

**THINGS YOU SHOULD KNOW ABOUT THE
BC EMPLOYMENT STANDARDS ACT
OR
NAVIGATING THE SEAS OF THE ESB**

Presented to:

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SESSION OUTLINE

1. RECORDS REQUIREMENTS
2. PAYMENT OF WAGES
3. HOURS OF WORK AND OVERTIME
4. GENERAL EMPLOYMENT OF YOUNG PEOPLE
5. LEAVES OF ABSENCE
6. TERMINATION OF EMPLOYMENT
7. ESB COMPLAINT RESOLUTION PROCESS

Attachments:

- | | |
|------------|--|
| Appendix 1 | DETERMINING WHO IS A MANAGER |
| Appendix 2 | EMPLOYEE VS INDEPENDENT CONTRACTOR |
| Appendix 3 | HIGH TECHNOLOGY PROFESSIONALS/COMPANIES |
| Appendix 4 | PROHIBITIVE GROUNDS UNDER THE BC HUMAN RIGHTS CODE |

THINGS YOU SHOULD KNOW ABOUT THE BC EMPLOYMENTS STANDARDS ACT OR

NAVIGATING THE SEAS OF THE ESB



Why do I need to know all of this stuff anyway?

As the Captain of your ship, you are legally required to comply with the BC Employment Standards Act.

SOME GOOD NEWS: Commission salespeople who sell sailing or motor vessels are excluded from minimum wage, overtime and statutory holiday requirements

1. RECORDS REQUIREMENTS [Oh no, more paperwork!]

Once you have hired your wonderful employee, you are required to keep the following records at your principal place of business in BC:

- Name, date of birth, occupation, telephone number and residential address
- Start date of employment
- Employee's wage rate, and how paid [i.e. salary or hourly, etc.]
- Hours worked each day, regardless of how employee is paid
- Benefits paid to the employee
- Gross and net wages for each pay period
- Amount of and reason for each deduction taken
- Dates of statutory holidays taken by the employee and amount paid
- Dates of annual vacation taken, the amounts paid; and days/amounts owing
- Dates taken and amounts paid from employee's time bank; and balance remaining
- Averaging agreements, if applicable
- Special clothing records agreements if applicable
- Statutory Holiday Substitution records if applicable

Records must be kept for two years.

Special Clothing

Special Clothing is:

- Clothing that is specified by the employer
- Branded clothing

Special Clothing is not:

- Something that would normally be in an employee's closet
- A general requirement [i.e. white blouse and black skirt]

Cost of maintaining special clothing is responsibility of employer unless employer and employees have agreed in writing that employee will be reimbursed.

SANDBAR: *The minimum fine for a records violation is \$500.00*

Now we get to the part that employers really like-paying wages.

2. PAYMENT OF WAGES

Wages includes any form of payment [i.e. hourly, salary, commission, etc.] paid to someone who performs work for another. It also includes incentives that are built into the pay plan.

Example 1

HAVE FUN MARINE dealer pays a bonus to sales associates who sell at least 25 boats by the end of each quarter. This is considered a 'non-discretionary' bonus; therefore it is classified as wages because it is automatically built into the pay structure.

Example 2

The end of the busy season arrives and the President of HAVE FUN MARINE decides that a number of people have significantly exceeded their sales targets. She decides to give them a bonus of \$2,000.00 each. This is a 'non-discretionary' bonus; therefore, it is not classified as wages because it is not automatically built into the pay plan.

Minimum Wage

- General Minimum wage in BC is currently \$8.00 per hour
- Minimum wage for live-in home support workers for each day or part of a day worked is \$80.00.
- Minimum wage for resident caretakers in apartment buildings with more than 60 suites is \$1635.00 per month.

First Job Entry-Level Wage is currently \$6.00 per hour as follows:

- Applies to employees with no paid work experience before Nov. 15, 2001
- After working a total of 500 hours with one or more employers, entitled to minimum wage
- Only actual hours of paid work experience count.
- Entitled to receive first job entry level wage regardless of how paid
- Does not apply to other flat rates as set by ESB.

Wage Statements include the following information:

- Employer name and address
- Hours worked
- Wage rate regardless of method of payment
- Overtime rate and overtime hours worked if applicable
- If paid other than by hour or salary, how wages calculated
- Other monies [i.e. vacation pay]
- Gross and net wages
- Amounts withdrawn from time bank and balance if applicable
- Amount and purpose of each deduction

Wage statements are a separate document from the employee's pay cheque. They can be provided electronically if you provide:

- Confidential access to the electronic wage statement at the workplace, and
- A means of making a paper copy of the wage statement.

