

SURVIVING ESA INSPECTIONS

A Ministry of Labour employment standards inspection can be a nerve-wracking event, but as long as you're organized and polite (and have nothing to hide), they're relatively painless. *HR Professional* talks to an employment lawyer and a Ministry of Labour ESA co-ordinator for tips on how to pass.

The purpose of an employment standards inspection is to raise awareness for both employers and employees of their rights and responsibilities, to promote self-reliance in the workplace and—most important—to ensure compliance with the *Employment Standards Act, 2000*.

They're also becoming more common now that the Province's various workplace enforcement agencies—Employment Standards, WSIB and Health and Safety—have begun sharing information.

"It used to be a complaints-driven system where they would only inspect if there was a complaint," says Erin Kuzz, a partner at Toronto employment law firm Sherrard Kuzz LLP. "They've since taken a much more proactive approach. If you're on the radar for one of them, you'll be on the radar for all of them."



ILLUSTRATION: MICHAEL EDDENDEN

Anatomy of an audit

When you get a letter announcing an upcoming visit from the Employment Standards branch (or worse—a random knock on the door), you can expect a focus on 10 things: they will ensure an ESA poster—which spells out rights and responsibilities—is visible to employees, that

COMMON ESA MISTAKES

- Overtime:** Employers often believe that if an employee's on salary, they're not entitled to overtime. Unless the person is a manager (as defined in the *Employment Standards Act, 2000*), you must pay overtime to everyone. You might not be tracking everyone's hours, but you can bet they are.
- Vacation pay:** Many employers think employees can waive vacations and take pay in lieu, but employees must take a minimum of two weeks per year and employers have to ensure they take it.
- Public holidays:** The biggest employer mistakes concerning public holidays are thinking only full-time employees are entitled to payment, and miscalculating the amount owed.

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wage statements (pay stubs) are provided, they will look for unauthorized deductions, take a fine-tooth comb over recordkeeping, hours of work, overtime, minimum wage, public holidays and vacation—both pay and time—and whether the employer is providing proper eating periods, says Jane Wilkins, acting provincial co-ordinator, Employment Practices Branch at the Ontario Ministry of Labour.

Typically these visits are scheduled, and the letter you receive advising of an upcoming appointment (usually two weeks hence) will also include a list of what they want you to produce. (If they have reason to believe the employer is a flight risk or will destroy documents, they can also show up unexpectedly.)

When the big day comes, an inspector will arrive and start off with basic questions for the point person—often HR: the company's official name, address and phone numbers. Then they'll move on to specifics: do you provide wage statements, when's your pay date, how do you do payroll—so when they get to your records they have a vague idea of how it's going to look.

"When we look at your records, we do a test audit—a random sample of employees. The size of the company determines how large the audit will be," says Wilkins. "If there are five or less employees, we'll audit them all; if there are more than 16, we'll look at 10 per cent, and so on."

You should also count on inspectors requesting private interviews with employees to confirm everything you're telling them. For example, if you say you provide pay stubs, they'll want to confirm this with an employee. Often the employees will be the same people the inspector used for their test audit.

"If we find violations, we'll ask the employer if it's accurate or if they're missing records that would clear things up," says Wilkins. If they can't, it's up to the officer to complete some kind of enforcement tool to ensure the employer corrects the situation and pays any outstanding money to employees, and it doesn't happen again.

Enforcement options can range from the minor, like a compliance order asking the employer to correct the problem within a couple of weeks, notices of contravention that have fines ranging from \$250 to \$1,000, all the way up to part III prosecutions under the *Provincial Offences Act*, with corporate fines of up to \$100,000 for a first offense, and/or 12 months in jail.

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Hedging your bets

There are three keys to a successful audit: Be candid, have inspectors onsite for as little time as possible and have your files organized. “The last thing an auditor wants is to dig through an unorganized mess,” says Kuzz.

Kuzz recommends printing hard copies of everything the inspector wants to see to reduce the likelihood they’ll want access to your computerized records, “because once

they’re in there, they might see things you don’t want them to see.”

You should also identify a point person who can deal with the inspector and get them what they need.

In terms of location, provide the inspector with an empty office or boardroom that’s close to a washroom and the front door—you want to limit opportunities for the officer to be nosing around your workplace.

Self-audit

Kuzz advises doing your own employment standards audit every couple of years so you can find discrepancies—and take steps to rectify them—before the Ministry of Labour does.

“That will bring a lot of goodwill from the auditor—let them know the steps you’ve put in place to get to compliance. They’re going to find where you’re not compliant, and you’ll get a ton of leeway from most officers if you say ‘we found this, we didn’t know we were doing it wrong, here’s the steps we’ve taken, we’ve got it fixed,’” says Kuzz.

Some areas you should really scrutinize in a self-audit are overtime, hours of work, paid holiday and vacation pay.

You can find an actual Employment Standards branch inspection sheet to use for self audits at www.hrthoughtleader.com/webextras.

Another good source of information is the Ministry of Labour website (www.labour.gov.on.ca), which you should check routinely for updates on legislation and online tools (including a new public holiday calculator) to help you stay compliant. **HR**