeking the enforcement of their rights under EPFNA or the ESA 2000, for giving information to an employment standards officer or for participating in a proceeding under EPFNA or the ESA 2000. This includes intimidating, penalizing or attempting or threatening to intimidate or penalize the foreign national for doing any of the listed activities in clauses (a) to (f) above.

Note that in addition to prohibiting reprisals related to EPFNA, this subsection specifically prohibits recruiters and persons acting on their behalf from reprising against foreign nationals for reasons related to inquiries about, exercising or enforcing their rights under the ESA 2000. This latter prohibition is necessary because section 74 of the ESA 2000 (which prohibits reprisals related to the ESA 2000) would not otherwise apply to recruiters or persons acting on their behalf, because they are not "employers".

In the ESA 2000 context, the Program applies a four-step test for determining whether an employer, or a person acting on behalf of the employer, has committed an act of reprisal. The test has been modified to fit the context of EPFNA in relation to recruiters or persons acting on behalf of recruiters as set out below:

1. Is the person alleged to have been the subject of a reprisal a foreign national employed or seeking employment in Ontario pursuant to an immigration or foreign temporary employee program?
2. Is the person alleged to have committed an act of reprisal a person acting as recruiter in connection with the employment of a foreign national pursuant to an immigration or foreign temporary employee program or someone acting on the recruiter's behalf?
3. Did the recruiter or person acting on a recruiter's behalf intimidate or penalize or attempt or threaten to intimidate or penalize the foreign national?
4. Did the foreign national engage in any of the protected activities set out paragraphs (a) to (f) of subsection 10(2)?
5. Did the recruiter or person acting on behalf of a recruiter intimidate or penalize or attempt or threaten to intimidate or penalize the foreign national because he or she engaged in the protected activities referenced in step 4?

If all five questions are answered in the affirmative, a breach of s. 10(2) is established.

Information on ESA 2000 reprisal can be found in ESA Part XVIII of this Manual. In particular, four of the five steps outlined here are discussed in further detail. The discussion of reprisals under the ESA 2000, including the discussion of enforcement and heads of damage, can be applied to this provision with necessary modifications.

Onus of Proof - s. 10(3)

10(3) In a proceeding for the contravention of this section, other than a proceeding described in subsection (4), the burden of proof that a person did not contravene this section lies on that person.

This provision places the legal burden of proof that a person did not contravene s. 10 on that person, except in proceedings referred to in s. 4 (which are Ontario Labour Relations Board reviews of notices of contravention and prosecutions). Subject to s. 10(4), the effect of this provision is to require the employer, recruiter, or person acting on behalf of the employer or recruiter, to rebut the claim of the foreign national that he or she has been the subject of a reprisal. The person (which includes a corporation) against whom the contravention is alleged must establish, on a balance of probabilities, that he, she, or it did not contravene s. 10 of EPFNA.

Exceptions - s. 10(4)

10(4) Subsection (3) does not apply with respect to the burden of proof in a review under section 30 of a notice of contravention of this section or the burden of proof in a prosecution for a contravention of this section.

Subsection 10(4) provides that a person who is alleged to have contravened the anti-reprisal provisions does not have the burden of proof to establish that he or she did not contravene s. 10 in two situations:

1. In a hearing before the Ontario Labour Relations Board arising from a review of a notice of contravention.
    - If a notice of contravention has been issued with respect to a contravention of s. 10 of EPFNA and the person against whom the notice was issued files an application for review of the notice, the onus is on the Director of Employment Standards to show, on a

balance of probabilities, that the employer or recruiter (or person acting on his, her or its behalf) contravened s. 10. The placement of the burden of proof on the Director is effected by s. 30 of EPFNA, which incorporates s. 122(4) of the ESA 2000 by reference.

2. In a prosecution arising for a contravention of s. 10.

Where a person is prosecuted for contravening s. 10, the onus of proof that applies is set out in s. 43 of EPFNA.

EPFNA Section 11 – Duty to Provide Documents to Foreign Nationals

Employer's Duty - s. 11(1)

11(1) A person who employs a foreign national shall give him or her a copy of the most recent documents published by the Director of Employment Standards under section 12 before the employment commences if the employer did not use the services of a recruiter in connection with the employment.

This section was amended by the *Stronger Workplaces for a Stronger Economy Act, 2014*, SO 2014, c 10, to reflect the *Employment Protection for Foreign Nationals Act*'s broader scope, effective November 20, 2015.

Subsection 11(1) provides that an employer who does not use the services of a recruiter in hiring a foreign national pursuant to an immigration or foreign temporary employee program is required to give certain information documents published by the Director of Employment Standards under s. 12 to the foreign national before his or her employment starts.

The documents published by the Director describe the rights and obligations of foreign nationals under EPFNA, the obligations of their employers and recruiters under EPFNA, and certain rights and obligations of foreign nationals and their employers under the *Employment Standards Act, 2000*.

Recruiter's Duty - s. 11(2)

11(2) If a recruiter contacts or is contacted by a foreign national in connection with employment, the recruiter shall give the foreign national a copy of the most recent documents published by the Director under section 12 as soon as is practicable after first making contact with him or her.

Subsection 11(2) provides that if a recruiter contacts, or is contacted by, a foreign national regarding employment pursuant to an immigration or foreign temporary employee program, the recruiter is required to give certain information documents published by the Director of Employment Standards under s. 12 to the foreign national. The documents must be provided as soon as is practicable after the recruiter first makes contact with the foreign national. What is "as soon as is practicable" will depend upon the circumstances.

The documents published by the Director describe the rights and obligations of foreign nationals under EPFNA, the obligations of their employers and recruiters under EPFNA, and certain rights and obligations of foreign nationals and their employers under the ESA 2000.

Duties re: Languages Other Than English - s. 11(3)

11(3) If the language of the foreign national is a language other than English, the employer or recruiter, as the case may be, shall make enquiries as to whether the Director has prepared a translation of the documents published under section 12 into that language and, if the Director has done so, the employer or recruiter shall also provide a copy of the translation to the foreign national.

This provision states that where the language of a foreign national is a language other than English, the employer or recruiter is required to enquire as to whether the Director of Employment Standards has prepared a translation of the documents published under s. 12 into that language. If the documents have been translated into that language, the employer or recruiter is required to provide a copy of the translation together with the English version to the foreign national.

Transition, Employer's Duty - s. 11(4)

11(4) If the foreign national is employed by the employer on the day subsection 8(2) of Schedule 1 to the *Stronger Workplaces for a Stronger Economy Act, 2014* comes into force, the employer shall give him or her a copy of the documents published by the Director under section 12 as soon after subsection 8(2) of Schedule 1 to the *Stronger Workplaces for a Stronger Economy Act, 2014* comes into force as is practicable.

This provision is a transitional provision that requires an employer to provide certain information documents to all foreign nationals who are covered under the "new" EPfNA effective on November 20, 2015 and who are employed by the employer on that date.

This provision requires the employer to give such employees a copy of the documents published under s. 12 as soon as is practicable after that date. What is "as soon as is practicable" will depend upon the circumstances.

In accordance with s. 11(3), if the foreign national's language is a language other than English, the employer would be required to provide the foreign national with a translated copy, if a translation is available, as well as the English version of the documents published under s. 12.

Different Categories - s. 11(5)

11(5) If the Director has prepared and published different documents for different categories of foreign nationals employed in Ontario or attempting to find employment in Ontario, and a foreign national who is employed by an employer or who contacts a recruiter is in a category for whom a document was prepared and published, the provisions of this section shall be applied as if they referred to the documents prepared and published for that category.

This amended subsection provides that if the Director has published different information documents for different categories of foreign nationals under s. 12(3), such foreign nationals are entitled to be provided with the appropriate information documents in accordance with s. 11.

EPFNA Section 12 – Director's Duty to Publish Documents

Director's Duty to Publish Documents - s. 12(1)

12(1) The Director of Employment Standards shall prepare and publish documents providing such information as the Director considers appropriate about the rights and obligations under this Act of,

(a) foreign nationals who are employed or who are attempting to find employment;

(b) employers of foreign nationals; and

(c) persons acting as recruiters in connection with the employment of foreign nationals.

Subsection 12(1) provides that the Director of Employment Standards must prepare and publish a document that provides information about the rights under the *Employment Protection for Foreign Nationals Act, 2009* of foreign nationals and the responsibilities of employers and recruiters of such foreign nationals.

Rights Under the Employment Standards Act, 2000 - s. 12(2)

12(2) The Director shall prepare and publish a document providing such information about the rights and obligations of employees and employers under the *Employment Standards Act, 2000* as the Director considers of particular relevance to foreign nationals and their employers, and such other information as the Director considers appropriate.

Subsection 12(2) provides that the Director of Employment Standards must prepare and publish a document that outlines the rights and responsibilities of employees and employers under the *Employment Standards Act, 2000* that are particularly relevant to foreign nationals employed pursuant to an immigration or foreign temporary employee program and the employers of such foreign nationals.

Different Categories - s. 12(3)

12(3) If the Director considers it appropriate, he or she may prepare and publish different documents under this section for different categories of foreign nationals and their employers.

This provision was added to s. 12 by the *Stronger Workplaces for a Stronger Economy Act, 2014*, SO 2014, c 10, effective November 20, 2015. It enables the Director of Employment Standards to prepare and publish different documents for different categories of foreign nationals and their employers.

If Information Out of Date - s. 12(4)

12(4) If the Director believes that a document prepared under this section has become out of date, he or she shall prepare and publish a new document.

This subsection provides that if the Director believes that the document published under this section regarding rights and obligations is out of date, he or she will prepare and publish a new document.

EPFNA Section 13 – Director's Authority to Publish Names of Offenders, etc.

Director's Authority to Publish Names of Offenders, etc., Internet Publication – ss. 13(1), (2)

13(1) If a person, including an individual, is convicted of an offence under this Act, the Director of Employment Standards may publish or otherwise make available to the general public the name of the person, a description of the offence, the date of the conviction and the person's sentence.

(2) Authority to publish under subsection (1) includes authority to publish on the Internet.

Where a person has been convicted of an offence under the *Employment Protections for Foreign Nationals Act, 2009*, this section authorizes the Director to publish or otherwise make available to the public including publication on the internet the name of the convicted person, a description of the offence, the date of the conviction, and the sentence received by the person.

Disclosure – s. 13(3)

(3) Any disclosure made under subsection (1) is deemed to be made in compliance with clause 42 (1) (e) of the *Freedom of Information and Protection of Privacy Act*.

Subsection (3) deems any disclosure made under subsection (1) to be in compliance with s. 42(e) of the *Freedom of Information and Protection of Privacy Act,* RSO 1990, c F.31. That provision reads as follows:

42. An institution shall not disclose personal information in its custody or under its control except,

(e) for the purpose of complying with an Act of the Legislature or an Act of Parliament or a treaty, agreement or arrangement thereunder;

EPFNA Section 14 – Employer's Duty to Keep Records

Employer's Duty to Keep Records - s. 14(1)

14(1) A person who employs a foreign national shall record the name and address of any person to whom the employer made a payment for finding the foreign national for employment or for finding employment for the foreign national, the date and amount of the payment and such other information as may be prescribed.

An employer of a foreign national who is employed pursuant to an immigration or foreign temporary employee program is required to record the following information:

- The name of any person to whom the employer made a payment for finding a foreign national for employment or for finding employment for a foreign national;
- The address of any person for whom the employer made a payment for finding a foreign national for employment or for finding employment for a foreign national;
- The date of the payment;
- The amount of the payment; and
- Other information prescribed by regulation.

This provision should be read with in conjunction with s. 14(2) which establishes how long the records must be kept and s. 14(3) which requires that all records be readily available for inspection by an employment standards officer.

At the time of writing, regulations have not been made under the *Employment Protection for Foreign Nationals Act, 2009* prescribing other employment or additional information that must be recorded.

Records Retention - s. 14(2)

14(2) The employer shall retain, or shall arrange for some other person to retain, the records for seven years after the earliest of,

(a) the date on which the employee ceases to be employed by the employer; or

(b) the date on which the employee becomes a permanent resident, within the meaning of the *Immigration and Refugee Protection Act (Canada)*, or a Canadian citizen.

Subsection 14(2) requires an employer to retain, or arrange for another person to retain, the required records for a period of seven years after the earlier of the following two events:

- The foreign national ceases to be employed by the employer pursuant to an immigration or foreign temporary employee program; or
- The employee becomes a permanent resident of Canada or a Canadian citizen.

The federal *Immigration and Refugee Protection Act,* SC 2001, c 27 and its regulations govern the process by which a person may be granted permanent resident status or Canadian citizenship.

It is the responsibility of the employer to record and retain information for record-keeping purposes. Where an employer makes an arrangement for another person, such as a bookkeeper or accountant, to retain the records, the employer's responsibility to create the records is not removed.

This provision should be read in conjunction with s. 14(3) which requires that records be readily available for inspection by an employment standards officer, even where another person retains the records.

Availability for Inspection - s. 14(3)

14(3) The employer shall ensure that the records required by this section are readily available for inspection as required by an employment standards officer, even if the employer has arranged for another person to retain them.

Subsection 14(3) is intended to prevent unnecessary delays in the production of an employer's records during an investigation under EPFNA. The provision therefore requires the employer to ensure the records made under s. 14(1) are "readily available for inspection", even if the employer has arranged for another person to retain the records.