The rules about paydays:

- Must be paid at least twice a month
- Pay period may not exceed 16 days
- All money earned including overtime and stat holiday pay, must be paid within eight days after the end of the pay period
- Where there is an advance paid the sum of the advance must be equal to the minimum wage
- Must be paid in Canadian currency and may be paid by direct deposit if authorized in writing by employee.

Deductions, Deductions

- You can only deduct money required by statutory regulation such as Income Tax, Canada Pension and CPP.
- Other deductions require the employee's written permission.

SANDBAR: *If you allow your employees to purchase products or services via charge account and the employee resigns or otherwise leaves your business, you may not recover monies owing from the final paycheque without the written permission of the employee.*



3. HOURS OF WORK AND OVERTIME

Minimum daily pay

- If the employee reports for work, s/he is paid for at least two hours
- If the schedule is more than eight hours, the minimum daily pay is four hours
- If employee is unfit for work, s/he is paid for actual time worked
- If work is stopped for reasons beyond employer's control, employee is paid for two hours or actual time worked, whichever is greater

Example 1

Employees report for work at a boat rental dock. The sun is shining at 08:00 so everyone starts work. By 09:00 it is pouring rain. The employees would get paid for two hours of work.

Example 2

The staff at HAVE FUN rental dock agreed to an averaging agreement under which they would work ten-hour days. Again the sun is shining at 08:00 so everyone starts work. By 10:00 a.m. there is a hurricane and they must close down the dock. They would get paid for four hours because their regular work schedule is more than eight hours.

Example 3

The Service staff at an automotive dealership had agreed to work ten-hour days during peak season. A mechanic wanted to leave work early to attend to a personal matter. The supervisor denied the request. The mechanic became disruptive so the supervisor suspended him without pay for the rest of the day. The mechanic had worked for two and a half hours. The employment of the mechanic was terminated three weeks later.

The mechanic filed a complaint to the ESB for severance pay and the four hours minimum daily pay for the day that he was suspended. The mechanic was awarded severance pay due to the absence of 'just cause'. He was also awarded the balance of the four hours for the day that he was suspended.

Meal Breaks

- Employee must not work more than five hours in a row without a 30-minute break
- If employee is required to work during a meal break, they are paid for the break
- No requirement in BC to provide paid coffee breaks

General Rules

- Split shifts must be completed within 12 hours of when shift started
- Employees must have at least 32 hours in a row free from work each week
- No excessive hours allowed
- For purposes of calculating overtime, a week is Sunday through Saturday
- Time must be recorded



Overtime Rates

- Time and one half after eight hours in a day
- Double time for hours worked in excess of 12 hours in a day
- Time and one half after 40 hours worked in a week

***SANDBAR:** Daily overtime is paid at the above rates even if the employee has worked less than 40 hours in a week. Weekly overtime is paid after the employee has worked 40 hours in a week even if s/he worked less than eight hours in a day.*

Example 1:

Mary normally works eight hours a day five days a week. She takes Tuesday afternoon off to go boating and then works 11 hours on Wednesday. She would get paid for three hours of overtime.

Example 2:

Bill has worked 40 hours from Monday to Friday. He works five hours on Saturday. He would get paid for five hours of overtime.

***SANDBAR:** If your policy on approval of overtime is not clearly communicated to your employees, you could end up paying overtime in the event of a dispute.*

Example 3:

Sandy decides to stay late one evening to finish up some work. She works two hours beyond the eight hours. When she submits her time sheet, she claims for two hours of overtime. The supervisor says he did not authorize the overtime; therefore, he does not want to pay. Sandy complains to the local ESB office and they order the employer to pay the overtime because the employer 'allowed it to happen'.

Example 4:

Joe is a parts person. During busy season there are three people on the parts counter. Joe decides to eat lunch at the parts counter and he answers the phone. Working through lunch means that Joe worked eight and a half hours that day so he claims for a half hour of overtime. The supervisor says that she did not ask Joe to work through lunch so therefore she does not want to pay the overtime. Once again, the employer would lose in the event of a dispute.

