

Employment Standards for In-home Care 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 19 February 2021.

British Columbia's *Employment Standards Act (ESA)* and Regulations set minimum standards for the treatment of employees, including care 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. The *ESA* applies to workers in BC regardless of their immigration status.

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/>.

Who is covered by the *ESA*?

The *ESA* has different classifications of care workers depending on the type of work and living situation of a worker. Some of these workers are excluded from certain protections of the *ESA*.

A 'domestic' is defined as someone who both works at their employer's home doing cooking, cleaning, child care, or other services AND lives at their employer's home. Domestic workers have all of the protections and entitlements of the *ESA* available to them.

A 'residential care worker' is defined differently. They are workers who supervise or care for anyone in a group home or a "family type residential dwelling" AND are required to live there while they are employed. A 'night attendant' is a worker who is given sleeping accommodations in a home where a disabled person lives AND works in the home for periods of less than 12 hours each day to care for the disabled person during the night. A 'live-in home support worker' is defined as a worker who provides home support services for someone with an illness or disability through a government-funded program AND provides these services on a 24 hour per day live-in basis without being charged for room and board.

Residential care workers, night attendants, and live-in home support workers are not considered to be domestic workers. The parts of the *ESA* about entitlements to meal breaks, restrictions on split shifts, minimum and maximum daily hours of work, no excessive hours of work, and overtime wages do not apply to these workers.

Additionally, a 'sitter' is defined as a worker in a private home who cares for a child, disabled, or ill person AND does not live in the home where they work. None of the *ESA* protections or entitlements are available for sitters. However, if a live-out care worker provides care for an individual in a private residence and also performs additional tasks, such as housekeeping or cooking, for example, all of the protections and entitlements of the *ESA* are available to them.

In May 2019, the BC Legislature adopted an amendment to the *ESA* that changes the definition of a 'domestic.' The amendment broadened it to define a 'domestic worker' as a worker who works at their employer's private home to provide cooking, cleaning, child care, or other services, regardless of whether they live-in or out. This updated definition would expand the protections of the *ESA* to more care workers. However, this amendment has not yet become part of the law.

The information in this fact sheet applies to care workers who are entitled to all of the protections and entitlements under the *ESA*. If you have questions about your protections and entitlements as a care worker in BC, we encourage you to contact MWC for legal advice.

What is the minimum wage in BC?

Right now, minimum wage in BC is \$14.60 per hour. Minimum wage is scheduled to increase to \$15.20 per hour on June 1, 2021. Most employers must pay their employees at least minimum wage.

Am I entitled to overtime pay?

Care workers are entitled to overtime pay under the *ESA*. When calculating overtime, both the number of hours worked in a day and the number of hours worked in a week must be considered.

1) Daily Overtime

If you work more than 8 hours in a day, you **must** be paid time-and-a-half for every hour worked for the next 4 hours. If you work more than 12 hours in a day, you must be paid double-time for every hour worked after 12 hours.

For example, if you work 14 hours in a day, the first 8 hours will be paid at the regular rate, the next 4 hours will be paid at time-and-a-half, and the last 2 hours will be paid at double-time. If the hourly rate is the minimum wage (\$14.60/hr in BC), then you should be paid \$262.80 for the 14-hour day. The table below shows the calculation.

	Hours Worked	Hourly Minimum Wage (\$14.60)
Total hours worked in a day:	14	
Hours paid regular	8	8 x \$14.60 = \$116.80
Hours paid time-and-a-half (1.5x)	4	4 x \$21.90 = \$87.60
Hours paid double-time (2x)	2	2 x \$29.20 = \$58.40
		Total wage = \$262.80

2) Weekly Overtime

If you work more than 40 hours a week, you must be paid time-and-a-half after 40 hours for every hour worked. If you work over 48 hours in the week, you are entitled to receive double the regular wage for every hour worked after 48 hours. This applies to you even if you have not worked more than 8 hours in a day. A week is calculated as beginning on Sunday and ending on Saturday. Only the first eight hours worked in a day count towards weekly overtime.

For example, if you worked 8 hours a day for 6 days in a week for a total of 48 hours, the last 8 hours must be paid time-and-a-half. If the hourly rate is the minimum wage (\$14.60/hour in BC), then you should be paid \$759.20 for 48 hours worked in a week.

	Sun	Mon	Tues	Wed	Thurs	Fri	Sat	Hourly Minimum Wage (\$14.60)
Daily Hours		8	8	8	8	8	8	
Regular Pay		8	8	8	8	8		40 x \$14.60 = \$584.00
Time-and-a-half (1.5x)							8	8 x \$21.90 = \$175.20
								Total = \$759.20

How many days off per week am I entitled to?

Every week, you are entitled to have at least 32 hours in a row free from work for rest. If your employer needs you to work during this time, you must be paid time-and-a-half for hours worked in that period. This means that *even if you work less than 40 hours a week but worked 7 days in a row, you must still be paid for time-and-a-half for one of the days worked.*

For example, if you worked 5 hours a day for seven days in a row, you should be paid time-and-a half for one of the work days. If the hourly rate is the minimum wage (\$14.60/hour), then you should be paid \$547.50.

