

TERMINATION OF EMPLOYMENT & SEVERANCE PAY

Employment Standards Fact Sheet

What is the purpose of the Employment Standards Act, 2000 (ESA)?

The ESA sets out rights of employees and requirements that apply to employers in most Ontario workplaces.

What work is not covered by the ESA?

Most employees and employers in Ontario are covered by the ESA. However, the ESA does **not** apply to certain individuals and persons or organizations for whom they may perform work, including:

- Employees in sectors that fall under federal jurisdiction, such as airlines, banks, the federal civil service, post offices, radio and television stations and inter-provincial railways
- Individuals performing work in a program approved by a college of applied arts and technology or university
- 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
- People who do community participation under the Ontario Works Act, 1997
- Police officers (except for the Lie Detectors part of the ESA, which *does* apply)
- Inmates taking part in work or rehabilitation programs, or young offenders who perform work as part of a sentence or order of a court
- People who hold political, judicial, religious or elected trade union offices.

Employees of the Crown are excluded from some (but not all) provisions of the ESA.

For a complete listing of other job categories not governed by the ESA, please check the ESA and its regulations. Regulations set out exemptions to the law, special rules and details about how to apply certain sections of the ESA.

What is termination of employment?

Common expressions for termination of employment include being “let go,” “discharged,” “dismissed,” “fired” and “permanently laid off.”

Under the ESA, employment is terminated if the employer:

- dismisses or stops employing someone, even when it is due to the employer’s bankruptcy or insolvency
- “constructively” dismisses an employee and the employee resigns in response within a reasonable period of time
- lays an employee off for a period that is longer than a temporary layoff (see *What is a temporary layoff?*).

What is a constructive dismissal?

A constructive dismissal may occur when an employer makes a significant change to a fundamental term or condition of an employee’s employment without the employee’s actual or implied consent

- For purposes of the ESA, the employer will be considered to have terminated the employee’s employment if the employee resigns within a reasonable period of time after the constructive dismissal.

An employee may be constructively dismissed if the employer makes changes to the employee’s terms and conditions of employment that result in a significant reduction in salary or a significant change in such things as the employee’s:

- work location
- hours of work
- authority or position

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

Constructive Dismissal may also include situations where an employer harasses or abuses an employee, or an employer gives an employee an ultimatum to “quit or be fired” and the employee resigns in response.

Constructive dismissal is a complex and difficult subject. An employee who thinks he or she may have been constructively dismissed should contact the Ministry of Labour for further information.

What is a temporary layoff?

A temporary layoff happens where an employer cuts back or stops an employee's work without ending his or her employment (e.g., laying someone off at times when there is not enough work to do). An employer may put an employee on a temporary layoff without providing a recall date.

Employers are not required under the ESA to provide employees with a written notice of a temporary layoff, nor do they have to produce a reason. (They may, however, be required to do these things under a collective agreement or an employment contract.)

If the layoff exceeds the period of time considered under the ESA to be a temporary layoff, the employee's employment will be considered terminated. The employee will be entitled to termination pay if notice of termination was not given.

For the purposes of the termination provisions of the Act, a week of layoff is a week in which the employee earned less than half of what he or she would ordinarily earn (or earns on average) in a week.

A week of layoff does not include any week in which the employee did not work for one or more days because the employee was not able or available to work, was subject to disciplinary suspension or was not provided with work because of a strike or lockout.

A temporary layoff can last:

a) not more than 13 weeks in any period of 20 consecutive weeks

or

b) more than 13 weeks in any period of 20 consecutive weeks, but less than 35 weeks in any period of 52 consecutive weeks, where certain conditions exist (e.g., where the employee continues to receive substantial payments from the employer, or the employee receives supplementary unemployment benefits— contact the Ministry of Labour for further information.

or

c) a longer period than described in b) above where the employer recalls an employee who is represented by a trade union within the time frames set out in an agreement between the union and the employer.

When can an employee's job be terminated?

In most cases, an employer can terminate an employee's job at any time, but employers must provide proper written notice, or termination pay instead of notice.

However, there are some situations where an employer *cannot* terminate an employee's employment even if the employer is prepared to give proper written notice or termination pay. For example, an employer cannot end someone's employment, or penalize them in any way, if any part of the reason for the termination of employment is based on the employee asking questions about the ESA or exercising a right under the ESA, such as refusing to work in excess of the daily or weekly hours of work maximums, or taking a pregnancy, parental, personal emergency, declared emergency, or family medical leave. (See the "Role of the Ministry of Labour" fact sheet for more information.)