Statutory Holidays

The statutory holidays in BC are:

New Year's Day
Canada Day
Thanksgiving Day

Good Friday
BC Day
Remembrance Day

Victoria Day
Labour Day
Christmas Day

*SANDBAR: Easter Sunday, Easter Monday and Boxing Day **are not** statutory holidays. Boxing Days is a statutory holiday for those organizations that are governed by federal legislation such as banks, communications and the transportation industry.*

Eligibility

- Employee must have been employed for 30 calendar days before the statutory holiday; and
- Have worked or earned wages on 15 of the 30 days immediately before the holiday.
- If employee works, s/he gets paid time and one half for the first 12 hours worked and double-time for any work over 12 hours; *plus* an average day's pay.

Substitutions

An employer and the majority of employees can agree to substitute another day off for a statutory holiday. The substitute day would still be treated as a Statutory Holiday. Written records are required.

Overtime Banks\$\$\$\$\$\$\$ [This is a dollar bank]

- Requires written request from the employee
- Must be banked at the same rate it would be paid in dollars
- Banked time must either be taken in time off or paid out in wages within six months of when the time was credited
- You may close the employee's time bank by providing one month's written notice.

SANDBAR: An employee may, at any time, request that the time bank be paid out in dollars.

Averaging Agreements

- Must be in writing
- Specify the number of weeks [one to four] over which hours will be averaged

- Specify work schedule for each day
- Specify number of times agreement may be repeated
- Specify start time and end date of agreement
- Be signed by employer and employee before the start date
- Hours must not average over 40 in a week

SANDBAR: *Rules for payment of overtime apply.*

Travel Time

Travel: time worked

Commute: not time worked

- Travel time does not have to be paid at the employee's regular wage rate; however, s/he must receive at least minimum wage.
- Employees are required to meet at a marshalling point where the employer transports them to the worksite. The travel to the marshalling point is considered a 'commute'; the travel from the marshalling point to the worksite is considered 'time worked'
- If you ask your employee to pick up supplies on the way to work, that is considered 'time worked'.
- Taking a company vehicle home at the end of the day and driving it back to work in the morning is considered a 'commute'.

Example 1

ABC Marine Dealer has a rental dock at the opposite end of town from the retail store. Sam Selling lives near the rental dock. ABC Marine asks Sam to drop off some supplies at the rental dock on his way home. This would be considered 'travel'. If Same Selling decides on his own to stop at the rental dock to see the people there, then this is a 'commute'.

Example 2

A Penticton construction crew was hired to do a job in Oliver. The employer of the crew asked them to meet at Cherry Lane Mall. They were then driven in the employer's truck to Oliver. They had to be at the job site and ready to start work at 09:00.

The employment of one of the crew members was terminated and he filed a complaint with the ESB alleging that he was owed overtime for the travel from Penticton to Oliver.

ESB Decision

The ESB did not award overtime; however, they did issue a Determination ordering the employer to pay travel time. In this case the drive from the residence to the mall was a 'commute'. The mall would be considered a marshalling point in this case. The ESB ruled that the travel from Penticton to Oliver was 'travel time'.

4. GENERAL EMPLOYMENT OF YOUNG PEOPLE

Employment of young people between the ages of 12 and 15

- If under the age of 15, the employer must have the written consent of the parent or guardian
- If age 12 or under the employer must get the written permission of Director of Employment Standards
- Must not be employed at the same time they are scheduled to attend school
- May work up to four hours on a school day and up to 20 hours in a week with five school days
- Must not work more than seven hours on a non-school day unless the Director of ESB grants approval
- May work up to 35 hours in any week containing less than five school days
- Must be under the direct supervision of a person aged 19 years or older at all times

5. LEAVES OF ABSENCE



Annual Vacation

Entitlement:

Completion of one year and up to five years of employment	two weeks of annual vacation [4% of gross wages]
Five or more years of employment	three weeks of vacation [6% of gross wages]

- People who have been employed for five calendar days or less are not entitled vacation pay
- Vacation is granted within one year of when the employee becomes eligible
- Payable at least seven days before start of annual vacation, or on regular pay days if agreed to in writing between the employer and the employee
- Sale, lease or transfer of business does not typically interrupt consecutive employment
- Time employee is on an approved leave does not interrupt consecutive employment.

