



## Retail Employment Law: Ontario FAQ

**Q | Does Ontario law recognize “at will” employment?**

**A |** There is no concept of “at-will” employment in Ontario as that term is understood in the United States. Ontario employees who are terminated without just cause are entitled, at a minimum, to notice of termination or pay in lieu of notice in accordance with the *Employment Standards Act, 2000* (“ESA”). The ESA also requires statutory severance pay in certain circumstances. Non-unionized employees are also entitled to reasonable notice of termination under common law. The common law obligation of reasonable notice can be quite onerous; it can range up to 24 months of compensation based on a number of factors such as age, length of service, position held and prospects for re-employment. A written contract can limit an employer’s common law obligation to provide reasonable notice or pay in lieu thereof, so long as it provides no less than the minimum requirements set out in the ESA.

**Q | How significant is the union presence in the retail sector?**

**A |** Unionization rates in the Canadian retail sector hover around 15%. Within the retail sector, the most significant level of unionization is in the food and beverages subsector where the rate is approximately 40%. Traditionally, large Canadian grocery retailers have been unionized. The rate of unionization in the retail sector, excluding food and beverages, is in the 7-8% range. This is attributable to a number of factors including the multitude of smaller locations and a greater reliance on part-time and short-term employees.

**Q | Are employees protected by human rights legislation/equal employment opportunity legislation?**

**A |** Applicable human rights legislation protects employees from discrimination in employment on the basis of enumerated characteristics including but not limited to race, sex, sexual orientation, age, marital status, family status and disability. Employers should ensure that any third party recruiters are recruiting in a manner that does not offend such legislation. In addition, applications for employment that are to be used in Ontario should be reviewed as there are limitations on what may be asked of applicants. The mere asking of an inappropriate question can result in monetary damages.

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## Q | What background checks and tools can be used with respect to prospective employees?

A | Educational, previous work history and criminal records checks are all permissible in Ontario with the consent of the prospective employee. Applicable human rights legislation prohibits discrimination in employment on the basis of “record of offences” which is defined as a conviction under the federal *Criminal Code* for which a person has been granted a pardon or an offence in respect of any provincial (not federal) enactment. Credit checks are also permissible subject to certain disclosure obligations. As a result of privacy concerns, social media checks should never extend to sites that are restricted or password-protected, and a prospective employee should never be forced or tricked into providing access to protected sites. Social media checks run an increased risk of revealing information about characteristics protected by human rights legislation.

## Q | What is the minimum wage for retail workers?

A | At present, the general minimum wage in Ontario is \$11.00 per hour. The minimum wage for students is \$10.30 per hour. This rate applies to students under the age of 18 who work 28 hours or less per week or who work during a school break or summer holidays. The minimum wage is \$9.55 per hour for employees who serve liquor directly to customers, guests or members in licensed premises. To the extent that an employee’s pay is based completely or partially on commission, it must at least equal the minimum wage for each hour worked.

## Q | Can an employer impose mandatory drug testing on employees?

A | Random or pre-employment drug or alcohol testing is permissible only in exceptional cases. The Supreme Court of Canada has ruled that random testing even in a dangerous workplace was not permitted in the absence of reasonable cause, i.e. there was reason to believe that the employee was impaired on duty, the employee was involved in a workplace accident or significant incident, the employee was returning to work after treatment for substance abuse or there was

evidence of an underlying drug or alcohol problem in the workplace. Alcohol and drug dependence and perceived dependence fall within the definitions of “handicap” and “disability” in human rights legislation. There is generally a requirement to show that an employer policy (such as testing for alcohol or drugs) is a bona fide occupational requirement. Given the legal test, this can often be difficult to achieve.

## Q | What are the limits on hours of work and work on Sundays/Holidays?

A | The ESA mandates that hours of work cannot exceed 8 in a day and 48 in a week. Exceptions are if the employer establishes a work day of more than 8 hours (subject to the weekly limit) or if an agreement is made with employees to work more than the daily or weekly limit and the agreement is approved by the Director of Employment Standards. Specific provisions in the ESA permit a retail employee to refuse to work on a Sunday or holiday. Even where the employee has agreed to work on a Sunday or holiday, he or she may decline to do so, but must provide 48 hours’ notice. There are nine statutory holidays in Ontario.

