Employer’s Guide:
Applying for Approval of Excess Weekly Hours of Work and Averaging Hours of Work
These publications are provided for your information and convenience only. They are not legal documents. Ontario's laws, including the Employment Standards Act, 2000 and its regulations, are available for everyone to read at www.e-laws.gov.on.ca. The authoritative text is set out in the official volumes and in office consolidations printed and available for purchase by Publications Ontario.
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The Employment Standards Act – Hours of Work

The Employment Standards Act, 2000, known as the ESA, is a law that sets minimum standards for fair workplace practices in Ontario. On December 9, 2004, amendments to the ESA were passed by the legislature. The new rules about hours of work became effective on March 1, 2005.

**EXCESS DAILY HOURS OF WORK**

Most employees in Ontario cannot be required to work more than eight hours a day, or the number of hours in an established work day if it is more than eight (e.g. an employee’s regular schedule is 10 hours a day, four days a week).

An employer and an employee, or their union, can agree in writing that the employee will work more than this daily limit.

As of March 1, 2005, if the employer enters into a written agreement with a non-unionized employee to work excess daily hours, the employer must first provide the employee with the most recent information sheet, *Information for Employees About Hours of Work and Overtime Pay*, published by the Ministry of Labour. For more information on the information sheet and drafting written agreements for excess hours of work, see Part 4: Written Agreements on page 16.

Employers do not need to apply for approval from the Ministry of Labour for employees to work excess daily hours.

**EXCESS WEEKLY HOURS OF WORK**

Most employees in Ontario cannot be required to work more than 48 hours in a work week.

An employer and an employee, or their union, can agree in writing that the employee will work more than this weekly limit.

As of March 1, 2005, employers who want employees to work more than 48 hours in a work week must:

- Give non-unionized employees the information sheet, *Information for Employees About Hours of Work and Overtime Pay*, published by the Ministry of Labour, before entering into a written agreement (see Part 4: Written Agreements),

- Obtain written agreement to work in excess of 48 hours up to a specified maximum number of hours in a work week from the employee, or from the union if the workplace is unionized (see Part 4: Written Agreements), and

- Apply for approval from the Ministry of Labour’s Director of Employment Standards. If the Director has not made a decision on an application within 30 days, a limited number of excess weekly hours may be worked, provided certain conditions are met (see Part 3: After Submitting the Application on page 14).
AVERRAGING HOURS OF WORK FOR OVERTIME PAY PURPOSES

For most employees, overtime begins after they have worked 44 hours in a work week. After that time, employees must receive overtime pay, which is at least 1½ times the employee’s regular rate of pay.

An employer and an employee can agree in writing to average the employee’s hours of work over a specified period of two or more weeks for the purpose of calculating overtime pay. This means an employee would only qualify for overtime pay if the average hours worked per week during the specified period exceed 44 hours.

As of March 1, 2005, employers who want to average an employee’s hours of work for the purpose of determining overtime pay must:

- Obtain written agreement from the employee, or from the union if the workplace is unionized (see Part 4: Written Agreements), and
- Apply for approval from the Ministry of Labour’s Director of Employment Standards. If the Director has not made a decision on an application within 30 days, overtime averaging over a period of two weeks may begin, provided certain conditions are met (see Part 3: After Submitting the Application).

Generally, agreements to average hours of work for the purpose of determining overtime pay that were entered into before March 1, 2005, and that have not expired or been revoked, are treated the same as agreements made on or after that date.

However, an employer who has an existing agreement with an employee must still apply for approval from the Director of Employment Standards before averaging the employee’s hours of work. This applies even if the Director has previously approved the agreement pursuant to s.30 of Reg. 285/01. Any approval granted by the Director under those circumstances ceased to have effect on March 1, 2005.
Application Process

Employers must apply for an approval from the Ministry of Labour’s Director of Employment Standards before their employees can work more than 48 hours in a work week or average their hours of work for the purpose of determining overtime pay.

This guide is intended to help you, the employer, with the application process.

Before you begin, you will need the: **Hours of Work and Averaging Hours Application Form**. Whether you are applying for approval of excess weekly hours of work, averaging hours of work, or both, you will only need this one application form. You can apply online for faster service at [www.labour.gov.on.ca/english/es/hours/](http://www.labour.gov.on.ca/english/es/hours/). The form is also available at ServiceOntario Government Information Centres.