Do all employees qualify for termination notice and pay?

Certain employees are not entitled to notice of termination or termination pay under the ESA. For example, employees who are guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial, and has not been condoned by the employer, are not entitled. Other examples include construction employees, employees on temporary layoff and employees who refuse an offer of reasonable alternative employment.

An employee who has been employed less than three months and has his or her employment terminated is not entitled under the ESA to notice of termination or termination pay.

Many of the exemptions from the ESA are complex. Contact the Ministry of Labour for further information.

How much notice of termination do employees get?

In most cases, when an employer ends the employment of someone who has been continuously employed for three months or more, the employer must provide *either* written notice of termination *or* termination pay or a combination of the two. If notice is given, the employee must be paid his or her regular wages throughout the notice period.

How much written notice is required depends on how long someone has been employed by an employer. Employers must continue to make the benefit plan contributions required to maintain an employee's benefit plans during the notice period. This applies even if the employee has received termination pay instead of working part or all of the notice period.

In most cases, written notice of termination of employment must be addressed to the employee. It can be delivered in person or by mail, fax or email, as long as delivery can be verified.

The chart on the following page specifies the periods of notice an employer must give an employee based on length of employment:

Length of Employment	Notice Required
Less than 3 months	None
3 months or more but less than 1 year	1 week
1 year or more but less than 3 years	2 weeks
3 years or more but less than 4 years	3 weeks
4 years or more but less than 5 years	4 weeks
5 years or more but less than 6 years	5 weeks
6 years or more but less than 7 years	6 weeks
7 years or more but less than 8 years	7 weeks
8 years or more	8 weeks

Note: Special rules apply in the case of “mass terminations”, where 50 or more employees are terminated at an employer’s establishment within a four-week period.

How much termination pay do employees get?

An employee who does not get the required written notice (see the chart above) must get termination pay instead.

Termination pay is a lump sum payment equal to the *regular wages for a regular work week* that an employee would have earned during the notice period had notice been given. A special method for calculating termination pay applies to employees who do not have a regular work week or are paid on a basis other than time worked (e.g., piece-work rate, commission).

Termination pay must be paid to an employee no later than seven days after the employee’s employment is terminated or on what would have been the employee’s next regular pay day, whichever is later.

Regular wages

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

Regular work week

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

What is severance of employment?

A person's employment is "severed" when the employer:

- dismisses or stops employing someone, even when it is due to the employer's bankruptcy or insolvency
- "constructively" dismisses the employee and the employee resigns in response within a reasonable period of time (see *What is a constructive dismissal?* on page 2)
- lays the employee off for 35 weeks or more in any period of 52 consecutive weeks
- lays the employee off because all of the business at an establishment is permanently discontinued, or
- gives the employee written notice of termination and the employee resigns after giving two weeks' written notice, and the resignation takes effect during the required notice of termination period.

What is severance pay?

"Severance pay" is compensation that's paid to a qualified employee who has his or her employment "severed." It compensates an employee for loss of seniority and job-related benefits. It also recognizes an employee's years of service.

Severance pay is not the same as termination pay, which is given in place of the required notice of termination of employment.

Who qualifies to receive severance pay?

An employee qualifies for severance pay when his or her employment is severed and he or she:

- has worked for the employer for five or more years (including all time spent by the employee in employment with the employer, whether continuous or not and whether active or not)
- and**
- was employed by an employer who
 - has a payroll in Ontario of at least \$2.5 million
- or**
- severed the employment of 50 or more employees in a six-month period because all or part of the business was permanently discontinued.

Certain employees are not entitled to severance pay under the *ESA*. For example, employees who are guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial, and has not been condoned by the employer, are not entitled to severance pay. Also, construction employees are not covered, nor are employees who refuse an offer of reasonable alternative employment.

Many of the exemptions from the ESA are complex. Contact the Ministry of Labour for further information.

How much severance pay are employees entitled to?

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

- the number of completed years of employment
and
- the number of completed months of employment divided by 12 for a year that is not completed.

The maximum amount of severance pay required to be paid under the ESA 2000 is an amount equal to the employee's regular wages for a regular work week for 26 weeks.

* See *Regular wages* and *Regular work week*.

Note: A special method of *calculating* severance pay applies to employees who do not have a “regular work week” or are paid on a basis other than time worked (e.g., piece-work rate or commission.)

When must employees receive their severance pay?

An employee must receive severance pay no later than seven days after his or her employment is severed or what would have been his or her next regular pay day, whichever is later.

