



CLEO

Community Legal Education Ontario
Éducation juridique communautaire Ontario



Nonprofit Law Ontario
Rules and tools for organizations

Decent Work and the Law

Legal Information to help nonprofits create a happy and healthy work environment for employees and volunteers

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Steps to Justice

Your guide to law in Ontario



Justice pas-à-pas

Votre guide de droit en Ontario

COVID-19: Updates on the law and legal services



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Land Acknowledgement

We acknowledge that since time immemorial the land on which we live and work has been the home and traditional territory of Indigenous Peoples, including the Mississaugas of the Credit, Haudenosaunee and Wyandot, and is now home to many diverse First Nations, Inuit, and Métis relatives. CLEO's work is also carried out across the many traditional territories of this land that is also known as Ontario. We acknowledge our privilege as well as our role in the systems of colonization.

As employers, we have a special opportunity to fulfill call to action 92

- (ii) ensuring that Indigenous peoples have equitable access to jobs and training, and
- (iii) Provide education for management and staff on the history of Aboriginal peoples, including the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills based training in intercultural competency, conflict resolution, human rights, and anti-racism.



Disclaimers

This presentation is:

- **general legal information.** It isn't legal advice tailored for your specific situation. Your contracts can provide greater standards than the statute.
- **A quick glance at employment law.** It isn't comprehensive and it doesn't address other areas of law, such as federal law.
- **law not best practices.** The law sets a minimum. Decent work is about more.
- **law not funder expectations.** Decent work costs money.



Session Overview

Legal issues in decent work (see Decent Work [Checklist](#))

- **Classifying individuals: Employees, Contractors, and Volunteers**
- **Harassment**
- **Equal Pay for Equal Work**
- **Human Rights at Work:**
 - Accommodation
 - Prohibited Grounds
 - Discrimination
- **The ESA and the Employment Contract: Greater Right or Benefit**

Discussion of experiences with employment and volunteer issues



Classifying Individuals

How to classify Individuals

Employee Rights

Dependent v Independent Contractor Rights

Volunteer Rights

Other Implications of Classification



How to Classify Individuals

Employee or contractor? Look at the whole relationship, focusing on the following factors:

- How important is the work to your organization?
- Who decides:
 - what the individual is to do?
 - how much the individual will be paid?
 - where and when the work is performed?
- Who provides equipment, tools, and materials?
- Can the individual subcontract their work to someone else?
- Can you suspend, dismiss, or otherwise discipline the individual?

Independent or dependent contractor? How exclusive is the work?
(*McKee v. Reid's Heritage Homes Ltd.*)

Volunteer? How extensive is their contribution? Is it in pursuit of a living?



How to Classify Individuals

Employee

- Characterized as such in contract
- Training is provided by company
- Works on site
- Company owns and supplies all tools and materials
- Part of company benefits and pension plan
- Company determines hours, salary
- Paid on same schedule as other employees
- Company makes statutory deductions (e.g. tax, EI, CPP)
- Company carries risk of financial loss
- Employed only by one company

Independent Contractor

- Characterized as such in contract
- Responsible for own training
- Works off site or rents space from company
- Worker owns and supplies tools and materials
- Manages own benefits and pension plan
- Sets own hours and pay scale
- Invoices company for work performed
- Manages own income tax and insurance arrangements
- Carries risk of financial loss
- Has a variety of clients

Dependent Contractor

- Characterized as such in the contract
- Long-term relationship with employer
- Length of employment or contract renewal suggests permanency
- Does not contract with other employers
- Economically dependent on the employer (vulnerable)
- Having “sub-agents” does not necessarily mean dependent contractor
- Supplies own equipment
- Higher degree of control over work than employee
- Not performing an essential function of the business



Employee Rights

Employment Standards Act only applies to employees.

You can set a higher but not a lower standard.

- **Pay** regularly, issue pay stub, no unauth. deductions.
- **Max Hours:** Can refuse after 48/wk, 1.5pay 44+ hrs (overtime provisions are subject to exceptions)
- **Breaks:** 11hrs shift to shift, min. 48hrs off/2wks, eating 30min/5hrs. (Exceptions for emergencies)
- **Leaves of Absence:** public holidays, vacation (2-3 wks/yr), parental, caregiver, organ donation, bereavement
- **Termination:** 1+ weeks notice (one week per year of service up to a maximum of 8 weeks, if employee has been continuously employed for at least three months)



Dependent v Independent Contractor Rights

Dependent Contractors

Right to reasonable notice: Contractor relationship of a more permanent kind that implies a right to reasonable notice (*Carter v. Bell and Sons*)

- **Must look at whole history of relationship**, not just present arrangement (*Keenan v. Canac Kitchens Ltd.*).

