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EMPLOYMENT STANDARDS HANDBOOK, THIRD EDITION

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The *Employment Standards Handbook, Third Edition* offers a thorough explanation of the scope of the Ontario *Employment Standards Act, 2000*, a clearer understanding of the policies used by the Employment Practices Branch of the Ministry of Labour in the administration of the Act and reliable updates on this rapidly changing area of law. It includes the full text of the Act and all regulations, a discussion of the various provisions of the Act and a collection of Digests referenced to the applicable portions of the book.

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What's New in This Update:

This release includes updates to Chapter 1 (Definitions), Chapter 3 (Application of the Act), Chapter 5 (Payment and Statement of Wages), Chapter 7 (Records: Recording, Keeping and Custody), Chapter 11 (Overtime Provisions), Chapter 12 (Minimum Wage), Chapter 14 (Vacation with Pay), Chapter 18 (Termination and Severance of Employment), Chapter 21 (Reprisal), Chapter 24 (Liability of Directors), Chapter 27 (Reviews by the Board) and Appendix D (Case Digests).

Highlights

- **Chapter 3—Application of the Act—I—Who Act Applies To—Section 3(1)—§ 3:1—Introduction—**As guidance, the Board has elaborated to explain that application of the Act depends on where an employee's work is performed. In this regard, under both s. 3(1)(a) and 3(1)(b), the Board considers the employee's actual, physical location. While the Board regards interpreting s. 3(1)(a) as being "straightforward nature", s. 3(1)(b) "contemplates some form of back and forth between Ontario and elsewhere," making it "necessary to look at how such movement occurred in fact to determine whether it is of a nature which brings about the application of the Act." Under one approach, the Act applied because the employee worked in Ontario and was only occasionally sent to the United States to perform work. Another approach concluded that the Act did not apply because the employee performed the substance of the work outside of Ontario and the work performed in Ontario was a continuation of (characterized as "incidental to") the outside work. Toward drawing conclusions from the evidence of whether the Act applies or not, the Board does not consider the content of an employment agreement to be determinative. Rather, the Board looks beyond the parties' intent and determines how the relationship worked in fact. In one case where an employee performed work both in and outside of Ontario, the Board concluded that the Act applied where the employment offer contemplated that the work was to be performed in Quebec *following* an initial twelve month transition period, but as a result of the employee's layoff and eventual termination, that transition period was never completed. While the work during the transition period was to be performed in Ontario or at project sites, with occasional time in Quebec, the uncontradicted evidence established that during that time prior to layoff, the employee worked

almost exclusively from Ontario. The Board held that even if the parties intended otherwise had the employment relationship continued, because their intent must yield to how the relationship worked in fact, the work performed in Quebec during the transition period must be viewed as a continuation of the work performed in Ontario given the work's brief duration during that time (see *Speidel (Friedrich) (Stelmine Canada Limited) (Re)*, E.S.C 2100-24-ES (May 29, 2025 – McCrory), 2025 CarswellOnt 9496 (Ont. L.R.B. (E.S.A.)).

- **Chapter 5—Payment and Statement of Wages—IV—Deductions from Wages—Section 13(1)—§ 5:27—Where Set-off or Deduction Prohibited—**Where an employment contract prescribed a method for calculating commissions, the method used by the employer was not the method prescribed in the contract, and it set-off shipment losses incurred against profits on other accounts. Since the employee had not authorized the employer to withhold or deduct from her wages in that way, the employer had failed to pay commissions pursuant to the employment contract, in violation of s. 13(1) of the Act (see *Triangle Logistics Solutions Inc. (Re)*, E.S.C. 1153-21-ES, 1163-21-ES (January 17, 2023 – Waddingham), 2023 CarswellOnt 1034 (Ont. L.R.B. (E.S.A.)).
- **Chapter 11—Overtime Provisions—VII—Special Overtime Provisions—§ 11:53—Persons Employed on a Farm—**In one case, the Board reviewed decisions that considered what it means to be "employed on a farm" for the purposes of the Farm Exemption. As articulated by the Board, *The Burry Approach* considered the exemption as applied to "chicken catchers" and declined to exempt chicken catchers from the Farm Exemption because they worked at multiple farms, not a single farm. The Board adopted the *Carlos Farms* test for determining whether persons are "employed on a farm", i.e., whether employees are fundamentally integrated into the operation of a farm. Finding that the workers' employer functioned as a discrete, time limited, third-party service provider, the Board held that the Farm Exemption did not apply (see *Brian's Poultry Services Inc. (Re)*, E.S.C. 3008-23-ES (May 28, 2025 – Bandhu), 2025 CarswellOnt 9536 (Ont. L.R.B. (E.S.A.)).
- **Chapter 21—Reprisal—§ 21:1—Reprisal Prohibited—Section 74—**The Board has found that where an employee had no existing legal duty or responsibility to perform any work for her employer on a July 1st holiday, the employee did not engage in "wilful misconduct, disobedience or wilful neglect of duty" when she subsequently declined to work on that day. The Board further noted that the em-