Where an employer has arranged for another person to retain the records, it remains the employer's responsibility to make them readily available, upon the request of an employment standards officer.

EPFNA Section 15 – Recruiter's Duty to Keep Records

Recruiter's Duty to Keep Records - s. 15(1)

15(1) A person who acts as a recruiter in connection with the employment of a foreign national shall record the following information:

1. The name of the foreign national.

2. The amount of any fees paid to the recruiter by the foreign national or other prescribed person that are permitted under subsection 7(2), the date of the payment and the reason for the payment.

3. The name and address of each employer for whom the recruiter found, or attempted to find, foreign nationals to be employed.

4. The name and address of each employer with whom the recruiter placed, or attempted to place, foreign nationals in employment.

5. The amount of any money paid to the recruiter by an employer of the foreign national, the date of the payment and the reason for the payment.

6. Such other information as may be prescribed.

A recruiter of a foreign national for employment pursuant to an immigration or foreign temporary employee program is required to record the following information:

- The name of the foreign national to whom the recruitment activity relates;
- The amount of any allowable fees charged to the foreign national and the date and reason for payment (fees would be allowed only if prescribed by regulation);
- The name and address of each employer for whom he or she attempted to find, or found, a foreign national for employment pursuant to an immigration or foreign temporary employee program;
- The name and address of each employer with whom he or she attempted to place, or placed, a foreign national in employment pursuant to an immigration or foreign temporary employee program;
- The amount of money paid to him or her by an employer and the date and reason for payment; and
- Any other information prescribed by regulation.

This provision should be read in conjunction with s. 15(2) which establishes a duty to keep certain documents associated with charging an allowable prescribed fee, s. 15(3) which establishes how long the records must be kept, and s. 15(4) which requires that all records be readily available for inspection by an employment standards officer.

At the time of writing, regulations have not been made under the *Employment Protections for Foreign Nationals Act, 2009* prescribing allowable fees, or additional information that must be recorded.

Duty to Keep Documents - s. 15(2)

15(2) If the recruiter charges the foreign national or other prescribed person a fee that is permitted under subsection 7(2), the recruiter shall retain or arrange for some other person to retain all invoices, statements of account and other documents related to the fee.

If a regulation was to be made allowing a fee under s. 7(2), s. 15(2) would require a recruiter who charged such a fee to retain any documents related to the fee, such as invoices and statements of account.

This provision would only be relevant if an allowable fee was prescribed. At the time of writing, no such regulation exists. At the time of writing, EPFNA prohibits recruiters from charging any fees to foreign nationals to whom EPFNA applies.

Records Retention - s. 15(3)

15(3) The recruiter shall retain or arrange for some other person to retain the records and documents for seven years after the services are provided in connection with the employment of the foreign national.

Subsection 15(3) requires a recruiter to retain, or arrange for another person to retain, the required records and documents for a period of seven years after the recruitment services have been provided.

It is the responsibility of the recruiter to ensure the information in s. 15(1) is recorded and that this information and any documents described in s. 15(2) are retained, whether or not the recruiter makes arrangements for another person, such as a bookkeeper or accountant, to retain the records or documents.

This provision should be read in conjunction with s. 15(3) which requires that records and documents be readily available for inspection by an employment standards officer, even if another person retains them.

Availability for Inspection - s. 15(4)

15(4) The recruiter shall ensure that the records and documents required by this section are readily available for inspection as required by an employment standards officer, even if the recruiter has arranged for another person to retain them.

Subsection 15(4) is intended to prevent unnecessary delays in the production of a recruiter's records during an investigation under EPFNA. The provision therefore requires the recruiter to ensure the records and documents required to be kept under ss. 15(1) and 15(2) respectively are "readily available for inspection", even if the recruiter has arranged another person to retain the records and documents.

Where a recruiter has arranged for another person to retain the records or documents, it remains the recruiter's responsibility to make them readily available, upon the request of an employment standards officer.

EPFNA Section 16 – Prohibition Re Record Keeping

16 No person shall make, keep or produce false records or other documents that are required to be kept under this Act or participate or acquiesce in the making, keeping or producing of false records or other documents that are required to be kept under this Act.

This provision is substantially the same as s. 131(1) of the *Employment Standards Act, 2000*. It prohibits a person from making, keeping or producing false records or other documents required to be kept under the *Employment Protection for Foreign Nationals Act, 2009*; it also prohibits a person from "going along with" making, keeping or producing such documents.

The Program's interpretation of s. 131(1) of the ESA 2000 can be applied to this provision with the necessary modifications. See ESA Part XXV, s. 131 for more information.

EPFNA Section 17 – Restricted Application of ss. 18, 18.1 and 19

Restricted Application of ss. 18, 18.1 and 19 - s. 17(1)

17(1) Sections 18, 18.1 and 19 do not apply with respect to an individual described in subsection 80 (2), (3) or (4) of the *Employment Standards Act, 2000*.

Subsection 17(1) provides that ss. 18, 18.1 and 19 of the *Employment Protection for Foreign Nationals Act, 2009* (director liabilityand indemnification of directors) do not apply with respect to persons described in ss. 80(2), (3), or (4) of the *Employment Standards Act, 2000*. This exempts the following people from the application of ss. 18, 18.1 and 19:

- Directors of corporations to which the *Not-for-Profit Corporations Act, 2010* S.O. 2010, c. 15 applies, or to which the *Co-operative Corporations Act*, RSO 1990, c C.35 applies;
- Directors, or persons performing similar functions as a director, of a college of a health profession or group of health professions established or continued under an Ontario statute; and
- Directors of corporations that are incorporated in another jurisdiction where the corporation is of a charitable or non-profit nature and has purposes similar to a corporation described in the first bullet above.

For a discussion of ss. 80(2), (3) and (4) of the ESA 2000 please see ESA Part XX.

Application to Certain Shareholders - s. 17(2)

17(2) Sections 18, 18.1 and 19 apply to a shareholder who is a party to a unanimous shareholder agreement to the extent that the agreement restricts the discretion or powers of the directors to manage or supervise the management of the business and affairs of the corporation in relation to duties and liabilities under this Act.

Subsection 17(2) indicates that shareholders who are parties to a unanimous shareholder agreement may be considered directors for the purposes of ss. 18, 18.1 and 19 of EPFNA to the extent that they have control over the affairs of the corporation relating to obligations under EPFNA. The shareholders are considered to have the discretion or power to manage or supervise the management of the business and affairs of the corporation where the unanimous shareholder agreement restricts the directors' powers to supervise or manage the same activities.

EPFNA Section 18 – Director's Liability to Repay Fees, etc.

Employer - s. 18(1)

18(1) The directors of an employer are jointly and severally liable to repay costs recovered by the employer from a foreign national in contravention of section 8,

(a) if the employer is insolvent, the foreign national has caused a claim for repayment of the costs to be filed with the receiver appointed by a court with respect to the employer or with the employer's trustee in bankruptcy and the claim has not been paid;

(b) if an employment standards officer has made an order requiring the employer to repay the costs, unless the amount set out in the order has been paid or the employer has applied to have it reviewed;

(c) if an employment standards officer has made an order that a director is liable to repay the costs, unless the amount set out in the order has been paid or the employer or the director has applied to have it reviewed; or

(d) if the Ontario Labour Relations Board has issued, amended or affirmed an order under section 29, the order, as issued, amended or affirmed, requires the employer or the directors to repay the costs and the amount set out in the order has not been paid.

This provision is similar to s. 81(1) of the *Employment Standards Act, 2000*, the major difference being that it applies in respect of illegally recovered costs rather than wages. The Program's interpretation of s. 81(1) of the ESA 2000 can be applied to this provision with necessary modifications. See ESA Part XX, s. 81.

Recruiter - s. 18(2)

18(2) The directors of a recruiter or person acting on behalf of the recruiter, as the case may be, are jointly and severally liable to repay fees charged in contravention of subsection 7(1) or (3), respectively,

(a) if the recruiter or person, as the case may be, is insolvent, the foreign national has caused a claim for repayment of the fees to be filed with the receiver appointed by a court with respect to the recruiter or person or with the recruiter's or person's trustee in bankruptcy and the claim has not been paid;

(b) if an employment standards officer has made an order requiring the recruiter or person, as the case may be, to repay the fees, unless the amount set out in the order has been paid or the recruiter or person has applied to have it reviewed;

(c) if an employment standards officer has made an order that a director is liable to repay the fees, unless the amount set out in the order has been paid or the recruiter or person, as the case may be, or the director has applied to have it reviewed; or

(d) if the Ontario Labour Relations Board has issued, amended or affirmed an order under section 29, the order, as issued, amended or affirmed, requires the recruiter or person, as the case may be, or the directors to repay the fees and the amount set out in the order has not been paid.

This provision is also similar to s. 81(1) of the ESA 2000, the major differences being that it applies to the directors of a recruiter or the directors of a corporation acting on behalf of the recruiter rather than the directors of an employer and that it applies in respect of illegally charged fees rather than wages. The Program's interpretation of s. 81(1) of the ESA 2000 can be applied to this provision with necessary modifications. See ESA Part XX, s. 81..

Primary Responsibility - s. 18(3)

18(3) Despite subsections (1) and (2), the employer, recruiter or person acting on behalf of the recruiter, as the case may be, is primarily responsible to repay the costs or fees, but proceedings against the employer, recruiter or person do not have to be exhausted before proceedings may be commenced to collect those costs or fees from directors under this section.

This provision is similar to s. 81(2) of the ESA 2000, the major differences being that it applies to directors of recruiters or corporations acting on behalf of recruiters, as well as employers, and that it applies in respect of illegally charged fees or illegally recovered costs. The Program's interpretation of s. 81(2) of the ESA 2000 can be applied to this provision with necessary modifications. ESA Part XX, s. 81..

Contribution from Other Directors - s. 18(4)

18(4) A director who has satisfied a claim to repay costs or fees is entitled to contribution in relation to the repaid costs or fees from other directors who are liable for the claim.

This provision is similar to s. 81(9) of the ESA 2000, the major difference being that it applies in respect of illegally charged fees and illegally recovered costs. The Program's interpretation of s. 81(9) can be applied to this provision with necessary modifications. See ESA Part XX, s. 81.

Limitation Periods - s. 18(5)

18(5) A limitation period established under section 28 prevails over a limitation period in any other Act, unless the other Act states that it is to prevail over this Act.

This provision is substantially the same as s. 81(10) of the ESA 2000. The Program's interpretation of s. 81(10) can be applied to this provision with the necessary modifications. See ESA Part XX, s. 81.

EPFNA Section 18.1 – Recruiters' liability to repay fees, etc.

Recruiters' liability to repay fees, etc. – s. 18.1(1)

18.1 (1) A recruiter who uses the services of another recruiter in connection with the recruitment or employment of a foreign national, and if the recruiter who uses those services is a corporation, the directors of that recruiter, are jointly and severally liable to repay fees charged to the foreign national by the other recruiter in contravention of subsection 7 (1).

Section 18.1 was added to the ESA effective December 2, 2021.

Subsection 18.1(1) provides that where a recruiter uses the services of another recruiter in connection with the recruitment or employment of a foreign national, and where that other recruiter charged fees to a foreign national in contravention of ss. 7(1) of EPFNA:

- the recruiter who used the other recruiter's services is jointly and severally liable to repay the fees unlawfully charged by the other recruiter, and
- if the recruiter who used the other recruiter's services is a corporation, the directors of the corporate recruiter are also jointly and severally liable to repay the fees unlawfully charged by the other recruiter.

Primary responsibility – s. 18.1(2)

18.1 (2) Despite subsection (1), the recruiter that charged the fee is primarily responsible to repay the fee, but proceedings against the recruiter that charged the fee do not have to be exhausted before proceedings may be commenced to collect the fees from the other recruiter and the directors, if any.

Subsection 18.1(2) provides that the recruiter that charged the unlawful fee is primarily responsible for its repayment, but that proceedings against that recruiter do not have to run their full course before an order can be issued against the recruiter who used that recruiter (or the directors of a corporate recruiter who used that recruiter).

This provision is similar to s. 81(2) of the ESA 2000, the major differences being the entities to whom it applies and that it applies in respect of illegally charged fees. The Program's interpretation of s. 81(2) of the ESA 2000 can be applied to this provision with necessary modifications. See ESA Part XX, s. 81.

Contribution from other directors – s. 18.1(3)

18.1 (3) A director who has satisfied a claim to repay fees is entitled to contribution in relation to the repaid fees from other directors who are liable for the claim.

This provision is similar to ss. 81(9) of the ESA 2000, the major difference being that it applies in respect of illegally charged fees. The Program's interpretation of ss. 81(9) can be applied to this provision with necessary modifications. See ESA Part XX, s. 81.

Limitation periods - s. 18.1(4)

18.1 (4) A limitation period established under section 28 prevails over a limitation period in any other Act, unless the other Act states that it is to prevail over this Act.

This provision is substantially the same as ss. 81(10) of the ESA 2000. The Program's interpretation of ss. 81(10) can be applied to this provision with the necessary modifications. See ESA Part XX, s. 81.

Order to repay fees – s.18.1(5)

18.1 (5) For the purposes of enforcing this section, an employment standards officer may make an order in respect of both recruiters and the directors, if any, described in subsection (1), and subsections 24 (2) and (7) apply with necessary modifications.

