



E-STEP: A Commitment to the Fair Workplaces, Better Jobs Act

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Module 1: An Overview of the ESA

The *Employment Standards Act, 2000* (“ESA” or the “Act”) establishes the minimum employment standards for all provincially-regulated employees in Ontario. Contractual relationships between an employee and employer must meet these minimum standards or they will be unenforceable at law.

To assist employers to understand these requirements, the Canadian Franchise Association (CFA) has partnered with the Ontario Ministry of Labour (the “Ministry”) to raise awareness of employer responsibilities under the ESA with “ESTEP” – the Employment Standards Training and Education Program. Through the ESTEP program, the CFA’s Employment Rules Toolkit provides a comprehensive range of content designed to educate franchisees and franchisors on their rights and obligations under the ESA through a series of engaging modules. Each module is delivered by an experienced employment lawyer who will explain the obligations under the Act and how the ESA applies in the real world.

Michael Sherrard of Sherrard Kuzz LLP delivered *Module One: An Overview of the Employment Standards Act* in August 2018. A recording of his presentation is available on the CFA’s website at: www.cfa.ca/employment-rules. This article summarizes the salient points of Module One and is intended to be read in conjunction with the presentation, not as a stand-alone document.

At press time, the future of the ESA is uncertain. The Government of Ontario, through Premier Doug Ford, has recently promised to repeal Bill 148 which made sweeping changes to Ontario’s employment and labour laws. As such, the information in this article is subject to change.

How and to Whom the ESA Applies

The ESA is remedial legislation guaranteeing a “floor” of rights for employees. Where the employment relationship is governed by the ESA, an employer must provide an employee with at least the minimum statutory entitlements under the Act.

The ESA applies to most employees in the Province of Ontario, although there are exceptions for certain types of employees such as police officers and employees who work for a federally-

regulated employer. There are also exemptions and special rules for employees in specified industries, such as construction and landscaping.

Definitions

The ESA includes a number of definitions important to its interpretation and application. The definition of “**employee**” includes a person who performs work for an employer in exchange for wages, supplies services to an employer for wages, is a homemaker, or is receiving training by the employer in skills that are used by the employer’s employees. The last aspect of this definition is important: an individual receiving training or orientation may be an employee for purposes of the ESA. However, this does not include a student who receives training through an employer’s commercial offerings (*e.g.*, a student attending university is not an employee of that university).

The definition of “**employer**” includes an owner or manager of a business or undertaking, who has control or direction of an individual’s employment, or is directly or indirectly responsible for the employment of a person in the business or undertaking.

The definition of “**establishment**” is particularly important for franchisors and franchisees. An “establishment” is a location at which the employer carries on business. Multiple work locations may be considered a single “establishment” where they are located in the same municipality or where an employee’s seniority rights carry over between locations. For example, if a franchisee owns multiple restaurants within the City of Toronto, all of these locations could be considered a single “establishment” under the Act. This could impact the calculation of the employee’s length of service and the employer’s obligations to the employee on termination of employment.

The definition of “**wages**” is also significant. Wages is defined as money payable under an employment contract, a payment required under the ESA (*e.g.*, overtime pay, termination pay, vacation pay), or room and board. Other payments, such as tips, discretionary bonuses (not related to hours, production, or efficiency), expenses and travelling allowances, and benefit contributions are not wages.

Required Postings

The Ministry has published a poster outlining some of the key minimum standards under the ESA. Each employer is required to post the most current version of this poster in a prominent area in the workplace. In addition, all new employees must be provided a copy of this poster within thirty (30) days of commencing employment and all existing employees are to be provided with a copy of the poster when it is updated by the Ministry.

Complaints and Enforcement

Within two years of the date of an alleged violation an employee who believes his or her employer has not complied with the ESA may file a complaint with the Ministry. Filing a complaint is free. In addition, the Ministry, on its own initiative, has broad discretion to audit a workplace or conduct an investigation.

Ministry investigations are conducted by an Employment Standards Officer (“ESO”). An ESO has a broad range of investigative powers, including the power to order the production of any document or to question any party the ESO deems necessary. The ESO may also order that a meeting occur between a complainant and employer.

Once an investigation is complete the ESO may make a variety of orders, including that the employer pay outstanding wages, reinstate a dismissed employee, or comply with the ESA.

An ESO order is not final. The employer or employee may appeal to the Ontario Labour Relations Board (“OLRB”). A hearing at the OLRB is a new hearing. The ESO’s finding is not binding on the OLRB and the parties are permitted to introduce new evidence and make new arguments.

An employer is prohibited from reprising against an employee for exercising his or her right to file a complaint.

Offences and Prosecutions

The Ministry may levy a penalty as prescribed by the ESA where an employer has failed to comply. In addition, an employer may be prosecuted for an offence under the ESA. This most commonly occurs in the circumstance where an employer has failed to comply with an earlier order or direction made by the Ministry. A prosecution is heard by the Ontario Court of Justice and both an individual (such as the director or officer of an employer) or a corporation may be found guilty of an offence. The Ministry has the right to publish the name of any party convicted of an offence as well as a description of the offence and the sentence.

Agreements

Under the ESA, most employees are only allowed to work up to eight hours a day (or the number of hours in the employee’s regular day, if greater) and 48 hours per week. Similarly, most employees are entitled to overtime pay after working 44 hours in a week.

An employer and employee may agree the employee will work in excess of these daily and weekly hours of work, and/or to average hours of work over a defined number of weeks for the purpose of determining overtime pay. However, to do so an employer must apply for and obtain a permit from the Ministry.

Conclusion

ESTEP Module One is designed to provide a basic overview of the ESA. For more information on specific rights and obligations and how they impact franchise organizations, consider participating in all of the ESTEP modules. For specific guidance on the interpretation and application of the ESA, consult with your employment counsel.

ABOUT THE AUTHOR

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