Scheduling

- Must schedule employee's vacation in periods of one or more weeks although employee may request shorter periods
- Employer has the right to decide when vacations will be scheduled
- If a statutory holiday occurs during vacation, the employee is entitled to be paid for that day

SANDBAR: *As an incentive to attract and retain staff, many employers grant more than the minimum vacation time. In the event of a disagreement, the Director of Employment Standards will enforce the actual vacation entitlement.*

Unpaid Leaves

Pregnancy Leave:

- Pregnant employee is entitled to up to 17 consecutive weeks of unpaid pregnancy leave.
- May start no earlier than 11 weeks before the expected birth date
- Must end no earlier than six weeks after birth date unless employee requests a shorter period.
- If leave is not requested until after the birth of a child or after termination of the pregnancy, the employee is entitled to up to six consecutive weeks of leave beginning on the date of birth or termination date.
- Initial period of leave may be extended up to six consecutive weeks if an employee is unable to return to work relating to birth or termination of a pregnancy.
- Request to return from leave earlier than six weeks after the birth must be made in writing at least one week before the proposed return date.
- You may require the employee to provide a doctor's certificate in support of a request for leave or leave extension.

Parental Leave for Birth and Adopting Parents:

- Birth mother who takes pregnancy leave is entitled to 35 consecutive weeks of unpaid parental leave. She must begin her parental leave immediately after pregnancy leave ends, unless she and employer agree otherwise.
- Birth mother who does not take pregnancy leave, a birth father, or an adopting parent is entitled to up to 37 consecutive weeks of unpaid parental leave. The leave can begin anytime within 52 weeks of the birth or placement of the child.
- Initial period of parental leave may be extended up to five consecutive weeks if the child requires an additional period of parental care.
- Employer may require employee to provide doctor's certificate or other evidence that the employee is entitled to the leave or leave extension.

SANDBAR: *The Act says that a request for pregnancy or parental leave must be made in writing at least four weeks before the proposed start date. However, the courts and the Employment Standards Tribunal have said that failure to give written notice does not affect the employee's entitlement to the leave. People are encouraged to tell their employers the date they will be going on leave well in advance and to put it in writing to avoid misunderstandings.*

Family Responsibility Leave:

"Immediate family" means the spouse, child, parent, guardian, sibling, grandchild or grandparent of an employee; and any person who lives with the employee as a member of the employee's family.

'Employment Year' means a year beginning on the date the employee started work.

- Entitlement is up to five days of unpaid leave in each employment year related to care, health or education of employee's immediate family.

Compassionate Care leave:

- May take up to eight weeks of unpaid leave within a 26 week period to care for or support a gravely ill family member.
- Must produce a medical certificate which states that the family member is gravely ill with a significant risk of death within 26 weeks.

'Family Member means someone who is:

a. In relation to the employee:

- Member of immediate family
- Step-sibling, aunt or uncle, niece or nephew
- Current or former foster parent, foster child, ward or guardian; or
- The spouse of an employee's sibling or step-sibling, child or step-child, grandparent, grandchild, aunt or uncle, niece or nephew, current or former foster child or guardian

b. In relation to employee's spouse:

- Parent or step-parent, sibling or step-sibling, child, grandparent, grandchild, aunt or uncle, niece or nephew, current or former foster parent, or current or former ward; and
- Anyone who is considered to be like a close relative regardless of whether or not they are related by blood, adoption, marriage or common law partnership.

Bereavement Leave:

- Entitled to up to three days of unpaid leave on the death of a member of the immediately family.
- Days do not have to be consecutive or start on the date of the death.
- Employer may request a copy of the death certificate.

Jury Duty:

- Unpaid leave is granted for the duration of the Jury Duty.

Reservists' Leave:

- Entitled to unpaid leave if deployed to a Canadian Forces operation outside Canada, is engaged in pre- or post-deployment activities either inside or outside Canada, or is deployed inside Canada to assist in dealing with an emergency or its aftermath.
- Must provide four weeks' written notice of the dates of the leave, or as much notice as is practicable

- If deployment is extended, employee must give employer notice four weeks before the date the leave was to have ended or as soon as practicable
- If employee wishes to return to work earlier than originally specified, must provide employer at least one week's notice

Continuous Employment re Unpaid Leaves

- Employment is considered continuous for the purposes of annual vacation and termination entitlements as well as benefits plans.
- With exception of Reservists Leave, employer must continue to make payments to any such plans unless employee chooses not to continue with his or her share of the cost of a plan
- Employee is entitled to all increases in wages and benefits that the employee would have received if not on leave.

