

Employment Standards for Migrant Agricultural Workers in BC

This fact sheet explains the law in general. It is not intended as legal advice for your particular problem. Because each person's situation is different, you may need to seek legal advice. The information in this fact sheet was reviewed by a lawyer, and was last updated on 16 February 2021.

British Columbia's *Employment Standards Act* (the "ESA") and Regulations set minimum standards for the treatment of employees, including farm workers, in the province. It covers most areas of the employment relationship, including the hiring of employees, wages, records, hours of work and overtime, statutory holidays, leaves, vacation and vacation pay, and termination of employment. However, farm workers are excluded from some of the ESA's protections.

The Employment Standards Branch (ESB) website has several fact sheets on the rights of employees under the ESA. The website can be accessed at <http://www.labour.gov.bc.ca/esb/>.

Am I considered a farm worker under the ESA?

A farm worker is a person who works on a farm, orchard, or other agricultural operation. The main responsibilities of a farm worker include:

- Growing or picking crops, or raising or slaughtering animals;
- Cultivating land;
- Using farm equipment;
- Cleaning, sorting, or packing crops; or
- Selling farm products on site.

Workers who process farm products, work in aquaculture, work at a retail nursery, or work as a landscape gardener are not considered farm workers.

Even if you are a non-status farm worker, you are covered by the ESA protections available to farm workers.

How much should I get paid?

Farm workers can be paid a piece rate, an hourly rate, or a salary for their work. All farm workers must be paid at least twice a month.

For those receiving piece rates, they must be paid at least the minimum piece rate for the crop they are harvesting. The calculation is **piece rate x volume or weight picked**. For more information on the minimum rates, visit <https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/forms-resources/igm/esr-part-4-section-18>.

Farm workers who get paid hourly or by salary must be paid at least the minimum wage. As of the date of this fact sheet (February 2021), minimum wage in BC is \$14.60 per hour. Minimum wage is scheduled to increase to \$15.20 per hour on June 1, 2021.

Farm workers under the Seasonal Agricultural Worker Program (SAWP) must be paid according to the SAWP contract.

Am I entitled to overtime pay or statutory holiday pay?

No. The parts of the *ESA* on overtime pay and statutory holiday pay do not apply to farm workers.

Am I entitled to breaks or a maximum number of hours of work?

The part of the *ESA* that provides rules for meal breaks, split shifts, hours free from work, and averaging agreements do not apply to farm workers. However, all farm workers **cannot** be required to work excessive hours or hours that are harmful to your health or safety.

Under the SAWP employment contract, you are entitled to a meal break every day. You are also entitled to two 10-minute breaks, one in the mid-morning and one mid-afternoon. For each six consecutive days of work, you are entitled to one day off. If there is an urgent need to finish the work without delay, your employer can postpone your day off until a date that you both agree on.

Am I entitled to Annual Vacation?

SAWP workers are not entitled to vacation leave. Agricultural workers under the Temporary Foreign Worker Program (TFWP) who are paid by the hour or by a salary are entitled to vacation leave. You are entitled to an annual vacation of:

- at least 2 weeks, after 12 consecutive months of employment; or
- at least 3 weeks, after 5 consecutive years of employment.

If you have not worked 12 months in your current job, you can make a written request for leave. If your employer agrees, the time you take off is advanced vacation time, which will reduce the amount of vacation time you will have once you become entitled to a vacation.

Your employer has the right to schedule your vacation according to their business needs, as long as they provide you with a vacation within 12 months of earning it. Your employer cannot schedule your vacation in periods of less than one week, unless you give a written consent for a shorter period. Furthermore, your employer cannot schedule your vacation to coincide with notice of termination of employment, nor can they reduce your vacation entitlement by granting time off as a “bonus” or sick leave.

Am I entitled to Vacation Pay?

If you are part of the SAWP or the TFWP and are paid by the hour or by a salary, you are entitled to vacation pay. You are eligible for vacation pay at a rate of:

- 4% of your total wages during your year of employment, if you have been employed for 5 consecutive calendar days; or
- 6% of your total wages during the year of employment, if you have been employed for 5 consecutive years.

An employer must pay vacation pay to an employee:

- at least 7 days before the start of an annual vacation (if applicable);
- on the employee’s scheduled paydays if agreed in writing; or
- at the end of the employment.

If your employment is terminated, your employer must pay all your outstanding vacation pay in your final paycheque.

If you are paid by the piece, you are not entitled to vacation pay, as it is included in the piece rate.

What if my employment contract is different than my rights under the *ESA*?

The *ESA* sets out the minimum standards when it comes to employment relationships in the province. Under the TFWP, if your contract gives you fewer protections than the *ESA*, the *ESA* provisions override the contract. It is illegal for an employer to contract out of these minimum standards. On the other hand, if your contract provides for higher standards than the *ESA*, the standards in your contract apply.

What if my employer violates the *ESA*?

If your employer violates the *ESA* or if you are owed money from your employer, you can file a complaint with the Employment Standards Branch (ESB). It is important to remember that there is a time limit on filing a complaint. A complaint can only be submitted within 6 months of the violation(s), or of the worker's last day of employment. A worker may only recover unpaid wages for the 12-month period prior to the last day of employment or the date the complaint was submitted.

For more information about the complaint process, file a complaint online, or download the complaint forms to send by email or mail, visit <https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/complaint-process>.

It is important to collect documents to support the claim, such as:

- your written employment contract;
- your pay cheque stubs;
- records of days and hours you worked;
- your Record of Employment;
- a diary detailing your work schedule and tasks;
- receipts for any money that you paid to your employer; and
- your bank deposit statements.

It is highly recommended that workers seek legal assistance from a lawyer or legal advocate before submitting their complaint.

After a complaint is submitted, the ESB will contact all parties to explain the law. If your complaint cannot be resolved at this stage, the ESB may conduct an investigation and then issue a decision. If the ESB determines that the employer violated the *ESA*, it will order the employer to pay the employee any unpaid wages and/or penalties.

Filing an ESB complaint **will not** impact your immigration status. Even if you are a non-status farm worker, you can still file an ESB complaint.

What other rights do I have that aren't covered by the *ESA*?

The *Temporary Foreign Worker Protection Act* provides additional protections to workers. Any employer hiring a worker from the SAWP or the TFWP must register with the ESB. Employers who use recruiters to hire foreign workers must use licensed recruiters, or else they may be fined. It is illegal for your employer or a recruiter to charge you a fee for hiring costs, recruitment, or information about prospective jobs. It is illegal for your employer or a recruiter to give you false or misleading information about immigration, employment, or housing. Your employer cannot take your passport or other documents away from you. They cannot threaten deportation or other consequences when they have no legal cause to do so. They cannot threaten you for participating in a government or law enforcement investigation or proceeding.

If your employer or a recruiter has violated any of these provisions, you can file a complaint to the ESB within 2 years of the violation.