The following checklists will help you complete the application process. If you are applying for both an approval for excess weekly hours, and an approval to average hours at the same time, complete all applicable sections of the application form. Submit the form only once and complete the remaining tasks on both checklists.

<table>
<thead>
<tr>
<th>Excess Weekly Hours of Work Checklist</th>
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<tbody>
<tr>
<td>Before employees can work more than 48 hours in a work week, an employer must:</td>
</tr>
<tr>
<td>□ Provide non-unionized employees with the most recent Information for Employees About Hours of Work and Overtime Pay document.</td>
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<td>See Page 16 for details.</td>
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<tr>
<td>□ Obtain written agreement from the employees or union.</td>
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<tr>
<td>See Page 16 for details on written agreements.</td>
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<tr>
<td>□ Apply on-line for faster service at: <a href="http://www.labour.gov.on.ca/english/es/hours/">www.labour.gov.on.ca/english/es/hours/</a> or</td>
</tr>
<tr>
<td>o Complete the Hours of Work and Averaging Hours Application Form and</td>
</tr>
<tr>
<td>See Page 5 for help with the application.</td>
</tr>
<tr>
<td>o Serve the application on the Director of Employment Standards by fax, verifiable mail or in person.</td>
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<tr>
<td>See Page 13 for details on submitting the form.</td>
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<tr>
<td>□ Post a copy of the completed form in the workplace.</td>
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<tr>
<td>See Page 14 for details about the posting requirement.</td>
</tr>
<tr>
<td>□ Receive approval from the Director, or, if no refusal has been issued, meet certain conditions and wait 30 calendar days.</td>
</tr>
<tr>
<td>See Page 14 for more information.</td>
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</tbody>
</table>
Averaging Hours of Work Checklist

Before an employer can average an employee’s hours of work for overtime pay purposes, the employer must:

- Obtain written agreement from the employees or union.
  See Page 18 for details on written agreements.

- Apply on-line for faster service at: www.labour.gov.on.ca/english/es/hours/, or
  - Complete the application form: Hours of Work and Averaging Hours.
    See Page 5 for help with the application and
  - Serve the application on the Director of Employment Standards by fax, by verifiable mail or in person.
    See Page 13 for details on submitting the form.

- Receive approval from the Director, or, if no refusal has been issued, meet certain conditions and wait 30 calendar days.
  See Page 15 for more information.
Part 1: Completing the Application Form

This section will guide you through the process of filling out a paper copy of the application form. If you are completing the online application (e-form), the electronic help system will guide you through the process.

You need the Hours of Work and Averaging Hours Application Form, which is available on-line at www/labour.gov.on.ca/english/es/hours/ and at ServiceOntario Government Information Centres.

If you are applying for approval of excess weekly hours of work, complete sections: 1, 2, 3 if applicable, 4, 5, 7 if applicable, 8, 10 and 11, of the application form.

If you are applying for approval to average hours of work, complete sections: 1, 2, 3 if applicable, 4, 6, 7 if applicable, and 9-11 of the application form.

The information you provide in the application form must be, to the best of your knowledge, complete and accurate. It is an offence, under the ESA, to provide false or misleading information.

1. EMPLOYER INFORMATION

   Employer Business Name/Trade Name
   Provide the full name of the business. If the employer is carrying on business under a name registered under the Business Names Act, enter the registered name here.

   Legal Name
   Provide the employer’s legal name.

   If the employer is a sole proprietorship, enter the first and last name of the sole proprietorship.

   If the employer is a partnership carrying on business under the names of the partners, enter the names of all partners by first and last name.

   If the employer is a corporation, enter the corporate name.

   Business Type
   Indicate the type of business: sole proprietorship, partnership, limited partnership, limited liability partnership or corporation.

   Business Registration Number
   Enter the nine-digit Business Registration Number, or if the employer does not have a Business Registration Number, leave the box blank.
Corporation Number
Enter the six-digit assigned Corporation Number, or if the employer is not a corporation, leave the box blank.

