COMMUNITY LIVING
Ontario

INSPIRING POSSIBILITIES

A LEGAL GUIDE TO ENGAGING SUPPORT WORKERS FOR PEOPLE WITH DISABILITIES

Foreword

Being the family member of a person who has a disability comes with lots of joy, surprises, and humour, as well as some challenges and heartache. It also comes with responsibilities.

One of those responsibilities can be the hiring of support workers. In Ontario, individualized, direct funding makes this a possibility. Direct funding gives people more control over their day-to-day lives, where they go, what they do and who supports them to do it.

This makes community more accessible, in ways that are suited to each person. But, dealing with the issues associated with hiring support workers, can be complicated. That is why we created this guide. Community Living Ontario believes in people. We believe in families and we believe in people who choose to make supporting people who have intellectual and developmental disabilities, their profession.

We hope this guide helps everyone to sort out the issues associated with these interconnected relationships in a way that provides education and help in determining which course is right for you.

In this together.

Chris Beesley,
CEO, Community Living Ontario

Introduction

Support Workers can provide vita supports that enhance opportunities for inclusion, provide relief to caregivers and improve wellbeing for people with disabilities and their families. This guide is designed as a manual for people who are considering engaging private Support Workers, or who have already done so, to help them to meet their obligations, avoid conflict and resolve issues as they arise.

In this guide we start by providing a brief background on the law that governs the relationship between families/people supported and their Support Workers. We then explore some of the key questions that people with disabilities and their families ask about working with a private Support Worker, including:

1. What kind of funding can I get to help me pay for supports?
2. How do I recruit a private Support Worker and what pitfalls should I be aware of?
3. How do I make sure i choose the right private Support Worker?
4. What should I put in a contract with a private Support Worker?
5. How do I manage disputes and challenges that arise with a Support Worker?
6. What are the rules related to the termination of a private Support Worker's contract?
7. What kind of insurance should I or can I get to reduce the risks associated with my Support Worker?
8. Is my live-in worker my "tenant" and what are the rules for how I manage how they live in my home?

Throughout this manual, we take the general rules that apply to employment or contractor relationships and apply them to the specific context of the relationship between a family or person with a disability and a worker they are hiring to support them. We also provide sample documents for you to adapt for your own purposes.

For ease of reference, we refer to the family or person doing the hiring as "you" or "the family" and we refer to the person providing private supports for pay as the "Support Worker" or the "worker".

The following is a brief overview of what you can expect to find in each chapter.

CHAPTER 1
LEGAL BACKGROUND AND OVERVIEW
In this chapter we provide a brief overview of the legal system in Ontario and the specific laws that affect how people and families interact with and hire Support Workers.

CHAPTER 2
FUNDING FOR SUPPORTS
Here, we discuss the various sources of funding available to people with disabilities in Ontario that can be used to purchase supports.

CHAPTER 3
DETERMINING THE STATUS OF YOUR WORKER
In this chapter we discuss the legal status of private Support Workers as either "employees" or "independent contractors".

CHAPTER 4
HIRING AN EMPLOYEE
Here, we discuss best practices and key considerations when hiring a Support Worker as an employee.

CHAPTER 5
CONTRACTING WITH AN INDEPENDENT CONTRACTOR
In chapter 5, we discuss best practices related to engaging a Support Worker as an independent contractor and how these practices differ from those that apply when you're hiring a worker as an employee.

CHAPTER 6
EMPLOYMENT OBLIGATIONS
In this chapter we review the key terms and conditions of employment that apply to "employee" relationships.

CHAPTER 7
HUMAN RIGHTS
Here, we discuss the issue of "human rights" and how to ensure you meet your obligations to your worker in relation to respecting their human rights.

CHAPTER 8
HEALTH AND SAFETY
In chapter 8, we review key obligations related to health and safety in the workplace – which in most cases will be your home or the home of a loved one with a disability.

CHAPTER 9
PAYROLL AND TAX CONSIDERATIONS
In chapter 9, we review tax considerations that apply depending on the structure of your relationship with your worker.

CHAPTER 10
INSURANCE
Here, we discuss key considerations related to insurance that will help you protect yourself from claims and liability related to injuries, losses or claims arising out of your relationship with your Support Worker.

CHAPTER 11
WORKING WITH STAFFING AGENCIES
In this chapter we discuss key considerations related to hiring a worker through a staffing and support agency, including legal and contract considerations.

CHAPTER 12
LIVE-IN SUPPORT WORKERS
In this chapter we discuss key issues related to Live-in Support Workers, including special exemptions from employment standards requirements, residential tenancies (landlord and tenant) issues and best practices for structuring the relationship.

DISCLAIMER: While we have attempted to capture the most common issues that you may encounter when working with a Support Worker, every relationship is different and novel issues are constantly arising. If you don't find what you need to answer your questions here, we recommend you seek out some advice from a lawyer who understands employment law, as well as your unique situation.

We have also attempted to provide the most up to date legal information available, however, the law is constantly evolving, including the laws related to the interpretation of contracts and legislation related to employment rights. While we hope to be able to update this book as developments happen, we do not warrant or guarantee that the legal information in this book is current.

Finally, the information included in this book is general information only and does not constitute legal advice with respect to your particular circumstances, or at all. We strongly recommend that before entering into an arrangement with a private Support Worker you obtain legal advice, and that you consult with your legal advisor before taking any significant steps related to any Support Workers you might currently be working with, including discipline, termination or dispute resolution.

CHAPTER

1

Legal Background

The law establishes important rules that govern most relationships within our society. These rules affect how people and families engage with Support Workers – whether through an agency or directly by hiring a worker as an "independent contractor" or employee. Being aware of and understanding these rules is the key to avoiding costly disputes, liability and disruption to care and support relationships. Examples of legal disputes that can arise related to Support Workers include:

- Complaints related to overtime pay, vacation pay, holiday pay and other employment related entitlements
- Complaints relating to health and safety in the workplace
- Liability related to wrongful dismissal or termination of the support relationship
- Human rights complaints
- For Employment Insurance, Canada Pension Plan and Income Tax remittances
- *Workplace Safety and Insurance Act* premiums and other liabilities for on-the-job accidents and injuries
- Disputes under the *Residential Tenancies* Act related to live-in Support Workers

This chapter is designed to provide you with a brief explanation of some key legal terms and the legal frameworks that affect your relationship with Support Workers you hire. The remaining chapters in this book will take a deeper look at the your rights, obligations and standards under these laws.

1. Law 101: Key Terms and Explanations

Below, we define some key terms and concepts:

"Statute"

A statute is a binding set of rules or "legislation" developed and passed by the legislative branch of either the federal or provincial government. Sometimes, a statute is called an "act." There are various statutes that apply to the service relationships between individuals/families and Support Workers. These include:

- The Employment Standards Act ("*ESA*")
- The Workplace Safety and Insurance Act ("WSIA")
- The Occupational Health and Safety Act ("OHSA")
- The Ontario Human Rights Code ("The HR Code")
- The Residential Tenancies Act ("RTA")
- The Income Tax Act ("ITA")
- The Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act ("SIPDDA")

This chapter provides a brief overview of these statutes in the following section. The details of your statutory obligations (meaning the duties you have that are based on a statute) will be addressed in greater detail in the rest of the chapters in this guide.

"Regulation"

Regulations are rules and procedures that are made by the government related to a particular statute. For instance, the *Employment Standards Act*, 2000 is a statute that provides minimum standards for employment relationships in Ontario. There are many regulations that are made related to that statute that provide for special rules, including related to residential care workers and domestic workers that may apply to certain support arrangements.

"Common Law"

The Canadian legal system (excluding Quebec) is based on statutes and the common law system. The common law refers to a legal system based on "judge made law". In the common law system, what a judge says in one case creates a rule (a "precedent") that will guide judges in similar cases in the future.

Common law is not set out in statutes, but does play an important role in the interpretation of statutes. The common law is constantly evolving and adapting based on changing circumstances in our society. The common law plays an important role in regulating employment and service relationships.

"Contract"

A **contract** is a legally binding agreement between two or more people, who are the **parties** to the contract. A contract is often a written agreement that is formally signed by the parties, but it can also be an oral agreement or even implied based on the actions of the parties.

A service or employment contract will generally exist where one party makes an "offer" to hire or pay for service, the other party accepts the "offer" and there is an exchange of "consideration" (a term discussed below).

"Consideration"

Under the common law, a valid contract requires an offer, acceptance and consideration. Consideration is something of value that is being exchanged between the parties to a contract. This can be a promise to perform a certain service – for example, to provide respite services – or a promise not to do something – for example only scheduling a worker on weekdays, not weekends. A promise to provide certain services can be made in exchange for payment for the services.

2. What Laws do I need to know about?

a. The Employment Standards Act, 2000 (*ESA*)

The *ESA* creates specific minimum rules that govern employment relationships in Ontario. Among other employment-related matters, the *ESA* covers wages, vacation time and pay, benefits, leaves of absence, severance and termination.

Importantly, the *ESA* applies to **employees** and not to **independent contractors**. This guide discusses the differences between employees and independent contractors in more detail in chapter 3.

The Ministry of Labour, Training and Skills Development ("MOL") has established Regulations which provide for certain exemptions and exclusions from the *ESA*. The *ESA* and its Regulations are enforced by the MOL and disputes are resolved through the Ontario Labour Relations Board (the "OLRB").

Some general principles to keep in mind about the *ESA* are:

1. An employer cannot contract out of the *ESA*. This means that unless one of the *ESA* exemptions applies to you or your employees, you must, at a minimum, follow the standards set out in the *ESA*. You cannot negotiate with your employees to provide less than what is set out in the *ESA*, but you can provide for more generous terms of employment.
2. Employers cannot penalize an employee for seeking to enforce their rights under the *ESA*.

b. The Workplace Safety and Insurance Act (WSIA)

The WSIA is an insurance system that covers workplace accidents. Coverage is mandatory for most employers and employees in the province of Ontario, with a few exceptions.

The Workers Safety and Insurance Board ("WSIB") makes coverage decisions and administers the WSIA. Families who engage a Support Worker to provide "respite" or as a "caregiver" for more than twenty-four hours per week are generally required to register with the WSIB. Once registered, employers pay WSIB premiums which are used to pay benefits to employees.

The WSIA establishes a broad list of workers who are covered, and identifies which employers are required to pay WSIB premiums and which employers may choose to do so on an optional basis. This is discussed further in chapter 10.

The WSIA sets out the criteria that must be met, in order for a workplace-related illness or injury to be covered. The WSIA also establishes what reporting obligations employers have, how premiums are calculated and what benefits a worker is entitled to, if their claim for WSIB coverage is successful. There are also regulations made under the WSIA that set out exemptions and exclusions from WSIB coverage.

c. The Occupational Health and Safety Act (OHSA)

The OHSA promotes safe and healthy workplaces and sets out the duties and responsibilities for workers and employers in the workplace. While the OHSA applies in most workplaces (including those involving private support relationships).

The OHSA covers, among other things:

- a general duty on the employer;
- to take all reasonable health and safety precautions;
- a worker's right to refuse work when the worker believes their health and/or safety is in danger (and exemptions to those rights for certain types of workers);
- workplace harassment; and workplace violence.
- prevention education.

The OHSA contains enforcement and penalty provisions. Under the OHSA, Ministry of Labour (MOL) health and safety inspectors may perform proactive inspections as well as inspections in response to complaints and work refusals.

Under the statute, MOL inspectors have the power to issue various types of compliance orders which can range from addressing or eliminating a hazard while the inspector is on site, ordering a harassment investigation, and issuing a stop work order until the employer complies with the statute. Similar to the *ESA*, an employer cannot penalize a worker for bringing attention to potential health and safety risks or for exercising their rights under the statute.

chapter 8 provides more information about the OHSA relevant to families, people with disabilities and their private Support Workers.

d. The Ontario Human Rights Code (OHRC)

The OHRC prohibits discrimination in the course of contracting (including with independent contractors and employees) and employment,[1] and gives workers the right to file complaints (or applications) through the Human Rights Tribunal of Ontario (HRTO).

The OHRC is focused on preventing and addressing discrimination based on certain personal characteristics, including: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age[2], marital status, record of offences[3] or disability[4]. The protection against discrimination in the course of employment (but not in contracting) also applies to a person's record of offences.

In the employment context, the prohibition of discrimination includes all aspects and stages of the employment relationship, including: recruitment, training, transfers, promotions, terms and conditions (i.e. pay, overtime, holiday, benefits, hours of work, shift work, discipline and performance), dismissals and layoffs. Importantly, the OHRC applies to workers who are full-time, part-time, and temporary staff.

Further information about how the OHRC applies in the context of employment will be discussed in chapter 7.

e. The Residential Tenancies Act (*RTA*)

While the *RTA* doesn't apply in all Support Workers relationships, it may apply where a family engages a live-in caregiver, or offers living accommodations to a worker as part of the support arrangements for their family member with a disability..

In these circumstances, discussed further in chapter 12, the *RTA* is an important source of both tenant and landlord rights and responsibilities. The *RTA* covers when rent must be received and what rent amounts can be charged, what responsibilities tenants and landlords have in relation to the physical 'unit' or living space, and when a tenancy can be terminated.

f. Income Tax Act (ITA)

The ITA sets out important tax reporting and deduction obligations for individuals and families engaging workers directly or through not-for-profit corporations. The ITA also governs certain tax credits that you may be eligible for. Families are encouraged to speak with a professional advisor who can provide guidance on navigating the ITA. Key tax considerations are discussed further in chapter 9.

g. Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act ("SIPDDA")

SIPDDA is provincial legislation that is the framework for developmental services in the province of Ontario and provides rules for how government funded service providers deliver services to people with developmental disabilities.

While this legislation doesn't specifically apply to how people/families engage workers directly, it may affect services and supports that are purchased from a government funded service agency. This legislation is discussed further in chapter 11 where we review issues related to purchasing supports from service agencies.

1. See sections 3 and 5 respectively.
2. 18 years or older.
3. "record of offences" means a conviction for, an offence in respect of which a pardon has been granted under the Criminal Records Act (Canada) and has not been revoked, or an offence in respect of any provincial enactment.
4. See generally Section 10 of the HR Code; Ontario Human Rights Commission "Employment" online: http://www.ohrc.on.ca/en/part-i---freedom-discrimination/employment-6

CHAPTER TAKEAWAYS:

This chapter provides a brief overview of key legal concepts and offers an introduction to the key legal frameworks that families should be aware of when they are engaging Support Workers.

Now that you have read this chapter, you will have a familiarity of what types of rights and responsibilities you and a worker have, and some important legal considerations that you can explore further with a legal or financial advisor. This will make navigating the various legal frameworks a little bit easier and can inform further questions you may have and how you will be move forward with hiring a worker for your loved one.

In particular, you should be familiar with the following topics after reading this Chapter:

- There are a number of written laws in Ontario that govern an employer's responsibilities and duties towards their private Support Workers. These written laws (referred to as "statutes" and "regulations", or together as "legislation") cover topics such as: minimum standards, human rights protections, workplace safety, workplace accident and injury insurance, live-in caregiver situations, employment taxes, services for people with developmental disabilities, and more.
- In addition to statute, Ontario has a system of court-made law referred to as the "common law". This law governs the interpretation of employment contracts and the interpretation of legislation. It can provide important benefits and protections to employees and responsibilities and powers to employers.
- You should know the basic rules of what makes a contract effective. This will help to ensure that contracts you enter with your private Support Workers work for you.

CHAPTER

2

Funding and Fund Administration

For someone living with a disability, funding for supports and services can be **critical** to ensuring health, well-being, dignity and liberty. Supports and services can be expensive. If you or your family member is living with a disability, you will likely already know that there are different types of funding available. Knowing what types of funding you may be eligible for will help you to plan for the future and get the supports you need.. This chapter provides a summary of the different funding options available to help meet the unique needs of people living with disabilities and their caregivers.

Some helpful reminders about self-directed planning and funding:

- Remember the process of securing funding and planning what supports and services you or your family need can take **time;**
- Funding recipient should always be involved to the greatest extent possible in the planning process
- Remember that personal information should be kept private among those assisting you with planning and applying for funding, and providing services and supports.

a. The Ontario Autism Program

The Ontario Autism Program ("**OAP**") is a provincial program operated by the Ministry of Children, Community and Support Services ("**MCCSS**"). The OAP is for children and youth under the age of 18 who have been clinically diagnosed with autism spectrum disorder ("**ASD**" or "**autism**"). Eligible children and youth can receive funding and supports until they turn 18 years old. Beginning in 2019, the OAP has been undergoing changes and is moving towards a new "needs-based" model which is still being implemented. OAP funding can cover a range of services from behavioural services, interventions and therapies to skills building programs, respite and family training.[5]

b. Passport Funding

The Passport program is an individualized funding program for adults living with intellectual disabilities that is funded by MCCSS and is coordinated by regional Passport Agency Offices across the province.

5. More information can be found on the Ontario Autism Program website

The main purpose of Passport funding is to enable adults with disabilities to live and participate in their communities enjoy and inclusion. This means the funding can be used for programming and activities within the community and is set up so that the recipient or someone appointed to act on their behalf can direct and manage their own supports. It is often used to purchase support from private Support Workers. It can also be used to purchase respite services to relieve primary caregivers. A small percentage of funding can also be used for administrative costs.

How is the Passport funding managed?

Managing your Passport funding is an important element of the program. Managing your funding means:

- choosing where the money will be spent;
- paying Support Workers and applicable employer costs (Canadian Pension Plan, Employment Insurance, WSIB premiums, vacation pay for Support Workers);
- ensuring you are invoiced for the services you are purchasing and/or receiving the necessary time sheets from your workers;
- submitting invoices and receipts to the applicable agency on time for reimbursement;
- ensuring the money is being spent on eligible services and in accordance with any applicable agreements you have with MCCSS and service providers.

If you require assistance with managing your Passport funding, you can appoint an individual or any agency take on the responsibilities of managing passport funding outlined above.

- Payroll for Support Workers and taking care of other administrative paperwork
- Assisting with coordinating criminal record checks, vulnerable person checks
- Assisting with recruiting workers
- Distributing funding to other service providers
- Tracking and overseeing how funding is being spent
- Providing resources about community supports and services

Other tools for managing Passport funds:

There are also online tools that can assist you with managing your Passport funding:

My Direct Plan

My Direct Plan is a free, online tool that allows you to manage and track your Passport funds and is a paperless way to submit invoices and receipts to PassportOne, a payment centre which will receive and process all receipts and invoices for all Passport Offices in Ontario.

A Passport recipient can create an account and permit person or agency that is supporting them to manage their funds to set up and administer their account.

My Community Hub

My Community Hub is another online tool that allows you to register for programs, activities and services offered by Developmental Services across the province. Making an account is free, but you can pay for services and programs through your account.

c. Complex Special Needs Funding

Complex Special Needs funding is provided by MCCSS for children and youth under the age of 18 who have been diagnosed with a developmental disability which requires an "integrated service approach" and supports that are typically provided by various sectors (health, education, social services) at different locations. The funding can be used for intensive supports and residential services to children with complex special needs. This funding is intended for children who have two or more 'special needs' and existing local or regional supports and services are not able to meet the immediate health and safety needs of the child.[6]

d. Special Services at Home Funding

Special Services at Home (SSAH) funding is for children under the age of 18 who are living with developmental and/or physical disabilities and who are not receiving supports and services under MCCSS' residential program. SSAH funding can be used for in home and outside of the home supports. The main purpose of the funding is to ensure families can get support and services when they may not be available otherwise in their community. In many ways, the SSHA

6. Ministry of Children, Community and Social Services, "Providing Access to Quality Supports and Services for Children With Special Needs and Their Families" online: www.children.gov.on.ca/htdocs/English/about/EBB/2016/providingaccess.aspx

funding is meant to fill service gaps and seeks to ease some of the stresses and challenges for families in meeting the needs of young children with physical and developmental disabilities. Funding is focused on two areas:

- Personal development and growth (daily living activities, behaviour program, communication, mobility, social skills and developmental programs)
- Family support and relief (respite) for primary caregivers

e. Individualized Funding

Individualized funding for residential services allows people with developmental disabilities live in a private home in the community and receive the services they need. Individualized funding is self-directed by the individual or someone the individual has appointed to assist them.

f. Family Managed Home Care

The Family Managed Home Care Program ("**FMHC**") is person-directed funding provided by the Ministry of Health and Long Term Care through each of the Local Health Integration Networks ("**LHIN**") across the province. The purpose of this funding is to provide individuals or the Substitute Decision Makers (SDMs) of individuals with disabilities, with more flexibility, control and choice in how the funding is allocated. Children with complex needs, adults with Acquired Brain Injuries (ABI), some home-schooled children and individuals with extraordinary circumstances (where an individual has stable needs but is experiencing certain barriers to care such as language, cultural issues or living in a remote or rural location) are eligible for this type of funding.[7] This funding is meant to provide full compensation for services provided in an individual's home, based on their individual service plan. Each potential client will undergo an assessment to determine their eligibility for FMHC funding.

g. Other

Families may have other sources of funding at play, including funding from a legal settlement related to an injury or claim, funds from an inheritance, funding from the government under certain grandfathered programs (such as innovative residential support programs where residential supports are established by families with funding from the government). The rules governing these various pockets of funding differ based on the source and how the funding is held (whether in trust, administered through a TPA, or in a personal account). However, the rights and obligations you must observe when engaging a Support Worker will generally be the same regardless of the type or source of funding.. The remainder of this manual focuses on these rules.

CHAPTER TAKEAWAYS:

The purpose of this chapter is to provide you with an overview of important funding sources that can be used to purchase supports and services for a person living with a developmental disability and their family. As discussed in this chapter, there are various types of funding that a family may be eligible for, based on their needs and circumstances. Sources of funding that may apply to your situation may include:

- The Ontario Autism Program, which provides needs-based funding to eligible children and youth with autism spectrum disorder;
- Passport funding for adults with developmental disabilities;
- Complex Special Needs funding provided by MCCSS for children and youth diagnosed with a developmental disability that requires an integrated service approach to supports;
- Special Services at Home funding for children and youth who are living with developmental and/or physical disabilities and who are not receiving supports and services under MCCSS' residential program;
- Individualized funding for residential services; and
- Family Managed Home Care Program funding, provided through the Ministry of Health and Long-Term Care.

7. "Family Managed Home Care Fact Sheet" online: http://healthcareathome.ca/southwest/en/care/PublishingImages/southwest/en/Getting-Care/Getting-Care-at-Home/family-managed-home-care/Family%20Managed%20Care%20Fact%20Sheet.pdf

CHAPTER

3

Employee or Independent Contractor

There are a number of important considerations that you must take into account when hiring (or "engaging") a private Support Worker.. Perhaps the most important is the question of whether your worker is an employee or an "independent contractor".

1. Employee or Independent Contractor?

Properly characterizing your worker as an "employee" or "independent contractor" will allow you to plan and budget for the legal costs and obligations that go along with the classification your worker falls into.

Generally speaking, employees have more rights and entitlements than contractors do, including, among other things:

- a protected minimum wage,
- vacation pay,
- public holiday pay,
- overtime,
- termination related entitlements,
- claims to WSIB coverage, and
- Employment Insurance and Canada Pension Plan contributions and remittances and
- Income Tax deductions.

Employees are generally subject to a greater degree of control by their employer, including as to when, how, where and under what conditions work will be performed.

Contractors, on the other hand, have very limited entitlements and generally work for a flat hourly rate with no claims to vacation pay, public holiday pay or overtime, and remit their own income tax. Contractors also generally have a greater degree of control over where, when and under what conditions they will work, have a number of "clients" and otherwise conduct themselves as self-employed.

In practice, the difference between the two classifications of worker can be slippery. Many families and workers prefer the "independent contractor" classification and structure their support relationships accordingly. Why? Well, for families, it can be less costly (i.e. no overtime, vacation or public holiday pay, or EI or CPP remittances) and less administratively burdensome. Workers may prefer this status because they can claim tax deductions as a self-employed person, or, as is often the case, because they do not report their earnings at all and treat the earnings as "under the table" income.

Despite these preferences and perceived advantages, misclassification of a worker can have negative consequences for both families and workers alike. Specifically, if a worker is treated as a contractor but later deemed to be an employee, the family that hired them can be liable for unpaid vacation pay, holiday pay, minimum wage, termination pay, CPP and EI, as well as fines/penalties and interest. Workers can also be held liable for unpaid income tax and interest. As a result, treating a Support Worker as an "independent contractor" can be risky and result in unbudgeted and unplanned for expenses for everyone.

Adding to the complexity, differentAdding to the complexity, different employment laws are often governed by different decision-makers or agencies. Sometimes their rulings can appear contradictory. For example, the Ministry of Labour might find that a worker is an employee and entitled to *Employment Standards Act*, 2000 (*ESA*) benefits. At the same time, the Canada Revenue Agency (CRA) may find that the worker is a contractor for tax reasons and required to have remitted their own taxes. This is an unfortunate reality of hiring. The best way to avoid contradictory rulings is to structure your relationship with your worker to ensure they are correctly classified and erring on the side of caution – i.e. treating a worker as an "employee".

a. Employee or Independent Contractor?

Decision-makers (judges, MOL inspectors etc.) use and weigh a variety of factors when they decide whether a worker is a contractor or an employee. If you are hiring a "Support Worker" directly, some of the questions that will influence their classification include:

- Do you control how, when, and where the work is performed?
- Do you direct and supervise the worker or does the worker dictate the work to be done?
- Is the worker required to work exclusively for you while at work (i.e. not support any other people or families or perform work for others remotely)?
- Is the worker prohibited from sending someone else (another worker) in their place if they are unavailable to work?
- Is the worker dependent on you for their livelihood?
- Do you provide all the tools, resources, work space, and cover all costs associated with the work being performed?
- Do you control the schedule?
- Do you keep the records of when the worker works and provide a pay cheque as opposed to being invoiced by the worker?
- Do you provide vacation pay, paid holidays, overtime pay, or other benefits typically associated with employment?
- Is it unclear based on your agreement with your worker what their status or classification is?

If you answered "Yes" to any of the questions above, then those "Yes" factors weigh in favour of your worker being an employee. The "No" factors weigh against a finding that the worker is an employee.

There are various resources available online to help you classify your worker. For instance:

- The Canada Revenue Agency provides some questions here. If you still aren't clear you can ask for a "ruling" from CRA and then rely on that ruling in the event that your worker or another government agency later challenges that status. Be aware, however, that you may not be happy with the results of that ruling.
- The Ontario Ministry of Labour also provides some direction on the difference between employees and independent contractors here.

b. Examples of Various Relationships and their Status

Below are a few examples of how various types of work relationships might be characterized.

Example #1:
A worker is hired to support a family's daughter every weekday at the family's house. She signs a contract confirming that she is a "contractor" and is expected to file her own taxes. Her hours are fixed by the family. The parents instruct the worker on how they want their daughter to be cared for, regularly watch the worker perform the job and interject to correct performance. The worker works for the family full time, and she is dependent on them as her primary source of income. The worker is paid biweekly her and does not issue an invoice.

In this case, despite the written agreement confirming her "contractor status", the worker is very likely to be an employee, not an independent contractor. The worker has many of the characteristics of an employee, and the family exercises a great deal of control over how, when, and where work is performed. In contrast, the only signs of "contractor" status are a written agreement and expectation related to filing of taxes, both of which are frequently viewed as evidence of the parties merely seeking to avoid their legal obligations to the government.

This type of situation is very common and can be very costly if it is discovered by the Canada Revenue Agency, or if there is a relationship breakdown and the worker subsequently claims employee status.

Example #2:
A worker is engaged by a family informally, without any written agreement, to care for their daughter out in the community in a group setting. The worker picks up their daughter every morning and provides support for a pre-determined period of time based on the family's needs and the worker's availability. The worker uses her own car and provides support in the community to a group of people at the same time based on the interests of the people being supported. The worker may bring along another worker from time to time depending on how many people are in the support group each day. The worker sends the family an invoice every month for the care for their daughter with a lump sum fee for service.