Subsection 18.1(5) creates the authority for an employment standards officer to issue an order to repay fees to recruiters and directors (if any) who have liabilities under s. 18.1.

It provides that ss. 24(2) (Order to repay fees) and ss. 24(7) (Orders against directors) apply with necessary modifications. See EPFNA, s. 24.

EPFNA Section 19 – Indemnification, etc., of Directors

19 Sections 82 and 83 of the *Employment Standards Act, 2000* apply with respect to the liability of directors under this Act.

Section 19 provides that ss. 82 and 83 of the *Employment Standards Act, 2000* apply with respect to director liability under the *Employment Protections for Foreign Nationals Act, 2009*.

Sections 82 and 83 of the ESA 2000 prohibit contractual and corporate governance provisions purporting to relieve directors from the duty to act in accordance with the ESA 2000 or purporting to relieve directors from liability for breach of the ESA 2000, allow (subject to certain restrictions and conditions) indemnification of directors, and provide that the ESA 2000 does not affect any civil remedies that a director may have against a person or vice versa. See ESA Part XX for a more detailed discussion of these provisions.

EPFNA Section 20 – Complaints

Complaints - s. 20(1)

20(1) A person alleging that this Act has been or is being contravened may file a complaint with the Ministry of Labour in a written or electronic form approved by the Director of Employment Standards.

Subsection 20(1) provides that a person who wishes to file a complaint with the Ministry of Labour alleging a violation of the *Employment Protection for Foreign Nationals Act, 2009* must do so using a form approved by the Director of Employment Standards. This provision is substantially the same as s. 96(1) of the *Employment Standards Act, 2000*. For a discussion of the Program's interpretation of s. 96(1) of the ESA 2000, which can be applied to this provision with necessary modifications, see ESA Part XXII, s. 96.

The EPFNA claim form may be filed online and is also available for download on the Ministry of Labour website and can be ordered through Publications Ontario.

Effect of Failure to Use Form - s. 20(2)

20(2) A complaint that is not filed in a form approved by the Director is deemed not to have been filed.

This provision states that if the complaint is not filed in the approved form, then the complaint shall be deemed not to have been filed.

This provision is substantially the same as s. 96(2) of the ESA 2000. The Program's interpretation of s. 96(2) of the ESA 2000 can be applied to this provision with the necessary modifications. See ESA Part XXII, s. 96.

When Complaint not Permitted - s. 20(3)

20(3) A person who commences a civil proceeding with respect to an alleged contravention of this Act is not permitted to file a complaint with respect to the same matter.

Subsection 20(3) establishes a prohibition against a person filing a complaint with the Ministry under EPFNA where the employee has previously commenced a civil proceeding in court seeking a remedy for the same matter. (Section 21 establishes the converse prohibition, i.e., the barring of a person from commencing a civil action where the person has previously filed a complaint with the Ministry under EPFNA in respect of the same matter). This provision is similar to s. 98(1) of the ESA 2000. The Program's interpretation of s. 98(1) of the ESA 2000 can be applied to this provision with necessary modifications. See ESA Part XXII, s. 98.

Limitation Period for Complaint - s. 20(4)

20(4) A complaint regarding a contravention that occurred more than three and one half years before the day on which the complaint was filed is deemed not to have been filed.

Subsection 20(4) imposes a three and a half year limitation period on filing a complaint under EPFNA.

Same - s. 20(5)

20(5) A regulation may change the limitation period set out in subsection (4) and may prescribe different limitation periods for different classes of complaints.

Subsection 20(5) allows a regulation to be made that would change the general limitation period for filing a complaint, as set out in s. 20(4). It also allows for different limitation periods to be established by regulation for different classes of complaints. At the time of writing, no such regulation has been made.

EPFNA Section 21 – Effect of Filing Complaint

Effect of Filing Complaint - s. 21(1)

21(1) A person who files a complaint under this Act with respect to an alleged contravention of this Act is not permitted to commence a civil proceeding with respect to the same matter.

Subsection 21(1) establishes that a person who files a complaint with the Ministry of Labour under the *Employment Protection for Foreign Nationals Act, 2009* is not allowed to commence a civil action in court seeking a remedy for the same matter (but see s. 21(2)). This prevents a person from seeking a remedy with both the Ministry and the courts in relation to the same matter.

This provision is similar to s. 97(1) of the *Employment Standards Act, 2000*. The Program's interpretation of s. 97(1) can be applied to this provision with necessary modifications. See ESA Part XXII, s. 97.

Withdrawal of Complaint - s. 21(2)

21(2) Despite subsection (1), a person who has filed a complaint may commence a civil proceeding with respect to a matter described in that subsection if he or she withdraws the complaint within two weeks after it is filed.

Subsection 21(2) provides a two-week "cooling off" period in which the foreign national can withdraw the EPFNA complaint that he or she has filed with the Ministry, and thus preserve his or her right to commence a civil action in court. This two-week period could be used by the foreign national to consult a lawyer to determine whether the filing of the EPFNA complaint is advisable, given the potential impact on the complainant's right to file a civil action.

This provision is similar to s. 97(4) of the ESA 2000. The Program's interpretation of s. 97(4) can be applied to this provision with necessary modifications. See ESA Part XXII, s. 97.

EPFNA Section 22 – Meetings Required by Employment Standards Officer

Meetings Required by Employment Standards Officer - s. 22(1)

22(1) An employment standards officer may, after giving written notice, require any of the persons referred to in subsection (2) to attend a meeting with the officer in any of the following circumstances:

1. **The officer is investigating a complaint against a person.**

2. While inspecting a place, the officer comes to have reasonable grounds to believe that a person has contravened this Act with respect to a foreign national.

3. The officer acquires information that suggests to him or her the possibility that a person may have contravened this Act with respect to a foreign national.

4. **The officer wishes to determine whether an employer is complying with this Act.**

5. The officer wishes to determine whether a recruiter or a person acting on behalf of a recruiter is complying with this Act.

This provision is similar to s. 102 of the *Employment Standards Act, 2000*.

Note that the language of s. 22(1) is permissive as far as the employment standards officer is concerned: the officer may require the persons listed in s. 22(2) to attend the meeting. The officer is not required by legislation to hold s. 22 meetings in preference to other methods of resolving claims or conducting an inspection.

That said, it is important to recognize that if a foreign national is employed as a live-in caregiver, the foreign national will both work and reside in a private residence. As per s. 34(2) of the *Employment Protection for Foreign Nationals Act, 2009*, which incorporates s. 91(3) of the ESA 2000, certain rules apply to an employment standards officer seeking to enter premises used as a dwelling or living quarters. If the premises are used as a dwelling or living quarters, then the officer must have the consent of the person occupying the premises or must obtain a search warrant under s. 92 of the ESA 2000 before entering and inspecting.

For this and other reasons, an officer may find it preferable in such situations to conduct the investigation at a place other than the private residence. In that regard, s. 22(1) provides the authority to require attendance at a meeting, (which could be held at a government office) as long as written notice of the meeting is provided and the reason for the meeting is captured by one of the five listed circumstances:

1. The officer is investigating a complaint;
2. The officer inspects a place and comes to have reasonable grounds to believe that a person contravened EPFNA in respect of a foreign national;
3. The officer acquired information suggesting the possibility that a person may have contravened EPFNA with respect to a foreign national (this may be a "tip");
4. The officer wishes to determine whether an employer is complying with EFPNA; and

5. The officer wishes to determine whether a recruiter or person acting on behalf of a recruiter is complying with EPFNA.

The Statutory Powers Procedure Act, RSO 1990, c S.22 does not apply to meetings convened under s. 22(1), although the rules of natural justice generally do apply (as they generally do to any other aspect of the investigation process).

Attendees - s. 22(2)

22(2) Any of the following persons may be required to attend the meeting:

1. The foreign national who is employed or who is attempting to find employment, as the case may be.

2. The employer.

3. The recruiter.

4. The person acting on behalf of the recruiter.

5. If the employer, recruiter or person acting on behalf of the recruiter, as the case may be, is a corporation, a director or employee of the corporation.

This provision describes the persons who may be required to attend a meeting held under s. 22(1).

Requirements - s. 22(3)

22(3) Subsections 102 (3) to (9) of the *Employment Standards Act, 2000* apply in connection with the meeting.

This provision states that ss. 102(3) to (9) of the ESA 2000 apply with respect to s. 22 meetings. Those subsections deal with topics such as requirements for notice of the meeting, the requirement to bring or make available documents or other records for the meeting, and direction on the use of technology during a meeting. For a discussion of ss. 102(3) to (9) of the ESA 2000 see ESA Part XXII, s. 102.

EPFNA Section 23 – Settlement

23. If a foreign national and another person who have agreed to a settlement respecting a contravention or alleged contravention of this Act inform an employment standards officer in writing of the terms of the settlement, section 112 of the Employment Standards Act, 2000 applies with respect to the settlement.

Section 23 provides that s. 112 of the *Employment Standards Act, 2000* applies if a foreign national and another person reach a settlement with regard to a contravention or alleged contravention of the *Employment Protection for Foreign Nationals Act, 2009*, and they inform an employment standards officer of the terms of the settlement in writing.

Section 112 of the ESA 2000 provides that where an employee and an employer enter into a settlement, inform an employment standards officer of the settlement in writing and do what they agreed to do under the settlement, the settlement is binding but may be overturned by the Ontario Labour Relations Board where it can be established that fraud or coercion was involved.

Please see ESA Part XXII, s. 112 for a discussion of s. 112 of the ESA 2000.

EPFNA Section 24 – Authority to Make Orders

Authority to Make Orders - s. 24(1)

24(1) An employment standards officer has the authority to make the orders and arrangements set out in this section in connection with a contravention of this Act.

Employment standards officers have the authority to make orders and other arrangements described in s. 24 when it is determined that there has been a contravention of the *Employment Protection for Foreign Nationals Act, 2009.*

Order to Repay Fees - s. 24(2)

24(2) If the employment standards officer finds that a recruiter or other person has contravened section 7 (prohibition against charging fees), the officer may order the recruiter or other person to pay the amount of the fees to the foreign national or prescribed person or to the Director of Employment Standards in trust, in accordance with subsections 103 (1) to (3) of the *Employment Standards Act, 2000*, or the officer may make the arrangements described in those subsections for the fees to be repaid. Subsections 103 (5) to (10) and section 105 of that Act apply with respect to the order or arrangement.

Subsection 24(2) establishes an employment standards officer's power to issue an order or make arrangements with a recruiter or other person to repay fees to a foreign national or prescribed person if they find that a recruiter or other person has contravened EPFNA s. 7, which prohibits the charging of fees. At the time of writing no persons were prescribed.

Specifically, an officer can:

1. Issue an order requiring the recruiter or other person to:
    - pay the amount of the fees directly to the foreign national or a person as prescribed by regulation (none have been prescribed at the time of writing)
    - pay the amount of the fees to the Director of Employment Standards in trust,

    OR
2. Arrange for a recruiter or other person to repay the amount of the fees directly to the foreign national (voluntary compliance).

Where an order is issued or an arrangement made to repay the amount of the fees directly to the foreign national, it must be done in accordance with ESA Part XXII, ss. 103(1) to 103(3). Those subsections establish the circumstances in which an officer may arrange direct payment to the employee or issue an order to pay, set out the administrative costs that must be paid when an order is issued requiring payment to the Director in trust and provide that a single order may be issued where monies are owing to more than one employee.

ESA Part XXII, ss. 103(5) to (10) and s. 105 apply with respect to an order or arrangement for the repayment of illegally charged fees. Those provisions address the contents of the order, service of the order, notice to the employee about the order, compliance requirements and the effect of the order and also provide that where an arrangement for repayment is made (i.e., where no order is issued) and the employee cannot be located, the employer must pay the amount owing to the Director of Employment Standards in trust.

Subsection 24(2) must be read in conjunction with EPFNA s. 1(2) which provides some guidance on what modifications must be read in where provisions of the ESA 2000 are incorporated into EPFNA by reference. In the context of a contravention of the prohibition against the charging of fees, a reference in the ESA 2000 to an order to pay wages under ESA Part XXII, s. 103 is to be read as a reference to an order to repay fees and a reference to an employer is to be read as a reference to a recruiter or person collecting fees on behalf of a recruiter.

Order to Repay Costs - s. 24(3)

24(3) If the employment standards officer finds that an employer has contravened section 8 (prohibition against cost recovery by employers), the officer may order the employer to pay the amount of the costs to the foreign national or prescribed person or to the Director of Employment Standards in trust, in accordance with subsections 103 (1) to (3) of the *Employment Standards Act, 2000*, or the officer may make the arrangements described in those subsections for the costs to be repaid. Subsections 103 (5) to (10) and section 105 of that Act apply with respect to the order or arrangement.

Subsection 24(3) establishes an employment standards officer's power to issue an order or make arrangements to repay costs recovered by an employer where they find that the employer has contravened EPFNA s. 8, which prohibits employers' recovery of certain costs.

Specifically, an officer can:

1. Issue an order requiring the employer to:
    - pay the amount of the costs recovered by the employer directly to the foreign national or a person as prescribed by regulation (none have been prescribed at the time of writing)
    - pay the amount of the costs recovered by the employer to the Director of Employment Standards in trust

    OR
2. Arrange for an employer to pay the amount of the costs recovered by the employer directly to the foreign national ("voluntary compliance").

