

Ministry of Labour, Training and Skills Development

# Keeping Ontario Safe:

What you need to know about employment standards related to COVID-19

2021

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# Legal Disclaimer

- This presentation covers some of the minimum rights and obligations under the *Employment Standards Act, 2000* (ESA) and their regulations.
- **This presentation is not legal advice.** It is not intended to replace the ESA, or their regulations and you should refer to the legislation at [Ontario.ca/laws](https://www.ontario.ca/laws).
- Although we endeavour to ensure that the information in the presentation is as current and accurate as possible, errors do occasionally occur.
- The ESA provides minimum standards only. Some employees may have greater rights under an employment contract, collective agreement, the common law or other legislation. Employers and employees may wish to obtain legal advice.
- **Important:** Due to orders under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* or the *Emergency Management and Civil Protection Act*, the minimum standards under the ESA that are described may apply differently to certain employees.

# Today, we'll take a look at:

## 1. Employment Standards Act (ESA)

- What the ESA is and who it applies to
- Recent changes to the ESA
- FAQs about employment standards and COVID-19
- Resources
- Questions and Answers



# EMPLOYMENT STANDARDS ACT

## What is the *Employment Standards Act, 2000* (ESA)?

- The ESA sets **minimum** standards for wages and certain other conditions of employment in Ontario.
- Employers and employees **cannot** contract out of or waive any of these employment standards.
- Employers can **offer** a greater right or benefit above these standards.

## Reprisals

- Employers are not allowed to penalize (a reprisal) an employee because they exercised their rights under the ESA.
- Employers (or person acting on their behalf) are not allowed to:
  - intimidate
  - dismiss
  - threaten
  - punish in any other way
- A claim can be filed at [Ontario.ca/ESAcclaims](https://www.ontario.ca/ESAcclaims) if an employee feels they may have been reprised against.

## Who is an employee?

The ESA covers employees. An employee is someone who...

- **performs work** for an employer for wages
- **supplies services** to an employer for wages
- **receives training** from an employer
- is a home worker
- ...and includes someone who was an employee.

## Exceptions, Exemptions and Special Rules

The ESA **does not** apply to everyone, for example:

- Federal jurisdiction (banks, airlines)
- Some students in work-experience programs
- Office holders (judges, politicians)
- People who do community participation under the *Ontario Works Act, 1997*

For a complete listing, please see the ESA and its regulations at [Ontario.ca/laws](https://www.ontario.ca/laws).