In this case, despite the absence of a written agreement confirming the worker's classification, the worker is much more clearly a contractor. The family does not exercise much control over how, where, and when the work is performed. The worker uses their own resources (vehicle), controls the activities, charges based on invoice, hires their own employees (if needed), serves more than just the family, and is not dependent on the family for her livelihood.

Example #3:
A family hires a worker to come to their home and care for their daughter. The family books the worker ahead of time, and the worker can choose whether or not to accept the work on a given day. Generally, the worker workers 1 or 2 shifts per week for a total of about 10 hours per week. The worker cannot send a subcontractor in their place to perform the work. When the worker is not working for the family, the worker has a full-time job with an agency and occasionally works for other families. However, when they are working, the family will watch and supervise their work. Finally, the worker doesn't provide an invoice, but is also not paid vacation pay or other benefits.

In this example, the status of the worker is much less clear. The family has a good deal of control (managing how and where the work is done), but the worker also has control (exercising when the work is done). In this case, it is difficult to predict how a legal decision maker would classify the worker and there is a strong possibility that they could find in favour of employment status because employment law and employment standards legislation in particular tends to favour results that provides more protection to workers.

2. Obligations based on the Status of Your Worker

If a worker is an ***independent contractor***:

- The worker is responsible for filing his/her own Income Tax;
- Your family is not liable for Canada Pension Plan (CPP) or Employment Insurance (EI) contributions or remittances to the government (normally paid by employers);
- The worker is not eligible for paid public holidays or vacations;
- There are no limits on his or her hours of work and he or she is not entitled to overtime;
- The worker is not entitled to employment law reasonable notice of termination (but could have claims related to termination of their contract);
- He or she is responsible for procuring his or her own WSIB coverage (if required);
- He or she should charge Harmonized Sales Tax (HST) depending on her revenues;
- He or she should have insurance;
- You are not obliged to provide a T4, but could be required to file a T4A confirming payments made to a self-employed person.

If your worker is an ***employee***:

- You must deduct and remit Income Tax, CPP contributions and EI contributions;
- You must file a T1, T4, and T4A with the CRA;
- You must keep a detailed accounting of hours worked, wages paid, vacation, public holidays, deductions and contributions remitted;
- You must provide paid public holidays and vacation, and must comply with minimum wage, hours of work and overtime requirements (all of which are required by the *ESA*);
- You must provide notice of termination (or termination pay) as required by the *ESA*, and in accordance with the common law if you haven't properly addressed this in an employment contract;[8]
- Provide a Record of Employment upon termination; and
- Depending on the type of work and how many hours your worker works per week, you may be required to have WSIB coverage

Improperly treating an employee as an independent contractor can be very costly. Doing so is an "offence" under the *Employment Standards Act*, 2000, which can result in fines and penalties. In addition, mischaracterizing a worker can result in liability to the CRA for unpaid remittances (see chapter 10), liability to the employee for unpaid wages, vacation, public holidays and overtime, liability for injuries suffered by the employee, liability for unpaid WSIB premiums, and unlimited liability at common law for reasonable notice of termination among other things.

We review the obligations discussed above, as well as best practices for managing your relationship with each type of worker in the following chapters.

8. For a discussion of common law reasonable notice, how it differs from ESA notice, and how to limit your liability for it, see chapter 4.

CHAPTER TAKEAWAYS:

After reading this Chapter, you should be aware of several important differences between employees and independent contractors:

- Workers can be divided into employees who are subordinate to the "employer" who they work for, and contractors who are seen as running their own business and providing services to a "client".
- Employees have greater rights with respect to the person they work for than independent contractors do. Those rights include entitlement to minimum employment standards, common law employment rights, and entitlement to public employment benefits (creating an obligation for employers to pay premiums and make tax deductions). In exchange for this, employers have greater control over their employees and their work.
- Independent contractors have fewer rights than an employee, but have much greater freedom from their client than an employee does from an employer.
- The line between employees and independent contractors can be slippery, and may lead to unexpected liability for those hiring independent contractors.
- Workers can also be employees and independent contractors for different purposes (for example, minimum standards vs. tax law).
- A number of factors are used by decision-makers to distinguish employees and independent contractors, with no one factor being determinative in most cases.
- Getting the characterization of your worker is very important and if you aren't sure, you should seek advice from a professional.

CHAPTER

4

Hiring an Employee

Once you have made the decision to hire a Support Worker that you will classify as an "employee", there are a number of steps you can take to ensure you hire the right person and manage the relationship to protect yourself and your family from unexpected liability.

In this chapter we will walk you through some of the important considerations, including:

1. Pre-recruitment considerations;
2. Recruitment best practices;
3. Screening;
4. Hiring your worker
5. Limiting liability through written contracts; and
6. Managing the relationship day-to-day to avoid surprises.

Being aware of your obligations and planning ahead can help you to avoid unexpected liability when engaging a worker.

1. Pre-recruitment considerations

Do you need a full-time Support Worker? Do you need a worker with special training or qualifications? Do you need someone on a live-in basis? Do they need to be able to drive?

Before you start recruiting, it's a good idea to decide what kind of Support Worker will best suit your needs. Write a list of all the qualities you want your worker to have: a sense of fun, a perfect driving record, first-aid training, a nursing degree, etc. Make a list of deal breakers: smokers, criminal records, lack of experience etc.. This will help you craft a precise job description that will attract Support Workers who have the skills and qualities you require.

What funds do you have available for support? Before you start recruiting it's important to know what you can afford. This means budgeting the total cost of paying for supports. This includes:

- the hourly wage or salary,
- the cost of any remittances you will have to remit to the government in respect of their earnings (for more on this see chapter 9),
- any vacation pay and public holiday pay your worker may be entitled to (see chapter 5), and
- insurance premiums (see chapter 10).

You should also consider any other benefits you choose to give to your Support Worker, such as mileage if they are driving you or your loved one in their own car, the cost of excursions, the cost of masks and other supplies required to keep your family and Support Worker safe. Now balance that against the supports you may receive from the government and any personal funds you have available to purchase supports.

For a very loose estimate of what your total costs will be on an hourly basis for an employee, you should budget approximately 15-20% extra on the base hourly wage. This will include the following employer expenses:

- Vacation pay (between 4% and 6% of wages);
- Public holiday pay (approximately 3.6% of wages);
- Employer side Employment Insurance remittances (approximately 1.4%);
- Canada Pension Plan remittances (approximately 4.9%);
- Workplace Safety and Insurance Board premiums (approximately 1-3%).

You should also consider what the going rate for Support Worker is in your community. You might be able to determine this based on what you've heard from other people in the community, or by looking at the going rates at local support agencies. Ultimately, this may be a negotiation and will depend on the expertise and experience you require, as well as the availability of Support Workers in your local area.

2. Recruitment Best Practices

Job Posting

Recruiting the right employee can be very challenging. Typically, this process involves posting an advertisement for the position on a job-site (Indeed, Craigslist, Kijiji), speaking with your local support agency, or using online services such as www.RespiteServices.com to locate a Support Worker.

When recruiting for a worker, your needs or the needs of your loved one should dictate the qualifications you are seeking from applicants. As described in chapter 7,

There is a human rights exemption allowing you to consider protected grounds when employing a worker to provide personal care services to you or your family member who is "aged, ill or infirm".

Despite the exemption, the best practice to avoid disputes is to avoid including requirements related to the candidate's race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, record of offences, age, marital status, family status or disability, wherever possible.

Requirements or duties for employment should be reasonable, genuine, and directly related to the performance of the job. For example, it is reasonable, genuine, and job-related to require your Support Worker to speak and understand your language or the language of the person they will be supporting, but it will generally not be acceptable to require they do so without an "accent".

Some qualifications may not mention a ground of the Code directly but may unfairly prevent or discourage people from applying from a job. For example, advertisements for jobs that require "Canadian experience" or that indicate a preference for childless applicants are examples of "qualifications" that may be found to be discriminatory under the Code. Even if you benefit from the exemption, posting for these types of qualifications may still cause you grief associated with allegations of discrimination that you may have to engage legal counsel to disprove.

The following are examples of wanted ads that may pose issues:

Discriminatory		Non-discriminatory
Example	**Reason**	
"Worker wanted – male workers only"	Directly expresses a preference based on gender	"Support Worker wanted: must be able to lift 120 lbs"
"Family seeking young, energetic Support Worker"	Directly expresses a preference based on age	"Family seeking worker to provide personal supports to energetic and physically active teenage son"
"Support Worker with unaccented English wanted"	Indirectly expresses a preference that may disadvantage job seekers based on their place of origin.	"Support Worker to work in a bilingual home, must be fluent in English and French"

Applications & Interviews

When applicants begin to answer your wanted ad (or you identify a candidate through a referral) consider their professionalism and skills. Do they respond promptly and professionally to your communications? Do they communicate respectfully? Do their skills match your needs?

For candidates that aren't a match, sending a courteous note such as:

> ***"Thank you for your application. We have decided to go in another direction."***

If the candidate follows up asking for more information you are not obliged to provide it and it's best not to debate your decision.

For those candidates that you believe may be a potential fit, arrange a phone and video conference interview or, Covid-19 permitting, a face-to-face meeting on neutral territory in your community, such as a café, park, or community centre.

Only after you've whittled your list of potential candidates down to your top contenders should you consider inviting them to your home (or the home of the person they will be supporting) for an in-person interview. Ideally in this interview you can introduce them to the person they'll be supporting and get a bit of a sense of how they interact to see if there is a fit.

During the interview stage, it's important to keep in mind the human rights considerations discussed above and in chapter 7. The best way to avoid disagreements and the risk of liability in general is to adhere to the Human Rights Code's guidelines, which generally means avoiding questions that are unrelated to determining the applicant's ability to perform the essential duties of the job.

In addition, interviewers must be cautious about notes taken during the interview process. Even though these notes may be solely for the use of the interviewer, they must not identify or differentiate candidates according to the Human Rights Code's protected grounds (for example, "South Asian woman, 55-ish"). Such notes could be used as evidence in a legal proceeding at a later time.

What to Ask and What Not to Ask:

The following are some examples of questions and how you might approach these sensitive areas. While certain needs of the person being supported might require questions related to sensitive subjects, these subjects should only to be raised in direct relation to the needs of the person supported.

Once again, if the person being supported requires supports with their intimate or personal care and they only wish to be supported by someone of their own gender then that will be a legitimate basis for confirming the gender of the applicant.

Absent any specific disability related needs, you may wish to consider the following recommendations:

SUBJECT	LOWER RISK QUESTIONS	HIGHER RISK QUESTIONS
Race, colour, ancestry, place of origin, ethnic origin, citizenship	"Are you authorized to work in Canada?" *Note, if you are going to ask this question, we recommend that you ask it of all candidates, not just those who present as being new to Canada*	• Questions and making notes about a worker's race, citizenship or nationality, birthplace, colour of their skin, colour or style of hair, what a person is wearing. • Requests for photographs as part of an application.
Creed, Religion	"What is your availability for work on the days when support is required?" "Are you comfortable escorting my son to and supporting my son at our synagogue?"	• Questions about a worker's religious affiliation, the type of religious institutions a worker may attend, which holidays / customs a worker observes.
Marital status and family status	"What is your ability to work the shifts required for the position?" "Are you able to travel for work?" "Are you willing to relocate for this position?" "Are you able to stay late on weekdays?"	• Questions about a worker's marital or family status (i.e., are they single, married, divorced?), a worker's maiden or previous names, whether a worker has any children or would want children in the future or what childcare arrangements a worker has in place.
Physical or mental disability	"Are there any restrictions that might affect your ability to perform certain duties of the position, such as manual lifts, complying with my daughter's behavioural support plan etc."	• Questions regarding the general state of a worker's physical or mental health.
Age	"Have you reached the legal working age?"	• Questions about the worker's age or date of birth.
Record of Offences	"Have you ever been convicted of an offence for which a pardon has not been granted." "Can you please provide a copy of your most recent criminal record check?" *Because workers are supporting a vulnerable group, employers are entitled to ask workers to complete criminal record/vulnerable sector checks.*	• Questions about whether a worker has a criminal record or has ever been convicted of an offence.
Sex or Gender	None.	Questions about a person's sex or gender, whether a worker is pregnant or has future plans to have children, or what childcare arrangements a worker has in place.
Sexual orientation	None.	Questions regarding a worker's sexual orientation or a worker's political beliefs regarding sexual orientation issues.

Note, an employer has the duty to accommodate the needs of job applicants up to the point of undue hardship. For example, if a job applicant is unable to work on Saturdays due to religious observance and the position requires working on weekends, the employer may be required to consider whether it is possible to accommodate the job applicant by making adjustments to work schedules.

If an applicant's disability becomes an issue at the interview, for example, where an applicant voluntarily chooses to discuss his/her disability, an employer may make inquiries about the applicant's accommodation needs. All questions should be limited to the applicant's ability to perform the essential duties of the job. Questions which are unnecessary, such as "How did you get your disability?" or "What kind of medication are you on?" are not appropriate. All other issues relating to disability should not be raised until a conditional offer of employment has been made.

3. Screening

a. General

We recommend doing a thorough screening of every candidate for a position before entering into a working relationship with them. This recommendation applies regardless of whether the worker is going to be classified as an independent contractor or an employee.

Background checks can vary in depth. They can be time consuming and expensive. They can also give rise to human rights concerns. For this reason, the best practice is to only perform background checks on an individual to whom you have extended a conditional offer of employment (i.e. an offer of employment that you can revoke if the results of the background check are not to your satisfaction).

All applicants should be told at the start of their application that background checks will be performed on any successful candidate and the types of checks that will be performed should be listed.

The most important background checks for families to consider include:

- A vulnerable sector screening/criminal records check
- References from the applicant's past employers
- Confirming training and certification requirements are up to date (e.g. CPR, driver's license, etc.)
- Depending on the type of work involved, a medical confirmation of immunizations.

A thorough screening ahead of time will ensure that a candidate is who they say they are and is able to do the job before you become locked into a legal relationship with them. More importantly, it can ensure that they do not have a history of misconduct with previous employers, a criminal record, or other traits that make them incompatible with the trust and confidence required to be a Support Worker for a person who is vulnerable.

b. Vulnerable Sector/Criminal Records Check

Employers often run criminal record checks for applicants to sensitive or high-trust positions. Employers who are looking for employees to care for vulnerable people can use the more intensive record check: the "Vulnerable Sector Check".

Vulnerable sector checks will reveal a wider range of information about an applicant than a standard criminal record check.

This will give you a more complete picture of the employee's history and if any past criminal activity that would disqualify the applicant from working with you.

You can even make it a term of the employee's contract that they provide an updated vulnerable sector check every year. That way, you have the most up to date information and you know about any changes that occur while they are employed with you.

Procedurally, the applicant must request the vulnerable sector check from their local police department. You cannot request it for them. Typically, a quick search online will indicate where you can direct your employee to get these records. An applicant will be required to sign a written consent to conduct the specified search. The applicant will also get to see the results and then make a decision as to whether to consent to the results being shared with you.

If you decide to request record checks, its a good idea to treat all applicants that you intend to hire the same.

c. Credit Checks

Some employers choose to perform credit checks in cases where the employee will be responsible for the handling of employer funds. This is important where the employee will have access to and management of funds with minimal employer supervision. This many also be appropriate where the position requires the candidate to administer funds for the benefit of a vulnerable person who may or may not be able to recognize improper use.

A credit check should only be performed once you've signaled to the applicant that you want to hire them, subject to the acceptable results of the credit check.

Practically speaking, most Support Workers are not subject to this degree of scrutiny and credit checks are reserved for unique scenarios where a Support Worker is independently managing the finances of a person supported with minimal oversight. Whether this is required for your support relationship will depend on the responsibilities involved, the amount of funds to which the worker will have access, and the amount of oversight you will have.

d. References

The following should be kept in mind when calling previous employers that an applicant provides as references:

i. Calls to references should be made only if the employee agrees in writing (ex. via e-mail);

ii. Questions posed to a reference should be restricted to performance and qualifications for the position;

iii. As much as possible try to avoid questions that could reveal personal information that is not relevant to the person's ability to perform the job (e.g. questions about faith or personal relationships).

iv. Be aware that some former employers do not provide references as a policy.

v. Confirm the information provided by the applicant about their work with the reference.

Reference letters and employment history should be carefully analyzed. Sometimes a string of short-term stints can be a red flag. In addition, it is generally advisable to require a reference from a former employer and the source of the reference should be the Human Resources (HR) department as opposed to a former colleague or supervisor. HR is more likely to be aware of any performance concerns and/or the circumstances under which the employment terminated. If an applicant is unable or unwilling to provide this type of a reference it may be an indication that the applicant is hiding something about their past work experience.

Examples of questions you may wish to ask in the reference checking process include:

Questions about the candidate's work:

- How long did they work for you?
- What were their responsibilities?
- Were they part-time or full-time?
- What are their strengths and what are their weaknesses?
- Did you have any concerns with their performance?
- Were they punctual?
- Why did they stop working for you?
- Would you hire them again?
- Is the candidate mature, honest, professional, kind, warm, friendly, hard working?

Asking questions about the experience with the worker can help you assess whether they would be a good fit for your support needs:

- Did you have the opportunity to supervise them directly?
- How did they respond to feedback?
- Did they talk to you about issues before they turned into problems?
- Is there anything I need to know that would help me to manage their work with my family?
- Is there any reason I should be concerned about leaving my loved one (who has a disability) alone with them?
- Are there any safety concerns related to this worker?
- Did the worker ever have to respond to an emergency?
- Did the worker get along well with other members of the support team?

e. Training/Education

It may be advisable to verify that an individual has the credentials they claim to possess this check should be limited to confirming the successful completion of training programs such as transcripts, diplomas, certificates or degrees, copies of which an applicant should be able to produce.

f. Records of Immunizations

You should be cautious in requesting a record of immunization. Only request this information if it is relevant to the position (for example, if the applicant will be caring for an immunocompromised individual). You must provide an opportunity to the applicant to explain why they do not have required immunizations. If an employee does not have the immunization due to a disability, religious reasons, or other characteristics protected by the Human Rights Code, you may have to accommodate them. It is a good idea to get legal advice if this occurs.

g. Background Checks to Avoid

Some types of background checks may be discriminatory and pose the risk of liability from a human rights perspective.

As discussed in the section on Interviews above, it's best not to inquire about an applicant's personal life if your questions aren't relevant to the position. Doing so may open you up to allegations of discrimination if you decide not to hire the applicant.

Further, it is generally not recommended that you require pre-employment drug and alcohol testing.

4. Hiring an Employee: When the Relationship Formally Begins

a. General Information

An employment contract relationship begins when an offer of employment and is accepted. This means that if you were to make a verbal offer of employment (for example, "You're hired!") and the Support Worker were to accept ("Great! When do I begin?") the employment relationship will begin.

If this offer were accompanied by a written contract as part of the offer, that written contract would govern the relationship (along with the common law and statutes like the *ESA*). If there is no written contract, the terms would be whatever was agreed on verbally, and the rest would be filled in by the common law and statute law. We explain the difference between a verbal and a written contract, as well as common law and statute, in chapter 1.

It is important to treat an offer of employment as what it really is: a contract that can bind you. To use that fact to your advantage, we recommend you do the following when making an offer to an applicant:

1. Clearly communicate your expectations and provide the Support Worker with an understanding of the terms of their employment by presenting a written contract;
2. Provide the Support Worker with an opportunity to perform any background checks and reserve the right to revoke the offer or terminate employment if the background check results are less than satisfactory;
3. Frame the terms of the contract to give you maximum flexibility in managing the relationship; and
4. Frame the terms of the contract to protect you from liability to the Support Worker in the event that you need to terminate their employment (for example, limiting common law notice entitlements).

The following section provides an overview of best practices in making an offer of employment and key terms that you may wish to include. The remainder of this section discusses considerations about making the offer. The next section discusses what terms you should put into an employment contract that you attach to the offer.

b. Timing

When making an offer of employment, the offer should generally be made before the start of employment. This is to provide the Support Worker with sufficient time to consider the offer and seek independent legal advice so that they can have a full understanding of all of the terms and conditions in the offer.

Any terms and conditions of employment which are not communicated to the Support Worker before they start employment will not be enforceable unless additional "consideration" is provided for the worker's acceptance of the new terms and conditions. Consideration needs to be some new benefit (a raise, a bonus, an additional vacation day, or any other benefit they wouldn't have been entitled to under the previously agreed terms of employment).

Therefore, as a best practice, an offer of employment should be made 7 days in advance and should be signed by the worker prior to them starting to work for you.

c. Conditional

If you wish to conduct background checks, require the Support Worker to successfully complete recertification or perform any other pre-employment qualification as a condition of employment, you should make that clear when you offer the worker the job.

For background checks it should be made clear that the offer is conditional not only on the Support Worker providing written consent for you to perform a background check, but also:

a. That the worker must cooperate in the process,

b. That the worker must take whatever steps are necessary to obtain a vulnerable sector police records check; and

c. That, in the event that the results of the background check are not satisfactory, that the offer of employment will be revoked, or if the Support Worker has already commenced employment, the employment will be terminated immediately without notice.

5. Written Contracts

a. What Should Be in an Employee's Contract

The following clauses may be appropriate for employees (keeping in mind *ESA* minimums, which will be discussed in chapter 6):

- A requirement that the employee provide vulnerable sector screening/criminal records check clearance;
- If you only want to employ the employee for a fixed period of time specify, when the contract begins and ends, and that the contract can be terminated before the end of the contract by providing the minimum termination related entitlements applicable under the ESA;
- Confirmation of the worker's qualifications and compliance with training, licensing and regulatory requirements;
- A probationary period (probation is a period where you are assessing the employee's suitability for the job; (including this will make it easier to terminate employment if they aren't a good fit);
- A termination clause that excludes common law reasonable notice and restricts entitlements to *ESA* minimums only;
- Vacation and holiday entitlements, stated clearly so that the employee knows the amount of holiday pay, vacation pay, and vacation time that they will receive;
- How the worker will be paid (i.e. paid wages by the hour for hours worked vs. salary of a fixed sum per week), keeping in mind that an employee must be paid the minimum wage and overtime where applicable. Learn more about how to calculate the minimum wage and overtime in chapter 6;
- When overtime will start to accumulate and how it will be compensated (whether it will be compensated as paid time off (lieu time) or as overtime at a rate of 1.5 times regular pay);
- A statement of the employee's hours of work;
- A description of responsibilities, including record-keeping requirements in relation to those responsibilities; and
- A clause where the employee acknowledges that they have had the opportunity to obtain independent legal advice so that they understand their rights.

An example of a basic employment contract is included at Appendix A at the end of this chapter. Please note that this template is not legal advice and is not suitable for every situation. Best practices and the legal interpretation of each term in the example are subject to change from time to time and should not be relied upon without legal advice.

6. Manage the Day to Day Relationship to Avoid Surprises

Once you've recruited for, screened and entered into a contract with a Support Worker, managing the day to day working relationship is vital to ensure continuity of care and appropriate support. Here are some recommended ways to help you manage the workers you have engaged to avoid risk or the breakdown of the relationship:

- Check-in with the worker regularly and provide supervision, direction or evaluation as necessary to avoid misunderstandings. Keep detailed records of your arrangements, hours of work, overtime, vacation, public holidays, and lieu time. Your records are your best defence to complaints from a dissatisfied worker. See chapter 6 for more on this topic.

- Be aware of your human rights and occupational health and safety obligations to your workers and seek advice when necessary. See more on these topics in chapters 7 and 8 respectively.
- Confirm any legal obligations with the WSIB and your coverage with any private insurance provider in relation to your worker. See more on this topic in chapter 10.
- Where performance issues arise, provide feedback and counselling as soon as possible. Keep written records of your discussions and the performance issues or misconduct at hand. Where necessary, provide clear warnings in writing. See chapter 6 for more on this topic.
- Be clear on your obligations in respect of deducting and remitting income tax, CPP and EI, and your responsibilities when it comes to completing T1s, T4s, T4As and Records of Employments. See more on this topic in chapter 9.

Above all, follow the golden rule and treat your workers as you would hope to be treated if you were in their shoes. Sensitivity, understanding, compassion and patience are key characteristics of a good employer and good strategies for avoiding disputes with your worker.

Finally, when disputes or issues arise seek advice before taking action to penalize, discipline or dismiss worker. Thirty minutes of preventative legal advice can save you thousands in legal costs and potential claims by a disgruntled worker.

CHAPTER TAKEAWAYS:

The key lessons of this chapter are:

- While a person seeking a Support Worker to provide disability related care or support for themselves or a family member are likely exempt from the *Human Rights Code* prohibition on discrimination in hiring, it is best practice to avoid discriminatory qualifications in job postings or questions about human rights protected grounds in interviews.
- Identify the legal obligations you have towards your worker based on their employment status. Then, make sure you meet your obligations (i.e. vacation, public holiday pay, income reporting and remittances etc.).
- Screen your workers ahead of time using police record checks, vulnerable record checks, and other background searches to ensure that they do not pose a risk to the person supported and have the necessary skills and experience to do the job.
- Limit your legal liability as far as possible through your written contracts. Remember to take care in writing these contracts to ensure that you achieve that goal.
- Manage your day-to-day relationship with your worker to ensure that you are meeting your obligations and to determine if you are sticking to the type of legal relationship you want. This sort of monitoring prevents a contractor from drifting into a role as an employee (with the surprise liability that can result from that).

Appendix A

Note and Disclaimer: This example does not constitute legal advice and the authors do not represent or warrant that it is appropriate for any particular situation or purpose. It may not be appropriate for your circumstances and you are strongly encouraged to obtain legal advice before entering into an employment contract or employment relationship with any worker.

[EMPLOYEE NAME] **VIA E-MAIL**

[EMPLOYEE ADDRESS]

[Date]

Dear **[NAME]**,

Re: Offer of Employment

Further to our discussion on **[DATE]**, we are pleased to offer you employment with [name of employer] starting [date]. This letter agreement sets out the terms and conditions of your employment.

1. **Position and Duties.** Your appointment will be as a [position title] for the express purpose of providing services and supports to [person supported]. Your responsibilities and hours of work are set out in the Job Description attached, and as may otherwise be assigned to you by [name of employer] from time to time.
2. **Conditional Employment.** This offer is conditional on the satisfactory results of a reference check, [add other checks as appropriate] vulnerable sector screening/criminal records check, and intermittent updates thereto.
3. **Probationary Period.** The first three (3) months of your employment will be a probationary period, and either party may terminate the relationship at any time pursuant to the Employment Standards Act, 2000 (*ESA*) without notice or pay in lieu thereof, for any reason or no reason at all.
4. **Compensation:** You shall earn [hourly rate], less applicable statutory withholdings, deductions and remittances, which shall be paid bi-weekly by direct deposit [biweekly/weekly/monthly] by direct deposit.
5. **Vacations and Public Holidays.** You will be entitled to 2 weeks' unpaid vacation time per year of employment and will receive vacation pay in the amount of 4% of earned wages, which shall be paid to you each pay period with your regular pay, subject to deductions and withholdings. After five (5) years of employment this will be increased consistent with the *ESA*. Public Holidays shall be compensated in accordance with the *ESA*.
6. **Termination and Layoffs.** It is always difficult to consider termination, just when a new relationship is beginning; however, we believe it is important that you are aware of and agree to our termination and layoff policy. While we hope it will not be necessary, we reserve the right to place you on a temporary unpaid layoff in accordance with the *ESA*, which layoff will not constitute constructive dismissal or termination of employment. In the event that we do terminate your employment, you will be provided with only the minimum required amounts of statutory notice of termination, statutory termination pay, statutory severance pay, statutory benefit continuance and/or vacation pay (or any other entitlement), if any, as may be required under the *ESA* (as may be amended or replaced from time to time). Except as expressly prescribed by the *ESA*, you will have no right or claim whatsoever for damages, wages, or other compensation, termination pay, severance pay and/or pay in lieu of notice, arising out of the termination of your employment under contract or common law. You further understand and agree that the provisions contained in this clause will continue to apply throughout your employment, despite any other change in the terms of your employment.