Corporation Jurisdiction
Indicate the jurisdiction in which the business is incorporated. If the employer is not a corporation, leave this box blank.

Renewals
Put an X in the box if you were issued an approval for excess weekly hours and/or to average hours of work effective March 1, 2005 or later and are seeking a renewal of the approval.

2. EMPLOYER CONTACT INFORMATION
Select a primary contact person and provide the following information about the contact person:
- First and last name, as well as the person’s title or position.
- Area code, telephone number and, if applicable, the extension number.
- Fax number.
- E-mail address, if applicable.

Preferred Method of Receiving Correspondence
Choose mail, fax or e-mail. Select only one method. Select e-mail for faster service. If fax or e-mail is chosen, but the information provided above is not valid, the Ministry will correspond by mail.

Preferred Language of Communication
Select English or French.

Employer Main Business Address
Enter the employer’s main business address. This address will be used on all correspondence the Ministry will provide you with in regards to this application.

3. ADDITIONAL LOCATIONS WHERE WORK WILL BE PERFORMED
Only complete this section if employees to whom the application applies will be working at locations other than, or in addition to, the main business address.

The location is the workplace where the employee(s) to whom the application applies work(s). This is typically a workplace of the employer’s, but where the employee works at some location away from the employer’s workplace (e.g. the employer of the employee(s) is a temporary help agency), the employer would indicate that location.

If your application applies to more than one location, attach additional pages and complete section 3 only to list each individual work location.
4. **APPLICATION TYPE**

If you are applying for an approval for employees to work more than 48 hours a week, choose Excess Weekly Hours of Work.

If you are applying for an approval to average an employee’s hours of work for the purposes of determining overtime pay, choose Averaging Hours of Work for Overtime Pay Purposes.

You may use the same application form to apply for both types of approvals.

5. **EMPLOYEE INFORMATION FOR EXCESS WEEKLY HOURS APPLICATION**

If the application covers more than one occupational group, list all groups and provide all the requested information for each individual group. Attach additional pages if necessary.

**Occupation**

Certain employees are covered by the ESA but are not covered by Part 7 Hours of Work and Eating Periods of the ESA, or they are covered, but subject to special rules. To determine whether employees in an occupation are covered by Part 7 Hours of Work provisions please consult the Fact Sheet “How are You Covered by the ESA?” available on-line at www.labour.gov.on.ca/english/es/factsheets/fs_covered.html.

Provide the name of the occupation of the employee(s) covered by this application (e.g. mechanics). The occupation name should be specific enough that employees and the ministry are able to determine who is covered by the application. General names such as “hourly employees” or “salaried employees” are too vague and do not provide enough description.

However, the employer does not need to use excessive detail. For example, if a company has a number of telephone operators that are divided into sub-groups (e.g. telephone operator – customer service, telephone operator – repair department, telephone operator – overdue accounts, etc.), and is applying for approval for all sub-groups, the employer can indicate the occupation as “telephone operators” instead of listing each sub-group individually.

An approval issued for employees in a certain occupation will also cover employees who are hired into that occupation after the approval was issued, provided that the employer also obtains the written agreement of the new employees to work excess weekly hours and provides the new employees with a copy of the Information Sheet.

**Number of Excess Weekly Hours**

Provide the maximum number of hours in a work week the employer wants the employee(s) in the occupation to work (e.g. 50).

When calculating the requested hours of work, do not include time associated with the employee’s eating period entitlement. For example, an employee works a 12-hour shift, four days a week, and that shift includes two 30-minute eating periods. In this case, the employee actually works 11 hours a day, four days a week, for a total of 44 hours in a work week.

**Number of Employees**

Provide the approximate number of employees covered by the application for that occupation.
Requested Duration
Select the length of time the employer wants the approval to cover. (i.e. less than one year, one year, two years, or three years).

Note: An approval for excess hours of work, from 48 to a maximum of 60 hours in a work week, will have a duration of no more than three years from the day the approval is issued. An approval for hours of work over 60 in a work week, will have a duration of no more than one year from the day the approval is issued.

If the employer selects a duration of less than one year the employer must complete the following:

Start Date
Provide the date that the employer wants the approval to start (i.e. the date for employee(s) to begin working excess weekly hours). The Director will not issue an approval with a retroactive start date.