However, an employer may pay severance pay in instalments with the *written* agreement of the employee or the approval of the Director of Employment Standards, Ministry of Labour. An instalment plan cannot exceed three years. If an employer fails to make a scheduled payment, all of the severance pay still owing to the employee becomes due immediately.

How do recall rights affect termination pay and severance pay?

A “recall right” is the right of an employee on layoff to be called back to work by his or her employer under a term or condition of employment. This right is commonly found in a collective agreement.

Employees who are eligible for severance pay and, where their employment is considered terminated because they have been on layoff for 35 weeks or more, termination pay, and who also have recall rights, must choose **either**:

- to keep their recall rights, and not be paid for termination pay and/or severance pay at that time (In this case, the employer pays the termination and/or severance pay to the Director of Employment Standards, Ministry of Labour, and it is held in trust* until the employee is recalled or the employee gives up his or her recall rights or the recall rights expire. If the employee is recalled, the money is paid back to the employer. If the employee gives up his or her recall rights or the recalls rights expire, the money is paid to the employee.)

or

- to receive the termination and/or severance pay, and give up their recall rights.

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

* If the employee is represented by a union, the employer and union must attempt to come to an arrangement to hold the money in trust. If that attempt is not successful, the union must notify the Director of Employment Standards and the employer in writing and the employer will then pay the termination and/or severance pay to the Director of Employment Standards to hold in trust.

What about Employment Insurance?

For questions about Employment Insurance call Human Resources and Social Development Canada—Employment Insurance Telemessage General Inquiries. The telephone number is listed in the Blue Pages of your telephone book under “Employment.”

With regard to termination or severance, is it possible that there are more rights for employees or obligations for employers?

Yes. The ESA provides minimum standards only. Some employees may have rights under the common law or other legislation that give them greater rights relating to notice of termination (or termination pay) and severance pay than the ESA. Employers and employees may wish to obtain legal advice concerning their rights.

It should be noted that if an employee has filed a complaint with the Ministry for termination pay or severance pay, he or she is generally not entitled to commence an action in court for the wrongful dismissal related to that same termination/severance of employment *unless* the employee withdraws the complaint within two weeks of filing with the Ministry. An employee who has commenced a wrongful dismissal action in court cannot file a complaint with the Ministry of Labour for termination pay and/or severance pay entitlements related to the same termination/severance of employment.

What if the employer does not follow the ESA?

If an employee thinks the employer is not complying with the ESA, he or she can call the Employment Standards Information Centre at 416-326-7160 or toll-free at 1-800-531-5551 for information about the ESA and how to file a complaint. Complaints are investigated by an employment standards officer who can, if necessary, make orders against an employer—including an order to comply with the ESA. The ministry has a number of other options to enforce the ESA, including requesting voluntary compliance, issuing an order to pay wages, an order to reinstate and/or compensate, a notice of contravention, or issuing a ticket or otherwise prosecuting the employer under the Provincial Offences Act.

This fact sheet provides general information about termination of employment and severance pay as set out in the Employment Standards Act, 2000 (ESA) and its regulations. For complete information please refer to the ESA and the regulations.

For More Information

If you have questions about the Employment Standards Act, call the Ontario Ministry of Labour's Employment Standards Information Centre at 416-326-7160, toll free 1-800-531-5551, TTY 1-866-567-8893, or visit a ServiceOntario Centre in person.

Information and ESA publications can be found at the Employment Standards section of the Ministry of Labour's website, www.labour.gov.on.ca.

ESA fact sheets are available on the following subjects:

Agricultural Workers	Personal Emergency Leave
Domestic Workers	Pregnancy Leave & Parental Leave
Family Medical Leave	Public Holidays
Frequently Asked Questions	Retail Workers
Homeworkers	Role of the Ministry of Labour
Hours of Work & Overtime	Termination of Employment & Severance Pay
How Are You Covered by the ESA?	Vacation
How to File a Claim	What Young Workers Should Know
Minimum Wage	

This fact sheet is provided for your information and convenience only. It is not a legal document. For further information and the exact wording in the ESA, please refer to the Employment Standards Act, 2000 (ESA) and regulations.

The Employment Standards Information Centre can be reached at 416-326-7160, toll-free at 1-800-531-5551, or, for Hearing Impaired TTY, at 1-866-567-8893.

Information on the ESA can also be found at the Employment Standards section of the Ministry of Labour's website: www.labour.gov.on.ca.

You can order copies of the ESA and related information materials from: Publications Ontario, 1-800-668-9938; Hearing Impaired TTY 1-800-268-7095, or the Ontario government E-Laws website at www.e-laws.gov.on.ca.