Conditions of Employment

Conditions of employment must remain the same while employee is on leave or jury duty. On return to work, employee is to be placed in former or comparable position.



6. TERMINATION OF EMPLOYMENT

As Captain of your Ship, you have a right to terminate an employee. If you terminate for 'just cause' the burden of proof is on you to prove that just cause for termination exists. There are certain requirements around providing notice and/or compensation for time worked.

Compensation for Time Worked

Employees who are terminated may be eligible for compensation as follows:

- After three consecutive months of employment – one week's pay or one week's notice
- After 12 consecutive months of employment - two weeks' pay or two weeks' notice
- After three consecutive years - three weeks' pay or three weeks' notice plus one week's pay or notice for each additional year of employment to a maximum of eight weeks.

You may provide a combination of written notice and compensation.

A week is calculated by totalling all wages, excluding overtime, earned in the last eight weeks of employment and dividing the total by eight.

No Notice or Compensation required if:

- Employee quits or retires;

- Employee is dismissed for 'just cause';
- Employee works on an on-call basis doing temporary assignments, which s/he can accept or reject;
- Employee is employed for a definite term;
- Hired for specific work to be completed in 12 months or less;
- Impossible to perform work because of some unforeseeable event or circumstance [other than bankruptcy, receivership or insolvency];
- If principal business is construction and employs the employee at one or more construction sites
- Employee refuses reasonable alternative employment
- Employee is a teacher employed by a board of school trustees

SANDBAR: If a definite term or specific work is extended for at least three months past its scheduled completion, the definite term and specific work exceptions described above do not apply.

If an employee quits, do we need to ask for a letter of resignation?

- There is no law in BC that requires people to provide notice in writing; however, it is a good idea to request it in writing. There have been many situations where employees quit and then file a complaint with the ESB claiming that they were dismissed.

When terminating an employee, is verbal notice adequate?

If you want to reduce your chances of having to pay compensation, the notice to the employee has to be in writing.

Example:

An employee was provided with two weeks verbal notice of termination. The employer was a small business who operated on a very informal basis. The employee filed a complaint with ESB alleging that he was entitled to severance pay. The employee told the Officer that he was provided with two weeks verbal notice so the Officer dismissed the complaint as the officer was satisfied that the employer was compliant. The employee appealed to the Employment Standards Tribunal. The EST decision was in favour of the employee as they said there was no evidence in writing that the employer had provided adequate notice.

Temporary Layoff

'*week of layoff*' is a week in which an employee earns less than 50 percent of his or her weekly wages at the regular rate.

No notice or compensation required if an employee is placed on temporary layoff.

Temporary layoff becomes a termination when:

- The layoff exceeds 13 weeks in any period of 20 consecutive weeks, or
- A recall period for an employee covered by a collective agreement has been exceeded.

When a temporary layoff becomes a termination, the beginning of the layoff is the termination date and the entitlement to compensation is based on that date.

A layoff other than a temporary layoff is considered a termination.

SANDBAR: *Some employees will ask for a 'layoff' even when they resign in order to collect Employment Insurance. The Fines for contravening the Employment Insurance Act can be a combination of a monetary fine as well as jail time.*

Some examples of 'just Cause':

Here are some examples of what may constitute just cause:

- Theft
- Fraud and dishonesty
- Assault or harassment of co-workers
- Serious wilful misconduct
- Conflict of interest, especially if it involves provable loss to the employer
- Serious undermining of the corporate culture
- Chronic absenteeism or tardiness
- Unsatisfactory performance

The seriousness of the infraction may determine whether notice and/or compensation are appropriate.

SANDBAR: There is a difference between '*having cause*' and '*establishing cause*'.

Positive ongoing communication with your employees could prevent 'headaches' in the event of a dispute. For instance, if you terminate employment because of unsatisfactory performance, the following points would be considered.

- Was a reasonable standard of performance established and communicated to the employee?
- Was the employee clearly warned that his or her performance was below the established standard and that continued failure to meet the standard would result in dismissal?
- Was the employee given a reasonable amount of time to meet the required standards of performance? And
- Did the employee still fail to meet the standards?