	Sun	Mon	Tues	Wed	Thurs	Fri	Sat	Hourly Minimum Wage (\$14.60)
Daily Hours	5	5	5	5	5	5	5	
Regular Pay	5	5	5	5	5	5		30 x \$14.60 = \$438.00
Time-and-a-half (1.5x)							5	5 x \$21.90 = \$109.50
								Total = \$547.50

Am I entitled to meal breaks?

For every 5 consecutive hours worked, you are entitled to at least a ½ hour for a meal break. If the employer requires you to work or be available to work during your meal break, you are entitled to be paid for the time worked during your break.

What if the amount of hours I'm working is dangerous for my health?

Your employer cannot require you to work excessive hours or hours that are harmful to your health or safety. You are also entitled to have 8 hours off between shifts unless an emergency requires otherwise.

Can my employer split shifts?

An employer is entitled to split your work shift as long as the split shifts are completed within 12 hours after you start the first shift.

For example, if the employer wants to split an 8-hour work shift into two 4 hour shifts and you start the first shift at 7 am, you should finish the second shift by 7 pm at the latest.

Can I bank overtime and take time off instead of getting paid?

You can establish a time bank with a written agreement. Having a time bank means that instead of being paid the overtime hours in a pay period, you can credit your overtime wages to a time bank and request your employer to do one or more of the following at any time:

- pay all or part of the overtime wages credited to the time bank;
- allow you to use the credited overtime wages to take time off *with regular pay* for a period agreed to by the employer and you; and
- close the time bank in which the employer will have to pay the you the outstanding balance.
 - Once you provide written request to the employer to close the time bank, all overtime wages must be paid out on the next payday.

Your employer may close your time bank as long as they provide one month's written notice to you. If your employer closes your time bank, they must pay you all overtime wages remaining in the bank, and/or allow you to use the credited overtime wages to take paid time off. This means that you can combine pay and paid time off. Your employer must fulfill its obligations within six months of closing your time bank.

When your employment ends or is terminated, your employer must pay out any overtime wages in the time bank on the final paycheque.

My employer suggested entering into an averaging agreement. What does that mean?

Typically, the standard work day is 8 hours and the standard work week is 40 hours. Overtime is payable for all hours exceeding 8 hours a day and/or 40 hours a week. The law also allows employers to enter into an "Averaging Agreement" with you.

An averaging agreement allows hours of work to be averaged over a period of one to four weeks. You can agree to work up to 12 hours a day, averaging 40 hours a week without overtime pay during that period. However, you are still entitled to overtime pay under an averaging agreement if you work more hours than the agreed work schedule, or if you work over 12 hours a day, or if you work hours in an excess of the average of 40 hours per week over the period covered by the agreement.

Am I entitled to statutory holiday pay?

Statutory holiday pay means you get *a day off with pay* at an average day's pay. You are entitled to statutory holiday pay if you have been employed for at least 30 calendar days and worked at least 15 of 30 days before the statutory holiday. If you work under an averaging agreement, however, you do not have to meet the 15 of 30 days work requirement. An average day's pay will be calculated as the total regular earnings (not including overtime pay) divided by the number of days worked in the previous 30 calendar days prior to the statutory holiday.

If you work on a statutory holiday, you will be paid time-and-a-half for the first 12 hours worked, double-time after 12 hours **in addition to** an average day's pay.

There are 10 statutory holidays in BC: New Year's Day, BC Family Day, Good Friday, Victoria Day, Canada Day, BC Day, Labour Day, Thanksgiving Day, Remembrance Day, and Christmas Day.

Am I entitled to Annual Vacation and/or Vacation Pay?

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 completed 12 months of employment, 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. An annual vacation is exclusive of statutory holidays to which you are entitled, which means if a statutory holiday falls on your vacation, you will still be paid the same as you would if you were not on vacation.

Your employer has the right to schedule your vacation according to their business needs, as long as your employer provides you with a vacation within 12 months of earning it. The employer cannot schedule your vacation in periods of less than one week unless you give a written consent for a shorter period. Furthermore,

the 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.

You are eligible for vacation pay if:

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

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 payday 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 the final paycheck.

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. It is illegal for an employer to contract out of these minimum standards. For example, the *ESA* requires most employers to pay their employees at least the minimum wage. This means that your employer must pay you at least the minimum wage, even if you have signed an employment contract which says that you will be paid less than the minimum wage.

On the other hand, if your contract provides for higher standards than the *ESA*, you and your employer are bound by the standards in the contract.

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 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 should not impact your immigration status. The ESB will not share information with other agencies. However, if you have concerns with regard to your specific situation, you may consider reaching out for advice before filing an ESB complaint.

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

The *Temporary Foreign Worker Protection Act (TFWPA)* provides additional protections to workers. Any employer hiring a worker from the Temporary Foreign Worker Program, the Home Child Care Provider pilot, or the Home Support Worker Pilot 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.

Can my employer remit “taxes” without paying me?

No. It is illegal for your employer not to pay you, but to remit taxes to the Canada Revenue Agency (CRA). An employer who remits ‘taxes’ to the CRA but is not paying any wages to the employee is making a fraudulent report. You can file an anonymous report with the CRA, that is, you do not have to reveal your name when you file this report. To make a report, visit: <https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/suspected-tax-cheating-in-canada-how-report.html>.