End Date
Provide the date that the employer wants the approval to end (i.e. the date for employee(s) to stop working excess weekly hours).

Written Agreement(s)
Indicate, by checking Yes or No, whether or not the employer has obtained or will obtain the written agreements for employees to work the requested number of excess weekly hours. If granted, an approval will only apply to employees who:
- Received the Information Sheet from their employer, as required by the ESA,
- Agreed in writing to work the excess weekly hours, and
- Are members of the specified occupation.

If employees in the occupation are unionized, an approval will only apply to employees if a written agreement is in place with the union representing the employees and the employees are members of the specified occupation.

Unionized
Indicate, by checking Yes or No, whether the employees in the occupation are unionized. If Yes, provide the Union Name and Local.
After completing sections 5 and 7, if applicable, for the Excess Weekly Hours of Work application, proceed to Section 8. Reasons for Excess Weekly Hours of Work Application.

6. EMPLOYEE INFORMATION FOR AVERAGING APPLICATION

This section must only be completed for averaging hours of work applications.

If the application covers more than one occupation, list all occupations and provide the requested information for each. Attach additional pages if necessary.

**Occupation**
Provide the name of the occupation of the employee(s) covered by this application (e.g. mechanics). The occupation name should be specific enough that employees and the ministry are able to determine who is covered by the application. General names such as “hourly employees” or “salaried employees” are too vague and do not provide enough description.

However, the employer does not need to use excessive detail. For example, if a company has a number of telephone operators that are divided into sub-groups (e.g. telephone operator – customer service, telephone operator – repair department, telephone operator – overdue accounts, etc.), and is applying for approval for all sub-groups, the employer can indicate the occupation as “telephone operators” instead of listing each sub-group individually.

An approval issued for employees in a certain occupation will also cover employees who are hired into that occupation after the approval was issued, provided that the employer also obtains the written agreement of the new employees, or if represented by a union, the union representative, to average hours of work.

**Number of Weeks to Average Over**
Provide the maximum number of weeks over which the employer wants to average an employee’s hours of work for the purpose of determining overtime pay (e.g. 2). The averaging period must consist of separate, non-overlapping, contiguous periods of two or more consecutive weeks.

**Number of Employees**
Provide the approximate number of employees covered by the application.

**Requested Duration**
Select the length of time the employer wants the approval to cover. (i.e. less than one year, one year, two years, or three years).

**Note:** An approval to average hours of work expires on the date on which the averaging agreement between the employer and the employee expires, or on the earlier date that the Director specifies in the approval.
If the employer selects a duration of less than one year the employer must complete the following:

Start Date
Provide the date that the employer wants the approval to start (i.e. the date to begin averaging an employee’s hours of work). The Director will not issue an approval with a retroactive start date.

End Date
Provide the date that the employer wants the approval to end (i.e. the date to stop averaging an employee’s hours of work).

Written Agreement(s)
Indicate, by checking Yes or No, whether or not the employer has obtained or will obtain written agreement(s) to average hours of work. If granted, an approval will only apply to employees who:

- Agreed in writing to have their hours of work averaged, and
- Are members of the specified occupational group.

If employees in the occupation are unionized, an approval will only apply to employees if a written agreement is in place with the union representing the employees and the employees are members of the specified occupation.

**NOTE**
After completing sections 6, 7 if applicable, proceed to Section 9. Reasons for Averaging Application.
7. LIST UNION CONTACT DETAILS

If you provided Union Name and Local in Section 5 and/or 6 of the application, list the Union Name and Local with the full name of the contact person and their telephone number and extension number if applicable.

8. REASONS FOR EXCESS WEEKLY HOURS OF WORK APPLICATION

Provide a response to the following questions:
1. Why do you require the specific number of hours requested?
2. Will you be taking any measures to avoid or reduce excess weekly hours of work? If not, why not?
3. Are there any health and safety issues raised by increasing the hours of work of employees? If so, how will you address these issues?