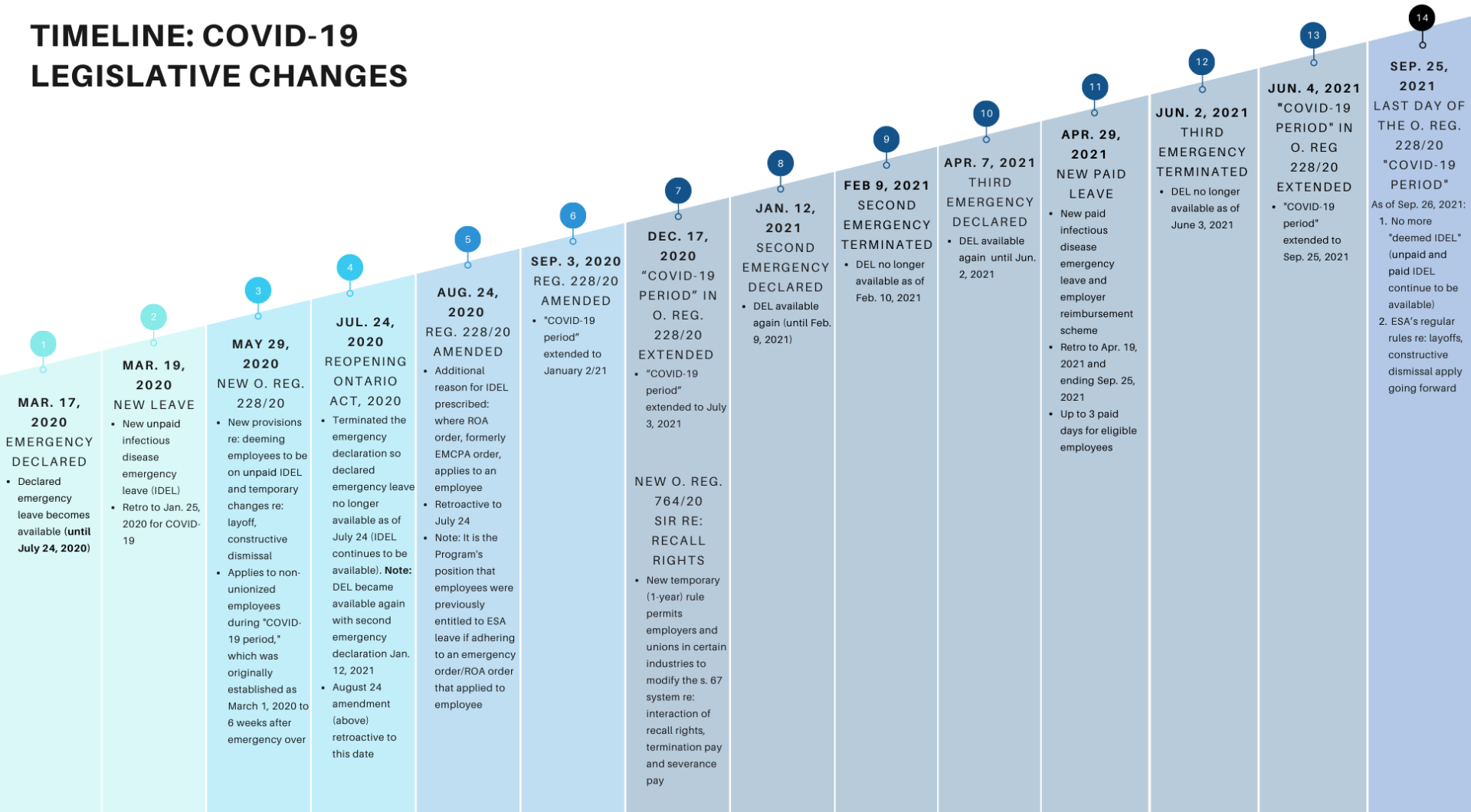


# Recent Changes to the ESA

Due to the COVID-19 pandemic, there have been a number of recent changes:

- Infectious Disease Emergency Leave (unpaid and paid)
- How the termination, severance and constructive dismissal rules apply in certain circumstances
- A regulation that may affect the recall rights of unionized employees in some industries

# TIMELINE: COVID-19 LEGISLATIVE CHANGES





## Leaves of Absence

### Unpaid, job-protected infectious disease emergency leave

#### Who can take this leave?

Employees can take **unpaid** infectious disease emergency leave (IDEL) if they will not be performing the duties of their position because of any of the following reasons:

- The employee is under medical investigation, supervision or treatment related to COVID-19
- The employee is following a COVID-19 related order issued under section 22 or 35 of the [Health Promotion and Protection Act](#).
- The employee is in quarantine, isolation or is subject to a control measure in specific circumstances
- The employer is concerned the employee may expose other individuals in the workplace to COVID-19
- The employee is providing care or support to a specified family member because of a matter related to COVID-19 (e.g. school or day care closures)
- The employee is directly affected by certain COVID-19 travel restrictions.
- The employee is subject to an order that relates to COVID-19 under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* (ROA)

## Leaves of Absence

### Paid, job-protected infectious disease emergency leave

On April 29, 2021, the Ontario government announced the COVID-19 Worker Income Protection Benefit and amended the ESA to provide:

- up to three days of paid infectious disease emergency leave (IDEL) under the ESA for employees who take time off work because of certain reasons related to COVID-19, and
- an employer reimbursement program

Paid leave is available until September 25, 2021.