## Q | When is overtime payable and are there exempt/non-exempt employees?

A | Overtime is payable after 44 hours of work in a week. There is no daily overtime entitlement. The ESA contains provisions that exempt certain roles from overtime. These “exempt” categories are narrower than in the United States. A common exemption is for employees whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis. The difficulty can be in determining whether lower level “managers” fall within this exemption, given the range of duties normally performed in a retail environment.

## Q | What job-protected leaves are available to employees?

A | There are a number of job protected, unpaid leaves under the ESA, including personal emergency leave (illness, injury or medical emergency of the employee or certain designated relatives), family medical leave (care for terminally

ill designated relative), organ donor leave, reservist (military) leave and pregnancy (maternity) and parental leave. Commencing October 29, 2014, these additional leaves are available: family caregiver (care for family member with a serious medical condition), critically ill child caregiver and crime-related child death or disappearance. Pregnancy leave is up to 17 weeks. Parental leave, which applies to both natural and adoptive parents, can be up to 37 weeks for employees who did not take pregnancy leave or 35 weeks if the employee took pregnancy leave. Employees continue to be entitled to participate in benefit plans during such leaves provided they continue to make any employee premium contributions and the period of leave is included in calculating their length of employment, length of service and seniority (but not toward completion of a probationary period). At the conclusion of the leave, the employee must be returned to the position most recently held or to a comparable position if it no longer exists.

**Q | What constitutes a part-time employee and how, if at all, are part-time entitlements different?**

**A |** There is no statutory definition of what constitutes a part-time employee. As a result, it can vary from employer to employer. Part-time employees have the same entitlements under the ESA as full-time employees albeit based on fewer hours for purposes of any hourly or monetary calculations. There is no legal requirement that part-time employees be eligible for the same fringe benefits as full-time employees.

**Q | Can employees be searched as part of a loss prevention program?**

**A |** Generally, an employer will not be entitled to undertake a search of an employee's belongings unless the right is conferred expressly when the employee is hired either through a term of the employment agreement or in an employer's policy, manual or handbook that is binding on the employees. If employees are to be searched, the searches should be universal or should involve a selection process that does not single out individual employees and should be conducted in locations where employees will not be unduly embarrassed.

**Q | How is workers' compensation handled?**

**A |** Workers' compensation in Ontario is through a mandatory, government regulated no-fault insurance plan rather than private insurance. Most employers are required to participate and pay an annual assessment (premium) based on their level of payroll and the risks inherent in their business activities. Claims for injury or illness arising out of and in the course of employment are administered and paid for by the responsible government agency (in Ontario, the Workplace Safety and Insurance Board). Participating employers are immune from civil action by employees in respect of such workplace injuries and illnesses.

**Q | Does Ontario have specific accessibility legislation?**

**A |** The *Accessibility for Ontarians with Disabilities Act* establishes a number of accessibility standards with respect to customer service, employment, transportation, communications and the built environment. The standards impose a significant obligation on those employers in the retail environment, particularly in the area of customer service.

**Q | Can Canadian employees be enrolled in US based incentive schemes?**

**A |** An incentive plan designed to comply with US tax and employment law may not be appropriate for Canadian employees. Certain features common in US plans may result in adverse tax consequences for Canadian employees. For example, a bonus that is not fully payable before the end of the third year following the year in which it was earned (for any reason, including 409A compliance) may be taxable in the year of grant as opposed to the year of payment. Care should be taken in adapting US and other foreign-based plans for a Canadian workforce so as to maximize Canadian tax efficiency and comply with Canadian employment rules.

**Q |** What is the equivalent of a 401(k) plan in Ontario?

**A |** Employers looking to establish a “401(k)-like” plan for their Canadian employees generally choose to implement a group registered retirement savings plan (“RRSP”). Although the tax and legal implications vary somewhat among the different Canadian defined contribution arrangements, an RRSP is a common choice for small groups of employees because it is relatively simple to administer. For larger groups of employees, other more tax-efficient options may make more sense.

**Q |** Is there a requirement to provide benefits equivalent to COBRA to Ontario employees?

**A |** There is no equivalent legislative requirement in Ontario to the COBRA right of workers and their families who lose their health care benefits to continue benefit coverage for limited periods of time under certain circumstances, such as voluntary or involuntary job loss. However, if an employee is involuntarily terminated without cause, the employer must continue to provide for benefit coverage during the relevant statutory notice period (which varies based on length of service to a maximum of eight weeks) and may be required to provide for benefit coverage or its monetary equivalent during the common law notice period to the extent that the latter is applicable to the terminated employee.

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