If you are prepared to accept employment with us in accordance with the terms and conditions outlined above please sign the Employee's Acceptance below and return the signed document to the undersigned by no later than [day before work starts].

Yours very truly,

[Signature]

Employee's Acceptance

I have read, understood and agree with the foregoing and had a reasonable opportunity to consider this Agreement, the enclosures and the matters set out therein. I accept employment on the terms and conditions set out in this Agreement having had the opportunity to seek independent legal advice.

Receipt of a copy of this Agreement and enclosures is hereby acknowledged.

Employee Name	Date

Job Description

[POSITION TITLE]

Overview:

The mandate for this position with is…..

Hours of Work:

Your hours of work will be:

- **[Day supports]**
- **[Overnight awake]**
- **[Overnight asleep]**

Duties and Responsibilities:

During:

- **[Day supports examples:**
- **[Overnight awake]**
- **[Overnight asleep]**

General Expectations:

The following conduct will not be tolerated under any circumstances:

- Willful neglect, physical, psychological or verbal abuse of any person
- Unauthorized, personal use of **[Person Supported]'s** equipment, materials or supplies
- Willful neglect, abuse, destruction, or theft of **[Person Supported]'s** property, staff or any person's property
- Failure to comply with operating and safety rules
- Insubordination or refusal to perform reasonable, safe, legal and ethical work related tasks
- Disorderly conduct
- Unsatisfactory performance of assigned duties
- Unauthorized absence or departure, from an assigned place of work
- Dishonesty as related to any staff or family dealings
- Falsification of records, including documents reflecting support and service provision
- Misuse or unauthorized release of confidential material
- Unauthorized absenteeism, lateness, or sleeping when scheduled for awake work hours
- Consumption, or being under the influence, of narcotics or during Active Hours of Work
- Possession or use of personal items reasonably described as "weapons" while on **[Person Supported]'s** property
- Absence from duty for purposes other than those reasons provided on request for approval of absence
- Unauthorized solicitation or collection of contributions for any purpose related to **[Person Supported]'s** care or on his property

Records and Reporting:

- **[Include instructions regarding daily log, financial records, serious occurrence reporting, medical records, etc.]**

Client	**Date**
Self-Employed Service Provider	**Date**

CHAPTER

5

Engaging a Contractor

Once you have made the decision to hire a "self-employed" worker or "independent contractor" to support you or your loved one with a disability, there are a number of steps you can take to ensure you hire the right person and that you manage the relationship to protect yourself and your family from unexpected liability.

In this chapter will walk you through some of the important considerations, including:

1. Finding a contractor;
2. Screening;
3. Written contracts;
4. Managing the Relationship

Being aware of your obligations and planning ahead can help you to avoid unexpected liability when engaging a worker as an independent contractor.

1. Finding a Contractor

As discussed in chapter 4, finding the right person to support you or your loved one with a disability can be very challenging. The same processes and best practices for "recruitment" of employees generally apply to contractors. We have reviewed these practices in chapter 4 and we don't repeat them here. There are however a few key differences.

First, a true "self-employed" worker or "independent contractor" will often have an established client base, they may advertise, have a website, or seek referrals through their other clients. If you are determined to use an independent contractor rather than an employee, finding a responsible and established self-employed worker through such means is preferable. The Support Workers' established practices in this respect will provide you with helpful evidence if they (or another entity) later tries to characterize your relationship with them as "employment".

Second, if you do find it necessary to post a wanted ad, it's important to clearly identify that you're looking for a "self-employed Support Worker" or "Support Worker contractor" to provide support services on a "fee for service" basis. If you advertise for an "employee" or "job" this can later be used as evidence that the Support Worker you hire is actually an employee.

Third, you may wish to clearly communicate in any wanted ad and throughout the interview process that the worker will be required to satisfy key requirements, such as having insurance, filing their own taxes, supplying you with invoices and receipts for payment, and supplying their own vehicle or other tools necessary to perform the services.

Ultimately, if you choose to engage with a Support Worker as an independent contractor, your best practice will be to reinforce that status throughout every stage of the relationship, including in the "recruitment" stage. Leaving these best practices aside, be sure to review chapter 4 and the discussion on avoiding potential human rights complaints through careful recruitment and interview practices.

2. Screening of New Workers

Similar to our recommendations for screening of employees (as discussed in chapter 4), we recommend doing a thorough screening of every potential contractor before entering into a working relationship with them. The best practices for background checks for employees and contractors are very similar and include recommendations related to:

- Requiring a vulnerable sector screening/criminal records check
- Requests for references from the applicant's past clients and confirming those references
- Confirming training and certification requirements are up to date (e.g. CPR, driver's license, etc.)
- Depending on the type of work involved, a medical confirmation of immunizations

In addition to the recommend background checks above, we also recommend that you verify that the Support Worker has or is will obtain necessary insurance for the work they will be performing. This may include requiring proof that the self-employed worker has registered with the Workplace Safety and Insurance Board (WSIB) for insurance coverage as an "independent operator". See chapter 10 for more on this topic. In addition, if you will be expecting the Support Worker to use their vehicle for work, including driving you or your loved one in the community, you will want them to provide proof that they have obtained what is known as a 6A rider for their vehicle insurance allowing them to carry passengers in their vehicle for compensation.

If your Support Worker claims to be truly self-employed and to be reporting their earnings to the Canada Revenue Agency (CRA) as a self-employed person, you may ask them to provide their Harmonized Sales Tax (HST) number, which typically a self-employed person will have to register if they have more than $30,000.00 in any 12 month period in self-employed earnings. Where a self-employed person doesn't have an HST number or can't otherwise prove that they have a record of reporting their income to the CRA this may be an indicator that the Support Worker won't report their earnings from you, which could put both you and the worker at risk. See more on this topic in chapter 9.

3. Contracting for Service: When the Relationship Formally Begins

It is very important to clearly identify the status of the arrangement between you and the Support Worker right from the outset If the parties aren't clear about this from the get go, the default may be that the worker is an employee. Ideally, the agreement about the worker's status should be expressed in a written contract that identifies the worker as a self-employed contractor and includes key terms and other indicators reaffirming that status.

i. When to Provide the Contract

It is best practice to provide the worker with a written contract at least 7 days in advance of the first day they will provide service. Require the contract to be signed and returned before the start date but no later than when the worker's first day of service.

ii. What should be in the contract?

The following clauses may be appropriate if you are engaging an ***independent contractor***:

- An acknowledgement that the worker is an independent contractor and not an employee.
- Confirmation that the worker is responsible for making the necessary deductions and remittances for EI, CPP and income tax on their own behalf and that you will not be doing this for them. This aspect of the agreement is critical. While it won't necessarily be enforceable if the contractor is deemed to be an employee, it is important that both parties clearly understand where responsibility for reporting and remittances lies.
- Any key qualification or conditions of service (such as proof of qualifications or certification and providing a satisfactory vulnerable sector screening);
- An indemnity clause to cover any liability against you if the worker is "deemed" to be an employee. An indemnity means that the worker will cover any costs, penalties, or other amounts that you might be found to owe if the workers is deemed to be an employee.
- A description of the scope of the work (whether it's for a fixed period of time, or to achieve a certain purpose), the services to be performed, and record-keeping requirements in relation to that work;
- A description of the expenses that the worker will cover on their own behalf, ensuring that costs covered by you are minimal. Contractors should generally cover their own expenses, including mileage, meals, cell phone costs etc.
- The invoicing procedure. Contractors should be required to submit invoices rather than relying on you to keep timesheets and automatically pay them on a regular pay date the way you would for an employee;
- A statement of the worker's right to work for others and/or employ subcontractors if appropriate. It is important that a worker treated as a contractor perform work for others and have the freedom and flexibility to do so;
- Confirmation of the worker's qualifications and compliance with training, licensing and regulatory requirements. Ideally your contractor will come to you fully trained and merely require an orientation to the specific needs of the person they will be supporting rather than training in the way an employee usually would;
- Describing when and how the contract of service can be terminated by either party. Typically this should not be expressed in the same way that employee "just cause" and "without cause" termination provisions would be. A clause that provides for 30 days notice' for termination by either you or the contractor is typical in a contractor agreement;
- A requirement that the worker obtain WSIB and/or insurance coverage (if you do not require this, you may consider taking out WSIB for the worker and/or confirming that your own insurance will cover the worker). Insurance provisions are discussed further in chapter 10.

A template for a basic "contractor" agreement is attached at Appendix A at the end of this chapter.. Be aware, however, that the law in relation to independent contractors is constantly evolving and we would strongly encourage you to seek legal advice before entering into a contractor relationship and preparing a contractor agreement.

4. Maintaining a Positive Working Relationship with your Contractor and Reaffirming their "Self-employed" Status

Once you've recruited for, screened and entered into a contract with a Support Worker, maintaining a positive working relationship is vital to ensure continuity of care and appropriate support. While the principles for working with a contractor are very similar to those that apply when working with an employee (review Chapter 4 for best practices in maintaining a harmonious relationship), there are a few key differences which will be important for reaffirming and maintaining the "self-employed" and "independent" status of your contractor.

As discussed in chapter 3, a self-employed worker or contractor is generally not subject to the same degree of "control" as an employee would be. The worker should be expected to be professional and knowledgeable about their work and be able to perform their services and responsibilities with minimal supervision and direction from you.

Scheduling

When it comes to scheduling supports, you may also wish to take a collaborative approach and schedule based on your Support Worker's availability rather than independently dictating work schedules for your Support Worker in the manner that is more typical of an employment relationship. For a worker who is truly self-employed and therefore has multiple clients or contracts to manage, this collaborative approach will show respect and be appreciated.

Payments and Invoicing

When it comes to making payments and accounting for services performed, it's a good idea to consistently reinforce the "self-employed" status of your worker by requiring that they keep records of the services they provide to you and invoice you on a monthly basis for the services they provide. This is preferable to you keeping timesheets in the way you typically would for an employee. A quick "Google" search for "invoice templates" will provide your Support Worker with a variety of options or, if they prefer, invoice pads can be purchased online or at office supply stores.

Quality of Service

Where there are concerns with the quality of services being provided, you should deal with this in the same way you would less than satisfactory service from other contractors, starting be pointing out the areas of concern, explaining your service expectations and potentially communicating that you will have to reconsider the service contract if service expectations aren't met. This should not be expressed as "discipline" as that is a hallmark of an employment relationship. Practically speaking this is similar to a "warning" a nd coaching and counselling that would be typical in an employment relationship, but it is better to avoid using "employment" style language in a contractor relationship.

Financial Reporting

You can also reinforce the Support Workers tax filing obligations by making clear that you will be filing a T4A with the CRA. A T4A is a form that the CRA requires you to submit if you make more than $500 per year in payments to a self-employed person. We discuss this further in chapter 9 and you can learn more about T4As here.

Human Rights, Health and Safety

Be aware of your human rights and occupational health and safety obligations to your workers and seek advice when necessary. See more on these topics in Chapters 7 and 8 respectively.

Ongoing Relationship Review

Finally, it is important to continuously evaluate the relationship that you have with a worker to determine if the nature of the relationship has changed and if any adjustments to your arrangement are required. For instance, it may be that when you began your relationship with your contractor you were comfortable that contractor was the correct classification of your worker because they worked for you only infrequently, had numerous other clients, and were not dependent on you for their earnings. However, over the years, things have changed and now you are the primary source of

earnings for your worker and the worker provides service to you 30 hours a week. At this point the relationship with the worker may be more accurately characterized as an employment relationship. It would be a good idea at this point to obtain some legal advice about how to continue to work with your worker in a manner that avoids liability for both you and your worker.

Dispute Resolution

In the event that a dispute arises between you and your worker, working through the issues in a manner that is respectful, patient and sensitive will help to resolve the dispute in a manner that hopefully allows the relationship to continue. If the dispute cannot be resolved, then it is a good idea to work towards a friendly parting of ways, which usually will require a "parting gift" or "termination package" in return for the worker signing a release of all claims. While you may not feel that you can afford a "package" or that your worker deserves one, however, the legal, mental, emotional and liability related costs you may face if you don't resolve things amicably will in most cases far outweigh the costs of the package. We strongly encourage you to seek legal advice should you have a dispute with your worker that requires you to end their contract.

Just when managing an employee, the golden rule applies to working with a contactor – treat them as you would wish to be treated – and when in doubt consult a legal advisor.

CHAPTER TAKEAWAYS:

The key lessons of this chapter are:

- Follow recruitment best practices as you would for employment (see chapter 4) but be sure to clearly articulate the "contractor" status of the relationship you are seeking to engage in.
- Screen your contractor ahead of time using police record checks, vulnerable record checks, and other background searches to ensure that they do not pose a risk to the person supported and have the necessary skills and experience to do the job. Be sure to seek confirmation that they are set up to conduct the relationship as a self-employed person, including meeting insurance, invoicing and reporting obligations.
- Limit your legal liability as far as possible through your written contracts and be sure to reinforce the "self-employed" contractor status of the relationship.
- Manage your day-to-day relationship with your worker to ensure that you are meeting your obligations and to determine if you are sticking to the type of legal relationship you want. This sort of monitoring prevents a contractor from drifting into a role as an employee (with the surprise liability that can result from that).
- When disputes arise with your worker, work towards mutually satisfactory resolutions and if a parting of ways becomes necessary be sure to protect yourself by obtaining a release from the worker.

Appendix A

Note and Disclaimer: This example does not constitute legal advice and the authors do not represent or warrant that it is appropriate for any particular situation or purpose. It may not be appropriate for your circumstances and you are strongly encouraged to obtain legal advice before entering into a service contract or contractor relationship with any worker.

Service Agreement

This contract for service is between [name of person/entity paying] (the "Client") and [name of worker/ workers' company] (the "Service Provider").

Background:

- The Client is requires supports and services to **[name of person supported]** (the "Person Supported") who is a person with a developmental disability;
- The Service Provider is a self-employed person skilled in the provision of services and supports to individuals with developmental disabilities who offers services to individuals, families and organizations in the community as an independent Service Provider;
- The Client wishes to purchase services from the Service Provider for the Person Supported and the Service Provider wishes to provide services to the Person Supported.

Terms of Agreement:

1. **Start Date.** This Agreement will commence on_____(the "Effective Date").

2. **Type of Service Being Purchased.** The purpose of this Agreement is to confirm the agreed upon responsibilities in the provision of support services as described in Schedule "A" (the "Services") to _____.

3. **Nature of Relationship.** The Service Provider is a self-employed independent Service Provider and the Fees have been negotiated between the parties on that basis. The Parties agree that the Service Provider remains free to provide service to other individuals, families and/or service agencies in the community without restriction, save and except during periods when the Service Provider is engaged in providing the Services to the [Person Supported];

4. **Fees.** The Service Provider will invoice the Client for fees in the amount of $_____ per hour. This invoice must be completed in full, signed, dated and submitted for review, approval and authorization to the Client on a monthly basis. The invoice will include the following information:
   i. The Service Provider's full name and signature;
   ii. The billing dates, number of hours and total hours;

Invoices shall be paid by the Client within two (2) weeks of receipt of a valid invoice by cheque.

5. **Representations and Warranties.** The Service Provider represents and warrants to the Client and acknowledges that Client is relying thereon as follows:

a. The Service Provider will remit the Service Provider Income Tax, Canada Pension Plan (CPP) or Employment Insurance (EI) as required by law and the Client will not be responsible for remitting any such deductions, or any employer side contributions in respect of same, to the Canada Revenue Agency (CRA). For clarity, the Service Provider shall bear all expenses in connection with the provision of the Services, including without limiting the generality of the foregoing, income and other taxes, Workplace Safety and Insurance Board premiums and costs, Canada Pension Plan, Employment Insurance premiums and costs. It is expressly understood that the Fees agreed to herein have been negotiated with this understanding in mind.

b. The Service Provider will maintain full responsibility for keeping a record of Fees charged by and paid to the Service Provider and for declaring the Service Provider's income to the CRA for income tax purposes. The Client will not be responsible for issuing a T4 slip to the Service Provider but will submit a T4A as a payor to a self-employed person where required by law.

c. The Service Provider shall obtain and maintain Workplace Safety and Insurance Board (WSIB) coverage as an independent operator and shall maintain such coverage and produce a clearance certificate upon request to the Client.

d. Service Provider shall bear all expenses in connection with the provision of the Services, including without limiting the generality of the foregoing, insurance, income and other taxes, WSIB premiums and costs, Canada Pension Plan (CPP), Employment Insurance (EI) premiums and costs; and

6. **Indemnity.** Service Provider shall defend, at its expense, any claim, or action (whether or not well founded and whether for damage to property or injury or death to humans) brought against Client or its officers, directors, supervisors, managers, Service Providers, students, volunteers or employees (collectively, "Indemnitees") arising out of or related to: any breach or alleged breach by Service Provider of any of its obligations, warranties or representations in this Agreement; any and all Services requested by Client from Service Provider or supplied by Service Provider pursuant to this Agreement; or any allegation that the Service Provider is an employee or dependent Service Provider of the Client, or that the Client is in any way liable for employment related payments (such as vacation pay, public holiday pay, or statutory deductions, contributions or remittances for Employment Insurance, Canada Pension Plan, or Income Tax), or any interest, fines or penalties related thereto, (together the "Liabilities") and the Service Provider shall indemnify and hold the Indemnitees harmless against any such Liabilities with respect to all resulting costs, liabilities and damages, including legal costs on a substantial indemnity basis, provided that Client promptly notifies Service Provider of any claim or action in respect of which this indemnity may apply and of which Client has knowledge and the Client co-operates with the Service Provider in the defense of any such claim or action.

7. **Termination by Either Party.** Either party may terminate this Agreement with (30) thirty days written notice being provided, provided that either party may terminate the agreement immediately without notice if has been inadequate or improper performance of Service Provider's obligations pursuant to this Agreement or Service Provider has engaged in unsafe or hazardous work practices or conducted themselves in a manner that is unsafe for **[Person Supported]** or others, provided further that notwithstanding the foregoing the Client shall comply with all legislative requirements and provide all statutory entitlements owing to the Service Provider in relation to the termination of the relationship with the Service Provider if any such statutory entitlements are deemed by any governmental authority to apply, including without limitation the Employment Standards Act, 2000 (nothing herein shall be an admission of any such liability). Subject to the foregoing, no other entitlements or obligations shall apply whether at common law or by contract.

8. **Survival.** The provisions of section 6 to 8 and any duties and obligations which by their very nature extend beyond the termination or expiration of this Agreement shall survive the termination or expiration of this Agreement.

The Parties acknowledged that they have each read and understood the terms of this Agreement and have had the opportunity to seek independent legal advice concerning same.

Schedule “A”

Description of Services

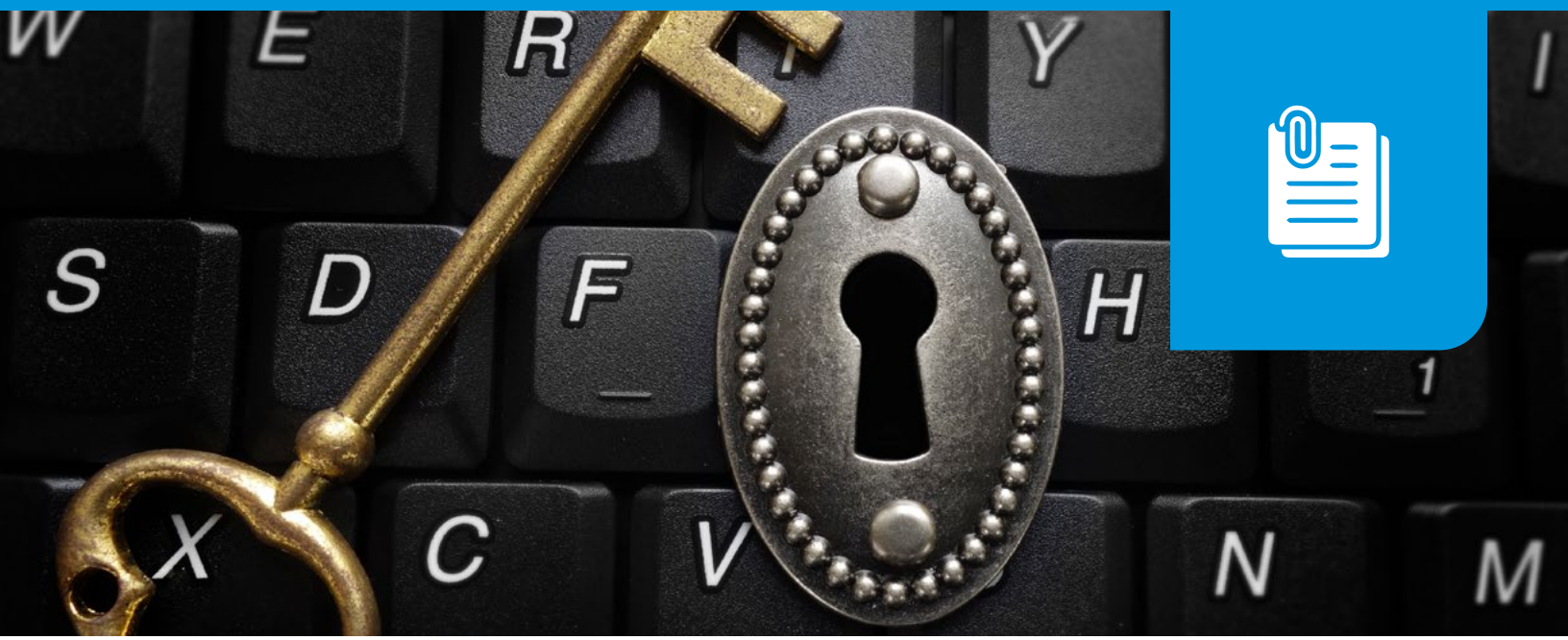
- [Include schedule of service]
- [Include obligation to follow policies and procedures of the Client]
- [Provide as much Service Provider control over how, when, where etc. of the Services as possible to increase the likelihood of the Service Provider designation being deemed appropriate]

Schedule “B”

Individual Support Plan

CHAPTER

6



Key Terms of Employment for Employees (and Sources of Liability for Misclassified "Contractors")

This chapter applies where a worker is properly classified as an employee. As discussed in chapter 3, a worker may be an employee, even if they are classified in a contract as a "contractor" or "self-employed". Therefore, it's important for you to get the classification of your worker right and to understand what your obligations are to your workers if they are employees.

The terms of an employment relationship are governed by several sources. This includes the contract, employment-legislation like the Employment Standards Act, 2000 (the "*ESA*"), and common law. In this chapter we provide a much deeper look into these obligations, including:

1. *ESA* Obligations: When reading these obligations, remember that the *ESA* sets a minimum floor for what your employee must receive. While you can agree to provide them with greater benefits, you cannot enter a contract to provide less generous terms than those required by the *ESA*.
2. Common Law Obligations: The common law will impose certain rules into your employment contract unless you have a written agreement excluding those rules. The common law will also shape the interpretation of benefits you agree to.
3. Contract Obligations: In addition to *ESA* and common law obligations, you are generally bound by all of the terms you agree to in your employment contract. This is the case even if they are not required by the *ESA* or common law.

Some of the information in this chapter may seem complex. We have attempted to simplify it wherever possible and indicated where you can skip information that will not apply to your circumstances. If you are seeking the assistance of a bookkeeper or payroll company to assist you with paying your Support Worker(s) (which we recommend, particularly where you are managing multiple Support Workers or have a high level of support requirements) these providers will be able to assist you with meeting your obligations.

1. Wages

This section provides basic information about how wages are calculated and paid to an employee.

The *ESA* requires employers to pay at least "minimum wage". This section provides an overview of how to calculate minimum wage, how wages should be paid, what wage statements must be provided, and what deductions and remittances can and cannot be made by the employer.

i. Minimum Wage

The "**minimum wage**" is the minimum standard pay rate for an hour of "work". The standard rate of pay cannot fall below this amount. The minimum wage for general employees is presently $14.25 an hour in Ontario and will increase on October 1, 1st each year to keep pace with the Consumer Price Index (a measure of inflation). There are other minimum wages for specific professions (for example, wilderness guides). However, none of these are likely to affect Support Workers.

Remember that the *ESA* minimum wage is only a minimum. If your employment contract provides a higher wage or salary, you will have to pay that.

ii. How to Calculate Minimum Wage

.inimum wage is calculated on a "**pay period basis**". That means that the employee must be paid at least the minimum wage for all hours worked during the pay period.

A **pay period** is a period of time that an employee is paid for in exchange for time worked (for example, every two weeks).

A **pay day** is a the day on which an employee must be paid in respect of work performed in a pay period - An employer must set a recurring pay period and a recurring pay day (for example, a two week pay period, and a payday on the next Thursday after the pay period).

Employers must pay the employee for the time worked in the pay period by no later than the pay day.

This is the same for employees who earn wages and those who earn salaries. Salaried employees have their minimum wage compliance calculated by **dividing the amount they were paid** for the pay period by the **number of hours actually worked**. If the result is equal to or greater than the minimum wage, they are compliant. If the result is less than minimum wage, they are in breach of the *ESA*.

Example:
A Support Worker works 35 hours a week. The pay period is weekly. The minimum wage for is $14.00. The minimum amount they can receive is 35 hours times $14.25/hour. That equals be $498.75 per week.

Now say an employee earns $800 every two weeks (the pay period). The employee works 60 hours in the pay period. To calculate their minimum wage compliance, divide $800 by 60 hours. This equals $13.33 per hour. This would not be minimum wage compliant.

However, say that same employee was paid $1000 every two weeks and the employee worked 60 hours. The result of $1000 divided by 60 hours is $16.66, above minimum wage and compliant.

As you can see, the minimum wage isn't necessarily the amount an employee is paid for any particular hour of work, but rather how much they are paid on average for all hours of work over a pay period.

iii. When is Work Performed?

Since an employer must pay at least minimum wage for all work performed, it is important to know what the *ESA* considers to be "work". The performance of tasks or service will clearly be work that must be paid under the *ESA*. For example, providing care to a person supported. However, the *ESA* also deems an employee to be performing payable work in certain less obvious situations.

An employer is also required to pay an employee for work even if the contract sets a cap on the number of hours an employee can work. For example, if a contract states "the employee will only work and be paid for 40 hours a week" and the employee "works" 44 hours, the employer will have to pay the remaining 4 hours.

An employee will also be "working" for *ESA* purposes at all times that they are not performing work but are required to remain at the workplace on call or where they are on a break period other than a meal period and required to remain at the workplace (meal periods are discussed below under "hours of work").

Applying this to Support Worker situations, that means that an employee who lives in a family's home and must respond to support calls at any hour likely would be found to be entitled to minimum wage for all hours of the day. To avoid this, the employee needs to have set periods when they are free from work and not required to be on-call. While there are certain exceptions for certain types of live-in support worker relationship, these are subject to restrictions that may make the unavailable in most family support scenarios. See chapter 12 for further discussion related to live-in arrangements.

iv. Reporting Pay – The Three Hour Rule

Sometimes the *ESA* requires an employee to be paid if they show up to work and there is no work to be done. This is required where all of the following conditions are met:

- The employee is required to show up to work;
- The employee does show up to work;
- The employee regularly works more than 3 hours of work per day; and
- The employee, after showing up to work, works for less than three hours despite being available to work longer (e.g. it was not the employee's fault that they worked less than three hours).

In that case, the employee must be paid for 3 hours of work, even if they worked less than 3 hours. This is sometimes called the "**Three Hour Rule**".

This rule does not apply where the employer cannot provide work because of fire, lightning, power failure, storms or similar causes beyond the employer's control. The best way to avoid the three-hour rule is to call employees ahead of time to let them know there is no work to perform and that they should not come to work.

Example:
An employee shows up to work as scheduled. Usually they work 8-hour shifts. On that day, however, the person they are supporting needs to go to the hospital and therefore the employee is sent home after just 2 hours. The employee in this case is paid for the two hours they worked and is also paid for an additional hour (for a total of three).

Now say that same employee shows up under the same circumstances, but no one is home because everyone is already at the hospital. The employee then leaves (having performed no work). They receive three hour pay.