Independent Contractors

Look in your contract.

Source: *Carter v. Bell and Sons* (1936), 1936 CanLII 75 (ON CA), 2 D.L.R. 438 (Ont. C.A.); *Keenan v. Canac Kitchens Ltd.*, 2016 ONCA 79 (CanLII)



Volunteer Rights

Ontario Human Rights Commission says
volunteers are protected by Human Rights Code

- Recruitment
- Discrimination
- Accommodation

Volunteer Canada's [Canadian Code for Volunteer Involvement](#) (CCVI)

Source: <https://www.ohrc.on.ca/en/iii-principles-and-concepts/5-who-protected-work>



Other Implications of Classification

| Topic | Employee | Dependent Contractor | Independent Contractor |
|------------------------------|--------------------|--------------------------------|------------------------|
| Employment Standards Act | Yes | No | No |
| Canada Labour Code | Yes | Yes | No |
| EI / CPP | Yes | No | No |
| Income Tax | “Normal” tax rules | No (can deduct expenses, etc.) | No |
| Common Law Reasonable Notice | Yes | Yes | No |
| Employer Vicarious Liability | Yes | No | No |



Harassment

What is Harassment?

How must employers respond?

Common Mistakes in Harassment Investigations



What is Harassment?

Harassment in the Workplace

- No one should have to experience a work environment that is stressful, degrading, disrespectful or dangerous to their mental or physical health

Types of Harassment:

1. Harassment based on a *Code*-prohibited grounds
 - Engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome based on a prohibited ground
2. Sexual harassment
 - Harassment because of sex in the workplace
3. Workplace harassment (e.g., bullying, personal harassment, poisoned work environment)
 - Inappropriate comments or behaviours that create a hostile or offensive work environment and negatively affect communication and productivity
 - Pattern of aggressive behaviour intended to offend, insult, hurt, undermine, or humiliate



How Must Employers Respond?

Policies and procedures are binding if consented to and consistently followed:

- Include in contracts and provide ahead of time
- Inform employees about updates. Consider getting signed.

Handling Harassment Complaints (OH&SA), Duties:

- Clear complaint mechanism
- Confidentiality except where necessary
- Investigate promptly
- Be thorough and objective
- Disclose results in writing to parties accusing and accused



Common Mistakes in Harassment Investigations

1. Failing to Conduct an Investigation Promptly
2. Disregarding Procedural Fairness
3. Choosing Untrained Investigators
4. Failing to Follow Policy and Procedure
5. Conducting a Biased Investigation
6. Failing to Gather all Relevant Information
7. Ignoring Confidentiality and Privacy
8. Neglecting to Properly Document
9. Retaliating Against the Complainant
10. Neglecting to Take Remedial Steps



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Equal Pay for Equal Work



Equal Pay for Equal Work

Equal pay for equal work: An employer cannot pay one employee at a rate of pay less than another employee **on the basis of sex** when:

- they perform substantially the same kind of work in the same establishment,
- their work requires substantially the same skill, effort and responsibility and
- their work is performed under similar working conditions.

Exceptions: seniority, merit, or qual/quant metrics, or when based on any other factor other than sex



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Human Rights at Work

Prohibited Grounds

Discrimination

Accommodation



Prohibited Grounds

- Age
- Ancestry, colour, race
- Citizenship
- Ethnic origin
- Place of origin
- Creed
- Disability
- Family status
- Marital status (including single status)
- Gender identity, gender expression
- Record of offences
- Sex (including pregnancy and breastfeeding)
- Sexual orientation

Source: <https://www.ohrc.on.ca/en/ontario-human-rights-code>



Discrimination

Discrimination may occur at any point:

- Job posting/advertisement
- Screening of candidates
- Interview(s)
- Testing for specific qualifications
- Hiring
- In the workplace
- Discipline and termination



Accommodation

Employers must accommodate to the point of **undue hardship**.

- **Goal:** “ensure that an employee who is able to work can do so.”
- Doesn’t need to fundamentally change workplace, but cost is not a good enough reason.
- To the point of “undue hardship”
 - High threshold
 - Case specific, no exhaustive definition
 - Employer must be prepared to make fundamental changes to the workplace

Examples: equipment for people with disabilities, paid days off for religious holidays, etc.



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Thank you for joining us!

Let's get started!

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