

Navigating Overtime Rules Under The Ontario ESA: A Guide For Employers



There is a common misconception that all Ontario salaried employees are exempt from overtime pay under the *Employment Standards Act, 2000* (ESA). This belief, as well as a misunderstanding of any of the overtime provisions, can lead to serious consequences for employers.

In this article, we'll clarify the overtime rules, including overtime pay, lieu time, and what they can do if employers need their employees to work more than 48 hours in a week.

The basics of overtime pay

In Ontario, employees are entitled to receive overtime pay at a rate of 1.5 times their regular hourly wage if they work more than 44 hours in a week. This applies to both hourly-paid and salaried employees unless they are subject to special industry-based rules, or fall under specific exemptions outlined in the regulations. Examples of categories of employees that are exempt from overtime provisions include¹:

- **Managers and supervisors:** Generally, employees in roles with the authority to hire, fire and make significant decisions;
- **Professionals:** Licensed professionals such as accountants, doctors, and engineers;

- **Certain salespersons:** Employees whose primary duties involve selling or negotiating sales for their employer and earn a significant portion of their income through commissions;
- **Information technology professionals:** Employees primarily engaged in software design and development or responsible for managing and operating information systems.

When determining eligibility for overtime, it is crucial for employers to assess each employee's role based on actual duties rather than title alone. By way of example, managers and supervisors are only exempt from overtime if they perform non-supervisory or non-managerial tasks on an irregular or exceptional basis. If that does not accurately describe their duties, despite their title or the majority of their duties, they are entitled to overtime pay.

The ESA does not refer to the method by which the employer calculates an employee's wages. Whether an employee is paid hourly or a salary is not determinative, or even relevant, to their entitlement to overtime pay. To ensure compliance, an employer must analyze all of an employee's duties in order to determine the right to overtime pay.

Lieu time: An alternative to overtime pay

Receiving "lieu time" allows employees to take time paid off instead of receiving overtime pay. Employers and employees must agree in writing to lieu time rather than overtime pay. Many employers fail to recognize that the paid time off must be provided at the same rate as overtime pay; 1.5 hours lieu time for each overtime hour worked. For instance, if an employee works 4 hours of overtime, they would be entitled to 6 hours of lieu time. The time off generally must be taken within 3 months of the overtime being earned, unless the employee agrees to stretch the period to 12 months.

Agreement to work more than 48 hours in a week

While the overtime rules contemplate work in excess of 44 hours per week, the weekly maximum employers can allow employees to work is generally 48 hours in a week. There may be situations where employers wish employees to work more than 48 hours in a week. In such cases, employers are only able to permit this if they obtain the written consent of their employees.² This consent must detail the terms and conditions under which an employee agrees to work these extended hours. The employer must also ensure that their employees are fully informed of their rights and the implications of working extended hours by providing them with the latest publication from the Ministry of Labour related to hours of work and overtime.

The ESA also permits averaging agreements, which allow employers to average employees' hours over a specific period greater than one week (up to four weeks) for the purposes of determining overtime entitlement. This means that if an employee works more than 44 hours in one week, and less than 44 hours in another week within the period, the total hours can be averaged over the agreement period. These agreements allow for flexibility in scheduling and a potential reduction in overtime expenses, but do not negate the need for consent when exceeding 48 hours of work in a week.

What to do if overtime has not been paid

If you have not been paying overtime as required by the ESA, it's essential to address this issue promptly. Non-compliance can lead to significant financial and legal repercussions for employers.

Footnotes

1. O. Reg 285/01.

2. *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 17(1).

Read the original article on GowlingWLG.com

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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