**For more information, or to apply for reimbursement visit:**

**[Ontario.ca/COVIDworkerbenefit](https://Ontario.ca/COVIDworkerbenefit).**

#### **IDEL Pay**

- Qualified employees are generally entitled to be paid what they would have earned had they worked and not taken the leave, up to a maximum of \$200 per day

#### **Employer Reimbursement**

- Eligible employers are entitled to be reimbursed the amount of IDEL pay that they paid to their employees, up to \$200 per employee per day taken
- Eligible employers must make their application for reimbursement to the Workplace Safety and Insurance Board (WSIB) within 120 days of the date the employer paid the employee
- This is a program of the Ministry of Labour, Training and Skills Development (not the WSIB) and is funded by the Ministry

## Leaves of Absence

### Paid, job-protected infectious disease emergency leave

#### Who is eligible for this leave?

Employees can take **paid** infectious disease emergency leave if they will not be performing the duties of their position because of any of the following reasons:

- The employee is under individual medical investigation, supervision or treatment related to COVID-19
- The employee is following a COVID-19 related order issued under section 22 or 35 of the [Health Promotion and Protection Act](#)
- The employee is in quarantine, isolation or is subject to a control measure in specific circumstances
- The employer is concerned the employee may expose other individuals in the workplace to COVID-19
- The employee is providing care or support to a specified family member because:
  - The specified family member is under individual medical investigation, supervision or treatment related to COVID-19
  - The specified family member is in quarantine, isolation or is subject to a control measure in specific circumstances

## Leaves of Absence

### Paid, job-protected Infectious Disease Emergency Leave (cont'd)

#### Paid leave under existing employment contract

- Employees who have rights to paid leave under their employment contract may not be eligible for, or may be entitled to fewer than three days of, paid infectious disease emergency leave
- In order for an employee's three-days of ESA paid leave to be reduced, all four of the following criteria must be met

#### On April 19, 2021:

1. The employee had the right to a paid leave under their employment contract for one or more of the same reasons that paid infectious disease emergency leave can now be taken under the ESA
2. The employee had not already used up those days of paid leave under their employment contract before April 19, 2021 and at least one of those days were still remaining
3. The employee's employment contract provided pay for the leave that is at least as much pay as the employee would be entitled to receive for paid infectious disease emergency leave under the ESA
4. The employee's employment contract did not contain conditions for taking the leave that are more restrictive than what is set out in the ESA for taking paid infectious disease emergency leave

Where all four of these criteria are met, the employee's three-day entitlement to paid infectious disease emergency leave under the ESA is reduced by the number of days available on April 19, 2021 under their employment contract that meet the four criteria.

## FAQ 1: Can an employee be fired if they refuse to come back to work due to a COVID-19 health concern?

### Scenario

- A workplace has reopened and the employer requests that the employee return to work
- The employee does not want to go back because they are worried they might come into contact with COVID-19
- **Note:** There may be other issues relating to the *OHSA (as discussed earlier)*

Learn more at [Ontario.ca/ESAGuide](https://www.ontario.ca/ESAGuide)

### What does the ESA say?

#### Employer

- Can require the employee to return to work, unless the employee has a right to a job-protected leave
- Has the ability to set an employee's work schedule

#### Employee

- There are a number of job-protected leaves under the ESA
- Does not qualify for unpaid or paid infectious disease emergency leave solely because they are concerned that they might get sick

## FAQ 2: Can an employee be fired if they refuse to go back to work due to a family obligation related to COVID-19?

### Scenario

- A workplace has reopened and the employer requests that the employee return to work
- Due to COVID-19, the employee has to take care of their child who has COVID-19

Learn more at [Ontario.ca/ESAGuide](https://Ontario.ca/ESAGuide)