The Director of Employment Standards can consider any factor he or she believes to be relevant when deciding whether or not to issue an approval. For example, the Director may consider factors such as:
   • Current or past contraventions of the ESA or its regulations on the part of the employer
   • The health and safety of employees
   • Whether the employer has examined other avenues to get the work done
   • The number of excess weekly hours being requested
   • The implications for the employer and/or the employees if approval is not granted
   • The requested duration of the approval and what measures are being adopted to avoid or reduce excess weekly hours of work in the future
   • Whether the employer has also served an application for an approval to average hours of work.

9. REASONS FOR AVERAGING APPLICATION

 Provide a response to the following questions:
1. Why do you require the specific averaging period requested?
2. Does the averaging period requested benefit the employees in the occupations listed?

The Director of Employment Standards can consider any factor he or she believes to be relevant when deciding whether or not to issue an approval. For example, the Director may consider factors such as:
   • Current or past contraventions of the ESA or its regulations on the part of the employer
   • The health and safety of employees
   • Whether any additional information provided, such as details on scheduling, indicates non-compliance with the ESA hours of work or rest period provisions
   • Whether the employer has also served an application for an approval for excess weekly hours of work.

10. IN THE LAST THREE YEARS...

Answer the two questions provided by selecting Yes or No, as appropriate. These questions only apply to the three-year period before the date of application.
Has the Employer been convicted of an offence under the ESA by a judge or justice of the peace? If yes, please indicate the most recent conviction date, if known.

If Yes is selected, provide the date of the most recent conviction. Only convictions under the ESA must be indicated.

Do not include orders made by an employment standards officer or orders made or affirmed by the Ontario Labour Relations Board. If an employer was charged with a violation, but was never convicted, then select “No” and leave the date area blank. For example, if an employer was issued a ticket for failure to comply with the ESA and the employer did not challenge the ticket within the time period allowed, select Yes and provide the date of the ticket. If the employer successfully challenged the ticket and has no other prior convictions, select No and leave the date area blank.

Does the Employer have any unpaid monetary orders under the ESA for which the time to apply for a review has expired?

If Yes is selected, provide the date of the most recent order. Select Yes if an employment standards officer issued an Order to Pay or other monetary order against the employer, which has not been paid, and the 30-day period to apply for review has passed. Select No if the employer was not issued an order, paid the order in full, or has applied for review of the order and either a decision has not yet been issued or a decision was issued setting the order aside.

11. DECLARATION

If you agree with the Declaration, complete the following in the space provided on the form:
• Print your first and last name
• Sign your name
• Provide the year/month/day on which the application was completed.

Please review your application carefully and ensure the information provided is complete and accurate. Areas of the form marked by an asterisk (*) must be completed. If you do not complete these areas your application form may be returned to you as incomplete and will not be considered to have been served.
Part 2: Submitting the Application

In order to successfully submit the application form in accordance with the ESA, you must serve the application on the Director of Employment Standards using one of the methods below. The 30-day period will not start until the application is served on the Director (see Part 3: After Submitting the Application).

Before submitting the application form, make a copy of it for your records. If you are applying for an approval for excess weekly hours, you will also need at least one copy of the application to post in the workplace, as required by the ESA (see Part 3: After Submitting the Application).

The application can be served on the Director by:

1) Submitting it electronically to the Director’s office by completing the on-line application (e-form) on the Ministry of Labour website at: www.labour.gov.on.ca/english/es/hours/ and following the instructions provided. Date of service will generally be the same date the transmission is made*. Retain a copy of the electronic submission for your records.

2) Mailing the application to the Director’s office by verifiable mail. The following Canada Post services are considered verifiable mail:
   a. Registered Mail
   b. Xpresspost, only if the “signature upon delivery” option is selected
   c. Priority Courier, only if the “signature upon delivery” option is selected.

   Date of service will be the date shown on the verification receipt. Retain the receipt for your records.

   Address the application to:
   Director of Employment Standards
   400 University Avenue, 9th Floor
   Toronto, ON M7A 1T7

3) Faxing the application to the Director’s office at (416) 212-7900 or toll-free at 1-866-588-9998.
   Date of service will generally be the same date the transmission is made*. Retain the fax confirmation of successful transmission for your records.

4) Delivering the application in person to the Director’s office at:
   400 University Avenue, 9th Floor
   Toronto, ON

   Do not deliver an application to any other location. Date of service will be the date shown on the receipt of acknowledgement provided by the Director or the Director’s representative. Retain the receipt for your records.