Where an order is issued or an arrangement made to pay the amount of the costs recovered by the employer directly to the foreign national, it must be done in accordance with ESA Part XXII, ss. 103(1) to 103(3). Those subsections establish the circumstances in which an officer may arrange direct payment to the employee or issue an order to pay, set out the administrative costs that must be paid when an order is issued requiring payment to the Director in trust and provide that a single order may be issued where monies are owing to more than one employee.

ESA Part XXII, ss. 103(5) to (10) and s. 105 apply with respect to an order or arrangement for the repayment of illegally recovered costs. Those provisions address the contents of the order, service of the order, notice to the employee about the order, compliance requirements and the effect of the order and also provide that where an arrangement for repayment is made (i.e., where no order is issued) and the employee cannot be located, the employer must pay the amount owing to the Director of Employment Standards in trust.

Subsection 24(3) must be read in conjunction with EPFNA s. 1(2) which provides some guidance on what modifications must be read in where provisions of the ESA 2000 are incorporated into the EPFNA by reference. In the context of a contravention of the prohibition against recovering certain costs, a reference

in the ESA 2000 to an order to pay wages under ESA Part XXII, s. 103 is to be read as a reference to an order to repay illegally recovered costs.

Order for Compensation - s. 24(4)

24(4) If the employment standards officer finds that a person has contravened section 10 (prohibitions against reprisal), the officer may make an order that the foreign national be compensated for any loss he or she incurred as a result of the contravention. Subsections 104 (3) and (4) of the *Employment Standards Act, 2000* apply with respect to the order.

Subsection 24(4) establishes an employment standards officer's power to issue an order for compensation if they find that any person has contravened the anti-reprisal provisions contained in EPFNA s. 10. The officer can order the foreign national to be compensated for any loss they incurred as a result of the contravention.

See ESA Part XVIII for a discussion of compensation orders in the context of the ESA 2000.

This provision also states that ESA Part XXII, ss. 104(3) and (4) apply to compensation orders issued under EPFNA s. 24(4). Section 104(3)(a) provides that an order may be issued requiring a person to pay the amount of compensation to the Director in trust and such order will include administrative costs as set out in s. 104(3)(a)(ii). As a result, an order issued under s. 24(4) requiring the payment of compensation to the Director in trust will include administrative costs. However, no administrative costs are attached to an order issued under s. 104(3)(b) which requires the person to pay the amount of the compensation directly to the employee. As a result, there are no administrative costs included in an order issued under s. 24(4) if it requires the person to pay the amount of compensation directly to the foreign national.

Further, ESA Part XXII, ss. 103(3) and (5) to (9) also apply to orders under EPFNA s. 24(4). Subsection 103(3) provides that a single order can be issued with respect to more than one employee. Subsections 103(5) to (9) address the contents of the order, service of the order, notice to the employee about the order, compliance requirements and the effect of an order.

Subsection 24(4) must be read in conjunction with EPFNA s. 1(2) which provides some guidance on what modifications must be read in where provisions of the ESA 2000 are incorporated into EPFNA by reference. In the context of a contravention of the anti-reprisal provision of EPFNA, a reference in the ESA 2000 to an order under ESA Part XXII, s. 104 is to be read as a reference to the corresponding order described in EPFNA ss. 24(4) or 24(5).

Order for Reinstatement - s. 24(5)

24(5) If the employment standards officer finds that an employer or a person acting on behalf of an employer has contravened section 10 (prohibitions against reprisal), the officer may make an order that the foreign national be reinstated. This order may be made in addition to an order for compensation. Subsection 104 (4) of the *Employment Standards Act, 2000* applies with respect to the order.

Subsection 24(5) establishes an employment standards officer's power to issue a reinstatement order if they find that an employer or person acting on behalf of an employer has contravened the anti-reprisal provisions contained in EPFNA s. 10. Where a reprisal under EPFNA has been found, the officer can issue an order requiring the foreign national to be reinstated into their position. The provision states that an officer may issue a reinstatement order in addition to an order for compensation. Thus, in addressing a

contravention of the anti-reprisal provisions, an officer may issue an order for compensation, an order for reinstatement or both.

For a discussion of reinstatement orders in the context of the ESA 2000, including when an order for reinstatement is appropriate, see ESA Part XVIII.

This provision states that ESA Part XXII, s. 104(4) applies to a reinstatement order issued under EPFNA s. 24(5). As a result, ESA Part XXII, ss. 103(3) and (5) to (9) also apply with respect to orders under EPFNA s. 24(5). Subsection 103(3) provides that a single order can be issued with respect to more than one employee. Subsections 103(5) to (9) address the contents of the order, service of the order, notice to the employee about the order, compliance requirements, and the effect of an order.

Subsection 24(5) must be read in conjunction with EPFNA s. 1(2) which provides some guidance on what modifications must be read in where provisions of the ESA 2000 are incorporated into EPFNA by reference. In the context of a contravention of the anti-reprisal provisions of EPFNA, a reference in the ESA 2000 to an order under ESA Part XXII, s. 104 is to be read as a reference to the corresponding order described in EPFNA s. 24(4) or s. 24(5).

Compliance Order - s. 24(6)

24(6) If the employment standards officer finds that a person has contravened a provision of this Act, the officer may make a compliance order respecting the contravention. Section 108 of the *Employment Standards Act, 2000* applies with respect to the order.

Subsection 24(6) establishes an employment standards officer's power to issue a compliance order if they determine that a person has contravened a provision of EPFNA.

ESA Part XXII, s. 108 applies with respect to a compliance order under EPFNA. It empowers an employment standards officer to order that the person stop violating the legislation or take or stop taking action specified in the order by a date specified in the order. Section 108 provides that a compliance order cannot require the payment of wages or compensation. By referentially incorporating ESA Part XXII, ss. 103(6) to (9), s. 108 also addresses service of the order, notice to the employee about the order, compliance requirements and the effect of the order. Further, s. 108 provides that other orders may be issued in addition to a compliance order and provides that the Director of Employment Standards may apply to court for an injunction to enforce the order.

Subsection 24(6) must be read in conjunction with EPFNA s. 1(2) which provides some guidance on what modifications must be read in where provisions of the ESA 2000 are incorporated into EPFNA by reference. In the context of a compliance order, a reference to an order under ESA Part XXII, s. 108 is to be read as a reference to the corresponding order described in in EPFNA s. 24(4) or s. 24(5).

Orders against Directors - s. 24(7)

24(7) If the employment standards officer finds that a corporation has contravened section 7 or 8, the officer may make orders against some or all of the directors of the corporation to pay amounts for which the directors are liable under section 18 (directors' liability to repay fees, etc.). Sections 106 and 107 of the *Employment Standards Act, 2000* apply with respect to the orders.

Subsection 24(7) establishes an employment standards officer's power to issue orders against a director or directors if they find that a corporation has contravened the prohibition against charging fees in EPNFA s. 7 or the prohibition against cost recovery by employers in EPFNA s. 8 and the directors are liable per EPFNA s. 18.

ESA Part XXII, ss. 106 and 107 apply with respect to the s. 24(7) order. ESA Part XXII, s. 106 provides for the issuance of orders against directors for wages owed by employers. Where an order to pay wages has been made against the employer, or where the employer is insolvent and a claim has been filed with a court-appointed receiver or trustee in bankruptcy, an employment standards officer can issue an order against some or all of the employer's directors for amounts for which directors are liable. ESA Part XXII, s. 107 provides for the issuance of orders against any directors who were not the subject of an order issued under s. 106 where the order against the employer and the directors who were subject of the s. 106 order remains unpaid and there has been no application for review.

Subsection 24(7) must be read in conjunction with EPFNA s. 1(2) which provides some guidance on what modifications must be made where provisions of the ESA 2000 are incorporated into EPFNA by reference. References in the ESA 2000 to an order under ESA Part XXII, ss. 106 or s. 107 are to be read as a reference to the corresponding order described in s. 24(7).

Money Paid when no Review - s. 24(8)

24(8) Section 109 of the Employment Standards Act, 2000 applies with respect to an order requiring payment to the Director of Employment Standards in trust.

Subsection 24(8) provides that ESA Part XXII, s. 109 applies where an order is issued requiring payment to the Director of Employment Standards in trust.

Section 109 requires the Director of Employment Standards to pay the money received in trust to the employee named in the order, unless the person against whom the order was issued has applied for a review of that order with the Ontario Labour Relations Board. If an order was issued with respect to more than one employee and less than the full amount has been paid, the amount that was paid (including the amount for administrative costs) is distributed proportionately among the employees. No proceeding may be launched against the Director for acting in accordance with s. 109.

Maximum Amount of Order - s. 24(9)

24(9) A regulation may prescribe a maximum amount for an order to repay fees or an order to repay costs and may prescribe different maximum amounts for different classes of contraventions or complaints.

This provision creates the authority to make a regulation that would set a maximum amount for an order to repay fees or an order to repay costs. It also provides that different maximum amounts could be established by regulation for different classes of contraventions or complaints. At the time of writing, no such regulations have been made.

Same - s. 24(10)

24(10) If a maximum amount is prescribed with respect to an order to repay fees or to repay costs, an employment standards officer shall not issue such an order with respect to one foreign national for an amount greater than the prescribed maximum.

This provision indicates that if a maximum amount for an order to repay fees or an order to repay costs is established by regulation, an employment standards officer would be prohibited from issuing an order for an amount greater than the prescribed maximum.

At the time of writing, no such regulation had been made and there is no maximum amount established for an order to repay fees or for an order to repay costs.

EPFNA Section 25 – Time Limits on Recovery

Complaint by Foreign National - s. 25(1)

25(1) If a foreign national files a complaint alleging a contravention of this Act, an employment standards officer investigating the complaint is not permitted to issue an order to repay fees or repay costs if the contravention occurred more than three and one half years before the complaint was filed.

Subsection 25(1) provides that where a foreign national files a complaint, an employment standards officer is prohibited from issuing an order to repay fees or an order to repay costs if the contravention occurred more than three and a half years before the complaint was filed.

It is important to distinguish the limitation periods established under the *Employment Protection for Foreign Nationals Act, 2009* from those under the *Employment Standards Act, 2000*. For example, where a complaint relates to unpaid wages under the ESA 2000, s. 111 of the ESA 2000 provides that an order cannot be issued for wages that came due to the complainant more than six months/one year or up to two years prior to the filing of the complaint. The different recovery periods under the ESA 2000 apply depending upon whether the unpaid wages came due prior to or on or after the date amendments made to s. 111 by the *Stronger Workplaces for a Stronger Economy Act, 2014,* SO 2014, c 10 came into force (February 20, 2015).

Complaint by Another Person - s. 25(2)

25(2) If, in the course of investigating a complaint, an employment standards officer finds that a person has contravened this Act with respect to another foreign national who did not file a complaint, the officer is not permitted to issue an order to repay fees or repay costs to that foreign national if the contravention occurred more than three and one half years before the complaint was filed.

This provision establishes a limitation period in respect of the recovery of illegally charged fees and illegally recovered costs through an order to pay where an employment standards officer who is investigating a complaint finds a contravention of the legislation in respect of a non-complainant while conducting the investigation.

It provides that where an officer is investigating a complaint filed by foreign national A, and during the course of that investigation finds a violation in respect of foreign nationals B and C, the officer may issue an order to repay fees or an order to repay costs in relation to foreign nationals B and C only if the contravention occurred in the three and half year period preceding the date foreign national A filed his or her complaint.

This provision is similar to s. 111(2) of the ESA 2000 as amended by the *Stronger Workplaces for a Stronger Economy Act, 2014* although the limitation period in s. 111(2) is two years (with respect to wages that came due on or after February 20, 2015.). The Program's interpretation of s. 112(2) can be applied to this provision with the necessary modifications. See ESA Part XXII.

Inspection, No Complaint - s. 24(3)

25(3) If an employment standards officer finds during an inspection that a person has contravened this Act with respect to a foreign national, the officer is not permitted to issue an order to repay fees or repay costs if the contravention occurred more than three and one half years before the officer commenced the inspection.

Subsection 25(3) provides that where during the course of an inspection (as opposed to the investigation of a complaint), an employment standards officer finds a contravention, he or she may issue an order to repay fees or an order to repay costs only for those contraventions that occurred in the three and a half year period preceding the date the inspection began.

Different Time Limits - s. 25(4)

25(4) A regulation may change a time limit set out in subsection (1), (2) or (3) and may prescribe different time limits for different classes of complaints or contraventions.

This provision allows for the making of a regulation that would extend or shorten the limitation periods that apply to the recovery of illegally charged fees or illegally recovered costs through an order to pay as set out in ss. (1) to (3). It also provides that different time limits could be prescribed for different classes of complaints or contraventions.

At the time of writing, no such regulation has been made.

EPFNA Section 26 – Refusal to Issue Order

Refusal to Issue Order - s. 26(1)

26(1) If, after a foreign national files a complaint alleging a contravention of this Act in respect of which an order described in subsection 24(2), (3), (4), (5) or (6) could be issued, an employment standards officer assigned to investigate the complaint refuses to issue such an order, the officer shall advise the foreign national of the refusal in accordance with subsection 110 (1) of the *Employment Standards Act, 2000*.