### What does the ESA say?

#### Employer

- Can require the employee to return to work, unless the employee has a right to a job-protected leave
- Has the ability to set an employee's work schedule

#### Employee

- There are a number of job-protected leaves available including, unpaid and paid infectious disease emergency leave that apply to employees
- Providing care or support to certain family members for a reason related to COVID-19, including a child sick with COVID-19

## FAQ 3: Can an employee work from home?

### Scenario

- An employee would like to work from home

### What does the ESA say?

- Does not regulate the issue of allowing employees to work from alternate locations (i.e., work from home)
- An employer generally has the ability to set an employee's work location and schedule

Learn more at [Ontario.ca/ESAGuide](https://Ontario.ca/ESAGuide)

## FAQ 4: Is the employee's job protected if the employee chooses to keep the child home from school and takes time off work to care for the child?

### Scenario

- An employee is concerned their child may be exposed to COVID-19 at school
- The employee chooses to keep the child at home and would like take time off work to care for the child

Learn more at [Ontario.ca/ESAGuide](https://Ontario.ca/ESAGuide)

### What does the ESA say?

- Where an employee chooses not to send their child to school or daycare out of fear the child would be exposed to COVID-19, the employee meets one of the qualifying reasons for taking unpaid infectious disease emergency leave
- In this situation, the employee is providing care or support to a specified family member because of a matter related to COVID-19
- Note that paid infectious disease emergency leave is not available where the employee chooses to keep the child at home where doing so is not a result of information or directions issued by a specified authority or government body



## FAQ 5: An employee fails to give notice to the employer that they will be taking infectious disease emergency leave. What is next?

### Scenario

- A workplace has reopened
- An employee takes the infectious disease emergency leave
- The employee has not notified the employer

### What does the ESA say?

#### Employer

- An employee is required to tell the employer in advance before starting a leave (or, if this is not feasible, as soon as possible after starting the leave)
- The employee does not lose the right to take the leave if they fail to notify the employer

#### Employee

- Advise the employer (written or orally) that they will be taking the leave before starting the leave
- If advance notice cannot be provided, the employee must inform the employer as soon as possible
- Where an employee is entitled both to both unpaid and paid infectious disease emergency leave, it is the default that the days of paid infectious disease emergency leave will be taken first, unless the employee opts out from the payment by providing written notice to the employer (before the end of the pay period in which the leave occurs)

Learn more at [Ontario.ca/ESAGuide](https://Ontario.ca/ESAGuide)

## New Regulation - Termination, Severance and Constructive Dismissal Rules During COVID-19 Period (non-union employees only)

### Before March 1, 2020

#### Termination and Severance Pay

- Employee is laid off for a period longer than a temporary layoff (13/20 or 35/52 weeks+)
- The employer is considered to have terminated the employee and they would generally be entitled to termination pay and severance pay (if applicable)

#### Constructive Dismissal

- Employer makes a significant change to an employee's employment without the employee's consent
- The employee would have to resign in response to the change within a reasonable period of time in order for the employer's actions to be considered a termination/severance of employment under the ESA



### March 1, 2020 to September 25, 2021 (“COVID-19 period”)

- Regulation prevents ESA termination and severance pay obligations that would have arisen during the COVID-19 period where an employer temporarily reduces or temporarily eliminates non-unionized employees' hours of work or wages for COVID-19 reasons:
  - Employee is not considered to be laid off.
  - The layoff clock stops ticking towards becoming a termination or severance of employment
  - Employee is not considered to be constructively dismissed under the ESA due to the temporary reduction or temporary elimination in hours of work or wages
- Employee is deemed to be on unpaid IDEL when not performing the duties of their position because their employer temporarily reduced or temporarily eliminated their hours of work for reasons related to COVID-19

**FAQ 6:** An employer eliminated a non-unionized employee's hours during the COVID-19 period, saying it was temporary and due to COVID-19. The employer hired someone else to do the employee's job. Does the regulation apply to freeze the layoff clock and prevent the employee from getting termination pay?

