

FREQUENTLY ASKED QUESTIONS ABOUT EMPLOYMENT STANDARDS

By: Lauren M. Bernardi

Our employment laws can often be confusing and unclear. As a result, there are a number of common misperceptions about employers' obligations to their employees.

This article reviews some of the more frequently asked questions about employment standards laws. This is a general overview only and specific legal advice is generally prudent when you are addressing a specific employment law matter.

What is the Employment Standards Act and to whom does it apply?

The *Employment Standards Act 2000* ("ESA") is legislation that governs most employment relationships in Ontario. It establishes minimum standards to which employees are entitled, such as vacation pay, minimum wage and notice of termination.

The ESA establishes the minimum terms of employment and with a few exceptions, employers may not provide less than the minimum terms established by the ESA, even if employees agree to it. If you provide more than the minimum standard (e.g., more than two weeks vacation) then that standard will apply.

Are new employees automatically deemed to be on probation?

No. The employee must agree to a probationary period before he or she starts working for you.

If you make an oral offer of employment and don't say anything about a probationary period, then there isn't one. It is best to get it in writing, preferably in a written offer of employment.

Sometimes employers argue that because there is a written policy outlining the probationary period, the employee is bound by it. Generally speaking, this is only true if the policies have formed part of the employment relationship (for example, you gave the employee a copy of your policy manual to consider as part of the employment offer).

How long can the probationary period be?

The ESA does not create a probationary period per se but it does stipulate that you don't have to provide notice of termination to employees who have worked for you for less than three months. Because of this, many probationary periods are three months long.

If you establish a longer probationary period, such as six months, you will have to provide notice of termination as set out in the ESA. For example, if you terminate someone who is four months into a six month probationary period, you must pay one week of notice under the ESA.

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Can I extend an employee's probationary period?

You can extend a probationary period but you will still have to provide the notice set out in the ESA.

However, unless there are some extenuating circumstances, extending a probationary period may not accomplish much. If an employee does not seem to be working out during the first three months, they are not likely going to work out with a longer probationary period, unless additional training or support is provided.

How many coffee and lunch breaks do I need to give and for how long?

The only requirement under the ESA is that you provide employees with a half-hour unpaid lunch break after they have worked for five hours. The ESA allows you to break the 30-minute lunch period into two eating periods totaling 30 minutes as long as the employee agrees to do so.

There is no requirement under the ESA to provide coffee breaks. If you do provide coffee breaks, they are considered working time for which employees must be paid, unless they can leave the workplace to attend to personal business during their breaks.

All of the employees who report to me are on salary. Do I still have to pay them overtime?

Just because an employee is paid on salary does not mean that he or she is exempt from overtime pay. Although there are certain exemptions to overtime requirements, merely paying an employee by way of an annual salary is not one of them.

Employees cannot agree to waive their right to overtime pay, so even if salaried employees don't ask for overtime pay, they are still entitled to it. Sometimes after an employee has been terminated, he or she will seek reimbursement for outstanding overtime pay. Therefore, it is best to pay overtime as you go.

Is our sales manager entitled to overtime?

One type of employee who is exempt from overtime pay is an employee whose work is primarily supervisory or managerial in nature.

Whether or not an employee falls within this exemption is contingent upon his or her actual duties and not on the title of the job. Therefore, if the sales manager is primarily responsible for selling and does not carry out true management functions or supervise other people, he or she will not be exempt.

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Employees may be considered managerial and, therefore, exempt from overtime pay if they:

- can set their own hours
- are involved in budget and goal setting
- determine the way in which their work is to be performed
- are involved in policy and standard setting
- can hire, fire or discipline employees

When do the overtime provisions apply?

Qualified employees must receive overtime pay after they have worked more than 44 hours in a week. Overtime is calculated on a weekly, not daily basis.

Even if an employee's regular work week is 35 or 40 hours, overtime under the ESA does not apply until the employee has worked more than 44 hours in the week. However, a lower threshold may apply if you have agreed otherwise. For example, some employers pay overtime for any hours worked in excess of a regular 37½ hour work week.