Progressive Discipline [a.k.a.] Corrective Behaviour

In the event of a dispute, an investigator would look for evidence that the Corrective Behaviour process was used to work with the employee and improve performance/behaviour. The steps include:

- a. Verbal discussion [usually two or three discussions depending upon the nature of the infraction]
- b. Written Warnings [usually three written warnings are issued prior to termination]
- c. Suspension [This may be with or without pay depending upon circumstances]

- d. Contract for Performance
- e. Termination

Where termination is related to the inability of the employee to meet the requirements of the job, and not to any misconduct the employer must be able to show that reasonable efforts were made [i.e. additional training or supervision] to assist the employee in meeting the expectation.

NOTE: *Foreign Workers are covered by the same rules as all other employees.*

7. ESB COMPLAINT RESOLUTION PROCESS

Branch may deem employment terminated

If an employer substantially alters a condition of employment, the Branch may determine that a person's employment has been terminated. In this case, the termination provisions of the ESA apply.

SANDBAR: *Some employees who are terminated sue for wrongful dismissal through the courts [common law system] that is different than a complaint made to the ESB under the Act. A person cannot pursue both remedies. A court may, depending upon the circumstances, award more than the minimum requirements of the ESA.*

In the unlikely event that a complaint is filed with ESB

- Employees filing complaints are initially required to use the Self-Help Kit provided by ESB
- If employer agrees, money is paid directly to employee and issue is resolved
- If employer disagrees, then a formal complaint may be filed with ESB

Employee is not required to use self-help kit under the following circumstances:

- Employer's business is closed
- Matter involves a person under the age of 19
- Complaint is related to leave provisions of the Act
- Employee is a farm worker, garment or textile worker, or domestic
- Employee has significant language or comprehensive difficulties
- The only issue is that the employer has withheld the employee's last pay cheque
- Employee has already sent a letter to employer attempting to resolve issue

If the complaint proceeds to the formal process and you are contacted by your friendly Industrial Relations Officer:

- The ESB will request information pertaining to the complaint
- ESB will review the complaint and evidence
- If necessary, a mediation session will be held where both the employer and the employee may have representatives present
- If agreement is reached a Settlement Agreement will be signed by both the employee and employee

THANK YOU FOR YOUR ATTENTION AND PARTICIPATION

I HOPE THAT YOU ARE ENLIGHTENED!



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DETERMINING WHO IS A MANAGER

Definition of a 'Manager' for purposes of the ESA

The ESA Regulation defines a 'manager' as:

- A person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources; or
- A person employed in an executive capacity

Some determining factors:

- How much can the individual, on their own or otherwise, materially and substantially affect the employment conditions of those for whose work they are held responsible by the organization?
- What kind of responsibilities does the employee have with regard to company resources, even if there are certain checks on their authority?

Typical Management Responsibilities

- Ensuring compliance with company policies
- Authorizing overtime, time off or leaves of absence
- Calling employees in to work
- Altering work processes
- Establishing or altering work schedules
- Training employees
- Committing or authorizing the use of company resources

Executive Capacity

Working in an executive capacity involves key critical decision making and may include:

- How many employees are to be employed?
- Determining purchase and production of product
- Suppliers and/or service providers
- Selling price of products
- Decides location of business [i.e. Shopping mall]

What is not considered?

- Title given to a position or the fact that other employees refer to that person as a 'manager'
- Method of payment of wages [i.e. salary, hourly]
- Responsibility to open and close the business for that day

Under the ESA, managers are exempt from overtime and statutory holiday pay.

Example 1

A person is employed in the capacity of Service Coordinator. She coordinates daily activities, determines staff schedules and supervises s small group of people.

She would not be considered a manager as she has limited authority to make independent decisions.

Example 2

An individual is hired for a specific term to manage a huge downsizing project. During this time the individual is also in charge of the company's human resources operation. She has full responsibility for project design and implementation. She also ensures compliance with company policies and oversees the Safety function. She has no employees reporting to her.

She would be considered a manager because she directs the activities of people, has full responsibility for company policies as well as for how the work is implemented.

Example 3

A retail store employed a person in the capacity of 'Store Manager'. The person ran the daily operations of the store and supervised two people. He was also responsible for cleaning the facility and performing general maintenance duties. He worked an average of 50 hours per week. The Manager's employment was terminated; he filed at the ESB for severance as well as overtime and statutory holiday pay.

The Store Owner made all financial, merchandising and gave final approval on hiring decisions.

ESB Decision

The Employer felt that because the employee had the title of 'Manager' and supervised two people that the person was a 'Manager'.