## Scenario

- An employer eliminated an employee's hours
- The employer said the elimination was temporary, and due to COVID-19
- The employer says the regulation applies and the employee's layoff clock is frozen
- The employer hired a new employee to do the employee's work
- The employee thinks the employer is just delaying the employee's termination pay entitlements

## What does the ESA say?

- The regulation's rules that freeze the layoff clock apply only if the elimination (or reduction) in hours is related to COVID-19 and is temporary.
- If those rules do not apply, the ESA's regular rules re: temporary layoffs apply.
- For example, if the layoff exceeds the length of a temporary layoff the employee's employment is terminated and there may be termination (and/or severance) pay owing.

Learn more at  
[Ontario.ca/terminationofemployment](https://Ontario.ca/terminationofemployment)

## FAQ 7: Can an employer force an employee to work extra hours, due to staff shortages during COVID-19?

### Scenario

- Due to COVID-19, the employer is experiencing a staff shortage
- The employer would like the employee to work extra hours

### What does the ESA say?

- Hours of work rules under the ESA have not changed.
- An employer and an employee can agree in writing that the employee will work more than:
  - eight hours a day or their established regular workday (if longer than eight hours), or
  - 48 hours a week

Learn more at [Ontario.ca/overtime](https://www.ontario.ca/overtime)

## FAQ 8: Can an employee take time off work to get a COVID-19 vaccine?

### Scenario

- An employee wants to leave work to get vaccinated against COVID-19

Learn more at [Ontario.ca/leavesofabsence](https://www.ontario.ca/leavesofabsence)

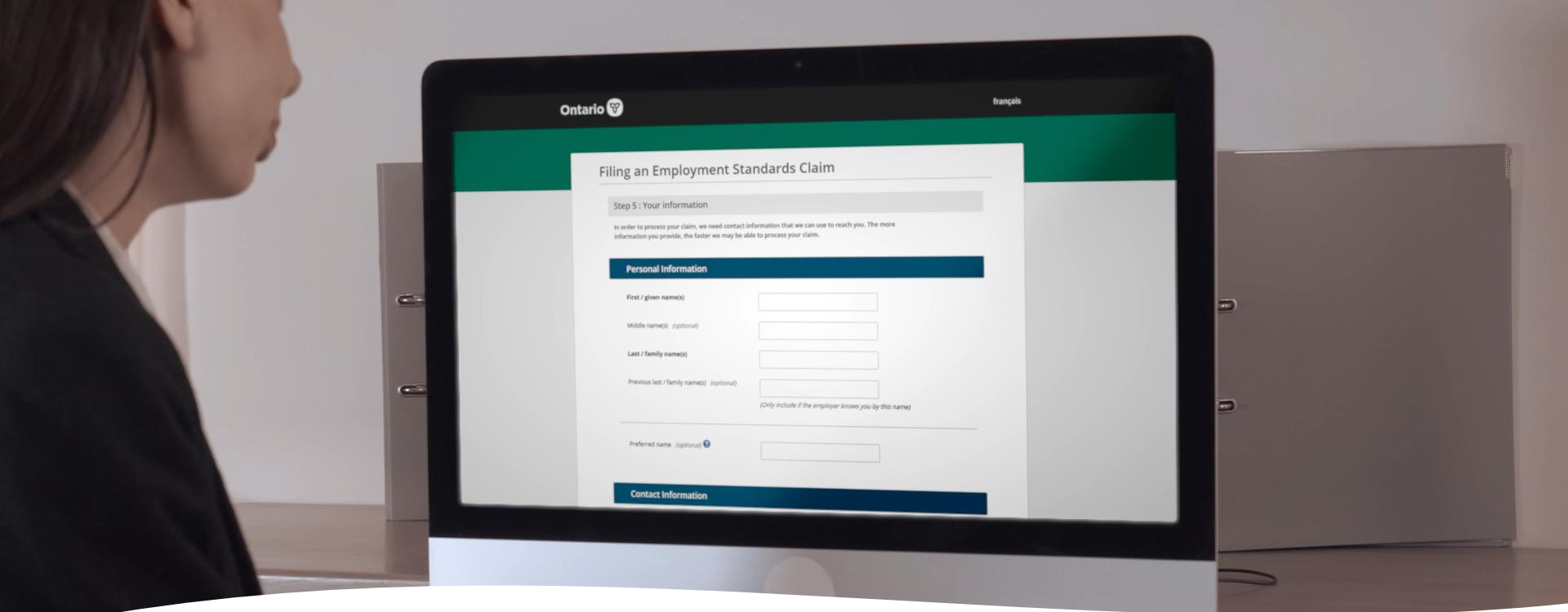
### What does the ESA say?