* An application that is served electronically or by fax (option 1 or 3 above) on a day that the Director’s office is closed, or after 5 p.m. on any other day, is considered to have been served on the next day that the Director’s office is open.
Part 3: After Submitting the Application

RIGHTS AND RESPONSIBILITIES - EXCESS WEEKLY HOURS OF WORK

Posting the Application Form

On the “date of service” (see Part 2: Submitting the Application on page 15) of an application for excess weekly hours of work, the employer must post at least one copy of the form in every workplace where the employees covered by the application work. The application must be posted in an area of the workplace where it will be clearly visible to the employees covered by the application and will likely come to their attention.

The application must not be posted until it has been served on the Director of Employment Standards. It must stay posted from the date of service until the Director issues an approval or a notice of refusal.

Waiting for Approval

Generally, the ESA requires an employer to have an approval before employees can work more than 48 hours in a work week.

However, if no approval or refusal has been issued 30 calendar days after the employer served the application, and the employer satisfies all of the conditions set out below, employees will be permitted to work more than 48 hours in a work week, up to a maximum of 60 hours, until the ministry processes the application.

The nine conditions are:

1) The employee has entered into a valid written agreement with the employer to work excess weekly hours (see Part 4: Written Agreements).

2) The employer served the application for excess weekly hours on the Director of Employment Standards in accordance with the ESA (see Part 2: Submitting the Application).

3) The application served on the Director applies to the individual employee, or the occupational group that includes the employee, who would work the excess weekly hours.

4) 30 calendar days have passed since the employer served the application on the Director.

5) The employer has not received notice from the Director that the application has been refused.

6) The employer’s most recent previous application for excess weekly hours of work, if any, was not refused.

7) The employer’s most recent previous approval for excess weekly hours of work, if any, was not revoked.
8) The employer has posted, and kept posted, a copy of the application for excess weekly hours of work. The application is posted in the workplace in at least one location where it is clearly visible to the employees covered by the application and it is likely to come to their attention.

9) The employee does not work more than:
   o the number of hours set out in the application for the employee or the occupational group that includes the employee,
   o the number of hours agreed to in the written agreement, or
   o 60 hours a week
   whichever is less.

RIGHTS AND RESPONSIBILITIES - AVERAGING HOURS OF WORK

Waiting for Approval

Generally, the ESA requires an employer to have an approval before averaging employee’s hours of work for the purpose of determining overtime pay.

However, if no approval or refusal has been issued 30 calendar days after the employer served the application, and the employer satisfies all of the conditions set out below, the employer will be permitted to average an employee’s hours of work over a two-week period, until the ministry processes the application.

The eight conditions are:

1) The employee has entered into a written agreement with the employer to average hours of work over a specified number of weeks (see Part 4: Written Agreements).

2) The employer served the application for averaging hours of work on the Director of Employment Standards in accordance with the ESA (see Part 2: Submitting the Application).

3) The application served on the Director applies to the individual employee, or the occupational group that includes the employee, whose hours of work will be averaged.

4) 30 calendar days have passed since the employer served the application on the Director.

5) The employer has not received notice from the Director that the application has been refused.

6) The employer’s most recent previous application for averaging hours of work, if any, was not refused.

7) The employer’s most recent previous approval for averaging hours of work, if any, was not revoked.

8) The employee’s hours of work, pending approval, are averaged over separate, non-overlapping, contiguous periods of two consecutive weeks.

Employer’s Guide: Hours of Work and Averaging Hours
Part 4: Written Agreements

WRITTEN AGREEMENTS FOR EXCESS HOURS OF WORK

Agreements Made On or After March 1, 2005

Agreements made on or after March 1, 2005 are only valid if the employer gives the employee the most recent Information for Employees About Hours of Work and Overtime Pay (Information Sheet)* document, before entering into the written agreement. The agreement must contain a statement in which the employee acknowledges the receipt of the Information Sheet.

Agreements Made Before March 1, 2005

Generally, agreements made before March 1, 2005 are treated the same as agreements made on or after that date, with the exception of the requirement to provide Information Sheets.