Finally, say that same employee from the first example is called 20 minutes before their shift is due to start and informed that they don't need to come in because of the trip to the hospital. The employee shows up to work anyways. In that case, the employee is not entitled to any pay.

v. How to Pay Your Worker

Under the *ESA*, an employee must be paid their wages in one of the following ways:

- Cash or Cheque – Payment by cash or cheque, payable only to the employee, must be "given to the employee at his or her workplace or at some other place agreeable to the employee"; or
- Direct Deposit – Direct deposit must be to a financial institution account in the employees' name, where only the employee or a person authorized by them has access. The institution must be within a reasonable distance of the workplace unless the employee agrees otherwise.

In practice, many people choose to pay their Support Workers by e-mail money transfer. Technically, this is not compliant with the *ESA* and should not generally be adopted for employees. If you do choose to use this method, it would be advisable to have your employee agree to this process in writing and keep detailed records confirming the process and payments.

vi. Pay Statements

The *ESA* requires employers to provide their employee with a "pay statement" on each pay day, stating the following information:

- the date-range of the pay period in which the pay was earned;
- the wage rate (if any);
- gross wages and (unless the information is otherwise provided) how that amount was calculated - gross wages are the amount an employee is owed before tax and other deductions are applied;
- the amount and purpose of any deductions;
- the amount, if any, for room or board that is deemed to have been paid to the employee; and
- The net wages being paid to the employee - "net wages" are the wages an employee is owed after all deductions are made.

As discussed below, we also recommend that you pay vacation pay to your employee on each pay cheque and reflect these payments on the pay statement.

In most cases these statements can be provided in a printed form or electronically. If you are using a bookkeeper or payroll company they will be able to produce these records for you. If you are using the CRA's Payroll Deductions Calculator tool, you can also use this tool to create pay statements.

vii. Deductions from wages

It sometimes happens that an employer needs to make deductions from an employee's pay. This may arise where an employee is accidentally overpaid, is responsible for damage to the employee's home, or misplaces funds for which they were responsible. However, there are rules that govern when this can happen.

a) General Rules and Exceptions

The *ESA* prohibits employers from making deductions from wages or making the employee return wages outside specific circumstances. The circumstances where an employer can make deductions include:

- Where an Ontario or Canadian statute (written law) authorizes it (e.g. income tax deductions);
- Where a court order authorizes it; or
- Where the employee gives their written authorization ('employee authorization').

An employer will lose this protection if the statute, court order, or employee authorization requires them to remit (pay) the deducted wages to a third party (such as the government) and the employer fails to do so. It is very important that employers remit any deductions they make to the proper persons.

b) Special Rules for Written Authorization

Additional rules apply to an employee's written authorization to make a deduction from wages.
First, a written authorization will only be valid if it refers "to a specific amount or provide a formula from which a specific amount may be calculated".

Second, an employer cannot make certain deductions, withholdings or returns even if an employee gives written authorization. These include deductions, withholdings, or returns of wages because of:

- Faulty work (in the Support Worker context, this would likely include poor performance); or
- To pay for a cash shortage, or lost or stolen property that the employee had access to where "a person other than the employee had access to the cash or property".

c) "Lawful Authority" Deduction Examples

Below are some of the common deductions employers make. This is not an exhaustive list.

So-called "Source Deductions"

Source deductions are the most well-known forms of statutory deductions from wages. These include: income tax, employment insurance, Ontario Health Tax, and Canada Pension Plan and the amount of deductions should be reflected on the pay statement for each pay. Once again, you can use the CRA's free Payroll Deductions Calculator tool to create these and reflect the deductions.

Court Judgments and Family Support

Other deductions from wages are less common. The most familiar are wage garnishments for unpaid court orders (e.g. civil debts and family support orders). "**Garnishment**" is the process of collecting a debt owed by an employee by taking a share of the employee's wages directly from the employer.

However, special rules under the Ontario Wages Act set limits on wage deductions by garnishment. The limit is 20% of wages for civil court judgments and 50% for family support judgements. However, there are provisions for both increasing and decreasing those percentages by motion to the involved court.

If your Support Worker is subject to a garnishment order you will be provided with a legal notice and required to comply with the garnishment provisions and make deductions and remittances in accordance with the garnishment order.

Overpayments due to an Honest Mistake

While deductions from wages are generally not permitted except in the circumstances in the *ESA*, an employer may still recover an accidental overpayment to the employee through a deduction in their wages. This is because an accidental overpayment is not technically considered a wage, and the prohibition on deductions from wages therefore does not apply. While employee consent is not required for a deduction of this nature, best practice is that the employee be made aware of the error and the steps to remedy it.

2. Hours of Work

The *ESA*'s "Hours of Work Limits" rules govern how long and when an employee can work. These rules can be split into two categories: (1) maximum work hours and (2) required time away from work.

First, the *ESA* sets daily and weekly maximum work hours that an employer and employee must follow unless there is an exceptional circumstance or a written agreement to have longer work hours. In addition to these maximum daily hours, employers must also give employees certain time away from work. This has some overlap with the daily limits of work, and will set an ultimate cap on how long you can make an employee work in a day even if you have a written agreement.

Keep in mind then that these rules do not apply to Residential Care Workers or Homemakers – classifications of workers that apply in very limited situations. See the sections on residential care workers and homemakers in chapter 12.

a. Maximum Hours Per Day

Unless you've entered an "hour-extending agreement" with your employee or there is an exceptional situation (both discussed below), the *ESA* sets the maximum hours of work that an employer may "require or permit" an employee to work in a day as the greater of:

- Eight hours in a day, or
- that number established between the parties as the employee's "regular work day".

If your Support Worker doesn't work more than 8 hours per day you can skip to the next section.

Example:
An employee regularly works 8 hours a day. This will comply with the *ESA*'s daily hours restrictions.

An employee regularly works 11 hours on Monday and Tuesday and 8 hours on Thursday and Friday. This complies with the *ESA*'s daily hours restriction.

An employee regularly works 8 hour days. One day, the employer makes the employee stay an extra hour. Without an exceptional circumstance, this is a breach of the *ESA*'s daily hours restriction.

c. Maximum Hours Per Week

Unless you've entered an "hour-extending agreement" or there is an exceptional circumstance, the *ESA* sets the maximum hours of work that an employer may "require or permit" an employee to work in a work week at 48. Remember this weekly limit when setting daily hours of work. If your worker doesn't work more than 48 hours per week, you can **skip to the next section**.

"Work Week" does not necessarily match a calendar week. The *ESA* defines Work Week as:
a recurring period of seven consecutive days selected by the employer for the purpose of scheduling work, or

a. if the employer has not selected such a period, a recurring period of seven consecutive days beginning on Sunday and ending on Saturday.

Example:
An employee works 8-hours a day, 5 days a week. This totals 40 hours in a work week, and complies with the *ESA*'s maximum weekly hours restriction.

An employee works 10-hours a day, 5 days a week. This totals 50 hours in a work week, and does not comply with the *ESA*'s maximum weekly work restrictions.

d. Hour-Extending Agreements (Both Daily and Weekly)

The *ESA* lets employers and employees agree in writing to work more than the maximum daily and weekly hours of work. Without such an agreement, an employer cannot require or allow an employee to work more than the maximum daily or weekly hours (unless there are exceptional circumstances). If you don't require your Support Worker to work more than 8 hours a day, or 48 hours per week you can **skip to the next section**.

These agreements can be for a one-off extension of work hours to meet a specific circumstance, or can be open-ended "as required" agreements that allow the employee to work longer hours into the future.

To be legally valid, the agreement must do the all of the following:

1. Specify the new agreed maximum number of daily and/or weekly hours,
2. The employer must have provided the employee with an electronic or paper copy of the most recent document published by the Ministry of Labour on hours of work and overtime – see here. https://www.ontario.ca/document/your-guide-employment-standards-act-0/mandatory-poster-and-information-sheets-employers#hours-of-work
3. The agreement states that the employee acknowledges that they have received that document and have been told by the employer that it is the most recent version of it.

An example of an overtime averaging agreement is attached as Appendix A at the end of this chapter.

Note, an employee can revoke an Hour-Extending Agreement with 2 weeks' notice to the employer. If the employee gives you notice, you must start adhering to normal rules after 2 weeks. You can also cancel the agreement with "reasonable notice" to the employee (we suggest 2 weeks as well).

e. Required Off-Work Intervals

In addition to daily and weekly maximums, employees must also have set time off from work. These can be divided into four types of time off: (1) time off every day, (2) time off between shifts, (3) time off every week or two weeks, and (4) time off for meals.

i. **Total Time Off Per Day:** Employees are entitled to at least 11 consecutive hours off work each day.
ii. **Time Off Between Shifts:** The general rule is that, employees are entitled to 8 hours off between shifts, except where: i) they agree otherwise in writing; or ii) the total time worked in the two shifts is 13 hours or less. Keep in mind that that the 11 hours off per day rule still applies in this situation.
iii. **Time Off Each Week or Two Weeks:** The *ESA* entitles employees to either 24 consecutive hours off work every week or 48 consecutive hours off work every two weeks
iv. **Meal Breaks:** The *ESA* requires an employer to give an employee an unpaid meal period of at least 30 minutes for every 5 hours of work. An employee can also agree (in writing or verbally), to split a meal period into two separate periods (e.g. two 15-minute breaks). If your Support Worker only works five hours or less then you won't need to worry about this rule.

f. Emergency Exceptions to Hours of Work Limits and Required Off-Work Intervals

The *ESA* has an exception to rules for maximum hours of work and minimum time off work in the case of exceptional circumstances. These exceptions apply only so far as is necessary to avoid serious interference with support.

The *ESA* identifies a few types of exceptional circumstances, only two of which may be relevant to families who employ Support Workers:

1. Where the employee must deal with an emergency. An emergency will be something like a fire in the workplace, natural disaster and potentially even a medical emergency in the home involving a family member or the person supported; and
2. Where a family requires 24/7 support and something unforeseen arises that threatens to disrupt continuous supports, such as a blizzard, power outage etc.

Note, the circumstances must really be exceptional. It is unlikely that an employer can rely on problems that arise from bad planning, regular events (like employees calling in sick), or foreseeable disruptions. Practically speaking, however, most Support Workers are willing to help out in these situations despite the rules.

g. On-Call Rules

The *ESA* allows employers to place employees "on-call". "On-call" is generally understood to mean that the employee is free to leave the workplace and go about their personal business, eat, sleep, rest and otherwise do as they please, provided that they must report for work if called upon during their on-call period. It is relatively uncommon for families to have "on-call" arrangements with their Support Workers. However, "on-call" arrangements do sometimes arise for Support Workers who are live-in or Residential Care Workers and the rules for such workers are discussed in chapter 12.

3. Overtime Compensation Rules

a. Introduction to Overtime

The *ESA* creates an entitlement to overtime pay (1.5 times their regular pay) for each hour an employee works over 44 hours per week. The limit of 44 hours per week is known as the "overtime threshold". If you don't have Support Workers working more than 44 hours per week you can **skip to the next section**.

Overtime pay is designed to compensate employees for longer than normal hours of work and to discourage employers from scheduling long hours. Unless your worker is subject to an exception from overtime (see Residential Care Worker exception discussed in chapter 12) overtime can drastically increase the cost of having your employee work longer hours.

b. Overtime Threshold

Crossing the "overtime threshold" triggers an entitlement to a higher wage rate ("overtime pay"). The *ESA* sets a basic "overtime threshold" of 44 hours per week, after which overtime must be paid.

This overtime threshold can be made more complex in three scenarios:

- Where a contract provides more generous terms (ex. overtime after 40 hours per week),
- Where the parties have an overtime averaging agreement (ex. an agreement that overtime will apply after 88 hours averaged over a 2-week period – see further information below), or
- Where the employee works in an industry with a special overtime threshold in the *ESA* (not applicable to families engaging Support Workers).

Note, hours worked on a public holiday that are paid at the holiday premium do NOT count towards the overtime threshold (public holiday rules will be discussed later in this chapter).

c. Overtime Averaging Agreements

ESA overtime is normally calculated week by week. However, an employee can agree in writing to calculate it using a longer period of up to 4 weeks. This is called an "overtime averaging agreement".

For example, say an employee agrees to calculate overtime using a 2-week period. In that case the overtime threshold would be 88 hours of work in the 2-week period and overtime pay would apply to any hours worked over 88 hours.

The benefit of this to the employer is that overtime will be averaged out. If the employee has low hours one week but high hours the next, overtime will be less likely to apply.

For an overtime agreement to be valid, it must provide a start date to the agreement and an end date that is no later than two years after the start date. Once the agreement is made, it cannot be revoked before the end date unless both the employer and the employee agree to revoke it.

An example of an overtime averaging agreement is provided in Appendix B at the end of this Chapter.

Example:
An employee works 36 hours one week and 54 hours the next. If overtime is calculated week by week, the employee is entitled to no overtime pay for the first week and 10 hours of overtime pay for the second week (for the 10 hours in addition to the first 44 hours worked).

However, say that same employee had an overtime averaging agreement that extends the window for calculating overtime to two weeks. The employer would average 36 and 54 (add them and then divide by 2). The average of the two numbers is 45 hours. This leads to an average weekly overtime of 1 hour per week for the pay period. The result is 2 hours of overtime owed to the employee. This is a much better outcome for the employer.

d. How Overtime is Paid (Premium Pay or Time Off in Lieu)

If your Support Workers do not work more than 44 hours per week, you can **skip to the next section**.

For each hour an employee works above the overtime threshold, they must receive overtime premium compensation. The default rule is that the employee receives one and one-half (1.5 times) their "regular rate" for every overtime hour worked. The employee's regular rate is calculated one of two ways, depending on whether the employee is paid hourly or by some other means (like salary):

- **Paid Hourly** – The regular rate is the amount the employee earns per hour of work in their usual work week (their hourly wage), not including overtime.
- **Not Paid Hourly** – The amount earned by the employee in the week the overtime was earned divided by the number of non-overtime-hours actually worked that week.

Alternatively, if an employee and employer agree in writing, the employee can be compensated for overtime with **paid time off in lieu of overtime** (commonly known as "Lieu Time") at a rate of one and one-half the hours worked. This provides the employee with paid time off of work instead of overtime being paid out. This is commonly used for salaried employees.

Lieu time must be taken within 3 months of the work week in which it was earned, or within 12 months if the parties agrees. This accumulation of overtime entitlement (especially for periods of more than 3 months) is referred to as "banking overtime".

Example:
An employee is paid hourly at a rate of $20.00 an hour. They work 4 hours of overtime in a week. As they are paid hourly, their regular rate is $20.00 an hour. Their overtime rate would be one and one half times $20.00, which is $30.00 an hour for every hour of overtime worked. Since they worked 4 hours of overtime, they receive four times $30.00, which is equal to $120.00.

Say that same employee is not paid hourly but is paid a salary of $660 per week. They again work 4 hours of overtime (48 hours total for the week). Their regular rate for is $660 divided by 44 hours (the non-overtime hours worked), which is equal to $15.00 an hour. Their overtime rate would be one and a half times $15.00, or $22.50 an hour. They would receive 4 hours of overtime pay at $22.50, or $90.00.

Now, assume that an employee and employer agree to compensate an employee for overtime with lieu time. The employee works 4 hours of overtime. Instead of wages (at regular or overtime rate) for the 4 hours, they receive 6 hours of time off in lieu with regular pay. They must take this in the next 3 months. If the employer agrees to give them longer, they must take it in the next 12 months.

4. Vacation

a. Overview of Vacation Entitlements

The *ESA* guarantees employees a minimum amount of **vacation time** with **vacation pay** every year. This amount goes up once an employee has five or more years of service. Employee vacation entitlements can be summarized as follows:

Years of Employment	Vacation Time	Vacation Pay
Less than 5 years	2 weeks per year	4% of earned wages
5 years or more	3 weeks per year	6% of earned wages

There is nothing stopping you from providing more generous vacation entitlements but you should be aware that the rules for how the vacation will be paid out and accrued continue to apply.

Vacation time and pay accrual can be complicated, however, many families employing Support Workers choose to adopt one of 2 options for dealing with vacation that are simple to explain.

Option 1: Bi-weekly vacation pay out

In option 1, the employer pays out vacation pay on each pay day. For an employee with less than 5 years of service, this means that on each pay cheque an employee will receive vacation pay equal to 4% of the wages they earned on that pay cheque.

In this option, vacation time is unpaid because vacation pay has already been paid out with each pay cheque.

Employers can dictate when employees take vacation time and many families will schedule or approve vacation time when it is convenient for the person being supported or their family.

You can either allow vacation time to be used immediately after it has been earned or you can require that an employee work a full year before being entitled to use the vacation time. Either way, vacation must be used within 10 months following the year in which it was earned.

This option is simple and prevents confusion related to how much vacation pay is owed when an employee takes a vacation day and/or how much paid time off an employee is entitled to if they don't have a regular schedule.

In order to take advantage of this option, the employee has to agree (in their employment agreement or other written record) to receive their vacation pay with each pay cheque or at other intervals.

Option 2 – Vacation Time with Pay Continuance

Under option 2, employees take their vacation and get their regular pay that they would have received had they continued actively working during the vacation period.

This can be relatively easy to calculate where an employee has a regular schedule and works consistently. However, it doesn't work well for employees who have a variable schedule. It can also result in confusion or excessive vacation costs where an employee has taken unpaid time off.

Based on these concerns we generally recommend Option 1 for families employing Support Workers.

b. Basic Vacation Rules

There are numerous other options for how to administer vacation for employees but there are a few basic rules to keep in mind:

i. **Keep records.** You must keep a record of vacation time and vacation pay that employees have earned and used.

ii. **Vacation Use.** Ensure employees use their vacation time and receive vacation pay by no later than 10 months after the year in which it was earned

iii. **Vacation Statements.** When an employee uses or is paid out their vacation, this should be recorded on the pay statement for the period during which they receive the vacation pay. If you are going with Option 1 above, this means you'll record the percentage based vacation pay on each pay stub. If you are going with Option 2, you'll be reflecting the vacation paid out only at the time it is paid.

For families wishing to explore more complex options you can read more about this here.

c. When and How Vacation is to Be Taken

The employer has the right to choose when vacation is taken. In practice, this is almost always done in consultation with the employee, but at the very latest, vacation time must be taken no later than 10 months after the year in which the vacation was earned.

Vacation must generally be booked in full week periods (i.e. a single 2-week period or two 1-week periods), unless agreed in writing. This is straightforward for an employee who has a regular work week, but becomes more challenging for employees who have variable work schedules. Where variable work week's apply the value of vacation time and how much should be paid for a week of vacation becomes complicated. This is another reason we recommend paying employee's their vacation pay entitlements on each pay cheque, rather than allowing for vacation pay to accrue and be paid out when vacation time is used. In that case, a week of vacation time is unpaid because the employee has already received their vacation pay on each pay cheque.

The "vacation pay on each pay cheque" model also simplifies things when an employee who works a variable schedule wishes to take their vacation in increments of less than a week at a time. This can lead to confusion about how many days are in a week of vacation and what is the value of a day of vacation? If vacation pay has already been paid out on each pay cheque these questions aren't that important from a practical perspective.

You can learn more about how to determine vacation pay and vacation time entitlements for these more complex situations here.

d. Leave and Vacation

Another benefit of adopting the "vacation pay on each pay cheque" model is that it avoids confusion as to what vacation pay accrues when an employee is on a statutory leave of absence. Generally, any time on a statutory leave (such as pregnancy or parental leave) will count for the purposes of an employee's accrual of vacation time. However, if this time on leave is unpaid, then vacation pay will not also accrue because vacation pay is earned based on a percentage of earnings. During an unpaid leave there are no earnings and therefore no vacation pay is accrued.

However, where an employer agrees in a contract to provide a set amount of paid vacation time per year of employment (as opposed to per year of active work), then that employer could be found to have agreed to provide paid vacation accrual even during statutory unpaid leaves of absence. Paying vacation on each pay cheque can help to avoid any confusion or misconceptions about vacation pay accrual during leaves.

e. Vacation Pay

Vacation pay minimums in the *ESA* are either 4% of regular wages (for employees with 2 weeks of vacation) or 6% of regular wages (for employees who have completed 5 or more years of service) For the purpose of calculating vacation pay "regular wages" include:

- Any money payable to an employee from the employer under the terms of their contract;
- Any payment owed to the employee under the *ESA* (includes overtime and termination pay);
- Non-discretionary bonuses and those related to hours, production, or efficiency; and
- Any allowance for room and board.

Regular wages does not include sums paid as gifts, discretionary bonuses that are unrelated to hours, production, or efficiency, expenses and travelling allowances, or benefit plans contributions or payments.

Basing vacation pay on a percent of wages earned by the employee automatically accommodates the situations of full-time, part-time and irregular employment.

Example:
An employee earns $800.00 a week in regular wages, and is entitled to two weeks of vacation a year. They earn 4% vacation pay on their regular wages, or $32.00 a week.

f. When Vacation Pay is To Be Paid Out

Vacation can be paid at different times. The default rule is that vacation pay is paid at the vacation's start. However, if vacation time is not taken in complete weeks, or if wages are paid by direct deposit, then the employer pays vacation on or before the regular pay day of the period the vacation falls in.

As discussed above, if the employee agrees in writing, vacation pay can also be paid each regular pay day as it accrues. In that case, the employer must separately itemize vacation pay from other earnings in the "statement of wages" or in a separate vacation pay statement given every pay period. We recommend that families adopt this model.

When an employee is terminated but still has outstanding vacation pay, it must be paid out with any remaining unpaid wages on the next pay day or seven days after termination, whichever is later.

g. Importance of Keeping Separate Vacation Pay and Wage Records

In the next section of this Chapter, we discuss records that must be kept regarding vacation time and pay. However, it is critical to know that an employer must keep separate records of vacation pay from regular wages. An employer who provides vacation and wages as a lump sum without differentiating which is which may be found not to have paid vacation. In that case, the employer would have to pay vacation pay on top of the amounts already paid (even if this was meant to include vacation pay).

Once again, the simplest way to reflect this is by paying vacation to your worker on each pay cheque and showing the amount attributable to vacation on the paystub.

h. Employee Entitlement to General Vacation Records

An employee is entitled to copies of vacation records on written request. These must be provided within 7 days or the first pay day after (whichever is later). Only one request may be made per year.

However, if the employer requests these records during the year that the records relate to, then the employer does not need to provide them until either seven days after the end of the year it relates to or the first pay day of the next year.

5. Employer Record Keeping Requirements

The *ESA* requires employers to keep certain records about their employee. Keep in mind, you will not have to keep certain records if you hire a residential care worker or a homemaker (discussed further In chapter 12).

If you are using a bookkeeper or payroll company to assist you with paying your support workers, they can assist you with maintaining these records.

i. Records Regarding Individual Employees

Employers must maintain the following employment-related records respecting each employee:

- Name and address – Must be recorded and retained until 3 years after termination;
- Date of birth – Must be recorded if the employee is a student and under 18 years old, and be retained for 3 years after they turn 18, or 3 years after termination (whichever comes first);
- The Date Employment Started – Must be recorded and retained until 3 years after termination;
- Dates and Times the Employee Worked – Must be recorded and retained until 3 years pass after the period that the record is about;
- Hours worked each day and week – Must be recorded and retained until 3 years pass (remember, this does not apply to Homemakers and Residential Care Workers);
- Regular Pay Statement – The information contained in the employee's pay statement must be retained for 3 years after the information was given to the employee;
- Pay Statement on Termination – The information contained in termination pay statements must be retained for 3 years after the information was given to the employee;
- Statements to Employees About their Substitute Holiday Entitlement – These must be kept for 3 years after it was given to the employee (see Statutory Holidays in the next section);
- Vacation Pay Statements – Employers who pay vacation pay by pay period must either record vacation pay in the normal statement of wages or a separate statement of vacation pay; if they choose the latter option, they have to retain that statement for 3 years; and

- Documents Relating to an Employee's Leave – Any notices, certificates, correspondence or other documents given to or produced by the employer relating to an *ESA* leave must be kept for 3 years after the day that the leave expires;
- Agreements to Work Excess Hours – Must be kept for at least 3 years after the date that the employee last performed work under the agreement; and
- Overtime Averaging Agreements – Must be kept for 3 years after the date that the employee last performed work under the agreement.

Exceptions to Record Keeping Requirements

There is an exception to certain aspects of the record keeping requirements when it comes to salaried employees. Employers do not need to record the dates and times work is performed by salaried employees or the hours worked each day and week so long as either::

- The employer does record hours the employee works above their regular work week and the employee's regular work day (or 8 hours if the employee does not have a longer work day), or
- The hours of work and overtime provisions of the *ESA* do not apply to the employee (such as if they are a Residential Care Worker – as discussed further in chapter 12).

In short, record keeping obligations are reduced when you have an employee that works a regular schedule and is paid a fixed salary for working that regular schedule.

Vacation Records

Employers also must record information about vacation time and pay an employee earns in a given vacation year. The amount of information required to be kept is significantly reduced where an employee receives their vacation pay on each pay cheque (yet another reason this is our recommended procedure). Where you adopt this process, in addition to having a record of all the vacation paid to an employee over the year, you must only be able to show the vacation time an employee earned (which will be a straightforward number of weeks based on years of service) and how much they used or didn't use.

If you do not pay out vacation on each pay cheque there are also more complex record keeping requirements related to accrual and payment of vacation pay.

- For further information in relation to record keeping see here.

The *ESA* provides most employees with a right to take certain public holidays off with pay. Many people are surprised to learn that this applies even where an employee wouldn't normally be working on the public holiday.

6. Statutory Holidays

The general rules for public holidays are as follows:

- Employees are entitled to take a public holiday off, and to receive "public holiday pay" for each statutory holiday;
- Alternatively, employees can work on a public holiday. If they do, there are a few options for how they will be compensated:
  - » They can receive public holiday, plus premium pay (1.5 times their regular rate) for the hours they work on the public holiday; or
  - » They can receive their regular pay for the hours they work on the holiday, and receive an alternative day off with public holiday pay.
- If a public holiday falls on a day that an employee would ordinarily not be working or during an employee's vacation, the employee will be entitled to either:
  - » A substitute holiday with public holiday pay or
  - » If the employee agrees in writing, they can just receive the public holiday pay.

i. What Days are Public Holidays?

Presently, there are nine public holidays in Ontario:

- New Year's Day;
- Family Day (the 3rd Monday in February);
- Good Friday;
- Victoria Day;
- Canada Day;
- Labour Day;
- Thanksgiving Day;
- Christmas Day;
- December 26.

Other days, such as "Civic Holiday" and Remembrance Day, are not public holidays under the *ESA* and you are not required to provide time off or pay on these days to a private Support Worker working for a family or private person in Ontario.

ii. What is "Public Holiday Pay"?

"Public holiday pay" is the base pay that an employee receives in connection with a public holiday. It is typically an average days' earnings based on the 4 weeks prior to the holiday.

Public holiday pay is normally calculated in the following way:

- **Step 1** - Add up all of the employee's regular wages from the 4 work weeks before the work week containing the public holiday (e.g. in a 5-week period where the public holiday.
- **Step 2** - If the employee received vacation pay during the 4-week reference period, add that vacation pay to their regular wages.
- **Step 3** - Divide the entire amount by 20 to get the public holiday pay.

There are also special scenarios for calculating public holiday pay, discussed more below.

Example:
Scenario A
Christmas day falls on a Tuesday.
In the 4 weeks before the week Christmas day falls in, the employee makes $400 the 1st week, $300 the 2nd week, $500 the 3rd week, and $400 again on the 4th week.
They earn 6% vacation pay on all wages earned in that period, paid out every pay cycle.
The total amount of their regular wages is $1600 for that 4-week period. Their vacation pay (6% of $1600) is $96.
The total of their regular wages is $1696 for that 4-week period.
Dividing that by 20, the public holiday pay is $84.80.

Scenario B
Now assume that an employee is only paid vacation pay when that the employee takes vacation. They earn $600 a week usually. Thanksgiving falls on a Monday.
In the 4-week window before that week, the employee earns $600 per week during the first 2 weeks, then takes 2 weeks of vacation at $600 a week.
The total amount of regular wages and vacation combined is $2400.
Dividing this by 20, the holiday pay is $120.