Subsection 26(1) imposes an obligation on an employment standards officer to notify a complainant of his or her decision not to issue an order to repay fees or costs, a compensation order, a reinstatement order, or a compliance order in respect of a complaint. The officer must notify the complainant in accordance with s. 110(1) of the *Employment Standards Act, 2000* which requires that a letter advising of the refusal be served in accordance with s. 95 of the ESA 2000. (Note that the notification obligation does not apply in the case of non-complainants.)

Note also that this provision does not impose any obligation to notify a complainant of a refusal to issue an order against a director under s. 24(7); this is because there is no right to apply for a review of a refusal to issue an order against a director.

For a discussion of ss. 95 and 110(1) of the ESA 2000, see ESA Part XXI and ESA Part XXII.

Deemed Refusal - s. 26(2)

26(2) If no order is issued with respect to a complaint described in subsection (1) within two years after it was filed, an employment standards officer is deemed to have refused to issue an order and to have advised the foreign national as required by subsection (1) on the last day of the second year.

This provision provides that where no order is issued within two years after the complaint was filed, then the employment standards officer shall be deemed to have refused to issue an order on the day before the two-year limitation period expires. Therefore, if during the two years after the foreign national files a claim, the officer neither issues an order, nor refuses to issue an order, then the officer will be deemed to have refused to issue an order on the day before the two-year period expired.

This provision is meant to address the unfortunate and rare event that an employment standards officer has neither issued an order nor refused to do so during the two-year limitation period set out in s. 28 of the Act. By deeming the officer to have refused to issue an order, the provision triggers the right of the foreign national to apply for a review by the Ontario Labour Relations Board under s. 29(3). The foreign national would have 30 days from the day before the two-year period expires in which to apply for a review of the officer's deemed refusal.

EPFNA Section 27 – Notice of Contravention

Notice of Contravention – s. 27(1)

27(1) If an employment standards officer believes that a person has contravened a provision of this Act, the officer may issue a notice to the person setting out the officer's belief and specifying the amount of the penalty for the contravention.

Section 27(1) permits an employment standards officer to issue a notice of contravention requiring payment of a specified penalty to a person that the officer believes has contravened the *Employment Protection for Foreign Nationals Act, 2009* (EPFNA).

The applicable penalties for a notice of contravention issued under this section are set out in O Reg 47/10.

The officer's power to issue a notice of contravention is discretionary. However, once the officer decides to issue the notice of contravention, the officer must set out the penalty as prescribed in the regulation.

Note that the officer may issue a notice of contravention to any person they believe has contravened the ESA 2000. The word "person" indicates that the notice may be issued against an individual or a corporation. However, s. 27(1) must be read subject to s. 27(2) which states that ESA Part XXII, s. 113(9) applies to the issuance of a notice of contravention. Section 113(9) provides that a notice of contravention may not be issued where the contravention is by a director or officer of a corporation.

Amount of Penalty – s. 27 (1.1)

27(1.1) The amount of the penalty shall be determined in accordance with the regulations.

O Reg 47/10 prescribes penalties for contraventions of the EPFNA as follows:

For a contravention of EPFNA s. 14 or s. 15:

- $250
- $500 for a second contravention of the same provision within a three-year period
- $1000 for a third or subsequent contravention of the same provision in a three-year period.

For a contravention of any other provision of EPFNA, the penalties set out are multiplied by the number of foreign nationals affected.

For contraventions occurring prior to November 28, 2015, this provision applies only if the affected employees are live-in caregivers, as prior to November 28, 2015 the EPFNA only applied to live-in caregivers.

For contraventions occurring on or after November 28, 2015, the regulation permits a single notice of contravention to be issued with a penalty multiplied by the number of affected foreign nationals (whether or not they were live-in caregivers).

Note: the penalty amounts prescribed in O Reg 47/10 were higher from January 1, 2018 to December 31, 2018. (Instead of $250/$500/$1000, the amounts were $350/$700/$1500). Pursuant to subsection 52(5) of the *Legislation Act**, those higher amounts apply only if the contravention relating to the Notice of Contravention occurred during the 2018 calendar year AND the Notice of Contravention was issued during the 2018 calendar year. Otherwise, the lower amounts set out in the current O Reg 47/10 apply.

**Subsection 52(5) of the Legislation Act provides that if an amendment lowers the amount of a penalty, the lower amount applies when a sanction is imposed (i.e. when the notice is issued) even if it is imposed in respect of a contravention that happened before the amendment.*

Penalty Within Range – s. 27 (1.2)

27(1.2) If a range has been prescribed as the penalty for a contravention, the employment standards officer shall determine the amount of the penalty in accordance with the prescribed criteria, if any.

This section states that if a range has been prescribed as the penalty, the employment standards officer shall determine the amount of the penalty from within that range in accordance with any prescribed criteria. At the time of writing, no range has been prescribed. Accordingly, the penalty amounts are as described in the discussion of s. 27(1.1) above.

Same – s. 27(2)

27(2) Subsections 113 (2), (3), (7) and (9) of the *Employment Standards Act, 2000* apply with respect to the notice of contravention.

This section provides that ESA Part XXII, ss. 113 (2), (3), (7) and (9) apply to a notice of contravention issued under EPFNA.

Subsections 113(2), (3), (7) and (9) provide that:

- A notice of contravention must contain or be accompanied by an explanation of the nature of the contravention
- The notice must be served in accordance with ESA Part XXI, s. 95
- A notice of contravention can be issued even when an order has been issued or a person has been or may be prosecuted or convicted with respect to the same contravention, and
- A notice of contravention cannot be issued with respect to a contravention by an officer or director of a corporation.

Deemed Contravention – s. 27(3)

27(3) The person is deemed to have contravened the provision set out in the notice if,

(a) the person fails to apply for a review of the notice under section 30 within the period provided under that section; or

(b) the person applies for the review and the Ontario Labour Relations Board finds that the person contravened the provision set out in the notice.

Subsection 27(3) provides that where a notice of contravention is issued against a person, the person is deemed to have contravened the provision in question if that person fails to make an application for a review of the notice of contravention within 30 days after the date of service of the notice, or, where on a review of the notice, the Ontario Labour Relations Board finds that the person contravened the provision. In the latter case, this would occur if the Ontario Labour Relations Board affirms the notice or amends it.

Penalty – s. 27(4)

27(4) A person who is deemed to have contravened this Act shall pay to the Minister of Finance the penalty for the deemed contravention and the amount of any collector's fees and disbursements added to the amount under subsection 128(2) of the *Employment Standards Act, 2000* and subsection 113(6.1) of the *Employment Standards Act, 2000* applies with respect to required payment.

Subsection 27(4) creates an obligation to pay the penalty set out in the notice of contravention (either by the officer where there is no review or where there is a review as affirmed or amended by the Ontario Labour Relations Board) to the Minister of Finance if the contravention is deemed to have occurred under s. 27(3).

It also requires payment of any collector's fees and disbursements added to the amount of the penalty under ESA Part XXIV, s. 128(2). In other words, once the notice of contravention has been sent for collection, any authorized collector's fees and disbursements are deemed to have been added to the amount set out in the notice of contravention.

ESA Part XXII, s. 113(6.1) applies to this penalty and establishes the time period within which the payment of the penalty to the Minister of Finance must be made. In the event that the notice is not appealed, the payment is due 30 days after the notice was issued. In the event the notice is appealed, the payment is due 30 days after the Ontario Labour Relations Board has found that there was a contravention.

Publication re Notice of Contraventions – s. 27(5)

27(5) If a person, including an individual, is deemed under subsection (3) to have contravened this Act after being issued a notice of contravention, the Director of Employment Standards may publish or otherwise make available to the general public the name of the person, a description of the deemed contravention, the date of the deemed contravention and the penalty for the deemed contravention.

This section permits the Director of Employment Standards to publish the name of the person or business that a notice of contravention has been issued against, as well as a description of the contravention, the date of the contravention, and the penalty for the contravention.

Note that the publishing of this information is restricted to situations where a person is deemed to have contravened EPFNA in accordance with s. 27(3). Such contraventions only occur when the recipient fails to file for a review of the notice with the Ontario Labour Relations Board within the period set out in EFPNA s. 30, where the person has filed for a review and the Board finds that they did in fact contravene the provision set out in the notice. As a result, the publishing of this information cannot simply occur once the notice was issued, but only after the Board has determined on an application for review that the provision set out in the Notice was contravened, or the period for applying for a review in s. 30 has expired.

Internet Publication – s. 27(6)

27(6) Authority to publish under subsection (5) includes authority to publish on the Internet.

This subsection clarifies that the authority to publish the information set out in s. 27(5) includes authority to publish on the Internet.

Disclosure – s. 27(7)

27(7) Any disclosure made under subsection (5) shall be deemed to be in compliance with clause 42 (1) (e) of the *Freedom of Information and Protection of Privacy Act*.

This subsection states that where the Director has published information under s. 27(5) that such publication is deemed to be in compliance with clause 42(1)(e) of the *Freedom of Information and Protection of Privacy Act,* RSP 1990, c F.31.

EPFNA Section 28 – Limitation Period Re Orders, Notices of Contravention

Limitation Period Re Orders, Notices of Contravention - s. 28(1)

28(1) An employment standards officer shall not issue an order to repay fees, an order to repay costs, an order for compensation or a notice of contravention with respect to a contravention of this Act concerning a foreign national,

(a) if the foreign national filed a complaint about the contravention, more than two years after the complaint was filed;

(b) if the foreign national did not file a complaint but another person did file a complaint, more than two years after the other person filed his or her complaint if the officer discovered the contravention with respect to the foreign national while investigating the complaint; or

(c) if clauses (a) and (b) do not apply, more than two years after an employment standards officer commenced an inspection with respect to the applicable person for the purpose of determining whether a contravention occurred.

This provision establishes a two-year limitation period on the Ministry's ability to issue an order to repay fees, an order to repay costs, an order for compensation or a notice of contravention. The two-year period for issuing the above-listed orders commences with the following:

1. If the order is in respect of a foreign national who filed a complaint, on the date the complaint was filed, or
2. If the order is in respect of a foreign national who did not file a complaint but another person did file a complaint and the contravention in respect of the non-complainant was discovered during the investigation of the complaint, on the date the complaint was filed, or
3. If the order is in respect of a foreign national who did not file a complaint and the contravention was discovered during an inspection (rather than an investigation of a complaint), on the date the inspection was commenced.

It should be noted that the legislation does not impose a limitation period with respect to an officer's ability to issue an order for reinstatement or an order for compliance. For more information on the Program's policy around the issuance of those orders, which can be applied in the context of the *Employment Protection for Foreign Nationals Act, 2009*, see ESA Part XXII, s. 114.

Requirements - s. 28(2)

28(2) Subsections 114(2) to (5) and section 115 of the *Employments Standards Act, 2000* apply with respect to the limitation periods described in subsection (1) and with respect to the amendment or rescission of an order or a notice of contravention.

Subsection 28(2) provides that ss. 114 (2) to (5) and s. 115 of the *Employments Standards Act, 2000* apply to the limitation periods set out in s. 28(1) and to the amendment or recession of an order or notice of contravention.

Subsection 114(2) provides that where a complaint is filed by one employee and a second employee files a complaint about substantially the same contravention, the second employee is treated as a non-complainant for purposes of the limitation period on the issuance of orders, thus, in the context of EPFNA, attracting the application of s. 28(1)(b); s. 114(3) provides that this rule does not apply if an order had already been issued or notification of a refusal to issue an order had already been made in respect of the first complaint. Subsections 114(4) and (5) provide that orders and notices of contravention, respectively, cannot be amended or rescinded after the expiry of the limitation period applicable to the issuance of orders and notices without the consent of the employer and employee (in the case of orders) or the consent of the employer (in the case of notices of contravention). Subsection 115 addresses the meaning of "substantially the same" as that term is used in s. 114. See ESA Part XXII for a more detailed discussion of these provisions.

EPFNA Section 29 – OLRB Review of Order, etc.

OLRB Review of Order, etc. - s. 29(1)

29(1) A person against whom an order has been issued under this Act is entitled to a review of the order by the Ontario Labour Relations Board in the circumstances described in subsection 116(1) of the *Employment Standards Act, 2000*.

Subsection 29(1) provides that a person against whom an order has been issued is entitled to a review of the order by the Ontario Labour Relations Board if he or she meets the conditions set out in s. 116(1) of the *Employment Standards Act, 2000*. Subsection 116(1) of the ESA, 2000 establishes that a person is entitled to a review if:

- He or she applies to the Board in writing for a review;
- In the case of an order under s. 74.14 or s. 103 (with the corresponding *Employment Protection for Foreign Nationals Act, 2009,* SO 2009, c 32 order being an order to repay fees or to repay costs), he or she pays the amount owing under the order to the Director in trust or provides the Director with an irrevocable letter of credit acceptable to the Director in that amount; or
- In the case of an order under ss. 74.14, 74.17 or 104 (with the corresponding EPFNA order being a s. 24(4) order for compensation), he or she pays the lesser of the amount under the order and $10,000 to the Director in trust or provides the Director with an irrevocable letter of credit acceptable to the Director in that amount.

For a discussion of s. 116(1) of the ESA 2000, see ESA Part XXIII.

Subsection 29(1) should be read in conjunction with s. 29(5) which incorporates by reference, amongst other ESA 2000 provisions, ss. 116(4) and 116(5) of the ESA 2000. Section 116(4) sets out a 30-day time limit for applying for a review, and s. 116(5) allows the Ontario Labour Relations Board to extend the time allowed to apply for a review, if it considers it appropriate to do so.