An employer who entered into an agreement with an employee before the Employment Standards Amendment Act (Hours of Work and Other Matters), 2004, came into force on March 1, 2005, is not required to have provided the employee with a copy of the most recent Information Sheet before making the agreement. Instead, the employer must have provided the employee with a copy of the most recent Information Sheet* by June 1, 2005.

* Employers are not required to provide unionized employees with a copy of the Information Sheet.

Information Sheets are available on the Ministry of Labour website at www.labour.gov.on.ca and at ServiceOntario Government Information Centres.

Requirements for Drafting Agreements to Work Excess Hours

For an agreement to work excess hours to be valid, the employee’s consent must be informed and voluntary. The terms of an agreement must clearly and explicitly state what is being agreed upon. Agreements to exceed the daily or weekly hours of work limits, as set out in the ESA, must still comply with the ESA rules about hours free from work and eating periods.

The ESA places specific requirements on agreements to work excess hours. The following points should be considered when drafting the agreement:

1) **The agreement must be in writing.**
   The ESA requires that agreements between an employer and an employee for excess daily or weekly hours of work must be in writing. Written agreements in electronic form are valid under the ESA only if evidence shows that the electronic text actually reflects the employee’s agreement.
For example, simply not responding to an e-mail from an employer that says, “If you don’t respond, you will be considered to have agreed…” does not constitute a valid agreement.

2) **The agreement must specify the maximum number of excess hours in a day or week that the employee will agree to work.**
   The agreement must specify the maximum number of hours an employee will work in excess of the daily or weekly limit (e.g. “The employee agrees to work up to 50 hours in a work week.”)
   It is not sufficient for an agreement to state, “The employee agrees to work in excess of the daily limit”.

   Agreements to work excess daily hours and agreements to work excess weekly hours are two separate agreements under the ESA, but they can be incorporated into one document.

   Avoid the use of the word “overtime” when drafting agreements to work excess hours, as “overtime” is not the same as excess hours.

3) **The employer may want to refer explicitly to the specific daily and weekly limits in the agreement to assist in demonstrating informed consent.**
   An employee’s consent to work excess hours must be informed. The employee must be aware that he or she is giving up the right to the daily or weekly limit for hours of work set out in the ESA.

4) **The agreement must contain a statement in which the employee acknowledges the receipt of the most recent Information for Employees About Hours of Work and Overtime Pay (Information Sheet) document.**
   Agreements made on or after March 1, 2005 are only valid if the employer gives the employee the most recent Information Sheet, prior to entering into the written agreement and this is confirmed in the written agreement.

   This statement is not required in agreements with a union or agreements entered into before March 1, 2005.

5) **Ideally, the agreement should inform an employee of his or her right to cancel the agreement with two weeks written notice to the employer.**
   Generally, an employee can revoke an agreement to work excess daily or weekly hours by giving the employer two weeks notice in writing. An employer can revoke an agreement by giving the employee reasonable notice.

6) **Ideally, the agreement should indicate any additional terms or conditions negotiated by the employer and employee relevant to working excess hours.**
   In exchange for working excess hours, an employer and employee may negotiate other terms. For example, some employees may ask to receive four hours advance notice of requests to work additional hours. These terms should be included in the agreement so that the employer and employee can easily determine what they are agreeing to.

7) **Ideally, the agreement should state when it would start and when it would end.**

8) **The agreement must include the names of the parties entering into the agreement (i.e. the employer’s name and the employee’s name).**
9) There must be some clear indication that the employer and employee have, in fact, agreed. Typically, the agreement of the employee and employer is indicated by having both parties sign the agreement.

Other Things to Keep in Mind

- Employees must have sufficient time to consider the agreement before agreeing to enter into it. The time will vary depending on the circumstances and the type of agreement.
- The agreement should be sufficiently specific so that an independent, objective third party would be able to determine what was being agreed to, simply by reading the agreement.
- A union may enter into agreements for excess daily and/or weekly hours of work on behalf of the employees they represent.

WRITTEN AGREEMENTS TO AVERAGE HOURS OF WORK

Agreements Made Before March 1, 2005

Generally, agreements to average hours of work for the purpose of determining overtime pay that were entered into before March 1, 2005 and that have not expired or been revoked, are treated the same as agreements made on or after that date.