Scenario C
Finally, an employee was on an unpaid leave for 2 of the 4 weeks before the week of Victoria Day. They earned $500 a week the other 2 weeks (for a total of $1,000) and were paid 4% vacation pay.
The sum of regular wages earned would be $1,000 (as no money was earned on the unpaid leave), and the vacation pay would be $40.

The total of $1,040 would be divided by 20, which equals $52 as public holiday pay.

iii. What is "Premium Pay" and How is it Calculated

"**Premium pay**" for work on a holiday is at least 1.5 times the employee's "regular rate". Employees must receive this if they work on the holiday, unless they agree in writing to take an alternative day off at another time which will be treated as the Substitute Holiday (discussed below).

Note that hours worked on a holiday will not be counted towards the 44-hour threshold for overtime. This is because they are already being compensated at a higher rate.

Example:
An employee makes $16 an hour as their regular rate. On a public holiday, their premium rate would be $24 an hour, or 1.5 times $16.

iv. What is a "Substitute Holiday"

A "**substitute holiday**" is a day off with public holiday pay to replace a public holiday that an employee worked. This substitute can be provided to an employee as an alternative to providing them with public holiday pay and premium pay for working on the holiday.

Substitute holidays must be scheduled no later than 3 months after the public holiday in which it was earned. If the employee's employment ends before the substitute holiday is taken, the employer must pay the employee the public holiday pay they have earned at the same time the employee is paid final wages (regardless of the reason for the termination).

If the employee is entitled to a substitute holiday, the employer must give the employee a written statement before the public holiday that includes the public holiday that is being substituted, the date of the substitute holiday, and the date that the statement as given to the employee.

> **Example:**
> An employee agrees to work on Canada Day. The employer elects to provide a substitute holiday, and schedules it for July 15th. This is acceptable, as it is within 3 months of the original holiday.

v. Scenarios Where Employees Lose their Public Holiday Entitlement

a) The "First and Last Rule"

An employee will lose their public holiday entitlement in two scenarios.

i. One is the "**last and first rule**". The employee loses their entitlement if they do not work their regularly scheduled shift immediately before and after the holiday without "reasonable cause". If an employee has permission to take time off work (e.g. for an appointment, vacation or leave of absence), the next most recent shift scheduled prior to the permitted absence will be considered the shift they must work to be entitled to public holiday pay.

"Reasonable cause" is something beyond the worker's control. This is up to the employee to show. For example, if an employee is ill and misses work as a result, this will be beyond the employee's control.

Note, if the employee still actually works on the holiday, even if they lose their general entitlement, they will be entitled to premium pay (1.5 times regular rate) for the time worked. However, they will not receive the base public holiday pay, and they will not be entitled to a substitute holiday.

iii. Failing to Work as Scheduled on a Holiday

If an employee agrees to work on a public holiday or is required to do so, but fails to work their entire shift without reasonable cause, they will lose their public holiday entitlement. Again, if the employee still actually works on part of the holiday, even if they lose their general entitlement, they will be entitled to premium pay for the time worked. However, they will not receive the base public holiday pay, and they will not be entitled to a substitute holiday.

If the employee had reasonable cause for missing work, they will still receive one of the following:

- If the employee was going to receive a substitute holiday with public holiday pay, they will still be entitled to receive this, or
- If the employee was going to receive public holiday pay plus a premium for time worked, they can still receive the public holiday pay, but not the premium for time they did not work – they will still be entitled to premium pay for any hours they did work.

iii. When Can an Employee Be Required to Work on a Public Holiday?

Generally, employers cannot make employees work on public holidays. However, employees in certain industries are exempted and can be required to work on a public holiday.

The only exemption that could arguably apply to families is the "continuous operations" exception, but this would likely only be the case where you have Support Workers 24 hours a day/7 days per week.

If this exception does apply, the employer gets to choose whether the employee receives public holiday pay and a premium or a substitute holiday.

Note that, your ability to make an employee work on a holiday will be subject to obligations under the Human Rights OHRC (discussed in chapter 7), such as being generally unable to make employees work on days of religious observance.

7. Leaves

The *ESA* also provides employees with leaves of absence away from work with job security.

Leaves of absence ("**leaves**") are authorized periods of time off work, usually unpaid. During the leave, the "employment" relationship continues, though the employee's duties are temporarily suspended.

Ontario has greatly expanded the forms and availability of minimum leave entitlements over time. Most recently, it introduced new unpaid infectious disease leaves in response to the COVID-19 pandemic. These 'minimum-standard' leaves do not prevent an employer from providing greater contractual rights (for example, paid sick leave). However, most families merely follow the minimum standards requirements and do not provide paid leaves.

i. Benefits, Seniority, and Service While on Leave

While an employee is on an *ESA* leave of absence, their length of service, seniority and participation in certain benefit plans must be continued (ex. benefit plans).

Practically speaking, most families do not offer benefit plans or operate based on "seniority". Therefore, families merely need to keep in mind that length of service continues to accumulate during leaves, which impacts vacation entitlements (i.e. whether an employee has completed 5 years of service) and termination related entitlements.

ii. Reinstatement Rights After Leave

Employees taking an *ESA* leaves are generally entitled to return to their old job - or to a comparable position if (and only if) their old position has been eliminated. On return, the employee is entitled to their old wage, including any increases that would have taken effect had the leave not been taken.

However - and this can be a big "however" - this does not prevent an employer from ending employment of an employee if they do so "solely for reasons unrelated to the leave". The test there is whether the employee would have lost their job anyways had they never gone on a leave.

The practical effect is that an employer must reinstate an employee after an *ESA*-protected leave unless the reason for a termination can be shown to be unrelated to the leave.

Example:
Your Support Worker seeks reinstatement at the end of her pregnancy-parental leave. However, you prefer the new worker who has been filling in during the leave, and want to keep the new worker on instead. Failing to reinstate the original Support Worker here would violate the *ESA*, as the position continues to exist and the fact that the employee went on a leave was related to the termination.

Compare this with a situation where during a Support Worker's leave of absence, the person she was supporting was offered and accepted a position in a residential group home. When the employee ends her leave, there is no work to return to and her employment is terminated. Here, the job would have been lost regardless of whether a leave was taken, so there is no violation of the *ESA*.

iii. Types of Leave

Most families will never have to deal with a request for a long-term leave of absence. However, we have provided a snapshot of the various types of leaves to which your Support Workers may be entitled in the chart below.

Type of Leave	Purpose of Leave	Eligibility	Duration	Notice to Start of Leave	Notice to End of Leave	Evidence Required
Pregnancy Leave	Only available to birth-giving parents	Birth parent's due date must be 13 weeks or more after their employment commences. They are not eligible for an *ESA* leave before this period.	If employee is entitled to parental leave, 17 weeks If employee is not entitled to parental leave, 17 weeks; or 12 weeks after birth, still-birth, or miscarriage	At least 2- weeks written notice	At least 4- weeks written notice	Certificate from a legally qualified medical practitioner stating the employee's due date.
Parental Leave	Available to all parents after a child is born or comes into the custody of the parent	Birth or custody of child must occur for the first time within 13 weeks or later after the start of employment. If it happens before, the employee is not eligible for parental leave under the *ESA*.	If employee took pregnancy leave, 61 weeks If employee did not take pregnancy leave, 63 weeks	At least 2- weeks written notice	At least 4- weeks written notice	
Leaves to Care for Ill Persons						
Family Medical Leave	To provide care and support to a relative with serious medical condition and risk of death	Employee providing care to a qualified relative who has been medically-certified as having a "serious medical condition with a significant risk of death occurring within a period of 26 weeks"	Up to 28 weeks in a 52-week period	Written notice before leave starts or as soon as possible		Medical certification by a "qualified health practitioner" (e.g. physical or certain registered nurses)
Family Caregiver Leave	To provide care and support for a relative with serious medical condition	Employee providing care to a relative who is medically certified as having a serious medical condition by a qualified health professional	8-week unpaid leave	Written notice before leave starts or as soon as possible		Medical certificate

Type of Leave	Purpose of Leave	Eligibility	Duration	Notice to Start of Leave	Notice to End of Leave	Evidence Required
Critical Illness Leave	Employee providing care to "critically ill" family members where a medical certificate states that the person is critically ill and requires care or support for a set period. "Critically ill" means the person's health has significantly changed and their life is at risk due to illness or injury. It does not include chronic conditions.	Employee must have 6 months or more of continuous service	If the person the employee is caring for is an adult, the employee is entitled to 17 weeks of leave within a 52 week window If the person is a minor child, the employee is entitled to 37 weeks of leave in a 52 week period In both cases, if the medical certificate says the person needs care for less than the maximum amount, the leave is limited to that lesser time. If the person cared for and supported dies while the employee is on the leave, the leave ends the last day of the week that the person dies.	Written notice before leave starts or as soon as possible Employee must also provide a written plan for weeks off.		Medical certificate
Family Responsibility Leave	To attend to illness, injury, or medical of eligible family member or an urgent matter relating to an eligible family matter	Employee must have at least 2- weeks of consecutive service	3 days	Before leave starts or as soon as possible		Reasonable evidence
Medical Leaves						
Sick Leave	For personal illness, injury, or medical emergency	Employee must have at least 2 weeks of continuous service	3 days	Before leave starts or as soon as possible		Reasonable evidence

Type of Leave	Purpose of Leave	Eligibility	Duration	Notice to Start of Leave	Notice to End of Leave	Evidence Required
Organ Donor Leaves	Employee undergoing surgery to donate all or part of certain organs to a person		Up to 13 weeks In some cases (particularly if a medical practitioner advises it), can be extended for an additional period of up to 13 weeks	At least 2- weeks written notice or as soon as possible	Can end leave early by giving at least 2- weeks written notice	Medical certificate that confirms surgery
Crime-Related Child Disappearance	Child of employee disappears and it is probable in the circumstances that the disappearance was the result of a crime	Employee must have at least 6 months of consecutive service	Single continuous leave of absence of up to 104 weeks (2 years)			
Child Death Leave	Child of employee dies	Employee must have at least six months of consecutive service	Single continuous leave of absence of up to 104 weeks (2 years)			
Bereavement Leave	Death of certain family members, including spouse, parent, child, grandparent, brother or sister, etc.	Employee must have two or more consecutive weeks of service	2 days	Before leave starts or as soon as possible		Reasonable evidence
Leaves to Care for Ill Persons						
Domestic or Sexual Violence Leave	To seek medical attention, obtain services, from a victim services organization; counselling; re-locate; or to seek legal or law enforcement assistance for the employee or the child who has experienced domestic or sexual violence or the threat of it	Need to be employed for at least 13 consecutive weeks	10 days of leave or 15 whole weeks (employee's choice). The first 5 days of either leave are paid	Before leave starts or as soon as possible		Reasonable evidence

Type of Leave	Purpose of Leave	Eligibility	Duration	Notice to Start of Leave	Notice to End of Leave	Evidence Required
Emergency and Sickness Leave	If an Emergency is declared per the Emergency Management and Civil Protection Act, and: • An Emergency Management and Civil Protection Act order or a Health Protection and Promotion Act (public health) order applies to employee; or • employee must provide care or assistance to a designated individual, • OR • One of the following reasons related to a designated infectious disease (e.g. COVID-19): • employee is under individual medical investigation, supervision or treatment; or acting in accordance with an order from local public health; • is in quarantine or isolation or is subject to a control measure (e.g. self-isolation) • is under a direction given by his or her employer in response to a concern that the employee may expose other individuals in the workplace to the infectious disease; is providing care or support to a designated individual because of a matter related to the designated infectious disease; or is directly affected by travel restrictions related to the designated infectious disease and cannot reasonably be expected to travel back to Ontario.		The leave lasts until the end of the declared emergency or until the employee is able to perform their duties again, whichever comes first. For infectious disease leaves, instead of the end of the declared emergency, the leave ends once the infectious disease is no longer designated in the *ESA* or the employee can otherwise return to their duties (whichever comes first).	Before leave starts or as soon as possible		Reasonable evidence but cannot ask for medical evidence if it is an infectious disease leave
Reservist Leave	Reservists are also eligible for an unpaid leave. However, this type of leave is not discussed further here as it not typical to the types of relationships addressed here.					

8. Termination

i. Key Concepts Related to Termination of Employment

This section discusses what employers should know about the end of an employment relationship.

No right to permanent employment

With a few exceptions, employees have no "right" to keep their job, and their employment can be terminated by the employer for any lawful reason. It's important to keep in mind that some reasons for termination are illegal, such as reprisal for an employee seeking to enforce their *ESA* rights or for a discriminatory reason.

Notice of Termination

In most cases, the employee has a right to written "notice of termination". The purpose of this notice is to give them time to find similar replacement employment. When inadequate notice is given, the employee is entitled to pay instead of notice, sometimes called "pay in lieu of notice", equal to the notice they should have received. Termination without proper notice is called "wrongful dismissal".

Resignation and Constructive Dismissal

An employee who resigns voluntarily and in a clear an unequivocal way will not be entitled to notice. However, an employee who resigns in response to unreasonable employer actions (like harassment) or because the employer has changed the contract in a fundamental way may be entitled to treat themselves as having been "constructively dismissed", and sue the employer for reasonable notice as if they had been wrongfully dismissed.

Temporary Layoff

An employee may or may not be entitled to notice if they are temporarily laid off. The *ESA* permits temporary layoffs of certain lengths, but the common law may treat it as a constructive dismissal if the employment contract does not permit temporary layoffs. If you believe you will need to temporarily suspend an employee's employment, you should consider including a temporary layoff provision in your contract.

In addition, note that during the pandemic special rules may apply which may allow for Temporary Layoff even if you haven't provided for this in your contract. These special rules are beyond the scope of this book and we recommend you seek legal advice if you have had to consider a temporary layoff.

Just Cause for Termination

The biggest exception to the entitlement to notice of termination at common law and under the *ESA* is where an employee engages in misconduct that provides grounds for termination without notice. Where this is the case, the employee's employment can be terminated immediately without notice or other termination entitlements.

Frustration of Contract

Finally, an employee will not be entitled to notice if their employment contract is frustrated. That typically occurs if an employee is unable to work for the foreseeable future for reasons beyond either party's control. There are many special rules about this type of termination, and it is advised you seek legal advice if it occurs. However, this chapter will review some of the rules for your familiarity.

ii. Termination for Just Cause

An employee who is terminated for just cause will not be entitled to notice under either the *ESA* or the common law. Just cause typically deals with misconduct by an employee. In order for misconduct to justify termination without notice under the ESA it must amount to "willful misconduct, disobedience or neglect of duty that is not trivial and has not been condoned." For the purposes of this section, we refer to this as "just cause".

Practically speaking, it is often difficult for an employer to prove just cause for termination. An employer must prove that the employee engaged in misconduct, and that the misconduct was so serious that it would be unreasonable for the employer to be required to continue to employ them.

Seriousness relates to the type of misconduct, as well as whether the conduct is part of pattern that demonstrates the employee can't be trusted to perform adequately. Certain types of misconduct can be enough on their own to warrant termination for just cause, even when they only happen once – for example, theft, abuse, serious dishonesty, or neglect that has very serious consequences or causes harm may all be sufficient to warrant termination without notice.

Other types of misconduct will require what is known as "**progressive discipline**" to justify termination. For instance, an employee will generally need to be warned that their conduct is putting their employment in jeopardy and be given a meaningful opportunity to improve before termination will be justified for less serious forms of misconduct such as lateness, absenteeism, poor performance and even insubordination.

The courts will also consider "mitigating circumstances" that might make termination too severe (such as a long, unblemished service history, condonation of the misconduct by the employer, etc.). That can make it very difficult to predict whether specific misconduct warrants termination.

Employers should proceed with caution if they wish to terminate an employee's employment for just cause. Claiming "just cause" exists where that is not the case comes with potential for added liability (discussed below).

iii. Termination without Cause

An employee who 's employment is terminated without just cause is generally entitled to reasonable notice. There are two types of notice in Ontario: common law reasonable notice and *ESA* notice.

The one exception is during a probation period, discussed in a section below. The common law and the *ESA* permit an employee to be terminated without notice in the first 3 months of employment so long as the parties agree it will be a probation period.

a) Common Law Notice

Common law notice will apply unless you have specifically contracted in writing to restrict an employee's notice entitlements to the statutory minimum prescribed by the *ESA*.

How much notice?

Common law notice is typically awarded in periods of months. The specific length will depend on several factors, the most important of which are:

- length of service,
- age,
- qualifications, and
- reemployment prospects.

The maximum amount awarded in Ontario is typically 24 months' notice (or pay in lieu) for long-term (20+ years), older employees (60+) with low reemployment prospects. The amount of notice applicable in each case will depend on its facts, though the range is generally between 3 and –6 weeks of notice for each year of service.

A note about Mitigation

Note, an employee who is given pay in lieu of notice has a duty to "mitigate" their losses by trying to find another comparable job. They do not need to actually find one, but need to try. If they do not try and they sue a former employer for reasonable notice, a court will likely deduct some of their damages. If they find a new comparable job, any earnings they make will be deducted from their reasonable notice.

What's Included in "Notice"?

When an employee is paid in lieu of reasonable notice, they are entitled to all of the compensation they would have received during their notice period if they had been given working notice. That includes salary, wages, the employer's contributions to any benefit plans (though not necessarily participation in the benefit plan itself), bonuses the employee would normally have received, and so on.

Example:
An employee is terminated without cause. They are 20 years old with 6 months of service with the employer. They have a valuable skillset and will likely be able to gain reemployment quickly after being terminated. Their reasonable notice period would likely be in the range of two weeks to one month.

However, if that same employee is 60 years old, their notice period would likely be longer (perhaps 2 months or more depending on their re-employment prospects).

b) *ESA* Notice, Benefits, and Obligations on Termination

The *ESA* also provides for notice of termination entitlements.. While this is less notice than the common law, the employer cannot contract out of it. The *ESA* also provides other benefits: severance pay and benefit continuation (both of which are generally not applicable to families due to their circumstances).

1. *ESA* Notice and Benefit Continuation

The *ESA* requires an employer to provide an employee who has 3 or more months of service with minimum notice of termination or pay in lieu. Unlike common law notice, *ESA* notice operates like an equation. The notice

an employee will be entitled to receive is dependent solely on their length of service:

Length of Service	Notice Entitlement
More than 3 months but less than a year	1 week
1 year or more but less than 3 years	2 weeks
3 years or more but less than four years	3 weeks
4 years or more but less than 5 years	4 weeks
5 years or more but less than 6 years	5 weeks
6 years or more but less than 7 years	6 weeks
7 years or more but less than 8 years	7 weeks
8 years or more	8 weeks

As with common law notice, the ESA notice can be provided as either working notice (e.g. "your employment will end in 2 weeks during which time you must continue to work") or as a lump sum equal to what the employee would have earned if they worked the notice period. Employees must not have their wages or employment terms reduced or altered once notice is given. Further, an employee must be paid the normal vacation pay they would have received during the notice period.

Employers must also continue making benefit contributions for the employees during the statutory notice period (benefit continuation) if any benefits were provided during employment. Practically speaking, most families do not provide their Support Workers with benefits so this may not be relevant for your situation.

Example:
An employee has 4.5 years of service. They are entitled to 4-weeks of notice on termination.

An employee has 12 years of service. They are still entitled to only 8-weeks of notice.

An employee has only 2 weeks of service. Since they have less than 3 months, they are not entitled to any *ESA* notice. They may be entitled to common law notice unless the contract says otherwise.

2. Severance Pay
In addition to notice of termination, certain employees are also entitled to be paid special severance pay. However, this is unlikely to apply to families hiring Support Workers because it only applies to employers who have a payroll of $2.5 million or more.

3. Earned but Unpaid Compensation
On termination, an employer must pay an employee all earned but unpaid compensation 7 days after the end of employment or the employee's next regular pay day (whichever is later). This includes outstanding wages, vacation pay (remember that vacation is also paid on any statutory notice pay), lieu time and substitute holidays remaining at the time of termination.

4. Pay Statement on Termination
On termination, the employee must be given a pay statement on or before the date that any outstanding wages and vacation are paid. This termination pay statement must contain all of the above information, and also the following:

- The gross amount of any vacation pay being paid (vacation pay is discussed later in this chapter);
- The pay period date range for any other wages being paid at that time; and
- The gross amount of wages for any other pay periods being paid at that time.

iv. Contracting out of Common Law Notice

It is possible for employers to contract out of having to provide common law notice.We recommend doing so as it can save you significant costs and give you more flexibility in making changes to your support arrangements. However, employers should be careful to use the right language when drafting contracts that try to limit common law notice. Courts are very protective of employees when interpreting such clauses, and will generally interpret any flaws in the language in favour of employees receiving common law notice.

It is highly recommended that you seek legal counsel in drafting such a contract. If you must proceed without legal counsel, make sure that your termination clause ensures that an employee will receive all statutory termination related entitlements prescribed by the *ESA* but will not receive common law notice or pay in lieu thereof. Take a look back at chapter 4 for further information about key contractual terms.

iii. Bad Faith and Unfair Dealing in Termination

It goes without saying that treating people fairly and sensitively is a best practice in life. This holds true in employment, and particularly when it comes to the termination of employment. In fact, employers who treat employees poorly in relation to their termination, insensitively, dishonestly, unreasonably, or otherwise in "bad faith" can be liable for increased damages, in some cases amounting to hundreds of thousands of dollars for large corporations acting badly.

The following list includes some of the employer behaviours that the courts consider to be "bad faith":

- Maintaining wrongful or unfounded accusations of misconduct or just cause;
- Communicating unfounded allegations or cause to the public or new employers;
- Refusing to provide a letter of reference after unfounded allegations or cause;
- Reassuring an employee that their employment will continue while planning their termination;
- Waiting to tell an employee about their termination until after the employee had monetarily committed to further employment (like buying a house to move to a new job site); and
- Firing an employee immediately on return to work from a disability leave.

iv. Constructive Dismissal

Sometimes, an employer's behaviour can create "constructive" termination. This can happen where:

i. the employer's actions demonstrate that they no longer intend to be bound by their employment contract with the employee (treating an employee in such a manner that it would be unreasonable for the employee to continue employment – i.e. they are forced to quit), or

ii. The employer changes the terms of the contract without the employee's acceptance or the right to do so under the contract (such as reducing salary, reducing hours, demoting an employee, etc.).

Where an employee has been constructively dismissed they may be entitled to common law notice of termination (or pay in lieu), as well as statutory (*ESA*) notice.

v. The Employee Quits or Resigns

Where an employee "quits" or resigns without good reason (i.e. is not constructive dismissed), the do not have a claim to termination related entitlements. In order for a resignation to be effective and relied upon by an employer it must be:

- **Voluntary** – The employee must make the choice to resign freely, must not be suffering from mental incapacity, and not be forced into resigning (i.e. constructively dismissed).
- **Clear and Unequivocal** – The employee's conduct has to clearly show that they intend to resign. For example, saying "I quit" in a burst of anger does not clearly show that the employee, acting with clear mind, intends to resign. In this situation, it's a good idea to confirm with the employee whether they are resigning if it is at all unclear.
- **Acceptance by the Employer** – An employer must accept the employee's resignation on the terms the employee proposes (i.e. if an employee says I resign and my last day will be 2 weeks from now, an employer can't unilaterally treat the resignation as effective immediately).

vi. Lay-Offs

The *ESA* lets employers temporarily suspend or "lay-off" an employee during times when they have no work. The *ESA* states that an employee may be laid off temporarily (i.e. with no work and no pay) for a period of up to 13 weeks in a 20-week period. However, that period may be extended to 35 weeks in 52 if the employer continues to provide the employee with benefits during the layoff and/or the employee's contract specifically allows for layoff for up to 35 weeks.

It is important to be aware, however, that just because the *ESA* allows for temporary layoffs, that does not mean an employer will have a right to conduct temporary layoffs. The common law generally considers unpaid temporary layoffs to be "constructive dismissal" unless the employee's contract specifically allows for temporary layoffs. Once again, there may be special rules that apply to temporary layoffs in the context of the pandemic. We recommend you seek legal advice if you are considering temporarily laying off a worker during the pandemic.

vii. Probationary Periods

A probationary period is an initial period of employment during which an employer may terminate an employee's employment without notice for any reason. Under the *ESA*, this period is the first 3 months of employment. However, this probationary period may not apply unless it is specifically identified in the employee's employment contract, or unless the contract restricts entitlements on termination to the *ESA* minimums. Have a look back at chapter 4 for further discussion on contract clauses.

It's important to note that even during an employee's probationary period, employment cannot be terminated for reasons related to the employee seeking to enforce their *ESA* rights or in relation to a protected human rights characteristic, such as race, gender, family status or disability.

CHAPTER TAKEAWAYS:

In this chapter, we reviewed the terms of employment between an a family (or person with a disability) and an employed Support Worker. The main take-aways are:

- Employers should consider whether they can or want to take advantage of special employee types to reduce their *ESA* obligations (such as residential care workers, domestic workers, or home-makers).
- Employers must comply with *ESA* rules on paying employee's minimum wage for actual or deemed work (keeping in mind they can use room and board as a partial offset), pay reporting pay if an employee works less than 3 hours in certain circumstances, set and use regular pay periods and pay days, pay employees through an approved method, provide employees with proper pay statements each pay day or following termination, and only make proper deductions and remittances from employee wages.
- Employers must comply with *ESA* rules limiting the hours an employee may work. These rules mandate maximum hours an employee may work in a day or a week, and minimum time off every day, between shifts, and every one-to-two weeks. These rules are subject to employees agreeing to exceptions and exceptional circumstances.
- Employers must ensure that their employees are receiving at least the minimum amount of overtime that they are entitled to under the *ESA*. This can be calculated on a weekly basis, on a longer basis of up to 4 weeks if the employee agrees, or using a more generous measurement.
- Give employees at least their *ESA* minimum vacation time and pay,. Employers must ensure vacation is taken no later than 10 months after the end of the period it is earned (keeping in mind special exceptions). Finally, employers must keep adequate separate record of vacation pay and other wages, or else they risk a finding that vacation was not paid. Records are producible to employees on request, subject to certain rules.
- Keep adequate records of the types required by the *ESA*, and keep these for the required periods of time.
- Provide employees with public holidays off with public holiday pay, or provide a substitute holiday or a premium and public holiday pay to employees who agree to or are required to work the public holiday (keeping in mind only certain kinds of employees can be made to work a public holiday).
- Understand and respect the rights of an employee to take an unpaid leave of absence under the *ESA*, with job security on their return (unless they are terminated for a reason unrelated to their taking a leave). There are a number of *ESA* leaves an employee may take. However, these are all unpaid except for sexual and domestic violence leave. Be aware as well of your obligations with respect to vacation time and pay while an employee is on a leave.
- Determine whether a terminated employee is owed common law and/or *ESA* notice of termination or pay in lieu, benefits, and severance pay. Attempt to contract out of common law notice using a well-crafted termination clause. Include a probation period in your employment contract. Be aware of when you can terminate an employee for just cause. Ensure that you provide employees with any earned but unpaid compensation on termination, regardless of whether notice is owed.

Appendix A - Sample Hour-Extending Agreement

Excess Hours Agreement

I, **[Employee's Name]**, agree that **[Employer's name]** may require me to work up to a maximum of **[Number]** hours per day, and **[Number]** per week, as required. I acknowledge that I have received a copy of the most recent information sheet on hours of work and overtime pay produced by the Ministry of Labour / Director of Employment Standards. I am aware that this agreement can be cancelled with 2 weeks' written notice by either party.

Signature of Employee	**Date**
Signature of Employer	**Date**

Appendix A - Sample Two-Week Overtime Averaging Agreement

Overtime Averaging Agreement

I, **[EMPLOYEE NAME]**, agree to have my hours of work averaged over a two (2) week period for the purposes of calculating overtime.

Approved overtime will be compensated at a rate of 1 and ½ times regular pay **[and/or 1 and ½ hours in lieu]** for every hour worked in excess of 88 hours in a two (2) week period, as set out in the Employment Standards Act, 2000, as amended from time to time.