The ESB determined that the person was not a manager and issued a Determination order the store to pay six months of overtime and statutory holiday pay.

EMPLOYEE OR INDEPENDENT CONTRACTOR

The Employment Standards Act applies to employees; it does not apply to Independent Contractors.

An Employee is defined as:

- a. A person, including a deceased person, receiving or entitled to wages for work performed for another;
- b. A person an employer allows, directly or indirectly, to perform work normally performed by an employee;
- c. A person being trained by an employer for the employer's business;
- d. A person on leave from an employer; and
- e. A person who has a right of recall.

An Independent Contractor is someone who maintains an arm's length distance from the business or organization. They do not have an employment relationship with the employer.

The tests for making these determinations are set by the courts, the Employment Standards Branch and the Employment Standards Tribunal. They include

1. Control:

- Is the person under the direction and control of another regarding the time, place and way in which the work is done?
- Is the person hired, given instruction, supervised, controlled or subject to discipline?
- Did the person apply for the position through responding to advertising?
- Is the person told how and when to do the work?
- Did the person have to do the work him or herself, or could that person give the work to another to do?
- Does the person perform work normally or previously performed by an employee?

The greater the degree of control, the greater the likelihood of the person being found to be an employee.

2. Ownership of tools

- Does the person use tools, space, supplies and equipment owned by someone else?
- If so, this would indicate an employment relationship.

SANDBAR: It is recognized that some employers require employees to provide their own tools or vehicles.

3. Chance of profit

- Does this person have a chance of profit?

4. Risk of loss

- Is the person at risk of losing money if the cost of doing a job is more than the price charged for it? If not, this would indicate an employment relationship

5. Payment

- Does the person receive payments or regular amounts at set intervals?
- Does the person receive payments regardless of customer satisfaction or customer payment?
- If the above applies, this would indicate an employment relationship.

Common Misunderstandings

There are some common misunderstandings around what establishes an Independent Contractor relationship. These include.

- Agreement: A person who signs an independent contractor agreement is not necessarily an independent contractor. It is not what you say you are, but the reality of the work relationship that determines if you are an employee or not. In addition, any agreement to waive employment standards entitlements is prohibited by the Act.
- Charges GST: GST filing numbers are provided upon request and the requester may or may not be in a lawful position to charge GST.
- No deduction for Income Tax, EI or CPP: It may be that the employer is simply breaking two laws by not complying with the Income Tax Act and the ESA.
- Works for several businesses: a person may be 'moonlighting'.
- Submits a bill for labour provided: It may be nothing more than a record of hours worked; in effect, a time card.
- Drives his or her own vehicle/provides own tools: It may be a condition of employment that a person provides a vehicle so as to perform the work.
- Method of payment: Payment by commission or other forms of pay incentive do not necessarily indicate a chance of profit or risk of loss; these are simply ways of tying pay to productivity.

Volunteers

Volunteers are persons who choose to provide services for non-profit organizations or charities for which they do not expect compensation. In profit-based organization, any person allowed, directly or indirectly, to perform work normally done by employees is considered to be an employee, not a volunteer.

Example 1

HAVE FUN DEALERSHIP charges office and equipment rental to a salesperson. The Sales person sells products on behalf of the business and submits a bill for commissions based on a rate mutually agreed to between him and the business owner. He has a part-time job unrelated to the business. The Sales person has signed an Independent Contractor Agreement. The contract is terminated and the Sales person files a complaint to ESB claiming an employer employee relationship. He claimed for severance, statutory holiday pay, overtime and vacation pay. He provided the ESB with records of hours worked.

ESB Decision:

The ESB determined that the sales person was an employee. Factors around the decisions include:

- He performed work normally done by an employee
- The work was integrated into the company's business
- The company determined his working hours, work location, etc.
- The business provided supplies, tools and equipment

Although the ESB does not normally award business expenses, in this case, issued a Determination ordering the company to reimburse the employee for the charges of office equipment and rental.

SANDBAR: The employer may not charge an employee for the costs normally associated with doing business.

TEMPORARY LAYOFF

Definition

'week of layoff' is a week in which an employee earns less than 50 percent of his or her weekly wages at the regular rate.

No notice or compensation required if an employee is placed on temporary layoff.