However, an employer who has an existing agreement with an employee must still apply for approval from the Director of Employment Standards before averaging the employee’s hours of work, even if the Director has previously approved the agreement pursuant to s. 30 of Reg. 285/01. The ESA specifically provides that any approval granted by the Director under those circumstances ceased to have effect March 1, 2005.

Requirements for Drafting Agreements to Average Hours of Work

For an agreement to average an employee’s hours of work for the purpose of determining overtime pay to be valid, the employee’s consent must be informed and voluntary. The terms of an agreement must clearly and explicitly state what is being agreed upon.

The ESA places specific requirements on agreements to average hours of work. The following points should be considered when drafting the agreement:

1) The agreement must be in writing.
   The ESA requires that agreements between an employer and an employee to average an employee’s hours of work must be in writing. Written agreements in electronic form are valid under the ESA only if evidence shows that the electronic text actually reflects the employee’s agreement.

   For example, simply not responding to an e-mail from an employer that says, “If you don’t respond, you will be considered to have agreed…” is not a valid agreement under the ESA.
2) The agreement must indicate the employee’s agreement to have his or her hours of work averaged over periods of a specific number of weeks. The agreement must indicate the specific number of weeks over which the employee is agreeing to have his or her hours of work averaged. The agreement must also indicate that the employee’s hours of work are being averaged for the purpose of determining overtime pay. It is not sufficient for an agreement to note, “The employee agrees to average his hours of work.”

3) The employer may want to refer explicitly in the agreement to the fact that overtime pay under the ESA is generally determined on a weekly basis, and is payable for all hours in excess of 44 in a work week, to assist in demonstrating informed consent. An employee’s consent to average hours of work must be informed. The employee must be aware that he or she is giving up the right to have his or her overtime pay entitlements determined on a weekly basis for hours worked over 44, as set out in the ESA.

4) The agreement must provide an expiry date. For the agreement to be valid, it must contain an expiry date. If the agreement involves an employee who is not represented by a union, the expiry date can be no more than two years after the day the agreement takes effect. If a union represents the employee, the employer and union can agree to an expiry date.

5) Ideally, the agreement should inform the employee that it cannot be cancelled before the agreement expires unless BOTH the employer and the employee agree to cancel it.

6) Ideally, the agreement should indicate any additional terms or conditions negotiated by the employer and employee relevant to averaging hours of work for the purpose of determining overtime pay. In exchange for agreeing to average hours of work, an employer and employee may negotiate other terms. For example, some employees may agree to have their hours of work averaged in exchange for a schedule that provides a greater number of days off work. These terms should be included in the agreement so the parties can easily determine what they are agreeing to.

7) Ideally, the agreement should state when it would come into effect.

8) The agreement must include the names of the parties covered by the agreement (i.e. the employer’s name and the employee’s name).

9) There must be some clear indication that the employer and employee have, in fact, agreed. Typically, the agreement of the employee and employer is indicated by having both parties sign the agreement.

Other Things to Keep in Mind

- Employees must have enough time to consider the agreement before agreeing to enter into it. The time will vary depending on the circumstances and the type of agreement.
- The agreement should be sufficiently specific so that an independent, objective third party would be able to determine what was being agreed to, simply by reading the agreement.
- A union may enter into agreements to average hours of work on behalf of the employees they represent.
Exemptions and Special Rules

Certain industries and job categories are exempt from the hours of work and overtime rules set out in the Employment Standards Act, 2000 (ESA). Please refer to the fact sheet How are You Covered by the ESA? available online at www.labour.gov.on.ca/english/es/es_pubs.html for more information on job-specific exemptions and special rules.

Questions?

For information about the ESA, hours of work and overtime pay rights and responsibilities, or how to complete the application:

- Visit www.labour.gov.on.ca for information, including fact sheets, brochures, applications, and a copy of the ESA.
- Call the Employment Standards Information Centre at 416-326-7160 (Toronto area), 1-800-531-5551 (toll-free), or 1-866-567-8893 for Hearing Impaired TTY.
- Call or visit your nearest ServiceOntario Government Information Centre.