This agreement shall expire on **[DATE OF EXPIRY]** ("Expiry Date"), which is not more than two years after the day that this agreement takes effect.

This agreement may be renewed prior to the Expiry Date.
This agreement cannot be cancelled unless BOTH the Employer and I agree to cancel it.

Signature of Employee	**Date**
Signature of Employer	**Date**

CHAPTER

7

Human Rights Obligations and Accommodation

The *Ontario Human Rights Code* (the "**OHRC**"). The OHRC grants wide-reaching protection from discrimination in a number of scenarios, including in "employment", "contracts", "services" and "accommodation".

While many people assume that the prohibition on discrimination in "employment" only applies to "employees", practically this has also been extended to "volunteers" and "independent contractors".[9] The OHRC could even apply if you're purchasing services or entering a contract for a Support Worker's services through a "company".

While this chapter uses the terms "employee", "employer" and "employment" to explain human rights obligations, keep in mind that these obligations may extend to your relationship with your worker regardless of how you have classified them.

9. http://www.ohrc.on.ca/en/part-i-%E2%80%93-freedom-discrimination/employment-6

Core Concepts

Prohibited grounds of discrimination:

The OHRC prohibits discrimination in employment based on "prohibited grounds" or "protected characteristics" which include: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability, and other analogous grounds.

"Discrimination":

Discrimination means imposing differential burdens, obligations, or disadvantages on a person because they are or are perceived to be part of a protected group or have a "protected characteristic". In order for a person to prove they have experienced discrimination they just have to show that (1) they have a "protected characteristic", (2) that they experienced disadvantage of some kind, and (3) that the disadvantage was imposed because of their protected characteristic.

Direct and Indirect Discrimination

Intentional and direct discrimination is easy to spot. For example, if an employer refuses to hire an employee because of their ethnicity, that will be prohibited discrimination. However, an employer does not need to intend to discriminate. All that matters is that the employee suffers an adverse impact because of their protected characteristic.

A neutral rule that doesn't obviously distinguish amongst employees based on personal characteristics may still have a discriminatory effect on an employee. For example, if a workplace requires an employee to work on a Saturday, but the employee's religious faith requires them not to work on Saturdays.

Once an employee can show that the employer has engaged in discrimination (whether intentional or not), it is up to the employer to provide a defense. If they have no defense, they may be liable for a breach of the OHRC.

Exceptions and Defenses to Discrimination

Despite the prohibition on discrimination in employment, it will not always be unlawful to distinguish between or otherwise exclude workers based on protected characteristics.

The OHRC provides several defenses or exceptions that may be available to you when it comes to engaging a Support Worker:

- Care of Aged, Infirm or Ill Relatives – You may refuse to hire or employ someone who is primarily providing for the medical or personal needs of you or a family member who is "aged, infirm or ill".
- Bona Fide Occupational Requirements – A rule or requirement that is a "Bona Fide" or legitimately necessary for the job or service in question will not be prohibited discrimination.
- Accommodation – If you have done everything possible (short of undue burden) to support a worker to be able to perform the work required but they still cannot because of a protected characteristic (such as their own disability or family obligations) then it will not be prohibited discrimination to exclude or otherwise disadvantage the worker.

We discuss these exemptions and defenses in greater detail below. However, keep in mind that these are complex legal issues. If you have job applicant or worker who raises concerns about discrimination you would be well advised to seek legal advice about your specific circumstances.

i. Personal Care or Care of Aged, Infirm or Ill Relatives

A very limited exception from the OHRC applies to personal care employment relationships involving a person who hires a worker to support them, or a family member who is ill, aged or infirm. Specifically, section 24(1)(c) of the OHRC exempts:

> an individual person [who] refuses to employ another for reasons of any prohibited ground of discrimination in section 5, where the primary duty of the employment is attending to the medical or personal needs of the person or of an ill child or an aged, infirm or ill spouse or other relative of the person.

This defense has not come up very frequently in human rights litigation and therefore there is very little in the way of guidance from the Human Rights Tribunal or the courts related to this exception. In particular, there is no guidance as to whether the words "ill child" would extend to a child with a "developmental disability". Nor is there any legally binding interpretation or guidance as to whether an "ill or infirm" relative would include a family member with an intellectual or developmental disability. In fact, many self-advocates and other advocates for people with disabilities would reject the label of "infirmity".

At the same time, outside the human rights context, the term "infirm" has been broadly applied to people who have **an impairment in physical or mental functions.**[10]

The Ontario Human Rights Commission has provided the following example in relation to the interpretation of this exemption:

> **Example:**
> A man hires a male live-in caregiver for his father who has severe disabilities. Despite receiving applications from several qualified women, his father would prefer a male attendant and this has been taken into account in the hiring process. This is permissible.[11]

This example does not speak to the father being "aged" or "ill" but rather only that the father has "severe disabilities". Therefore, we would argue that the Commission has interpreted this exception as applying to circumstances where a worker is being hired to provide personal or medical supports to a family member with disabilities.

It's important to keep in mind that the availability of this exemption is very clearly limited "individual" employment situations. In other words, to take advantage of this exemption, you should personally engage the worker and not hire them through a corporate entity, such as a holding company. In addition, this exemption will not apply where you or your loved one with a disability are receiving support through an agency.

Finally, while this exemption may allow you to choose not to employ a worker because of a protected

10. See for example in the context of eligibility for certain tax credits and disability trusts.
11. http://www.ohrc.on.ca/en/iv-human-rights-issues-all-stages-employment/5-interviewing-and-making-hiring-decisions

characteristic, it will not be a defense to otherwise discriminatory or harassment treatment of a worker that you have chosen to employ. Treating workers you have hired fairly and equally without distinction due to protected characteristics will always be the best practice and will help to avoid legal disputes and liability.

ii. Bona Fide Occupational Requirements

Even if the exemption above doesn't apply, imposing a restriction or job requirement that excludes workers who belong to a protected group may still be permissible if the restriction is legitimately necessary for the job. This is known as a "bona fide occupational requirement" or BFOR.

When considering the BFOR defense, it is important to note that there are two kinds of discrimination.

The first is "**direct discrimination**". Direct discrimination occurs when an employer explicitly targets a protected group. For example, an employer will be engaged in direct discrimination if they say "only men need apply" or "no wearing of crosses in the workplace". An employer can only use a BFOR defense to justify direct discrimination on the basis of the following protected characteristics: age, sex, record of offenses, or marital status. Direct discrimination on other grounds (e.g. race or creed) cannot be justified by a BFOR.

The other type of discrimination is **indirect or "constructive" discrimination**. This occurs when a seemingly neutral work rule or requirement actually has a discriminatory effect (it negatively impacts someone because of a protected characteristic). For example, a requirement to work on Sundays may appear neutral on its face (since it does not explicitly target any one group), but it will have a negative impact on people who need Sunday off for religious purposes. Unlike direct discrimination, an employer can use a BFOR as a defense to claims of indirect discrimination in relation to any protected characteristic.

Even where a BFOR legitimately exists, however, this may not allow you to exclude an employee, if there were ways in which the employee could be supported to perform the BFOR without causing you an undue burden. This support is known as "**accommodation**".

iii. Accommodation

If the job requirements you have for your Support Worker would impose a disadvantages on them due to

a protected characteristic, then you will have the duty to accommodate the worker, if it's possible to do so without undue hardship.

When does the duty arise?

For the duty to accommodate to arise, the employee must generally ask for an accommodation or indicate that they cannot comply with a workplace rule or requirement for reasons of disability or other protected grounds (ex. religious or family obligations).

What does it involve?

The duty to accommodate has both procedural aspects (meaning a certain way things have to be done) and substantive duties (certain outcomes that must be achieved). If either of these is breached, the employer could be found to have breached the OHRC.

What is the procedural duty to accommodate?

The procedural duty requires the employer to investigate whether an accommodation is needed and whether reasonable accommodation can be offered without causing undue hardship. This includes:

- Acknowledging the employee's request for accommodation in a timely manner;
- Obtaining all readily available information about the employee's restrictions and needs;
- Investigating what options are available for accommodation;
- Considering input from the employee; and
- If there are no reasonable options that won't cause undue hardship, being able to explain why that is.

What is the substantive duty to accommodate?

The **substantive duty** requires the employer to offer a reasonable accommodation or show that there is no form of accommodation that won't cause undue hardship. An offer of accommodation only has to reasonably meet the employee's needs. It does not need to be perfect or the exact accommodation that the employee wants so long as it is reasonable and would meets their needs. An employee will have an obligation at that point to accept the reasonable accommodation. If they don't, the employer won't have to offer other forms of accommodation.

It should be noted, the reasonableness of an offer is measured objectively given the needs of the employee, the cost, complexity, and expense of the accommodation requested, and the knowledge of the employer.

What is undue hardship?

Undue hardship is the point where accommodation becomes so burdensome for the employer that it would be unreasonable to expect the employer to accommodate an employee. There are a number of factors for assessing whether undue hardship exists. These include:

- The cost of accommodation;
- Outside sources of funding to offset that cost;
- Health and safety requirements;
- How easily the employer can change who performs what work in the workplace; and
- Substantial interference with the rights of other employees.

This isn't a closed list, so other factors may arise. They also have to be applied flexibly in each case.

An employer's threshold for undue burden will vary greatly based on the employer's nature, size, and financial means. This often imposes greater duties on larger organizations to provide accommodation. It typically means small employers (like families) who have limited financial resources and only a small number of workers will find it easier to demonstrate undue hardship.

There are a few things an employer generally will not be required to do to accommodate an employee:

- An employer generally is not required to create a new job for the employee with different duties, or to change the essential working conditions or duties of the employee's job; and
- It is not discriminatory on its own to pay lower wages where less work is performed, and to pay no wages where no work is performed. If an employee is unable to work with reasonable accommodation or can only perform less work (like shifting to part-time), you do not have to pay them for the time they do not work.

Once again, if you have a worker who requires accommodation or otherwise raises concerns related to discrimination due to a protected characteristic, you should seek legal assistance in navigating this complex area of the law.

FREQUENTLY ASKED QUESTIONS

1. **Question**: An employee has requested flexible work hours due to a disability – what do you do?
   Answer: In this situation, you should ask the employee for a medical note indicating what they can and cannot do (the limitations of their disability) and confirming that these restrictions are due to a medical reason. Then, once you have the necessary information, consider whether you can provide accommodation without undue burden (using the factors discussed above). When in doubt, obtain legal counsel. Keep in mind that you are not required to pay an employee for time that they do not work, even if they are missing work due to a protected ground.

2. **Question:** An employee identifies as a visible minority. They inform you that a stranger referred to them using a racial slur while they were out in the community performing their job with your loved one. What do you do?
   Answer: Speak to the employee to investigate what happened and gather information about the stranger's description. If the incident occurred in a place of business, report the incident to the business with a description of the individual. Consider precautions or reporting that may be necessary to help keep your Support Worker safe in the community while on the job and implement them.

3. **Question:** An employee has made a complaint against a family member, arguing that they are engaged in discriminatory language against the employee's faith.
   Answer: Investigate the matter promptly, and if the employee's complaint is legitimate take appropriate action to respond to the complaint. This may involve requiring the family member to issue an apology or other measures to prevent the conduct from recurring where possible. This can be more complex where the person engaging in the unwelcome behaviour has a disability that underlies the conduct. In this case you may wish to seek legal advice if you cannot come to a satisfactory resolution with the worker.

4. **Question:** An employee has made a complaint against a family member, alleging that they have been sexually harassed.
   Answer: This is a complex situation, given the family context of the complaint. The first priority is to protect the employee. If the person the complaint is made against resides in the workplace and cannot have their access barred, you may want to offer the employee a leave with pay while you are investigating the complaint. As soon as possible after the complaint is made, you should retain legal counsel to advise you on how to navigate the complaint while minimizing legal risk. This process can also be followed in other situations where a serious human rights complaint has been made against a member of the family.

CHAPTER TAKEAWAYS:

Human rights and discrimination in Support Worker relationships is a complex area of the law. In this Chapter, we discussed the following key points:

- Definitions of core human rights concepts, including legally protected characteristics and "discrimination" (including direct and indirect discrimination).
- Exceptions and defenses to discrimination claims, including: care for aged, inform, or ill relatives; bona fide occupational requirements; and accommodation to the point of undue hardship. In particular, we discussed both the procedural duty to investigate an accommodation request, and the substantive duty to supply a reasonable accommodation short of undue hardship. We further discussed what factors will be considered in determining whether an employer will have met the standard of undue hardship.
- Best practices for reducing the risk of a human rights claim (or a successful human rights claim should one arise), and common scenarios that you may face that invoke human rights law.
- It is a good idea to familiarize yourself with discrimination and accommodation principles to ensure that you know what practices and language to avoid and what your obligations are. While this chapter provides an introduction to these concepts, the Ontario Human Rights Commission has a policy document that provides a more detailed discussion of what constitutes discrimination under law in Ontario that you can access here: http://www.ohrc.on.ca/en/iii-principles-and-concepts/2-what-discrimination
- It's a good idea to consider having policies on human rights and accommodations for your Support Workers. This can help to ensure everyone is on the same page. The Ontario Human Rights Commission has a short guide to drafting this type of policy which may be useful to families employing workers that you can access here: http://www.ohrc.on.ca/en/policy-primer-guide-developing-human-rights-policies-and-procedures/5-anti-harassment-and-anti-discrimination-policies
- Don't let complaints fester. Promptly address any human rights issues as they arise and if you aren't sure what to do seek legal guidance.

CHAPTER

8

Occupational Health and Safety

When families engage Support Workers, the health and safety of their family member being supported and their workers is paramount. Support Workers are typically covered under Ontario's *Occupational Health and Safety Act* (the "**OHSA**")[12]. This piece of legislation sets out protections for workers and the responsibilities that workers and employers have to ensure healthy and safe workplaces. OHSA generally applies to employees, but may also apply to independent contractors.

Having health and safety policies and procedures in place is always a best practice. Especially in light of the global COVID-19 pandemic, health and safety measures such as screening, cleaning and using Personal Protective Equipment ("PPE") such as masks, gloves and gowns, are becoming even more important for families, workers and people supported

This chapter provides an overview of what duties you have when you engage workers, and the rights and responsibilities of your workers. While some of the obligations and requirements identified in this chapter may seem excessive or daunting and may not strictly apply to your circumstances, the purpose of this chapter is be a resource for best practices.

This chapter also provides health and safety tips and reminders to help you manage workers and keep everybody in the workplace healthy and safe. We discuss workplace insurance – which provides coverage in the event of a work-related accident in chapter 10.

a. Application

The OHSA applies to a wide range of work relationships and extends to all "workers", which is defined in the act to include, among others, "a person who performs work or supplies services for monetary compensation." This definition is broad enough that it has been interpreted to apply to not only almost all employees, but also contractor relationships, and even some "volunteers". While the OHSA in general has been extended to self-employed contractors on the basis that they are actually employees in a number of situations, the OHSA specifically states that self-employed workers are subject to the same employers' duties, hazardous materials, notification, and enforcement, apply with necessary modifications to self-employed persons.

12. Occupational Health and Safety Act RSO 1991, c 0.1 [OHSA].

There is an exception applicable to many private Support Worker relationships. Specifically, work performed by an owner or occupant of a private residence, **or their servant**, in or on the property of that personal residence is not subject to *OHSA*.[13] However, if you hope to rely on this exemption, it's important to be aware that if your worker regularly provides supports outside the home such as in outings in the community, this will likely mean that OHSA responsibilities and standards DO apply and the exception is not available..

In any event, as a matter of best practice, it is always a good idea to meet the OHSA obligations we discuss below.

b. Common Health and Safety Risks for Support Workers

The following are common health and safety risks that private Support Workers face when providing direct supports:

- Injuries related to transferring, lifting, carrying, pushing and pulling equipment
- Injuries related transferring, lifting people supported
- Slips, trips, falls, physical strains
- Work-related stress including burn out, caregiver burden, shift work
- Working alone and overnight
- Bullying and harassment
- Aggression or violence

Being aware of these risks is key to being able to address them and reduce the risks for your Support Workers, which is one of your key obligations.

c. What are my duties as an employer?

Employers bear most of the responsibilities under OHSA. Reviewing these duties will help protect families, workers and the people they support. Keep in mind that, while these duties technically don't apply if your worker is working exclusively in your private residence, they are still best practices for keeping you, your loved one with a disability and your worker safe.

i. Providing a safe work environment:

It is important to maintain the physical workspace. Employers have the duty to take all reasonable precautions to ensure the health and safety of their workers. This is a best practice not only for the benefit of your worker, but also for your own benefit and the benefit of others with whom the worker may interact.

Do's and Don'ts:

- **DO** ensure all repairs are done in a timely manner, such as fixing uneven flooring or carpet, leaky faucets, broken or worn out seating, broken washer/dryer, assistive devices, railings.
- **DO** maintain supply of soap and cleaning products
- **DO** take care to address exposed electrical wires
- **DO** secure pets if necessary
- **DO** provide private space for domestic workers
- **DO** have a designated place to dispose of hazardous materials (e.g. used dressings/bandages, soiled clothing, medications)

- **DON'T** ignore repairs
- **DON'T** wait for supplies to run out
- **DON'T** forget to inform a worker of a potential hazard or risk so that the worker can be aware and act accordingly

ii. Providing information, training and education

Employers must provide their workers with information and training on the needs and preferences of the people being supported, and how to properly and safely use equipment, substances and materials, and perform their duties. This duty might also include providing information and training on how to identify violent behavior and how to redirect and de-escalate behaviors, based on the needs of the person being supported. Employers must ensure that workers have the necessary qualifications and certifications and have a duty to ensure these remain up to date.

Employers must also ensure that their employees and supervisors complete the basic occupational health and safety awareness training as set out in OHSA. You can access the free online training here. Once a worker has completed the training, even with a previous employer, then they don't have to repeat the training so long as they can show their certificate of completion.

13. OHSA, section 3.

As a best practice, it's a good idea to put together a 'manual' for staff that has specifics about the person being supported such as their likes and preferences, allergies, medications, needs and strengths, as well as emergency response plans and key contacts, and keeping it in a designated place to help protect the privacy of the person being supported.

iii. Duty to have health and safety policies and procedures

Employers who are subject to the OHSA technically must keep written policies, unless they have less than 5 workers. While many private individuals hiring Support Workers do not have 5 or more workers and therefore technically aren't obliged to have written policies, a written manual or handbook for your workers with key health and safety policies and procedures in place can be an excellent resource for you and your worker in ensuring that you're on the same page when it comes to how work will be performed and how supports will be managed. Some key topics to cover in your manual include:

- Hygiene
- Fire safety
- Emergency protocols
- Using Equipment
- Physical lifts
- Going on outings
- Handling and disposing of any sharp objects (e.g. needles), soiled linens, clothing.
- Mental health and well-being
- Workplace harassment and violence

iv. Duty to Report

There are certain health and safety incidents that you must report to the Ministry of Labour, Training and Skills Development ("**MOL**") Depending on the nature of your arrangement with workers, an agency may also have an obligation to provide you with Serious Occurrence Reports in the event of certain incidents. These reporting duties will be triggered when there is a death, a critical injury, accident, fire, a work refusal in the workplace or when a worker has an illness arising out of exposure to something hazardous in the workplace.

v. Duty to prevent and respond to workplace violence and harassment

Among the most common issues raised in complaints under the OHSA are incidents of workplace violence and harassment. Harassment and violence in the workplace seriously undermine your relationship with your worker and the support they provide, cause severe trauma and harm to your worker and others in the workplace, not to mention raise the possibility of significant liability.

With this in mind, developing policies and procedures for addressing harassment and violence in the workplace are a best practice, and unless you are exempt, legally required under the OHSA. You can access Ministry of Labour resources related to workplace violence and workplace harassment here.

d. Workers Rights and Obligations

1. What Rights do Workers Have?

This chapter began by outlining the duties families potentially have to workers to ensure workplaces are health and safe. Under OHSA, workers also have rights that all employers should be aware of and respect. The three main worker rights are:

- Right to Know
- Right to Participate
- Right to Refuse

However, given the "personal residence exception" described earlier in this chapter, these worker rights may not apply to workers who work primarily in your home or the home of a loved one with a disability. It is still considered best practice to train and educate your workers on health and safety and involve them developing rules and policies that will help keep everybody safe.

i. Right to Know

A worker's right to know mirrors the employer's duty to provide information, train and educate workers on policies, procedures and potential workplace hazards or risks. Workers and employers can work together to ensure this right is being protected. Workers should be made aware of what your policies and procedures are, what potential hazards and/or risks to a worker's health and safety the worker may be exposed to in the workplace, and how to avoid these risks and handle possible hazards.

ii. Right to Participate

Workers have the right to be involved in identifying and resolving workplace health and safety issues. This includes the ability to access a complaints process where the worker has the opportunity to discuss their concerns with the employer, and to propose options for addressing these concerns. Coming up with individualized options that work for workers and families require participation by all involved.

iii. Right to Refuse[14]

In certain circumstances where workers believe that the physical conditions of a workplace present a risk to the worker's health and safety or there is violence in the workplace that may endanger them, a worker can refuse to work and cannot be penalized or disciplined for doing so, so long as their work refusal has been made in good faith (i.e. honestly and sincerely).

When a worker refuses unsafe work, a detailed procedure must be followed to address their concerns and/or prove that the work is safe. We summarize the procedure below as a quick reference guide. However, it is important to keep in mind that work refusals can quickly turn into complex legal disputes involving the Ministry of Labour. If you have a worker who is refusing allegedly unsafe work you may wish to consult a lawyer.

Work Refusal Procedure

Step 1 - First, the worker must communicate their refusal to you.

Step 2 - You will have to investigate the work refusal with the worker present. The worker should remain at the workplace in a safe place, until the investigation is complete. The worker should be available to answer any questions and provide additional details, if necessary, to the employer about the situation.

Step 3 - Next, you must take steps to address the hazard/risk/concern in the workplace so that the worker may return to work. The investigation should be documented, including what the complaint was, when the complaint was made and how you responded. You should document whether the issue was resolved after an initial investigation.

Step 4 - If, the worker reasonably believes that the initial source of the refusal has not been eliminated or sufficiently reduced and still poses a danger to the worker, they can continue to refuse to work or perform a particular work task or responsibility. If the worker maintains their refusal to work, an inspector from the MOL must be contacted to conduct a workplace investigation.

Step 5 - The inspector will walk through the workplace and speak with the worker, the employer and any others in the workplace as needed. If the workplace is a family home, or the home of the person supported or a group home, depending on the circumstances, the inspector will only investigate the areas that are considered to be the workplace.

Step 6 – There are several possible outcomes of an MOL inspection:

- Discussions with you and your worker and coming to an understanding for moving forward
- The inspector orders you to take certain actions which can be done immediately
- The inspector orders you to take certain actions which are more complicated or take more time to undertake. Such orders will need to be implemented by a certain date, and you must notify the inspector when the orders have been complied with
- The inspector orders that work stop for a specified amount of time

If you have more than one worker, you must inform other workers about a work refusal, including reasons for the refusal and/or the investigation taking place before other workers begin their shift in the workplace. Additionally, you must post any MOL inspection orders in the workplace so workers can see them.

Finally, there are certain scenarios where a worker cannot refuse to work. The limits of a work refusal apply to circumstances where the worker's refusal could endanger the life, health or safety of another person. It can also apply to workers in group homes and other type of residence for people with disabilities, where the work refusal stems from an inherent part of someone's job or is a normal condition of their employment. For example, where a person supported would be left alone and unsupervised, a work refusal may not be permitted.

14. OHSA, section 43.

Mental Health and the Workplace

Mental health and psychological safety are two critical considerations when engaging Support Workers. Psychological Safety refers to the absence of harm and/or threat of harm to mental wellbeing. A psychologically healthy and safe workplace is a workplace that actively works to prevent harm (both intentional and unintentional) to a worker's psychological health while also promoting workers' psychological well-being. This is important whether you are engaging a single worker or multiple workers, regardless of whether they are an "employee" or "contractor".

Practically speaking, many private Support Workers face mental health stresses associated with precarious work, holding multiple jobs, low pay, long hours, and strenuous working conditions. This has never been more true than during the COVID-19 pandemic which has stretched many families, people with disabilities and Support Workers to the very limit.

In order to help reduce mental stress for everyone in the work relationships, it is important that there is ongoing communication between you and your Support Worker(s). For example, you may want to implement a daily, weekly or monthly log or report where workers can provide their perspective about the person supported and their experience. The worker may not share their personal feelings, but this record may help you get a sense of what is happening in the workplace: what the dynamics are, what are the challenges, what is working well and how your loved ones are interacting with their workers.

Showing staff that you appreciate them and their work is also important. It helps to build trust and respect. A positive relationship with employers can improve communication of expectations and concerns and can increase how comfortable staff are providing support to your loved one and raising health and safety-related issues with you. This, in turn, can reduce workplace stress and anxiety.

CHAPTER TAKEAWAYS

After reading this Chapter, you should be aware of the basics of how Ontario regulates safety in the workplace and your obligations as an employer:

- OHSA is the statute that regulates health and safety for all workers who perform work for you, including not just employees but also independent contractors. While there are exceptions that may apply to a worker who works exclusively in the home of their employer best practice is to follow the rules set out by the OHSA wherever possible..
- OHSA obliges employers to take all reasonable precautions to provide a safe working environment, to provide information, training and education to employees, to put health and safety policies and procedures into place, to report certain health and safety incidents to the MOL, and to prevent and respond to workplace violence and harassment. This Chapter describes these obligations and provides a number of tips for accomplishing this in a home care environment.
- OHSA grants workers three primary rights in the workplace: the right to know risks and hazards in the workplace and how to avoid those risks and hazards, the right to participate in identifying and resolving workplace health and safety issues, and the right to refuse unsafe work (which requires complying with a specific work refusal process).
- This Chapter also addresses strategies for creating a psychologically healthy and safe workplace in order to prevent psychological harm as a result of the workplace.

Key Policy Terms

a. Example of Health and Safety Policy

MOL has a useful template to get families started on developing their health and safety policy, which can be edited and tailored to meet the needs of your unique support situation.