- Employees can take unpaid and paid IDEL if they are under treatment related to COVID-19. This includes when:
  - The employee is not performing work because they are getting a COVID-19 vaccination
  - The employee is not performing work due to having experienced a side-effect from a COVID-19 vaccination

## Reminder

During COVID-19, it is important to remember that regular employment rules under the ESA still apply, such as:

- **Hours of Work and Overtime Pay**  
There are daily and weekly limits on hours of work. [Ontario.ca/hoursofwork](https://www.ontario.ca/hoursofwork) and [Ontario.ca/overtime](https://www.ontario.ca/overtime)
- **Vacation Time and Pay**  
There are rules around the amount of vacation time and pay employees earn. [Ontario.ca/vacation](https://www.ontario.ca/vacation)
- **Leaves of Absence**  
There are a number of job-protected leaves of absence in Ontario. [Ontario.ca/ESAGuide](https://www.ontario.ca/ESAGuide)
- **Public Holidays**  
Most employees are entitled to take public holidays off work and be paid public holiday pay. [Ontario.ca/publicolidays](https://www.ontario.ca/publicolidays)
- **Minimum wage**  
Most employees are entitled to be paid at least the minimum wage. [Ontario.ca/minimumwage](https://www.ontario.ca/minimumwage)
- **Termination notice and pay**  
Generally, employers must give employees advance notice of termination or termination pay. [Ontario.ca/terminationofemployment](https://www.ontario.ca/terminationofemployment)



## Filing an Employment Standards Claim

If an employee believes their employer has not followed the ESA?  
File a claim or learn more at [Ontario.ca/ESAclaims](https://Ontario.ca/ESAclaims).

### Remember

- There are time limits to filing, generally within two years of the alleged contravention.
- Unionized employees should contact their union representative.
- An employee generally can't file a claim if they've already started a court action against their employer for the same matter.

# Resources

[Ontario.ca/coronavirus](https://ontario.ca/coronavirus) for more COVID-19 information and resources.

## Employment Standards

- **ES Information Centre**  
1-800-531-5551 (Toll-Free)  
1-866-567-8893 (TTY)
- [Ontario.ca/ESAguide](https://ontario.ca/ESAguide) for *Your guide to the ESA*
- [Ontario.ca/labournews](https://ontario.ca/labournews) to stay up to date on MLTSD news

## Federal

- [Canada.ca/coronavirus](https://canada.ca/coronavirus) for Canada's COVID-19 resources and financial and economic support programs

## Other

- [Ontario.ca/COVIDworkerbenefit](https://ontario.ca/COVIDworkerbenefit), for information on paid infectious disease emergency leave for COVID-19.
- [Ontario.ca/EmploymentOntario](https://ontario.ca/EmploymentOntario) for information on training, building skills, finding a new job or talent
- [publichealthontario.ca](https://publichealthontario.ca), for a summary of COVID-19 activity in Ontario and resources



# Questions?

Please do not mention any personal details or information in your questions, for example the name of your employer.