ployee asking to be paid "double time" to work on that day did not constitute "extortion/blackmail" or wilful misconduct, disobedience or wilful neglect of duty in law (see *Giggly Panda Baby Spa Inc. (Re)*, E.S.C. 2157-22-ES (September 1, 2023 – Kaufman), 2023 CarswellOnt 14388).

- **Chapter 24—Liability of Directors—II. Directors' Liability for Wages—Section 81—§ 24:3—Introduction—**In a case where the business was incorporated in British Columbia, the Board considered the relevant provisions of the *British Columbia Business Corporations Act*, under which a director ceases to hold office upon resignation, which takes effect when the director's written resignation is provided to the company unless specified to take effect at another time or upon the occurrence of a specified event. Where the director sent an email to another listed director, stating "Pls., use this email as notice that I am resigning as director effective immediately and relinquishing my shares to the company," the Board found this was clear and compelling evidence of a written resignation, that was effective when provided, and sufficient to rebut the presumption to establish that he was no longer a director at that relevant time (see *Balasubramanian (Sudeep, aka Sudeep Bala), a director of Conversion Relations Inc. (Conversion Relations Inc.) (Re)*, E.S.C. 0128-23-ES (July 15, 2025 – McCrory), 2025 CarswellOnt 12620 (Ont. L.R.B. (E.S.A.)).
- **Chapter 26—Complaints and Enforcement—II—When Civil Proceeding Not Permitted—Section 97—§ 26:4—Introduction—**The Board considered a case in which the employer application for review of an Order to Pay asserted that pursuant to s. 98(2) of the Act the Board was without jurisdiction to hear the application because the responding party employee was subsequently added as a party to a civil proceeding against the employer that related to the same termination or severance of employment. The Director of Employment Standards submitted that s. 97(2) of the Act was implicated, not s. 98(2). Considering sections 97 and 98 of the Act in their entirety, the Board noted that "it is clear that an individual's ability to file a complaint under the Act seeking termination or severance pay depends on the timing of a civil proceeding seeking the same remedies." There being no dispute that the civil proceeding was commenced after the complaint's filing, investigation, and decision of the Officer, and there being no dispute that both the complaint and the civil proceeding relate to the same termination or severance of employment, the Board concluded that s. 97(2) and not s. 98(2) of the Act applied due to the timing. Accordingly, the Board declined to find any statutory basis for concluding that it

was without jurisdiction to hear the application (see *Franmed Consultants (1993) Inc. o/a Regen Scientific Inc. (Re)*, E.S.C. 0666-22-ES (March 7, 2023 – McCrory), 2023 CarswellOnt 3816).

- **Chapter 27—Reviews by the Board—II—Applications for Review—Section 116—§ 27:11—Extension of Time for Applying for Review—Section 116(5)—**The essence of the provisions of s. 116 is to require the payment into trust of those moneys as part of the application for review. An application for review is not complete unless the monies have been paid into trust (see *11997629 Canada Ltd. operating as Trinity International Investments (Re)*, E.S.C. 0600-21-ES (July 8, 2021–Ross), 2021 CarswellOnt 10335 (Ont. L.R.B. (E.S.A.)); *Freeway Motors Ltd. (Re)*, E.S.C. 2357-21-ES (June 7, 2022–Doyle), 2022 CarswellOnt 8466). The Board has clarified that monies are considered to have been paid when received by the Board, and not when the "cheque is in the mail" (see *Acenzia Inc (Re)*, E.S.C. 1563-22-ES (January 4, 2023 – Ross), 2023 CarswellOnt 214 (Ont. L.R.B. (E.S.A.)).