Review of Order, Sought by Foreign National - s. 29(2)

29(2) If an order to repay fees, an order to repay costs, an order for compensation or an order for reinstatement has been issued in respect of a foreign national, he or she is entitled to a review of the order by the Board in the circumstances described in subsection 116(2) of the *Employment Standards Act, 2000*.

This provision provides that a foreign national in respect of whom an order to repay fees, an order to repay costs, an order for compensation or an order for reinstatement has been issued is entitled to a review of the order by the Ontario Labour Relations Board if he or she fulfils the conditions under s. 116(2) of the ESA 2000.

Subsection 116(2) of the ESA 2000 establishes the right of an employee in respect of whom certain orders have been issued to a review of the order if the application for review is made in writing and is made within thirty days of service of the order. Therefore, a foreign national seeking a review of an order to repay fees, an order to repay costs, an order for compensation or an order for reinstatement must, within thirty days of the service of the order, apply to the Board for a review of the order in writing.

For a more detailed discussion of s. 116(2) of the ESA 2000 see ESA Part XXIII.

Note that foreign nationals have no entitlement to a review of an order issued against a director under s. 24(7) or to a review of a compliance order issued under s. 24(6).

Same, Refusal to Issue Order - s. 29(3)

29(3) In case of a refusal to issue an order described in subsection (2), the foreign national is entitled to a review of the refusal by the Board in the circumstances described in subsection 116(3) of the *Employment Standards Act, 2000*.

Subsection 29(3) provides that a foreign national who has filed a complaint alleging a contravention of the Act can apply to the Ontario Labour Relations Board for a review the employment standards officer's decision not to issue an order to repay fees, an order to repay costs, an order for compensation or an order for reinstatement if he or she meets the conditions set out in s. 116(3) of the ESA 2000.

Subsection 116(3) of the ESA 2000 provides employees who have filed a complaint alleging a contravention of the ESA 2000 with an entitlement to a review of an employment standards officer's decision not to issue certain orders. The application for a review must be made in writing within thirty days after service of the letter advising the employee of the officer's refusal to issue an order. The 30-day time period applies where an employment standards officer refuses to issue an order, as well as where there is a deemed refusal to issue an order under s. 110(2) (which corresponds to s. 29(2) of EPFNA). It is important to note that subsection 116(3) of the ESA 2000 only applies where the employee in question has filed a complaint. Subsection 29(3) thus makes these principles apply in the context of EPFNA, as well.

See ESA Part XXIII for the Program's interpretation of s. 116(3).

Exceptions, Orders Against Directors - s. 29(4)

29(4) Despite subsections (2) and (3), the foreign national is not entitled to a review of an order under subsection 24(7) or to a review of a refusal to issue such an order.

This subsection provides that even though foreign nationals have the right to a review under subsections (2) and (3), there is no right to a review of an order issued against a director under s. 24(7), nor is there a right to a review of an employment standards officer's refusal to issue an order against a director under s. 24(7). See the discussion at EPFNA s. 24(7).

Requirements - s. 29(5)

29(5) Subsections 116 (4) to (9) and sections 117 and 118 of the *Employment Standards Act, 2000* apply with respect to the review.

Subsection 29(5) establishes that ss.116 (4) to (9), and ss. 117 and 118 of the ESA 2000 apply with respect to a review.

In very general terms, those provisions address the limitation periods for applications for review to the Ontario Labour Relations Board, allow the Board to extend the limitation period, require the Board to hold review hearings and establish certain requirements for hearings at the Board, specify the parties to the review, allow the Board to establish its own practice and procedure, provide that money held in trust pending a review must be held in an interest-bearing account and paid out with interest in accordance with a settlement or Board decision, and provide that the chair of the Board may make rules of practice and procedure.

For a discussion of these provisions, see ESA Part XXIII.

Powers of the Board - s. 29(6)

29(6) The Board has the powers set out in sections 119 and 120 of the *Employment Standards Act, 2000* in a review under this section.

Subsection 29(6) provides that the Ontario Labour Relations Board has the powers set out in ss. 119 and 120 of the ESA 2000 on a review of an order or a refusal to issue an order under this Act. Section 119 deals with such matters as quorum, posting of notices and, most importantly, gives the Board the powers conferred on employment standards officers and authorizes the Board to substitute its findings for those of the officer whose decision is under review. Section 120 deals with such matters as interim orders, interest and judicial review of Board decisions.

For a detailed discussion of the powers of the Board, see ESA Part XXIIIl.

EPFNA Section 30 – OLRB Review of Notice of Contravention

OLRB Review of Notice of Contravention - s. 30(1)

30(1) A person against whom a notice of contravention has been issued under this Act may dispute the notice in the circumstances described in subsection 122(1) of the *Employment Standards Act, 2000*.

This provision establishes the right of a person against whom a notice of contravention has been issued to a review of the notice of contravention as provided for in s. 122(1) of the *Employment Standards Act 2000*. Subsection 122(1) of the ESA 2000 provides that the written application for review must be made within thirty days of the service of the notice, unless the Ontario Labour Relations Board considers it appropriate to extend the time limit.

It is important to note that it is only the person against whom the notice has been issued, and not the foreign national to whom the contravention relates, who can apply for a review.

For a discussion of s. 122(1), see ESA Part XXIII.

Requirements - s. 30(2)

30(2) Subsections 122(2) to (7) of the *Employment Standards Act, 2000* apply with respect to the review.

Subsections 122(2) to (7) of the ESA 2000 apply to a request for review of a notice of contravention. In very general terms, those provisions relate to reviews of notices of contravention at the Ontario Labour Relations Board and to the powers of the Board on such reviews.

For a more detailed discussion of ss. 122(2) to (7), see ESA Part XXIII.

EPFNA Section 31 – General Provision Respecting the Board

31. Sections 123 and 124 of the *Employments Standards Act, 2000* apply with respect to the Ontario Labour Relations Board and its duties under this Act.

This provision provides that ss. 123 and 124 of the *Employment Standards Act, 2000* apply to the Ontario Labour Relations Board and its duties under the *Employment Protection for Foreign Nationals Act, 2009*.

Section 123 of the ESA 2000 provides that a Board member, employee or registrar cannot be compelled to give evidence in a civil proceeding, Board proceeding or other administrative proceeding with respect to information obtained while exercising his or her powers or performing his or her duties under the ESA 2000 unless the Board consents. It also provides that a labour relations officer cannot disclose information or material received under the ESA 2000 without Board authorization.

Section 124 of the ESA 2000 provides that where the Board has not made a decision six months after a proceeding was commenced, a party can apply to terminate the proceeding. If the proceeding is terminated, the chair can reinstitute the proceeding on such terms as he or she considers appropriate.

For a discussion of ss. 123 and 124 of the ESA, 2000 see ESA Part XXIII.

EPFNA Section 32 – Prescribed Arrangements Re Collective Agreements

Prescribed Arrangements Re Collective Agreements – s. 32(1)

32(1) A regulation may prescribe how this Act may be enforced if an employer is bound by a collective agreement.

This provision allows a regulation to be made that prescribes how the *Employment Protection for Foreign Nationals Act, 2009* may be enforced where an employer of a foreign national is bound by a collective agreement. At the time of writing no such regulation has been made.

Effect of Settlement – s. 32(2)

32(2) A regulation may prescribe that a settlement made on an employee's behalf by a trade union that represents the employee is binding on the employee.

This provision allows a regulation to be made that provides that a settlement made on behalf of an employee by a trade union representing the employee is binding. At the time of writing no such regulation has been made.

EPFNA Section 33 – Powers and Duties of Director

Powers and Duties of Director – s. 33(1)

33(1) The Director of Employment Standards may exercise the powers conferred upon the Director under the Act and shall perform the duties imposed on the Director under this Act.

This subsection provides that the Director of Employment Standards may exercise the powers conferred upon him or her under the *Employment Protection for Foreign Nationals Act, 2009* and that he or she is required to perform the duties imposed on him or her under this Act.

Application of ss. 85(2) & (3),88 and 88.1 of the ESA 2000 – s.33(2)

33(2) Subsections 85 (2) and (3) and sections 88 and 88.1 of the *Employment Standards Act, 2000* apply with respect to the Director.

This provision makes ss. 85(2) and (3) and ss. 88 and 88.1 of the *Employment Standards Act, 2000* applicable to the Director of Employment Standards in relation to EPFNA.

Subsections 85(2) and (3) of the ESA 2000 allow the Director or the Deputy Minister, in the Director's absence, to name a Ministry of Labour employee as Acting Director, with the Director's powers and duties, if the Director is absent or unable to act or if the office is vacant.

Section 88 of the ESA 2000 provides for certain powers and duties of the Director of Employment Standards including the making of policies respecting the interpretation, administration and enforcement of the ESA 2000; the delegation of powers and duties to employment standards officers; the establishment of interest rates for purposes of the ESA 2000; and the disbursement of money held in trust in circumstances where no other provision of the ESA 2000 addresses such disbursement. For a more detailed discussion of s. 88 see ESA Part XXI.

Section 88.1 of the ESA 2000 allows the Director of Employment Standards to transfer the investigation of a complaint or inspection from one employment standards officer to another employment standards officer. For a more detailed discussion of s. 88.1, see ESA Part XXI.

EPFNA Section 34 – Powers and Duties of Employment Standards Officers

Powers and Duties of Employment Standards Officers - s. 34(1)

34(1) An employment standards officer may exercise the powers conferred upon employment standards officers under this Act and shall perform the duties imposed on them under this Act.

Subsection 34(1) parallels s. 33(1), concerning, in this case, the powers and duties of employment standards officers. This section provides that employment standards officers may exercise the powers conferred upon them under the *Employment Protection for Foreign Nationals Act, 2009,* SO 2009, c 32, and are required to perform the duties imposed on them under EPFNA.

Application of ss. 89 and 90 - s. 34(2)

34(2) Sections 89 and 90 of the *Employment Standards Act, 2000* apply with respect to employment standards officers.

This provision establishes that ss. 89 and 90 of the *Employment Standards Act, 2000* apply to employment standards officers insofar as EPFNA is concerned.

Section 89 of the ESA 2000 requires employment standards officers to follow the policies established by the Director of Employment Standards respecting the interpretation, administration and enforcement of EPFNA and provides that an officer is not required to hold a hearing when exercising those powers or making a decision under EPFNA.

Section 90 of the ESA 2000 establishes that an employment standards officer is not a competent or compellable witness in a civil proceeding. An officer therefore cannot be made to testify in a civil action regarding any information obtained under EPFNA or to produce records or other documents made or received under EPFNA, except insofar as his or her duties under the EPFNA require such testimony or production. For example, if needed in a judicial review proceeding. For a more detailed discussion, see ESA Part XXI.

Prosecution of Employment Standards Officer - s. 34(3)

34(3) No prosecution of an employment standards officer shall be commenced with respect to an alleged contravention of subsection 89(2) of the *Employment Standards Act, 2000* without the consent of the Deputy Attorney General.

This subsection provides that a prosecution of an employment standards officer for a failure to follow the policies established by the Director, as required by s. 89(2) of the ESA 2000 (which is incorporated into EPFNA by reference through s. 34(2)), may only be commenced if the Deputy Attorney General provides his or her consent.

Proof of Consent - s. 34(4)

34(4) The production of a document that appears to show that the Deputy Attorney General has consented to a prosecution of an employment standards officer is admissible as evidence of his or her consent.

Subsection 34(4) states that a document that appears to be the consent of the Deputy Attorney General to prosecute an employment standards officer is admissible as evidence of his or her consent.

EPFNA Section 35 – Investigation and Inspection Powers

Investigation and Inspection Powers - s. 35(1)

35(1) An employment standards officer may, without a warrant, enter and inspect any place in order to investigate a possible contravention of this Act or to perform an inspection to ensure that this Act is being complied with.

Subsection 35(1) provides that an employment standards officer may enter and inspect any place for the purposes of investigating a possible contravention or to perform an inspection to ensure the *Employment Protection for Foreign Nationals Act, 2009* is being complied with. Nothing in the provision limits the officer to a single visit in carrying out the investigation or inspection.

Note: there are limitations on this right of entry due to the incorporation of certain *Employment Standards Act, 2000* provisions as set out in s. 35(2) below.

Requirements - s. 35(2)

35(2) Subsections 91 (2) to (10) of the *Employment Standards Act, 2000* apply with respect to investigations and inspections under this Act.

This provision provides that ss. 91(2) to (10) of the ESA 2000 which deal with investigation and inspection powers under the ESA 2000, apply with respect to investigations and inspections under EPFNA. Subsection 91(2) limits an officer's right to enter and inspect in the case of any part of a place used as a dwelling to instances in which the occupier of the dwelling consents or a warrant has been issued. Other provisions of s. 91 that apply to EPFNA investigations and inspections require officers to produce evidence of their appointment on request; address the examination, demand and removal of records; and provide that a copy of a record certified by an officer as a true copy has the same evidentiary value as the original. For a more detailed discussion of these provisions, see ESA Part XXI.