Key Policy Inclusions

A. Clear Policy statement of your commitment to health and safety and the importance that everybody work together to ensure health and safety:
B. Clear outline of responsibilities of employer:
C. Clear outline of responsibilities of workers:
D. Commitment to provide health and safety training and information to workers

b. Examples of Best Practices and Procedures

The following is a list of information and/or procedures it is good to keep together in a manual for use by your Support Workers and others who might support you or your family member with a disability:

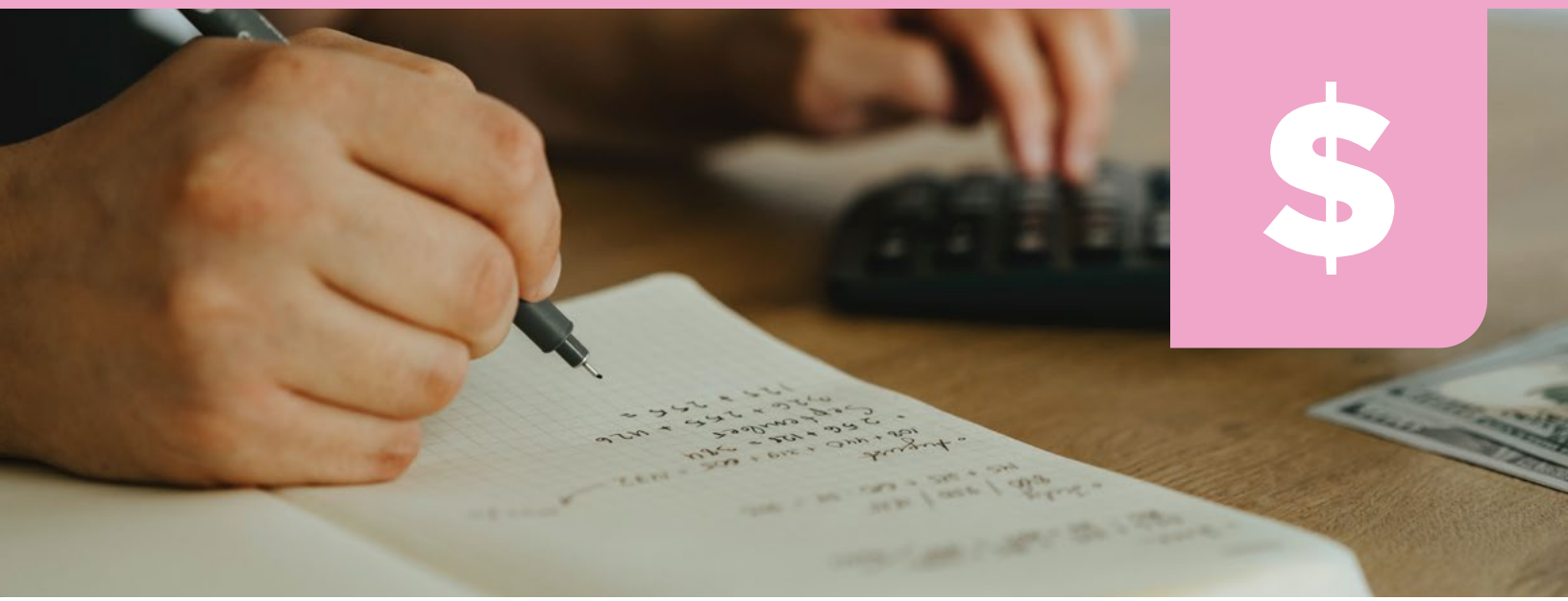
A. In Case of Emergency
- To call 911
- List of emergency contacts

B. First Aid
- Where to find the first aid kit
- When to call 911
- Health Card numbers
- Physician numbers

C. Storing any medications, any medical equipment (i.e bandages, needles)
D. Using, storing, cleaning equipment (i.e. walkers, canes, wheelchairs, assistive technology)
E. Hand hygiene and cleaning
F. Fire Prevention
G. Procedures for applicable daily supports provided
H. Checklist for going on outings
I. Maintenance and Repairs expectations or reporting
J. Complaints procedure
K. COVID-19 Response including:
- Self-screening prior to coming to work
- Procedures for screening prior to entering the home
- Hand hygiene upon entering the home and throughout your shift
- Mask wearing procedures
- Receiving visitors

CHAPTER

9



Tax and Corporate Considerations

When engaging Support Workers, there are corporate and tax considerations that you should keep in mind:

- First, it is critically important to consider the tax implications and compliance requirements associated with engaging workers directly, which will depend on whether the worker is characterized as an independent contractor or an employee; and
- Second, while many people hire Support Workers directly, you may want to consider establishing an alternative structure such as a trust, partnership or corporation. Setting up such a structure may be quite advantageous, often resulting in better management of payroll and funding, limiting legal liability, and facilitating a sustainable framework for supports.

In this chapter, we will provide information about important corporate and tax considerations when engaging workers to meet your needs or the needs of a family member living with a disability, which can be used to inform discussions with your professional advisors.

a. Corporate Structure

Most people and families hire Support Workers directly. This type of structure is usually referred to, for tax purposes, as a 'sole proprietorship', where one individual is responsible for making any decisions, in addition to managing funding and payroll. A sole proprietorship does not have legal status that is separate from the individual, which means that the sole proprietor is personally liable for any debts or liabilities, and must personally pay any relevant taxes.

While a sole proprietorship may suffice for many people and families, others may want to consider establishing a more formal arms' length structure to engage workers, manage funding, and limit any legal liability. This option may be of particular interest if you are managing a significant amount of funding, you have a number of Support Workers, and/or have significant support needs that you would like to see addressed consistently over the long term.

There are various arms' length structures available, including a **trust, partnership,** or **corporation**.

Trusts

A business trust would operate under a trust agreement – the trustees of the trust would manage the engagement of workers, funding and payroll, and the beneficiaries of the trust would be the people supported. While a business trust would safeguard any assets, there are a number of governance and compliance issues that would make it inefficient to operate. First, the trustees would be personally liable for any debts or liabilities. Second, business trusts are not common and not generally commercially accepted entities, which may create difficulties with banking. Third, the business trust would have a deemed 21-year disposition rule that may negatively impact the beneficiaries. Finally, any income must be distributed to the beneficiary by the end of each calendar year, or the business trust is liable for tax payable at the highest marginal rate.

Partnerships

A partnership could be established under a partnership agreement between the people supported and/or family members. A partnership would allow for better management of workers, funding and payroll, in addition to better decision-making overall. A partnership could also contribute to the long-term sustainability of supports. From a tax perspective, however, each partner would be personally liable for any debts or liabilities.

Corporation

Most people or families who want to formalize the hiring of Support Workers do so through a corporation. A **corporation** would involve the formal establishment of a legal structure under federal or provincial law (i.e. by registering articles of incorporation). The primary purpose of the corporation would be to provide support to an individual with a disability. It may act a vehicle to administer funding, provide fiscal management and limit legal liability. From a planning perspective, establishing a corporation formalizes a network of support for a person supported to ensure their long-term security and well-being, long after parents or caregivers have passed away.

Corporations may be set up as **for-profit ("FPC") or not-for-profit ("NFP")** corporations. The choice between an FPC or NFP depends on the needs of the individuals and families involved. FPCs are governed by shareholders, who maintain control over the corporation and benefit from it. The purpose of an FPC is to generate a profit. NFPs are formed for purposes other than earning a profit, such as for the support of a person with a disability. NFPs are also governed by members, who support or benefit from the goals and objectives of the corporation.

NFPs are often the preferred structure for people or families engaging workers. They are incorporated as provincial or federal corporations under the *Ontario Corporations Act*[15] ("OCA") or *Canada Not-for-Profit Corporations Act* ("CNCA"). While there are advantages and disadvantages to incorporating an NFP under the OCA or CNCA, an NFP must generally name directors, members and officers, and set out the purposes of the corporation when filing for incorporation.

Formalizing a Network of Support as a Not-for-Profit Corporation

When engaging Support Workers, families often formalize a network of support as a legal entity. These types of organizations may be structured as a Microboard™, Aroha or Self-Directed Support Organization ("SDSO"). These organizations usually

15. Note that the Ontario *Not-for-Profit Corporations Act* ("ONCA") is expected to be enacted in 2020 to replace the OCA for not-for-profit corporations.

consist of a small group of family members and friends of the person supported who incorporate as an NFP. The primary purpose of the NFP is to support the person with a disability in expressing their own will and preferences when making life decisions.

From the perspective of a person or family who is engaging Support Workers, there are various benefits to formalizing a network of support as an NFP. The NFP may:

- Act as an "employer of record" for engaging employees, independent contractors and agencies;
- Act as a formal entity to administer and receive individualized funding;
- Receive and manage income and disability supports;
- Help to oversee and manage assets (such as funds or a home);
- Limit personal liability; and
- Advocate for additional support and resources, such as access to additional funding options.

Incorporating a Not-for-Profit Corporation

Before incorporating your NFP, you should consider the following:

- **Jurisdiction:** You should determine whether the NFP will be established under federal law (the CNCA) or provincial law (the OCA). Note that Ontario is currently revamping its not-for-profit legislation and is expected to soon enact the Ontario *Not-for-Profit Corporations* Act to replace the OCA. As a result, the provincial system may experience some delays. People and families may prefer to incorporate the NFP under federal law, which is usually faster than the provincial system and allows for any changes to the corporation to be easily made. You should speak to a legal professional to determine which jurisdiction better applies to your circumstances.
- **Governance Structure:** The governance structure of an NFP consists of members, directors and officers, whose roles are described as follows:
  - **Members:** A member of an NFP is a person who supports or benefits from the goals and objectives of the corporation. Members govern and maintain control over the NFP by exercising their right to vote and electing the directors of the corporation. Members must meet at least once a year for an Annual General Meeting ("AGM").
  - **Directors**: The directors of an NFP are responsible for managing and supervising the affairs of the corporation. The directors are accountable to the members of the NFP. There must be a minimum of three directors on the board of directors.
  - **Officers:** Officers of the NFP (such as the chair, secretary or treasurer) are responsible for the day-to-day operations of the corporation. The officers are usually named from amongst the directors.

Note that the members and directors of the NFP may be the same people or different people. A family of four, for example, may decide to be members of the NFP and elect themselves as the directors, for the purpose of supporting a family member with a disability. The family members may also decide to appoint one person amongst them as the chair of the NFP.

In order to incorporate an NFP, the following documents are needed[16]:

- Articles of Incorporation: The Articles of Incorporation include the name of the corporation, statement of purpose of the corporation, address of the head office, directors and members.[17]
- NUANS Name Search: A NUANS name search is required to determine whether a proposed name can be assigned to a corporation.
- By-Laws: By-Laws set out the governance framework for the corporation, outlining the functions of the board of directors and its relationship to members.

It is recommended that you speak to a legal professional before incorporating your NFP.

b. Tax Considerations

Families that pay Support Workers directly – whether as independent contractors or employees – should be aware of their responsibilities related to deductions, remittances and reporting to the Canada Revenue Agency (**the "CRA"**), as well as available tax exemptions and credits.

The CRA administers the *Income Tax Act*. The CRA has different taxation rules for independent contractors

16. Please note that this list refers to incorporation under the Canada Not-for-Profit Corporations Act (federal).
17. Members are not identified by name, but classes of membership are included. Usually only one class of members is preferred.

and employees. Please refer to chapter 3 for more information on the employment relationship and the differences between an employee and an independent contractor. You can also contact the CRA for a determination on the employment relationship you have with your worker. It is important that an employment relationship is classified correctly because the CRA has the authority to "... assess at any time any amounts payable..."[18] This means that the CRA can review and assess whether a "payor" has made the proper deductions and has met the relevant employer obligations, potentially requiring the employer to pay amounts owing on a retroactive basis.

i. Families engaging Support Workers as employees

Under the *Income Tax Act*, all employers are required to set up a payroll account for its employees with the CRA in order to withhold and remit to the federal government certain amounts from the employee's salary for income taxes, Canada Pension Plan ("CPP") contributions, and Employment Insurance ("EI") contributions.

There are different legal frameworks that impact deductions, including the Employment Insurance Act and the *Canadian Pension Plan Act*. However, a detailed overview of these pieces of legislation is beyond the scope of this guide. Some key considerations include:

- As an employer, you must make both CPP and EI employer contributions on behalf of an employee, in addition to the amount you deduct and remit for the employee's contribution to CPP and EI;
- There are penalties for failing to deduct the required CPP contributions or EI premiums from the wages you pay your employee;
- There are penalties for failing to remit (give to the government) deductions you have taken and are remitting late; and
- Remember that there are federal and provincial tax credit forms (TD1 forms) that should be completed by the employee prior to the start of their employment in order to determine the amount of federal and provincial tax that must be deducted from their income.

With respect to your payroll account, you can either hire a payroll services firm to provide all payroll functions (including filing all payroll forms and submitting monthly remittances to the government, issuing T4 slips, and electronic payments to your employees) or perform these functions on your own. **In general, it is more efficient to hire a payroll services firm**; however, if you decide to provide these services on your own, the steps are as follows:

Step 1 Contact CRA to register for a payroll program account. You will need information such as number of employees, types of pay periods, and dates when employee received their first wages. You may register for the program either online or by calling 1-800-959-5525.

Step 2 Calculate how much you will need to remit each month. To determine these amounts, you can use either an online calculator or payroll tables both provided by the CRA. See the online calculator tool here.

Step 3 Complete monthly CRA remittance forms. These forms will be sent to you every month. Keep your portion of the remittance form for your records.

Step 4 Remit your payments. You can either mail in a cheque or pay at a financial institution.

Step 5 Manage your records. Keep your portion of the remittance form and all invoices in a file. You will need this information when you are filing your personal taxes each year. The CRA's online payroll calculator tool (linked above) will allow you to print out weekly records to keep on file.

Step 6 Complete and issue a T4 slip to your workers by February of the following year of the year in which the employee worked and received remuneration from you. You can complete this form online on the CRA website.

Step 7 Complete and submit a TRSUM report to the CRA by February of the following year of the year in which you had employee(s) work and received remuneration from you.

What to do if an employee no longer works for you?

If an employee has decided to leave, or you are laying off an employee, you must provide your Support Worker with a Record of Employment ("**ROE**") within five days after the end of the pay period during which employment was interrupted. In addition, you should

18. *Income Tax Act, 1985, c.1 (5th Supp.)*, section.227(10) ["*ITA*"]

calculate your employee's earnings for the year to date and provide the employee with a T4 form – which would have the information you provide on your T4 information return.

ii. Families engaging Support Workers as independent contractors

Families engaging Support Workers as independent contractors do not have set up a payroll account to deduct or remit CPP contributions, EI premiums or income tax. This is the responsibility of the independent contractor. Your agreement with an independent contractor should clearly set out that such deductions and remittances, as well as insurance and WSIB, are the responsibility of the independent contractor. On at least a monthly basis, make sure you receive an invoice from the Support Worker for services provided (including any applicable HST) prior to issuing a payment. See chapter 5 for more on contracting with a self-employed worker and see the sample service agreement at Appendix B.

Technically speaking, when you pay an independent contractor under a contract for services, you are required to issue a T4A slip to the contractor for the total amount of fees you paid to the contractor in that tax year (net of HST). This amount should be equal to the cumulative amount of the invoices you received from the contractor in the calendar year for services. The T4A slip must be issued to the contractor no later than the end of February in the calendar year after the services were provided. In addition to issuing the T4A slip, you are required to submit a T4ASUM report to the CRA that is a summary of all the T4A slips that you have issued to contractors in that particular tax year. You can learn more about T4As and T4ASUM reporting here.

Practically speaking, you should be aware that filing the T4A will bring your arrangement with your worker to the attention of the CRA. If your worker is not reporting their earnings as a self-employed person as required then this may result in the CRA scrutinizing the relationship to determine if your worker is actually an employee. If your worker is found to be an employee this can result in liability for both you and your worker. This is why it is important to carefully consider how you have characterized your worker from the outset and re-evaluate the relationship as it evolves to ensure the characterization remains valid. This subject is discussed further in chapter 3.

iii. Families employing Support Workers as employees through a not-for-profit corporation

As discussed above, some families may establish a not-for-profit corporation as a support network for individuals who need disability-related supports and services. Whether a family would benefit from forming such a corporation will depend on the specific circumstances of each family. It would be best to speak with a legal professional or accountant to determine the best option for your family.

The rules and obligations discussed in subsection (i) with respect to payrolls and employees apply to not-for profit corporations as well. The only difference is that the corporation, not the family member, will apply for the payroll program account and will be responsible for the managing and remittance of deductions on behalf of its employees.

A not-for-profit corporation that engages workers has the same responsibilities as an individual family to deduct and remit amounts held in trust to be paid to the CRA for CPP, EI and income tax. It is important to note that if a corporation fails to make the necessary deductions and remittances, the directors will be jointly and severally liable along with the corporation, to pay the amount due. This amount includes penalties and interest on any amount owed to the CRA. See considerations related to CRA filings for self-employed workers above.

Additional corporate filing requirements:

- T2 Corporation Income Tax Return
  A not-for-profit corporation must file a T2 Corporation Income Tax Return. This must be filed within six months of the end of the corporation's fiscal period. There is no fee to file a T2 Return.

- Non-Profit Organization Information Return (T1044)

  A not-for-profit corporation must file a Non-Profit Organization Information Return (the "NPO Information Return") under the following conditions:

  1. It received or was entitled to receive taxable dividends, interest, rentals, or royalties totalling more than $10,000 in the fiscal period;
  2. Its total assets were more than $200,000 at the end of the immediately preceding fiscal period.

This form is sometimes referred to as a **T1044 Form**. It would be best to speak with a professional advisor regarding whether your corporation meets the criteria required to file an NPO Information Return. An NPO Information Return must be filed no later than six months after the end of the corporation's fiscal period.[19] You will have to report total receipts, assets, liabilities and any compensation paid to Support Workers or other workers the corporation employs in your NPO Information Return.

Your corporation may face financial penalties if it fails to file its NPO Information Return or files it late, unless your corporation can demonstrate extraordinary circumstances beyond your control. You can make changes to your NPO Information Return by sending a letter to the CRA with an explanation of the changes and either submitting a new NPO Information Return or making corrections to the original.

- Annual Return (Form 4022)

  If your corporation has been incorporated federally, every corporation subject to the CNCA must file an annual return with Corporations Canada every year. The corporation's legal status should be "active." There are two ways to file an annual return:

  - Through the Corporations Canada Online Filing Centre
  - Sending Form 4022 – Annual Return to Corporations Canada by email or mail

    You must file your annual return **within 60 days following a corporation's anniversary date** (date the corporation was incorporated, amalgamated or continued). There are nominal fees associated with filing your annual return. You must file this each year moving forward.

iv. Families employing Support Workers as independent contractors through a not-for-profit corporation

Families engaging Support Workers through a not-for-profit corporation as independent contractors do not have set up a payroll account to deduct or remit CPP contributions, EI premiums or income tax. This is the responsibility of the independent contractor. The agreement with an independent contractor is between the corporation and the Support Worker and should clearly set out that such deductions and remittances, as well as insurance and WSIB, are the responsibility of the independent contractor. On at least a monthly basis, make sure you receive an invoice from the Support Worker for services provided (including any applicable HST), prior to issuing a payment.

The obligations discussed in subsection (iii) with respect to additional corporate filings for not-for profit corporations still apply regardless if the corporation engages independent contractors.

v. Tax credits available for families that employ caregivers (either directly or through a not-for-profit corporation)

All families incurring expenses for Support Workers, either individually or through a not-for-profit corporation, irrespective if the Support Worker is an employee or independent contractor, should review their personal T1 income tax returns in order to claim disability-related caregiver credits and medical expenses. It is likely that Support Worker expenses incurred on behalf of related family members are eligible for tax credits that could reduce personal tax liability.

19. A **fiscal period** refers to the period for which the organization's accounts cover. The fiscal period can be no more than 53 weeks.

CRA Reporting and Remitting: Steps to compliance based on structure and status of worker

	Families engaging Support Workers as employees	Families engaging Support Workers as independent contractors	Families engaging Support Workers as employees through a not-for-profit corporation	Families engaging Support Workers as independent contractors through a not-for-profit corporation
First Step	Set up a payroll program account; either through a payroll services company or do it yourself.	Ensure invoices are received on a monthly basis from the Support Worker.	Set up a payroll program account; either through a payroll services company or do it yourself.	Ensure invoices are received by the corporation on a monthly basis from the Support Worker.
Reporting	By you or the payroll services company: **i.** Remit all CPP, EI, and income tax deductions on behalf of employees by the 15th day of the month following the month the deductions were withheld. **ii.** Issue a T4 slip to each employee by the last day of February of the following calendar year for which the employee provided services in the immediate prior year. Submit a T4SUM to the CRA by the last day of February of the following calendar year for all employees that provide services in the immediate prior year.	Independent contractors are responsible for filing their own tax returns and for deducting CPP, EI and income tax. As such, no payroll account is required. Remittance Deadlines: N/A	By you or the payroll services company: **i.** Remit all CPP, EI, and income tax deductions on behalf of employees by the 15th day of the month following the month the deductions were withheld. **ii.** Issue a T4 slip to each employee by the last day of February of the following calendar year for which the employee provided services in the immediate prior year. Submit a T4SUM to the CRA by the last day of February of the following calendar year for all employees that provide services in the immediate prior year.	Independent contractors are responsible for filing their own tax returns and for deducting CPP, EI and income tax. As such, no payroll account is required. Remittance Deadlines: N/A

	Families engaging Support Workers as employees	Families engaging Support Workers as independent contractors	Families engaging Support Workers as employees through a not-for-profit corporation	Families engaging Support Workers as independent contractors through a not-for-profit corporation
Record Keeping	It is important to keep up to date records relating to the staff you are hiring and you must keep these records for 6 years from the end of the last taxation year to which the records relate.[20] You should always obtain receipts for costs associated with engaging your Support Worker and the services provided.	It is important to keep up to date records relating to the staff that you are hiring and you must keep these records for 6 years from the end of the last taxation year to which the records relate.[21] You should always obtain receipts associated with engaging your Support Worker and the services provided, copies of proof of insurance, workers' compensation registration, and GST/HST registration number.	It is important to keep up to date records relating to the staff that you are hiring and you must keep these records for 6 years from the end of the last taxation year to which the records relate.[22] You should always obtain receipts associated with engaging your Support Worker.	It is important to keep up to date records relating to the staff that you are hiring and you must keep these records for 6 years from the end of the last taxation year to which the records relate.[23] You should always obtain receipts associated with engaging your Support Worker and the services provided, copies proof of insurance, workers' compensation registration, and GST/HST registration number.
Corporate Filing (if applicable)	N/A	N/A	• File a NPO Information Return (T1044) (if required) within 6 months after the end of your corporation's fiscal period. • File a T2 corporation Income tax return every year. A T2 form must be filed within 6 months after the end of your corporation's fiscal period. • A Form 4022 – Annual Return if your corporation is federally incorporated to Corporations Canada within 60 days following a corporation's anniversary date	• File a NPO Information Return (T1044) (if required) within 6 months after the end of your corporation's fiscal period. • File a T2 corporation Income tax return every year. A T2 form must be filed within 6 months after the end of your corporation's fiscal period. • A Form 4022 – Annual Return if your corporation is federally incorporated to Corporations Canada within 60 days following a corporation's anniversary date

20. *ITA*, section 230(4).
21. *ITA*, section 230(4).
22. *ITA*, section 230(4).
23. *ITA*, section 230(4).

Determining whether to incorporate, and how to structure a support network, in addition to considering tax implications and tax credits, are common but overwhelming issues an individual or family may have to address when hiring Support Workers. We hope that this guide can provide useful insight and information about key issues before consulting with professional advisors. There are other helpful resources to assist families who are engaging workers, including the following:

- Canada Revenue Agency (CRA) Guide for Employers
- CRA Guide for Non-Profit Organizations
- CRA Payroll Guide, deductions calculator and deductions tables
- CRA Guide to submitting payroll information returns, including T4s

CHAPTER TAKEAWAYS:

In this chapter we reviewed the tax considerations that apply when engaging a Support Worker, both as an employee or as a self-employed independent contractor. We also reviewed the various structures you may wish to consider for paying your worker, whether in your personal capacity, through a trust, partnership or corporation. As discussed throughout this book as a whole, it is imperative that you properly classify your worker so that you can confirm what your obligations are in terms of making payments, deductions and remittances and avoid unanticipated liability.

CHAPTER

10

Insurance Essentials

While it's always a best practice to take all reasonable steps to prevent injuries and other harm from occurring on the job (as discussed in chapter 8), sometimes accidents happen. To help protect your workers, your family and yourself from liability associated with accidents that occur in the workplace, it's a good idea to explore your insurance options. In this chapter we discuss the insurance obligations and options you may have in relation to your Support Worker relationships, including:

- Workplace Safety and Insurance Board (WSIB) coverage
- Private Accident Insurance
- Homeowners insurance
- Automobile insurance
- Directors and Officers liability insurance

While not all types of insurance will be available or even desirable for every Support Worker situation, it's important to consider your options and be aware of the risks you take on when hiring a Support Worker.

1. Why do I need insurance?

Insurance can provide you with coverage for a number of risks, including: risk of illness or injury suffered by your worker while on the job and any lost earnings or personal harm they may suffer as a result; harm or damage to your home caused by the worker; harm or injuries caused to your worker, yourself or your loved one with a disability in a vehicle accident; and harm or injuries suffered by third parties that are caused by your worker.

This coverage can prevent financial hardship you may face if you are subject to a law suit from your worker or a third party, or have do repairs to your home or other property.

2. What is WSIB?

The WSIB is Ontario's provincially-run no-fault insurance program for workers. "No-fault" means that neither the employee nor the employer need to be at fault for an accident to be covered under the WSIB. Employers collectively pay into the program and pool and share the cost of benefits. In exchange for this program and the certainty of benefits it brings, employees covered by WSIB *cannot* sue their employer if they are injured or suffer a workplace illness (such as catching COVID-19 on the job). This is the big advantage of WSIB for employers. The law creating the WSIB is the *Workers Safety & Insurance Board Act* ("**WSIA**").

Under the WSIB, all participating employers pay premiums for their employees. The premium rate is paid as a percent of an employee's earnings (typically for Support Workers that rate is between 1 and 3.5 %) Premium rates can go up or down if employers have greater or fewer claims.

The key benefits under the WSIB include:

- Loss of earnings benefits (up to 85% of earnings when an employee can't work due to a workplace illness or injury);
- Assistance in returning to work or retraining to re-enter the labour marker elsewhere;
- Coverage of health care costs as a result of an injury;
- Benefits for permanent effects of a workplace injury on the employee's life ("non-economic loss awards"); and
- Retirement benefits for prolonged injuries in certain circumstances.

WSIB claims are adjudicated by the WSIB themselves, with the ability to appeal to a higher decision-making body: the Workplace Safety & Insurance Appeals Tribunal.

i. Which Employees Must Be Covered by the WSIB

Many employers are required to participate in the WSIB because of the type of job their employee performs. To help determine which jobs must be covered by the WSIB, the WSIB divides jobs in Ontario into a long list of job "**classifications**". The WSIB then assigns which job classifications must participate in the WSIB. Other jobs are not required to participate in the WSIB, but most may participate voluntarily if they like (some employers may desire the benefits of the WSIB).

The WSIB keeps a full list of jobs and whether they are covered or not online:

Private Households (workers who work in your home)

Workers employed by a householder (i.e. an individual person who lives in a private residence) to provide care or support to the householder or another person who resides in that private residence may fall into the classification of "domestic worker" if the work is primarily performed in the residence (even if some of the work occurs in the community). Domestic workers must be covered for WSIB if they work more than 24 hours per week in the householder's home. You can review the various types of work that fall into this classification here.

Residential Facilities Workers

If your worker does not primarily work in your home, but does work in an a separate residential location that you've established for one or more people with a developmental disability, arguably this would be a residential facility that is not subject to mandatory WSIB coverage, regardless of how many hours per week the Support Worker's work. See further details about this classification here.

Non-residential Services

If the supports your worker provides don't primarily take place in a residential location, but rather are primarily in the community then they may be subject to the yet another classification where the WSIB obligations vary depending on the supports being provided.

The classification also lists several subcategories of jobs. While some of these subcategories are not required to be covered by WSIB, all of the subcategories that are relevant to Support Workers hired by families are required to be covered by the WSIB. For example, this includes:

- Care attendant service for persons with disabilities
- Home-maker services
- Non-medical home care for persons with developmental disabilities
- Respite worker services, without nursing skills.

The classification of workers can be complex. You can contact the WSIB directly here or contact a lawyer to determine if you are required to enroll.

ii. Do I have to enroll if my worker is "self-employed"?

As discussed in chapter 3, obligations applicable to any given worker will depend on their status as an "employee" or "self-employed", The obligations to be covered as outlined above depend on the worker being an "employee". The WSIB determines whether a worker is an "employee" based on the "organizational test" which focuses on factors of control, ownership of tools/equipment, chance of profit/risk of loss, and whether the person is part of the employer's organization, or operating their own separate business.[24] "Self-employed" workers (referred to as "independent operators" in the WSIB context) are not automatically insured but may voluntarily elect to be considered workers and apply to the WSIB for their own account and optional insurance. You can learn more about that here.

If you have decided to work with a worker who will be classified as an independent contractor, you may wish to consider requiring that the worker register with the WSIB and pay WSIB premiums. This will help to reduce liability if they are injured on the job, and at the same time demonstrate that the worker is in fact an independent contractor for employment law purposes.

iii. What if I haven't enrolled but should have?

If you are required to enroll in WSIB but have not done so, you can face a number of penalties. This includes paying back-premiums to the date you should have applied (even if this stretches years back), paying interest on those back premiums, and even being charged with a provincial offense. The provincial offense can carry a large fine (up to $25,000 for individuals, and $500,000 for corporations) and jail time of up to 6 months. While the Province is unlikely to charge a private individual with a provincial offense outside of more serious circumstances (like deliberate avoidance of WSIB on a large scale), the risk should be avoided wherever possible.