Temporary layoff becomes a termination when:

- The layoff exceeds 13 weeks in any period of 20 consecutive weeks, or
- A recall period for an employee covered by a collective agreement has been exceeded.

When a temporary layoff becomes a termination, the beginning of the layoff is the termination date and the entitlement to compensation is based on that date.

The twenty week period starts on the first day of the layoff. The layoff period is exceeded on the first day of the 14th week of layoff.

A layoff other than a temporary layoff is considered a termination.

You may not issue a notice of termination while an employee is on temporary layoff.

***SANDBAR:** Some employees will ask for a 'layoff' even when they resign in order to collect Employment Insurance. The Fines for contravening the Employment Insurance Act can be a combination of a monetary fine as well as jail time.*

Can an employee work during a period of Temporary Layoff?

Yes, Employment Insurance allows people to work up to 19 hours without being penalized on their claim. Of course, if they work full time, their claim will be interrupted.

Example 1

Merry mechanic is given notice of temporary layoff on October 30th. She is called back for two full weeks during December. She resumes the temporary layoff period starting on December 15th. Since she worked more than 50 percent of the time during the two weeks, she would not be considered on temporary layoff during that time. Therefore a new period of temporary layoff starts again on December 15th.

Example 2

Joe Sailboat is given notice of temporary layoff on September 30th. During his period of temporary layoff he gets a temporary job for 11 weeks. The employer hired someone to replace Joe on a temporary basis; however, Merry performed so well that the employer decided to hire her on a long term basis. The employer terminated Joe's employment. Joe filed a complaint with the ESB claiming that he was entitled to receive severance pay.

ESB Decision

The ESB ruled in favour of Joe Sailboat and found the employer to be non-compliant with the provision that notice of termination must not be given during temporary layoff. Joe had been with the company for five years so the ESB issued a Determination ordering the employer to pay five weeks of severance pay.

The company appealed to the Employment Standards Tribunal; however, the EST upheld the decision of the ESB.

Example 3

GOOD COMPANY Yacht Dealer decided to renovate his store. The renovations were going to take 16 weeks during which time it would be unsafe for employees to be working on site. He requested a variance of the time period for the temporary layoff. He confirmed that he intended to call back all of his employees. The employees were concerned that because the time period was 16 weeks, they would be considered as being terminated for purposes of the ESA.

In this case the employees and the Business Owner were advised to make a joint application to the ESB.

ESB Decision

The Director of Employment Standards approved the deal.

Factors considered when approving a Variance include:

- Consistency with the purposes and intent of the ESA and Regulations
- Whether, on balance,
- EMPLOYEES benefit from the variance
- Decision will normally be communicated to the applicants within two weeks and a Determination will be issued
- Copy of variance must be displayed in workplace.

PROHIBITIVE GROUNDS UNDER THE BC HUMAN RIGHTS CODE

- RACE
- MENTAL OR PHYSICAL CHALLENGES
- GENDER
- SEXUAL ORIENTATION
- COLOUR
- ANCESTRY
- POLITICAL BELIEFS
- RELIGION
- MARITAL STATUS
- FAMILY STATUS
- PLACE OF ORIGIN
- LAWFUL SOURCE OF INCOME [TENANCY ONLY]
- CRIMINAL CONVICTION

SPECIAL RULES FOR HIGH TECHNOLOGY PROFESSIONALS AND HIGH TECHNOLOGY COMPANIES

What is a High Technology company for purposes of the ESA?

- A company in which more than 50 percent of the employees are either 'high technology professionals' or managers of those professionals, or are employed in an executive capacity

What is a High Technology professional for purposes of ESA?

- Analyzes designs or develops information systems based on computer or other technologies;
- Analyzes designs or develops scientific or technological products, materials, devices or processes;
- Carries out scientific research and experimental development; or
- Is engaged as a sales or marketing professional in relation to the above services, systems products or research.

An employee who is engaged in the retail sale of any of the above is not a 'high technology professional'.

High technology professionals are exempt from the following provisions:

- Meal breaks
- Split shifts
- Minimum daily pay
- Hours free from work each week
- Overtime
- Statutory holidays

Differences in Averaging Agreement provisions for the technology sector:

- Can agree that the work schedule does not have to be specified for each day covered by the agreement. The agreement must be in writing.
- A written request is not required to adjust the work schedule under an averaging agreement.
- The work schedule can average more than 40 hours per week; and
- Daily overtime is only payable after 12 hours worked.