EPFNA Section 36 – Warrants

Warrants - s. 36(1)

36(1) A justice of the peace may issue a warrant for the purposes and in the circumstances described in subsection 92(1) of the *Employment Standards Act, 2000.*

Subsection 36(1) provides that a justice of the peace may issue a warrant authorizing an employment standards officer to enter a premises on the same grounds as are set out s. 92(1) of the *Employment Standards Act, 2000*. These grounds are:

- The officer has been prevented from exercising a right of entry;
- The officer has been prevented from exercising any investigation or inspection power;
- There are reasonable grounds to believe that the officer will be prevented from exercising a right of entry or exercising an investigation or inspection power; or
- There are reasonable grounds to believe that an offence under the legislation or regulations has been or is being committed and that information or other evidence will be obtained through the exercise of an investigation or inspection power.
    - This last ground was added to s. 92(1) of the ESA 2000 by an amendment contained in s. 51(1) of the bill that led to the enactment of the *Employment Protection for Foreign Nationals Act, 2009.*

For a discussion of an officer's right of entry and investigation and inspection powers under the ESA 2000, see ESA Part XXI.

Requirements - s. 36(2)

36(2) Subsections 92(2) to (6) of the *Employment Standards Act, 2000* apply with respect to the warrant.

This provision establishes that ss. 92(2) to (6) of the ESA 2000 apply to warrants. Those provisions deal with topics such as expiry of warrants, when warrants may be executed and access to police assistance in executing a warrant, and provide that ss. 91(4) to (13) of the ESA 2000 (which relate investigation and inspection powers) apply to an officer when executing a warrant. For a detailed discussion of ss. 92(2) to (6) see ESA Part XXI.

EPFNA Section 37 – Prohibitions Re Investigations and Inspections

Obstruction - s. 37(1)

37(1) No person shall hinder, obstruct or interfere with or attempt to hinder, obstruct or interfere with an employment standards officer conducting an investigation or inspection under this Act.

This provision mirrors s. 91(11) of the *Employment Standards Act, 2000* and prohibits any person from hindering, obstructing or interfering with an investigation or inspection being conducted by an employment standards officer.

Refusal or False or Misleading Information - s. 37(2)

37(2) No person shall,

(a) refuse to answer questions on matters that an employment standards officer thinks may be relevant to an investigation or inspection under this Act; or

(b) provide an employment standards officer with information on matters the officer thinks may be relevant to an investigation or inspection that the person knows to be false or misleading.

This provision mirrors s. 91(12) of the ESA 2000 and prohibits a person from refusing to answer an employment standards officer's questions or from providing false or misleading information to the officer.

Separate Inquiries - s. 37(3)

37(3) No person shall prevent or attempt to prevent an employment standards officer from making inquiries of any person separate and apart from another person under clause 91 (6) (e) of the *Employment Standards Act, 2000*.

This provision is similar to s. 91(13) of the ESA 2000 and ensures that an officer may interview a person separately from any other persons on matters the officer thinks may be relevant to the investigation or inspection; this is intended to help to prevent "tailoring" of evidence or intimidation of persons, by the presence of others, who may have evidence. Clause 91(6)(e) of the ESA 2000 gives an employment standards officer the right to question any person on matters relevant to an investigation or inspection.

False and Misleading Information - s. 37(4)

37(4) No person shall provide false or misleading information under this Act.

This provision is identical to s. 131(2) of the ESA 2000. It prohibits any person from providing false or misleading information under the *Employment Protection for Foreign Nationals Act, 2009*. It has a general application in prohibiting any person, whether it is an employer or recruiter (including a corporation), a foreign national, a director or officer or agent, or any other person, from providing false or misleading information under EPFNA. It covers situations where the information is provided voluntarily, as well as pursuant to a demand or a summons, and regardless of whether the information is required to be kept by EPFNA or not.

EPFNA Section 38 – Posting of Notices

38(1) An employment standards officer may require an employer or recruiter to post and to keep posted in or upon his, her or its premises in a conspicuous place or places where it is likely to come to the attention of affected foreign nationals,

(a) any notice relating to the administration or enforcement of this Act that the officer considers appropriate; or

(b) a copy of a report or part of a report made by the officer concerning the results of an investigation or inspection.

This provision allows employment standards officers to require the posting of notices or copies of a report.

The notice referred to in clause (a) might, for example, consist of a general outline of all of the provisions of the *Employment Protection for Foreign Nationals Act, 2009* or, on the other hand, may focus on one or more provisions that the officer feels are of particular relevance. The copy of the report or part of a report referred to in clause (b) may be a copy of the officer's report (or excerpts of it) concerning his or her investigation or inspection.

EPFNA Section 39 – Service of Documents

39. Section 95 of the Employment Standards Act, 2000 applies with respect to the service of documents under this Act.

Section 39 provides that s. 95 of the *Employment Standards Act, 2000* applies with respect to service of documents under the *Employment Protection for Foreign Nationals Act, 2009*. For a discussion of s. 95 of the ESA 2000, which addresses issues such as methods of service, the effective date of service, the Ontario Labour Relations Board's powers around service, and certificates of service, see ESA Part XXI.

EPFNA Section 40 – Collections

40(1) Sections 125 to 129 of the *Employment Standards Act, 2000* apply with respect to the collection of money which a person is liable to pay under this Act.

Sections 125 to 129 of the *Employment Standards Act, 2000*, which are all provisions dealing with collections, apply to the collection of money which a person is liable to pay under the *Employment Protection for Foreign Nationals Act, 2009*. For a discussion of the Program's interpretation of ss. 125 to 129 of the ESA 2000 see ESA Part XXIV.

EPFNA Section 41 - General Offence

41(1) A person who contravenes this Act or fails to comply with an order under this Act is guilty of an offence and on conviction is liable,

(a) if the person is an individual, to a fine of not more than $50,000 or to imprisonment for a term of not more than 12 months or to both;

(b) subject to clause (c), if the person is a corporation, to a fine of not more than $100,000; and

(c) if the person is a corporation that has previously been convicted of an offence under this Act,

i. if the person has one previous conviction, to a fine of not more than $250,000, and

ii. if the person has more than one previous conviction, to a fine of not more than $500,000.

Section 41 of the *Employment Protection for Foreign Nationals Act, 2009* is similar to s.132 of the *Employment Standards Act, 2000* and applies to every person (a term which includes a corporation), who violates a provision of EPFNA, or disobeys an order made under EPFNA. An individual who is found guilty of an offence is liable to a fine of not more than $50,000 or 12 months in jail, or both.

A corporation that is found guilty of an offence is liable to a fine of not more than $100,000 for a first conviction, $250,000 for a second conviction, and $500,000 for a third or subsequent conviction.

Prosecutions under EPFNA may be initiated under Part I or Part III of the *Provincial Offences Act,* RSO 1990, c P.33 ("POA"). A Part I prosecution can only be commenced by a person who has been appointed a provincial offences officer. Part I prosecutions are commenced by filing a certificate of offence with the Ontario Court of Justice and serving the accused with either an offence notice ("ticket") or summons. A ticket may only be used where a set fine for the offence in question has been established by the Chief Justice of the Ontario Court of Justice. At the time of writing, no set fine has been established for offences under EPFNA. However, a provincial offences officer may use the Part I summons procedure for EPFNA offences. The POA provides that where the summons procedure is used in respect of an offence under an Act, the provisions of the Act respecting maximum fines and terms of imprisonment do not apply; instead the POA provides that the maximum fine that can be imposed on conviction is $1,000. A sentence of imprisonment cannot be imposed if the summons procedure is used. If a prosecution is commenced under Part III of the POA, the s. 41 provisions regarding maximum fines and (in the case of an individual) maximum terms of imprisonment would apply.

EPFNA Section 42 – Limitation Period, Prosecution

42(1) No prosecution shall be commenced under this Act more than two years after the date on which the offence was committed or alleged to have been committed.

Section 42 provides that a prosecution cannot be commenced under the *Employment Protection for Foreign Nationals Act, 2009* more than two years after the offence was committed or alleged to have been committed.

The date on which an offence has been committed or is alleged to have been committed is a question of fact. For example, a contravention of s. 10 (reprisal) would occur on the date the employer penalized the foreign national for exercising or attempting to exercise a right under EPFNA (e.g., the date the employee was terminated for having refused to pay costs the employer incurred in becoming his or her employer). A contravention of EPFNA's prohibition against a recruiter charging a fee in connection with the employment of a foreign national would occur on the day the fee is charged. A contravention of EPFNA's requirement to comply with an order to pay would occur once the order becomes final and binding (which, in the case where no application for review is made, is at the expiry of the period for applying for a review.)

In the case of a prosecution under Part I of the *Provincial Offences Act*, RSO 1990, c P.33 ("POA"), the prosecution is considered to commence when a certificate of offence is filed with the court office. In the case of a prosecution under Part III of the POA, the prosecution is considered to commence when a document called an "information" is laid under oath before a provincial judge or a justice of the peace.

EPFNA Section 43 – Onus in Prosecution for Reprisal

43 In a prosecution in which a person is alleged to have contravened subsection 10 (1) or (2) (prohibitions against reprisal), if the prosecutor establishes that the person acted in a way that a reasonable person in the position of the foreign national would in the circumstances find intimidating or punitive or that the person attempted or threatened to act in such a way, the court may, in the absence of evidence to the contrary, find that the person intimidated or penalized or attempted or threatened to intimidate or penalize the foreign national and that the person did so for a reason referred to in subsection 10 (1) or (2), as the case may be.

In a prosecution for a prohibited reprisal, if the prosecutor establishes that the accused acted in a way that a reasonable person in the position of the foreign national would consider intimidating or punitive, or that the accused attempted or threatened to act in that way, the court could find that a person engaged in a prohibited reprisal in the absence of evidence to the contrary. In other words, if the prosecutor establishes those facts, the court can, in its discretion, shift the onus to the person who is alleged to have contravened s. 10.

EPFNA Section 44 – Additional Orders re: Reprisals, Property

Additional Orders Re Reprisals, Property - s. 44(1)

44(1) If a person is convicted of contravening section 9 (prohibitions against taking, retaining property) or section 10 (prohibitions against reprisal), the court shall, in addition to any fine or term of imprisonment that is imposed, order that the person take specific action or refrain from taking specific action to remedy the contravention.

Subsection 44(1) states that where a person is convicted of contravening s. 9 or 10, the justice of the peace or the provincial judge making the conviction shall, in addition to the fine or term of imprisonment, order specific action that the person must take or refrain from taking to remedy the contravention. (Thus, the court could order that the person convicted return the property that was taken or retained to the foreign national who has the right to possess the property.)

Orders May Also Include - s. 44(2)

44(2) Without restricting the generality of subsection (1), in the case of a contravention of section 10, the order may include one or more of the following:

1. A requirement to pay compensation.

2. If the person convicted is an employer, a requirement to pay wages owing to the foreign national.

3. If the person convicted is an employer, a requirement to reinstate the foreign national in employment.

In addition to the powers granted to the court under s. 44(1), if an employer is convicted of contravening s. 10, s. 44(2) authorizes, but does not require, the court to order that the employee be paid any wages that are owing to the employee. The section also authorizes the court to order that the employee be reinstated or compensated by the employer, or both.

Note that pursuant to s. 45(1), where a person is convicted of contravening a provision of the *Employment Protection for Foreign Nationals Act, 2009* other than s. 10 (reprisal), the court is required to order the person to pay any amount owing to the foreign national with respect to the contravention.

Failure to Comply with Order - s. 44(3)

44(3) A person who fails to comply with an order issued under subsection (1) is guilty of an offence and on conviction is liable,

(a) if the person is an individual, to a fine of not more than $2,000 for each day during which the failure to comply continues or to imprisonment for a term of not more than six months or to both; and

(b) if the person is a corporation, to a fine of not more than $4,000 for each day during which the failure to comply continues.

Subsection 44(3) sets out the fine for a failure to comply with a court order made under s. 44(1) of EPFNA. For example, if the court, on conviction for a violation of s. 10, orders the employer to reinstate the foreign national with compensation for lost wages and benefits, and the employer fails to comply, the court may further order the person, if an individual, to pay a fine of up to $2,000 for each day that he or she failed to comply with the order of the court. In the case of a corporation, the court could order that a fine of up to $4,000 be paid for each day the person failed to comply with the court's order. For example, if the court orders that a certain amount of money be paid by August 1st, and the person did not do so until September 1st of that same year, the person could be fined up to $124,000, if a corporation, or $62,000, if an individual, for the failure to comply in a timely manner with the order of the court. The fine would be in addition to any fine or term of imprisonment imposed pursuant to s. 41.

EPFNA Section 45 – Additional Orders re: Other Contraventions

Additional Orders Re Other Contraventions - s. 45(1)

45(1) If a person is convicted of contravening a provision of this Act other than section 10 (prohibitions against reprisal), the court shall, in addition to any fine or term of imprisonment that is imposed, assess any amount owing to a foreign national affected by the contravention and order the person to pay the amount assessed to the Director of Employment Standards.

Subsection 45(1) provides that where a person is convicted of contravening a provision of the *Employment Protection for Foreign Nationals Act, 2009* other than a conviction for a violation of s. 10 (reprisal), the court is required to assess any amount owing to the affected foreign national(s), in addition to any penalty (i.e., fine or term of imprisonment or both) imposed.

For example, where a recruiter had not paid an order to repay fees and accordingly committed an offence that resulted in a conviction under s. 41, the court is required (in addition to any fine or jail sentence that may be ordered) to assess the amount owing and to order the recruiter to pay the amount owing to the Director of Employment Standards in trust.