A failure to register does not necessarily mean doom, however. The WSIB has a mechanism by which non-compliant employers can come forward and voluntarily disclose their failure to register.. To take advantage of this, a non-compliant employer must come forward before they are discovered and make full, voluntary disclosure of their failure to register. The WSIB will generally permit such employers to avoid any penalties and provincial offenses, and to only pay back premiums to the date they should have registered with WSIB or 12 months before the voluntary disclosure (whichever is more recent). Overall, this is a very good deal for non-compliant employers.

While the risk of being "caught" by the WSIB is relatively low (the WSIB is not actively seeking out non-compliant families and private individuals), it does exist and if you are discovered to be non-compliant consequences can be serious. Therefore, some families feel it is worth it to either voluntarily register and/or voluntarily disclose the past non-compliance.

iv. What Premium Rate Applies to Support Workers

Support Workers are classified in the "services for the elderly and persons with disabilities" job classification, which has a 2020 class premium rate of $1.22 per $100 of insurable earnings. Keep in mind, that number will be subject to any adjustments to reflect the individualized risk of a particular employer.

The rate for Residential Support Workers in 2020 is $2.02 per $100 of insurable earnings.

The rate for Domestic Workers in 2020 is $1.51 per $100 of insurance earnings.

The precise details of calculating the premium rate can be complex and are beyond the scope of this guide. However, full details of how premium rates are set can be found in the WSIB's electronic guide here:

24. https://www.wsib.ca/en/operational-policy-manual/workers-and-independent-operators

What if I'm not required to register for WSIB?

Even if you are not legally required to have WSIB for your employees because they are in a non-compulsory classification, you may still wish to voluntarily register with the WSIB. As indicated above, WSIB is the only form of insurance that provides the bar to litigation that many families wish to have in place. Similarly, there are not many alternatives that will provide the broad support and coverage for workers that many families feel their Support Workers deserve.

If you do wish to consider voluntarily registering you can learn more about the process here.

3. Alternative Workplace Accident Coverage

If you are not legally required to register with the WSIB then you may wish to consider alternative insurance for workplace accidents. A number of insurers offer insurance products that will cover your workers in relation to injuries they may suffer while on the job. Typically this insurance does not cover the broad scope of risks insured by WSIB (for example, this type of insurance typically does not cover mental stress related injuries or COVID-19 related illness), nor does this insurance act as a barrier to being sued by your worker in relation to injuries they may suffer on the job. However, this insurance does limit the risk associated with on-the-job injuries and is worth exploring if you choose not to voluntarily register with the WSIB.

If you wish to consider this option speak with you Insurance Broker about workplace accident insurance for your employees.

4. Occupier's Liability Insurance

In addition to WSIB, families hiring Support Workers should consider purchasing occupier's liability insurance as a general precaution. This will protect damage to property in the event of an accident in the home. There are many commercial options available. Speak with your insurance broker about what kind of risks are insured and whether a worker performing work on or around your home will be covered.

Be sure to read the terms of any agreement to ensure that it will provide the coverage required. In particular, it's important to note that this type of insurance is usually not a substitute for WSIB. In fact, most insurance policies of this nature indicate that if a worker was legally required to be covered by WSIB but was not because you failed to register then they will not be eligible for insurance coverage under your Occupiers Liability coverage. The same things goes for most home insurance policies. In short, if you're legally required to be covered by WSIB usually you won't be able to obtain alternative coverage elsewhere.

5. Automobile Insurance

If you are offering a vehicle to your Support Worker to use in providing care, you must ensure that the Support Worker is insured to drive the vehicle. Again, there are many commercial options available on the market. Be sure to read the terms of any policy to ensure it provides the coverage that is required.

If your worker will be using their own vehicle and providing transportation to you or another person for whom you are purchasing supports, then the worker should be required to obtain a 6A rider for their automobile insurance so that they can carry passengers for compensation. You may wish to require that your worker provide you with proof that they have obtained such a rider as a condition of working with them. If they don't have this insurance and an accident occurs then both you and your worker may be at risk.

6. Directors and Officers' Liability Insurance

In addition to the various types of insurance listed above, if you have opted to engage Support Workers through a corporation such as a holding company or a microboard, we would recommend that you secure errors and omissions insurance and directors and officers liability insurance to insulate you and your co-directors from personal liability. While this type of insurance will not generally cover liability for money owed under a statute (i.e. such as wages, vacation pay or public holiday pay) it may cover you for claims

made by employees for common law notice, liability for human rights breaches or other sums that are not specifically prescribed by law.

Once again, we would recommend that you speak with your insurance broker to ensure you are covered.

CHAPTER TAKEAWAYS:

In this Chapter we reviewed the insurance that families should be familiar with and use when hiring a Support Worker. The key lessons are:

- You must enroll in the WSIB if you have employees that belong to a compulsory classification of worker;
- If you have independent contractors, you should consider requiring them to enroll with the WSIB as "independent operators";
- If you do not register with WSIB and your worker is not covered independently, consider a private workplace accident policy;
- You may also consider an occupier's liability insurance policy if you will have workers entering your property;
- You should ensure that your automobile Insurance will cover any worker who will be driving your vehicle and/or require that any worker who will be using their own vehicle to drive you or a loved one in the community takes out an appropriate rider on their own insurance to ensure you are all covered; and
- If you have engaged a worker through a corporation, be sure that you have appropriate Directors and Officers and Errors and Omissions insurance coverage in place to protect you and any other directors and officers from personal liability.

It is always a good idea to discuss these options with an insurance broker who understands your situation and can connect you with the various types of insurance that will keep you covered if the worst should happen.

CHAPTER

11

Contracting with Temporary Help and Service Agencies

After reviewing the options and obligations related to hiring a private Support Worker, many people and families are understandably overwhelmed. The option of working with a Support Worker as an employee feels like too much work and the option of hiring an independent contractor seems too risky. In that case, many people and families will turn to established service providers from the community. These staffing providers may be small personally run corporations with a few "contractors", large scale staffing agencies with hundreds of Support Workers they treat as employees or contractors depending on the agency, or not-for-profit developmental services or attendant care agencies.

Legal Considerations and Recommendations

There are a number of key laws for you to be aware of when purchasing supports through an agency.

Employment Standards Act, 2000 (*ESA*)

As discussed in the previous chapters in this book, the *ESA* sets out certain minimum employment standards applicable to employees in the province of Ontario. The *ESA* has specific provisions and regulations related to Temporary Help Agencies (THAs) and generally prescribes that workers assigned to a client of a THA are employees of the THA and entitled to the protections of the *ESA*. These provisions were only recently introduced into the *ESA* to address the serious problem of THAs treating their workers as independent contractors. Unfortunately, many THAs continue this practice despite their legal obligations to the contrary and in so doing they put not just their own businesses, but also their clients (including families who rely on their services) at risk. This is because if a THA fails to pay its workers their *ESA* entitlements (such as minimum wage or overtime entitlements) their client's can be held liable for the unpaid wages.

Based on this wide spread practice we strongly encourage that when working with a staffing agency you verify that the staffing agency treats its workers as employees and takes liability and responsibility for any legal obligations to or in relation to their workers under the *ESA*.

WSIB Obligations

As discussed in the previous chapter, WSIB is mandatory for certain classifications of workers. This includes employees of staffing agencies who supply supports to people with disabilities. Unfortunately, many staffing agencies continue to treat their workers as independent contractors and as such they do not register for WSIB in respect of the workers they assign to families, nor do they have insurance that would cover risks to families. This means that the agencies, the workers and families are all at risk when it comes to accidents and injuries arising in the workplace.

Based on this practice, we would recommend verifying that any agency you purchase from has WSIB in place, or a legitimate workplace accident alternative insurance for those agencies that are not "staffing agencies" but rather residential support providers subject to a legitimate exemption from compulsory WSIB registration.

Contracts

Although contracts can be made verbally, it is a best practice to have a written contract between you and a THA or service agency when engaging their staff. This will help to minimize misunderstandings and will establish clear, agreed upon expectations and responsibilities. Contracts should include the following provisions:

- Types of services being provided;
- Cost of services being provided;
- Schedule of services being provided;
- Warranty and indemnity provisions for non-compliance (which means that agency will be responsible for responding to and covering the cost of claims potentially made against you or the agency by their workers or by third parties harmed by their workers in the course of providing the services);
- Requirements that the agency has Workplace Safety and Insurance Board ("WSIB") coverage (or a legitimate alternative accident insurance coverage);;
- Requirement of the agency to have general liability insurance;
- Privacy and confidentiality assurances for you and the person receiving supports;

CHAPTER TAKEAWAYS:

This chapter has outlined important considerations for when you or your family choose to purchase Support Worker services through a staffing or service agency. Some best practices include:

- Choosing a reputable agency
- Ensuring the agency treats workers as employees
- Reviewing copies of an agency's operational and accountability policies and procedures
- Having a written contract
- Integrating a warranty and indemnity clause if the agency or their employee is not compliant with the terms of your agreement
- Keeping your own records (i.e. hours worked per day, days per week)
- Ensuring that the agency has proper and adequate insurance, ideally including WSIB.

CHAPTER

12

Special Classifications of Support Workers and Considerations for Live-in Arrangements

Introduction

Aside from the general rules that apply to employment and contractor relationships (as outlined in previous chapters), there are certain special categories of work relationships that may be of interest to individuals and families engaging workers for personal support. In this chapter we review key classifications of Support Workers, their advantages and the key legal issues you should consider before you implement any of them. The classifications and issues we explore here include:

1. Sitters
2. Domestic workers
3. Homemakers
4. Residential Care Workers
5. Landlord and Tenant issues for live-in-care givers

1. Sitters

A person who provides "occasional, short-term care, supervision or personal assistance to children is **not** considered a domestic worker." Generally speaking, such workers are usually not even considered to be employees, nor to have the right to the minimum wage, vacation or other minimum employment related rights.

When a "sitter" begins to provide supports more than "occasionally" (i.e. on a regularly scheduled or consistent basis) then arguably they become domestic workers and subject to the *Employment Standards Act, 2000 (ESA)*.

Similarly, where a "sitter" regularly performs work for 24 hours per week or more then registration with WSIB may become mandatory.

2. Domestic Workers

"Domestic workers" generally include workers who work in a private home directly for the person who owns or rents the home (i.e. not paid by a business, corporation or agency). They are hired to work in a private home and do things such as, housekeeping, or providing care, supervision or personal assistance to children or people who are elderly, ill or who have disabilities.

Conceivably there are circumstances where a worker directly engaged and paid by a householder will not be an employee of the householder (such as when the worker is a "sitter"). However, those circumstances will generally be limited to where the work is very "occasional" in nature and/or where many other indicators of self-employed status are present, as further discussed in chapter 3.

Domestic workers who are employees have the same rights as other workers under the *ESA*, regardless of whether they work part-time or full-time, and whether they live in or out of their employer's home. See chapter 6 for discussion on the general rights that apply to employees. Briefly, these rights include the right to receive written particulars of their employment terms, such as the regular hours of work (including starting and finishing times), and the hourly rate of pay. They are also entitled to:

- minimum wage
- regular payment of wages
- hours of work protections
- overtime pay
- vacation with pay
- public holidays
- leaves of absence, including sick leave, family responsibility leave and bereavement leave

There is, however, an exception to the general rules related to the minimum wage for domestic workers. Specifically, you are permitted to count certain pre-set amounts towards the minimum wage as "wages" if room and board is provided to your worker. The amount you can consider to have been paid to your worker (thereby reducing the amount you have to actually payout to your worker) is set out below:

Private room	$31.70 a week.
Non-private room	$0.00 a week.
Board	$2.55 a meal and not more than $53.55 a week.
Both room and board	$85.25 a week if the room is private and $69.40 a week if the room is not private.

Amounts will only be deemed to be paid in respect of rooming if the room is:

a. reasonably furnished and reasonably fit for human habitation;
b. supplied with clean bed linen and towels; and
c. reasonably accessible to proper toilet and wash-basin facilities.

Room or board amounts only counts towards the minimum wage if the employee has actually received the meals or occupied the room.

Example:
An employer provides a private room but no meals to an employee. The worker works 40 hours a week, and is entitled to $570 a week as minimum wage (40 x $14.25/hr). Because of the room deduction, the employer can count $31.70 towards the amount owed without actually paying it. That means that the employer only has to pay $538.20 every week to the employee.

Say that the employer provided that same employee non-private room and meals. The deduction would be $69.40 a week. The employer would then only have to pay $480.60 a week to meet minimum wage.

Finally, say that same employee received 10 meals a week and no room. The employer would multiply the total meals (10) by the meal deduction ($2.55 per meal). That equals $25.50 as the employee's meal deduction. The employer would only have to pay $524.50 weekly to meet minimum wage.

While the room and board credits don't seem like much on a daily or weekly basis, they can add up over the course of a year to a savings of $4,500.00 per year for a worker.

Practically speaking, the room and board credits are most commonly applied for domestic workers who "live-in". Most employers assume that the live-in status of the worker means that the rules under the *ESA* don't apply to them. This is not the case. While there are exemptions that apply to certain live-in workers – these exemptions are not generally available for domestic workers who work in the home in which their employer resides.

Residential Care Workers

Live-in-caregivers are not "domestic workers" where they do not reside in the home that is occupied by their employer, but rather they work in a home that is operated by a non-occupant employer for the purpose of supporting a person or people with disabilities. This type of worker may qualify to be a "Residential Care Worker", a type of worker who is exempted from many benefits granted by the *ESA* (such as overtime and the normal rules on hours of work). The rules for these workers are governed by O. Reg 285/01, a regulation made under the *ESA*.

The residential care workers exemption is a great advantage to employers. However, it remains to be seen whether it is available to families that directly employ workers. The exemption is more likely to apply for a separate legal entity, like a not-for-profit corporation or "microboard", which is a support structure that many families explore for future planning and continuity of care purposes when establishing these types of more elaborate support arrangements. See chapter 9 for further discussion related to incorporation of support organizations.

Residential care workers are workers who are:

"employed to supervise and care for children or developmentally handicapped persons in a family-type residential dwelling or cottage and who resides in the dwelling or cottage during work periods, but does not include a foster parent."

There are 4 key elements that need to be satisfied in order for a worker to be a residential care worker and subject to the special *ESA* rules:

1. The worker must "supervise and care". This is generally understood to mean preparing meals, feeding, cleaning, organizing recreational activities, and so on.
2. The focus of the work must be "children or developmentally handicapped persons".
3. The work must be performed in a "family-type residential dwelling or cottage", which generally means a home or home-like environment.
4. To be clear, this exemption would most likely not be found to apply in situations where the employer (i.e. the person who is responsible for paying, supervising, directing, scheduling the work) resides in the home with the person receiving care – this more closely aligns with the definition of a Domestic Worker. It would more likely apply where the person supported lives in a home with the worker, but the employer does not also reside in the home.
5. The worker must "reside" in the residence during their "work period". The term reside is generally understood to mean that the worker must eat, sleep, and spend rest periods in the residence. If the employer merely provides accommodation for the employee and it is their option whether or not to use it, the exemption will usually not apply. The employee may reside elsewhere when not on a shift.

Some of the exemptions that apply to residential care workers under the *ESA* are as follows:

- No obligation on the employer to keep records of the number of hours worked each day and each week.
- No maximum hours of work in a day or week, except that the worker must receive 36 consecutive hours per work week free from work.
- No entitlement to overtime.
- "Hours worked" and required to be paid does not include time spent when the worker is resting, eating, sleeping, or otherwise free to attend to his/her own private affairs or pursuits at the residence, even if the worker is on-call and required to respond if called upon.[25]

25. This is the interpretation provided by the Ministry of Labour in its Employment Standards Interpretation Manual but there is limited case law on the correct interpretation of this exemption. As this areas of the law is constantly evolving it is important to seek legal advice before attempting to rely on this exemption.

- "Hours worked" and required to be paid does not include time spent at the residence when the worker and the employer have agreed in writing that the worker is free from work during that specific time period.
- Entitlement to 12 hours of pay a day (no more, no less), unless the worker keeps a record of hours worked. In that case, the employee can receive a maximum of 15 hours, but you only have to pay them for hours they actually work (per the rules above). This is a big advantage if your employee will have to be available in the house "on-call" but can attend to their own personal matters in the meantime. That time "on-call" will not count as time worked.

If you are considering engaging a worker on a live-in basis, we recommend that you speak with a lawyer as the rules and regulations are complex. You will want to be very specific about the nature of the relationship with your worker and enter into clear written agreements identifying the terms under which the worker will be engaged.

Homemakers

'Homemakers' are another class of worker that is subject to broad exemptions from the minimum employment standards applicable to employees generally. However, this is not a classification that usually applies to direct employment of a Support Worker by a person with a disability or their family. That is because this classification (and related exemptions) apply only if the worker is providing homemaking or personal support services in a person's home, but their employer is not the owner or renter of the home.

If your situation does fall within this exemption (because, for instance, the worker is employed through a corporation and the lease/ownership of the home is in the name of the occupant or another legal entity) then your Support Worker will not be subject to the normal rules related to:

- daily or weekly limits on hours of work
- daily rest periods
- time off between shifts
- weekly/bi-weekly rest periods
- eating periods
- overtime pay

You will also not be required to keep a record of your worker's daily or weekly hours of work if you are paying the worker the minimum wage for hours worked up to 12 hours per day. However, if the homemaker works more than 12 hours in a day and is paid for more than 12 hours at the minimum wage rate or higher, then the regular rules relating to overtime pay and hours of work will apply to your worker. In short, the homemaker classification has complex rules and the benefit of this classification (i.e. all the exemptions from normal employment standards rights) can be lost if the classification is not structured carefully. Therefore, it's important to get legal advice before attempting to take advantage of this classification.

Immigration Concerns - Sponsoring a Live-in-Caregiver

If you are hiring a domestic worker that is not a Canadian citizen or permanent resident, but is legally permitted to work in Canada, you should be aware of potential immigration implications and Federal Government caregiver programs for foreign nationals. We will outline these programs briefly below. However, immigration procedures and considerations are beyond the scope of this book and we recommend you obtain legal advice if you are considering sponsoring a worker.

The Federal Government has a program which allows families to hire foreign workers as live-in care givers. These programs include the Live-In Caregiver Program which periodically accepts applications to hire a caregiver who is not a Canadian citizen or permanent resident, but who is already in Canada and legally permitted to work in Canada. Eligible caregivers under this program already have a work permit under the Live-In Caregiver program. In order to qualify for this program, you must have received a positive Labour Market Impact Assessment ("LMIA"). Families may also consider the Temporary Foreign Worker Program if they want to hire a caregiver who already resides in Canada.

Some families may want to hire a live-in caregiver who is currently living outside of Canada, but who has agreed to move to Canada to live in the private home of the person supported or their family. In this situation, families can sponsor a worker through the Home Support Worker Pilot Program. Under this program, as an employer, you must identify a worker you would like to hire and then provide them with an offer of employment. There are certain eligibility requirements a caregiver must meet which include language and education requirements, and work experience.

An important consideration when thinking about sponsoring a live-in caregiver, is that the process takes time. There are often backlogs and delays. For further information about sponsoring live-in caregivers and to understand which program may best suit your circumstances, we would recommend speaking with an immigration lawyer.

Practical Considerations Related to Live-in-Caregivers

There are also additional practical considerations before hiring a live-in worker:

- This person will be attending to their own personal business in the home. Clear terms in the contract with the worker about appropriate behaviour and boundaries while in the home will help alleviate any concerns you might have.
- Be as specific as possible when outlining the hours of work that the worker is expected to be active (e.g. working), free (where the worker is free to leave the home), and overnight/on-call (where the worker is free to attend to their own affairs but must be available if there is an emergency or other unforeseen circumstance) to ensure that there is no dispute about entitlement to wages or other compensation.
- There should be a clear agreement in the contract with the worker regarding the duties that the worker is required to perform in relation to both the home (such as home maintenance) and the person supported (such as personal care).
- It's a good idea to also have a clear agreement as to how household expenses will be paid.
- Depending on the structure of the relationships, there may be *Residential Tenancies Act* ("*RTA*") implications as discussed in the next section of this Chapter.

Residential Tenancies Act (*RTA*) Overview

The *RTA* governs most residential tenancies (as opposed to commercial tenancies – stores and businesses) in *Ontario*. When the *RTA* governs a landlord and tenant relationship, it provides rules about the following types of topics:

- When rent must be paid;
- When a landlord must perform repairs to a rental unit;
- When a landlord may access a unit; and
- How a residential tenancy (i.e., lease agreement) can be ended by either the tenant or the landlord.

Disputes between landlords and tenants under the *RTA* can be brought before the Landlord and Tenant Board to be adjudicated. The Landlord and Tenant Board can issue orders, which can vary from eviction to orders that the landlord perform maintenance tasks for the unit.

i. Who is Generally Subject to the *RTA*?

Generally, all individuals living in a residential building have rights under the *RTA* and are considered "**tenants**", while the owner of the residential property is considered a "**landlord**".

A family home where a tenant rents one or more of the rooms may be captured by the *RTA*. However, they may still be subject to exceptions from certain rules or obligations.

While there are many exceptions to the *RTA*'s application, two are relevant to families hiring live-in Support Workers.

The first is where a worker is required to share a bathroom or kitchen facility with the property's owner, the owner's spouse, child or parent or the spouse's child or parent, and where the owner, spouse, child or parent lives in the building in which the living accommodation is located. This will be relevant to many families who hire a live-in caregiver to reside in their home. There is a nearly identical exception in the *Human Rights Code* from human rights protections in residential accommodation.

For both the rental and the human rights exceptions, it is not enough that an employee has the option to use a kitchen or bathroom used by the owner or the owner's family – it has to be the only option for them in the house. This can be achieved by having the employee live with the employer or an appropriate relative in a house with a single kitchen.

If this exception applies, an employee will only have the rights provided to them under contract and common law. It will generally be much easier to impose rules on the employee during their residence, and to evict the employee if the landlord tenancy and/or employment relationship breaks down.

The second circumstance will be if the employee pays no rent. This is not always a guarantee that an employee who occupies a house will not be a tenant in the sense of the *RTA*, but it makes it much more likely. The *RTA* definition of a tenant focuses on someone who pays rent to live in the unit. While this does not say that someone else cannot be a tenant if they do not pay rent (this may arise if the occupant has some legal right to be there other than the *RTA*), it is far less likely that the *RTA* will apply in that case. In short, an employer will exchange the rent they would have collected for the increased control over the unit and a greater ability to remove the employee if the relationship ends.

Some challenging scenarios:

If the family hiring a live-in caregiver is themselves renting the space that they both reside in, the family will not be a landlord. Instead, the family could be viewed as a roommate with the Support Worker. This is not an ideal situation for the family, as they may lose control over the the live-in Support Worke's access to the residence. A roommate cannot evict another roommate if the relationship breaks down, and cannot enforce the other rights of a landlord. The one benefit of this arrangement is that the family can simply move out of the unit if the relationship breaks down. While this is an extreme measure, it can provide the family with more freedom to end a relationship than a landlord might have (a landlord cannot simply walk away from the property).

If you are the owner of the home you intend to share with a live-in Support Worker you will ideally orchestrate the arrangement with the worker to ensure that you are exempt from the RTA because:

a. under the RTA the right to evict a tenant is strictly regulated and can only be used in certain circumstances; and

b. The right to impose rules on the tenant is restricted by the *RTA*.

If a tenant is exempt from the *RTA*, the landlord can impose whatever rules they have the contractual or common law right to impose, and can contract for a much greater right to evict.

ii. Right to Evict Under the *RTA*

Where the *RTA* applies, a tenancy can only be terminated in a number of specified ways, all of which can be extremely draining on homeowners (both financially and in terms of time).

Under the *RTA*, tenancy can be ended in the following ways:

- A tenant can terminate the tenancy at any time with notice to the landlord.
- A tenancy can also be ended by mutual agreement of the parties.
- A landlord can only unilaterally end a tenancy if they obtain an "eviction order" from the Landlord and Tenant Board. A landlord can only obtain an "eviction order" on the basis of one of the "grounds" set out in the *RTA*. Before getting an order, the landlord has to give notice to the tenant warning them of their pending right to evict, and giving the tenant a chance to correct their behaviour.

Fortunately, families have a right to evict a live-in worker due to termination of the employment relationship, where residence in the home was clearly "conditional on continuing employment". There are procedural requirements to be followed in this case, and it's important that access to the unit has been clearly identified as "conditional" from the outset.

In addition, a landlord will have grounds to obtain an eviction order after notice to the tenant in the following circumstances:

- The tenant is not paying rent in full;
- The tenant is causing damage or disturbing other tenants or the landlord;
- Illegal activity is occurring in the rental unit;
- The landlord plans to do major repairs or renovations requiring a building permit and which require the unit to be empty;
- The landlord requires the unit because they, a member of the landlord's immediate family, or their caregiver want to move into the unit;
- The landlord agrees to sell the property and the purchaser (or their family) is going to move in;

For more detail and resources on how tenancies can be ended, see the following guidance from the Landlord & Tenant Board:

- A Frequently Asked Questions document on ending a tenancy (and other *RTA* subjects).
- A comprehensive informational brochure on how and when a landlord can end a tenancy.

iii. Best Practices for Employers of Live-In Caregivers

The following best practices should be adopted by the employers of live-in caregivers or other workers in special classifications::

- If you are entering a live-in caregiver arrangement, be aware of your potential obligations as a landlord and consider structuring your relationship to either avoid the application of the *RTA* and/or increase the flexibility related to evictions by clearly identifying that the worker will share a kitchen and/or that continued access to the home is subject to and conditional on continuing employment.
- Carefully consider whether you will claim a "room and board" credit when paying your worker, keeping in mind that this could potentially constitute payment of rent and create a landlord and tenant relationship. This will be a bigger concern where the person they share the home is rented as opposed to owned by the other occupant or the other occupant's family member.
- If you will be charging rent and the worker won't be sharing a kitchen or bathroom with you or your family member, then you will need to enter into a standard form lease issued by the Province (the province has a guide for reference). Add a term to this lease that continued tenancy conditional on continued employment.
- Reserve the right to set rules in your contract, subject only to limitations in the *RTA* that apply (if any).
- Where the *RTA* applies and you have to sign a lease, avoid entering long, fixed-term leases with employees (for example, one-year fixed term leases). Where tenancy is conditional on employment, the employment ends, and the employee had a fixed-term lease, the tenancy will only end at the end of the fixed term lease (or the end of the notice period, whichever is later). This can extend the tenancy considerably.
- If your tenancy is under the *RTA*, be sure to fill out all forms properly according to instructions. Failure to fill out forms properly (in particular notice forms) can lead the Landlord Tenant board to void them (as if they were never given).
- Familiarize yourself with any municipal by-laws in your area for renting housing space, as well as the Ontario *Fire Code*. This will ensure you meet compliance standards.
- In the event you have a particularly difficult employment breakdown, you should seek legal advice on how to manage the eviction.
- Ideally, you should obtain legal advice in crafting the employment contract and lease for a live-in caregiver to ensure it maximizes your rights.

CHAPTER TAKEAWAYS:

In this Chapter we reviewed a number of topics. The key take aways are:

- Employers should determine if their employee falls into a special employment category, and what their rights and obligations are towards the employee given that role. The live-in caregiver role in particular has a number of rights and obligations that arise with respect to residential tenancy laws and rules.
- Employers contemplating offering residential accommodation to their employee should be familiar with the *RTA*, whether it applies to them, and the obligations and rights they have under it.
- The *RTA* imposes strict obligations on an employer, the most important of which is that tenancy can only be ended with notice for good reason. Termination of a tenancy that is conditional on continued employment will permit the end of a tenancy with notice.
- Be aware of the benefits of being exempt from the *RTA*, specifically an expanded right to evict an employee and a right to impose rules.
- Be aware that the *Human Rights Code* applies to residential accommodations, with an exemption if the tenant shares a kitchen or bathroom with the owner or their family.

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