Can I require employees to bank overtime and take time off in lieu of overtime?

You may create a banked overtime system but only if:

- the employees agree to it
- the time you give in lieu of overtime pay is equivalent to time and a half for all hours in excess of 44 per week
- you allow the employees to take the banked time within three months after it is earned, or you have a signed agreement with them to extend that time period to 12 months
- you pay employees who are terminated or resign, any remaining banked overtime.

Can I require employees to take their banked overtime hours within the year, failing which they forfeit the time?

No. Employees are entitled to be compensated for all hours they work. You may, however, state that if employees do not take compensating time off within a specified period of time, their overtime will simply be paid out.

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Is Easter Monday a statutory holiday?

No. There are nine statutory holidays. They are:

- New Year's Day
- Family Day *
- Good Friday
- Victoria Day
- Canada Day
- Labour Day
- Thanksgiving Day
- Christmas Day
- Boxing Day

The first Monday in August is also not a statutory holiday, even though some employers treat it as such.

Can I require employees to work July 1st, in exchange for another day off?

Under most circumstances, you may not require employees to work on a public holiday unless they agree to do so.

If your employees agree to work the public holiday then you must pay them for the day. You must also provide them with a substitute day off with pay, not later than their next vacation. If an employee agrees to work on the public holiday but doesn't want a substitute day off, you must pay the employee one and one-half times his or her regular wage for hours worked on the public holiday plus one day's wages to cover the holiday the employee did not take.

If an employee agrees to work on a public holiday but doesn't show up and does not have a legitimate reason for failing to show up, he or she loses the right to a paid public holiday or a substitute day off.

Must I provide benefits to permanent employees?

No. Employee benefits such as medical benefits, pension plans, etc. are not mandated by law but if you provide them, they cannot be discriminatory.

* Effective 2008

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How much paid sick and bereavement leave must I provide each year?

Employees working in organizations with 50 or more employees are entitled to up to 10 days of *unpaid* emergency leave. This is to attend to their own or a family member's illness or other urgent family matter. The definition of family is very broad and includes step family members, certain in-laws and same sex partners. This leave applies concurrently with any other applicable leaves you offer. For example, if you provide paid sick time and an employee takes a sick day, that will be credited against the emergency leave days and the employee's sick days under your policy.

For employers with less than 50 employees, there is no requirement to provide emergency leave. However, all employees who are governed by the provisions of the ESA are entitled to family medical leave, regardless of the size of their workplace.

Family medical leave is unpaid, job-protected leave of up to eight (8) weeks in a 26-week period.

Family medical leave may be taken to provide care and support to a specified family member for whom a qualified health practitioner has issued a certificate indicating that the family member has a serious medical condition and there is a significant risk of death occurring within a period of 26 weeks.

This article covers only a few of the questions you may have regarding employment standards. For more information, you may wish to obtain a copy of the "Employer's Guide to the Employment Standards Act". It is available from the Ontario government's web site at www.gov.on.ca/LAB/es or by calling 416-326-5300.

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About Bernardi Human Resource Law

At Bernardi Human Resource Law we know that today's response to your workplace challenges can become tomorrow's precedent. We think ahead and help you make the best decisions to meet your needs both now and in the future.

Balancing your legal obligations and business objectives can be hard. We act as your trusted advisors; not simply as lawyers but as an integral part of your management team. Through our practical advice, workshops and articles, we arm you with the knowledge and tools to address rapidly changing human resource issues.

Above all, we're on your side. We work with you to prevent costly problems and when litigation is necessary, we act as strong advocates to protect your interests.

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About Lauren Bernardi

Lauren is a lawyer and human resource advisor with the Mississauga firm of Bernardi Human Resource Law. Lauren's advisory, training and educational services help managers direct their human resources in a strategically sound and legally appropriate manner. She is an accomplished and entertaining speaker on management and human resource issues.

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