The court could not order the person convicted to pay the ten per cent administration costs portion of the order to repay fees, since the section refers specifically to an "amount owing to a foreign national affected by the contravention". However, the court's assessment of the amount owed to the foreign national(s) could include interest.

Collection by Director - s. 45(2)

45(2) The Director shall attempt to collect the amount ordered to be paid under subsection (1) and if he or she is successful shall distribute it to the foreign national.

Subsection 45(2) indicates that the Director of Employment Standards must attempt to collect any money that is ordered to be paid under s. 45(1) and distribute it to the foreign national if the collection action is successful.

Enforcement of Order - s. 45(3)

45(3) An order under subsection (1) may be filed by the Director in a court of competent jurisdiction and on filing is deemed to be an order of that court for the purposes of enforcement.

Subsection 45(3) provides that the Director of Employment Standards may file the court order issued under s. 45(1) in a court of competent jurisdiction. The order then becomes enforceable as an order of the court for the purposes of enforcement. This means, for example, that a writ of seizure and sale could be issued so that the defaulting person's assets could be seized and sold in order to satisfy the amounts owing.

EPFNA Section 46 – Offence re: Directors' Liability

Offence Re Directors' Liability - s. 46(1)

46(1) A director of a corporation is guilty of an offence if the director,

(a) fails to comply with an order under section 18 and has not applied for a review of that order; or

(b) fails to comply with an order under section 18 that has been amended or affirmed by the Ontario Labour Relations Board on a review of the order under section 29 or with a new order issued by the Ontario Labour Relations Board on such a review.

Where a recruiter, person acting on behalf of a recruiter or an employer is a corporation and an order to repay fees or costs has been issued against a director of the corporation, s. 46(1) provides that the director is guilty of an offence if he or she fails to comply with the order, either as issued, where no application for review is made, or as amended or affirmed by the Ontario Labour Relations Board, where a review takes place and the Board amends or affirms the order.

The provision should be read in conjunction with s. 46(2) below which establishes a maximum fine for directors under s. 46.

Penalty - s. 46(2)

46(2) A director convicted of an offence under subsection (1) is liable to a fine of not more than $50,000.

Subsection 46(2) provides that a director convicted under s. 46(1) is liable to a fine of not more than $50,000. (Note that directors convicted under s. 46(1) are not liable to imprisonment.)

EPFNA Section 47 – Offence Re Permitting Offence by Corporation

Offence Re Permitting Offence by Corporation - s. 47(1)

47(1) If a corporation contravenes this Act, an officer, director or agent of the corporation or a person acting or claiming to act in that capacity who authorizes, permits or acquiesces in the contravention is a party to and guilty of the offence and is liable on conviction to the fine or imprisonment provided for the offence.

Same - s. 47(2)

47(2) Subsection (1) applies whether or not the corporation has been prosecuted or convicted of the offence.

Subsection 47(1) provides that where a corporation contravenes any provision of the Act or the regulations, an officer, director or agent of the corporation (or a person acting or claiming to act in such a role) who authorizes, permits or acquiesces in the contravention is a party to and guilty of the offence and is liable on conviction to the penalty provided for the offence, i.e., a maximum of $50,000 fine and/or 12 months' imprisonment. This applies whether the individual's role in relation to the corporation's contravention is active, e.g., authorizing the act that constituted the contravention, or passive, e.g., being aware of the act but failing to take steps that he or she could have taken to prevent it.

Subsection 47(2) provides that the individual officer, director or agent may be convicted under this provision even though the corporation has not been prosecuted or convicted. Thus, a corporate director could be prosecuted under s. 47, even though a prosecution has not been commenced against the corporation under s. 41.

The key to s. 47 is that the officer, director or agent of the corporation must be a person who "authorizes, permits or acquiesces" in a contravention of the *Employment Protection for Foreign Nationals Act, 2009* by the corporation.

These provisions have the same wording as ss. 137(1) and (2) of the *Employment Standards Act, 2000*. For a discussion of the Program's interpretation of those provisions, which can be applied to EPFNA with necessary modifications, see ESA Part XXV.

Additional Penalty - s. 47(3)

47(3) If an individual is convicted under this section, the court may, in addition to any other fine or term of imprisonment that is imposed, assess any amount owing to a foreign national affected by the contravention and order the individual to pay the amount assessed to the Director of Employment Standards.

Collection by Director - s. 47(4)

47(4) The Director shall attempt to collect the amount ordered to be paid under subsection (3) and if he or she is successful shall distribute it to the foreign national.

These provisions indicate that where an individual is convicted of an offence under s. 47, the court may, in addition to any other penalty, assess the amount owed by the corporation in relation to the foreign

national(s), and may order the individual to pay the amount assessed to the Director of Employment Standards in trust, who is required to attempt to collect the amount and, if successful, to distribute it to the foreign national(s). Please note that unlike s. 45(1), this section does not require the court to make an assessment and order the payment of wages to the Director upon conviction.

These provisions are similar to ss. 137(4) and (5) of the ESA 2000. For a discussion of the Program's interpretation of those provisions, which can be applied to EPFNA with the necessary modifications, see ESA Part XXV.

No Prosecution Without Consent - s. 47(5)

47(5) No prosecution shall be commenced under this section without the consent of the Director.

Subsection 47(5) provides that a prosecution under s. 47 of an officer, director or agent of a corporation (or person acting or claiming to act in such a capacity) that has contravened the legislation can only be commenced with the consent of the Director of Employment Standards. This power has been delegated pursuant to s. 33(2) of EPFNA which incorporates s. 88 of the ESA 2000 by reference.

Proof of Consent - s. 47(6)

47(6) The production of a document that appears to show that the Director has consented to a prosecution under this section is admissible as evidence of the Director's consent.

This provision states that a document that appears to indicate the consent of the Director of Employment Standards (or his or her delegate pursuant to s. 33 of the Act) to prosecute under s. 47 is admissible as evidence of the Director's consent.

Onus of Proof - s. 47(7)

47(7) In a prosecution in which a person is alleged to have contravened this section, if the prosecutor establishes that the person was aware that the corporation was contravening this Act, the court may, in the absence of evidence to the contrary, find that the person authorized, permitted or acquiesced in the contravention.

In a prosecution under s. 47, where the prosecutor establishes that an officer, director or agent (or person claiming to act in that capacity) was aware of the corporation's contravention of the legislation, the court may conclude that the individual authorized, permitted or acquiesced in the contravention in the absence of evidence to the contrary. In other words, if the prosecutor establishes that the individual was aware of the contravention, the court can, in its discretion, shift the onus to the individual.

EPFNA Section 48 – Where Prosecution May be Heard, etc.

48 Section 138 of the *Employment Standards Act, 2000* applies with respect to the prosecution of offences under this Act.

Section 48 indicates that s. 138 of the *Employment Standards Act, 2000* applies to prosecutions commenced under the *Employment Protection for Foreign Nationals Act, 2009*.

Subsection 138(1) of the ESA 2000 provides that the prosecutor can choose to have the prosecution of an offence conducted in the area where the accused resides or carries on business, rather than where the offence occurred as would normally be the case under the *Provincial Offences Act,* RSO 1990, c P.33. For example, if the accused is a recruiter who lives in Hamilton and who is alleged to have illegally charged a foreign national a recruitment fee in Toronto, the Crown could require that the case heard in Hamilton.

Subsection 138(2) of the ESA 2000 provides that the Attorney General or his or her agent may, by giving notice to the clerk of the Ontario Court of Justice, require that the prosecution be heard by a judge of that court rather than by a justice of the peace.

EPFNA Section 49 – Copy Constitutes Evidence

49. Section 140 of the *Employment Standards Act, 2000* applies with respect to documents, records and certificates of the Director of Employment Standards under this Act.

Section 140 of the *Employment Standards Act, 2000* applies with respect to documents, records and certificates of the Director of Employment Standards under the *Employment Protection for Foreign Nationals Act, 2009*.

Section 140 of the ESA 2000 states that a copy of an order, notice of contravention ("NOC") or record signed by an employment standards officer or by the Ontario Labour Relations Board constitutes evidence of the order, NOC or record. It also provides that certain certificates (e.g., certificate that an employer failed to pay an order) that appear to be signed by the Director of Employment Standards constitute evidence of facts indicated in the certificate.

See ESA Part XXVI for a more detailed discussion of s. 140 of the ESA 2000.

EPFNA Section 50 – Regulations

Regulations - s. 50(1)

50(1) The Lieutenant Governor may make regulations,

(a) prescribing anything referred to in this Act as prescribed;

(b) providing that any provision of this Act or a regulation does not apply to a person or class of persons or in specified circumstances;

(c) providing that, despite subsection 8(1), an employer may recover from a foreign national or class of foreign nationals or from such other person or class of persons as may be prescribed, such costs as are prescribed;

(d) requiring a person who employs a foreign national or who ceases to employ a foreign national to provide notice to the person or body specified in the regulations of the employment or the end of the employment in a written or electronic form approved by the person or body, and to provide such other information as is required by the regulation:

(e) governing penalties for contraventions for the purposes of subsection 27(1).

This section allows for the making of regulations under the *Employment Protection for Foreign Nationals Act, 2009*. Subsection 50(1) was amended by the *Stronger Workplaces for a Stronger Economy Act, 2014,* SO 2014, c 10, effective November 20, 2015 with the addition of the reference to a "class of persons" in clause (b) and the addition of clauses (c) and (d). At the time of writing, no regulations have been made pursuant to this subsection. It was further amended by the *Fair Workplaces, Better Jobs Act, 2017*, SO 2017, c 22 to allow for the making of regulations governing the penalties attached to notices of contravention under EPFNA s. 27(1).

Conditions - s. 50(2)

50(2) A regulation made under this Act may provide that it applies only if one or more conditions specified in it are met.

This subsection allows for any regulations made under s. 50(1) to apply only if certain conditions are met.

Regulations re Penalties for Contraventions – s. 50(3)

50(3) A regulation made under clause (1) (e) may,

(a) establish different penalties or ranges of penalties for different types of contraventions or the method of determining those penalties or ranges;

(b) specify that different penalties, ranges or methods of determining a penalty or range apply to contraveners who are individuals and to contraveners that are corporations; or

(c) prescribe criteria an employment standards officer is required or permitted to consider when imposing a penalty.

This section permits regulations to be made establishing different penalties or ranges of penalties for different contraventions as well as establishing different methods of determining those penalties and ranges. It also permits regulations to be made establishing different penalties, ranges of penalties and methods for establishing such penalties or ranges for contraveners who are individuals and contraveners that are corporations. Finally, it allows regulations to be made that prescribe the criteria an officer shall or may consider when imposing a penalty. At the time of writing, no ranges of penalties, methods, or criteria have been established and officers are therefore required in accordance with EPFNA s. 27(1.1) to apply the penalties prescribed in O Reg 47/10.

Employment Protection for Foreign Nationals Act, 2009 - Regulations

Ontario Regulation 47/10 – Penalties

This regulation sets out penalties that are prescribed for notices of contravention issued pursuant to s. 27 of the *Employment Protection for Foreign Nationals Act, 2009.*

O Reg 47/10 Section 1 – Penalties Re Notices of Contravention

1(1) The following penalties are prescribed for the purposes of section 27 of the *Employment Protection for Foreign Nationals Act*, 2009:

Item	Column 1 Contravention	Column 2 Penalty, in dollars
1.	If the notice relates to a contravention of section 14 or 15 of the Act	250
2.	If the notice relates to the second contravention of section 14 or 15 of the Act in a three-year period	500
3.	If the notice relates to the third or subsequent contravention of section 14 or 15 of the Act in a three-year period	1,000
4.	If the notice relates to a contravention of a provision of the Act other than section 14 or 15	250
5.	If the notice relates to the second contravention of a provision of the Act other than section 14 or 15 in a three-year period	500
6.	If the notice relates to the third or subsequent contravention of a provision of the Act other than section 14 or 15 in a three-year period	1,000
7.	If the notice relates to a contravention of a provision of the Act other than section 14 or 15 and the contravention affects more than one foreign national	250, multiplied by the number of foreign nationals affected
8.	If the notice relates to the second contravention of a provision of the Act other than section 14 or 15 in a three-year period and the contravention affects more than one foreign national	500, multiplied by the number of foreign nationals affected

9.	**If the notice relates to the third or subsequent contravention of a provision of the Act other than section 14 or 15 in a three-year period and the contravention affects more than one foreign national**	**1,000, multiplied by the number of foreign nationals affected**

(2)REVOKED:

2. OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THIS REGULATION).

See the discussion at section 1 of O Reg 289/01 (Penalties and Reciprocal Enforcement) under the ESA 2000 for information about when the penalty amount escalates and when the multiplier is applied. The principles that are set out there also apply in the EPFNA context.

Ontario Regulation 348/15 – Employer Recovery of Costs

This regulation sets out the exception to the prohibition against cost recovery in s. 8(2) of the *Employment Protection for Foreign Nationals Act, 2009*.

O Reg 348/15 Section 1 – Exception to Prohibition Against Cost Recovery

1 For the purposes of subsection 8(2) of the Act, the following are prescribed as costs that an employer may recover or attempt to recover from a foreign national or other prescribed persons:

1. **Costs of air travel and of work permits, if the employer is permitted to deduct such costs under an employment contract made pursuant to the Government of Canada program known as the "Seasonal Agricultural Worker Program".**
2. **Omitted (provides for coming into force of provisions of this Regulation).**