Employment and HIV/AIDS

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1. Introduction

Knowing your rights and entitlements when living with HIV/AIDS is especially important in the workplace. People living with HIV/AIDS (PHAs) often feel very vulnerable at work, especially when dealing with issues like whether or not to disclose, and what their rights are in the case of termination. In the event of temporary sickness, discrimination or unexpected long-term disability related to your HIV status, your workplace entitlements under the law can allow you to maintain your self-sufficiency, which immediately impacts your sense of well being. Employment difficulties in relation to one's HIV/AIDS status can be particularly demoralizing, especially if it results in dependency upon family or friends. These pressures create greater stresses that can have a negative impact on your health.

This chapter will provide information about basic rights in the workplace under Ontario and federal employment laws. This chapter will also highlight issues which are particularly important for people living with HIV/AIDS. The legal protections that will be described mainly fall under employment and/or labour laws, and anti-discrimination laws.

Legally, discrimination has been defined to include imposing a burden, disadvantage or obligation; or withholding or limiting access to opportunities, benefits & advantages that are generally available to other members of society. At the core of legal protections

against discrimination is the importance placed upon protecting and maintaining our human dignity, from which our self-respect and self worth, including our physical and psychological integrity and empowerment are maintained.

Our societal objectives of ensuring human dignity and self-worth are evident throughout workplace entitlements under the law. These basic entitlements will be presented in the following manner:

2. Definitions

Arbitration: A way of settling disputes available to unionized workers through a third party whose decision is final, and binding. This third party can be more than one person or a board with a chairperson and one or more representatives. Arbitration is usually the last step in settling grievances and can be used as a final stage of collective bargaining where workers are not legally allowed to strike.

Arbitrator: The person or persons who are selected to oversee the settlement of a dispute in situations involving the collective agreements and the settlement of grievances.

Claim: a complaint or demand for something. In employment standards a claim is a demand that the employer meet his or her obligations under the law. In wrongful dismissal, a claim is a legal action taken in court against an employer.

Collective Agreement: A written agreement between one or more unions acting as a bargaining agent, and one or more employers covering issues such as wages, hours, working conditions, fringe benefits, rights of workers and union, and the processes to be followed in settling disputes and grievances.

Constructive Dismissal: occurs where an employer, without the consent or agreement of the employee, changes a fundamental and important term of employment such as wages or salary and then forces the employee to either accept this change or quit. In these cases, an employee may be able to sue the employer for the wrongful dismissal. The changes must not be trivial and must be imposed without the employee's consent.

Employee: Generally, an employee is an individual who serves an employer. In labour situations, whether someone is an employee or an independent contractor depends on a number of factors including how much control you have over the work, including hours of work, assessing the quality of work, ability to hire and fire.

Employer: Generally, the person who pays someone else to do work. Employers usually have control over hiring and firing, setting hours of work, assessing the quality of the work, providing the tools of employment.

General Holiday: See "public holiday".

Grievance: A complaint against management by one or more employees, or a union, about an alleged breach of the collective agreement. The process for handling a grievance is usually included in the collective agreement. The final step in the grievance process is usually arbitration.

Independent Contractor: Someone who is not an employee, but rather independently enters into contracts to do work for money. Generally independent contractors are not protected by the Employment Standards Act or the Canada Labour Code.

Just Cause: the term used to describe situations where termination happens because your employer believes you did something wrong. Just cause is usually related to willful

misconduct, disobedience or willful neglect of duty. Just cause can also include criminal conduct, harassment or some kinds of incompetence

Lay-off: when an employer no longer requires the services of an employee. Includes cessation of work for a period of time. Some lay-offs are in fact termination.

Mediation: A process that tries to resolve labour disputes through compromise or agreement. Decisions by a mediator, conciliator or conciliation board are not binding and the parties are free to accept or reject recommendations.

Notice of Termination: refers to the act of telling someone that their employment is going to be terminated at some point in the future. In employment law, there are specific rules about how much notice an employer is required to give to an employee that their employment will be ending. Employers may sometimes want you to continue working through the notice period, or may wish to provide termination pay.

Public Holiday: Holidays that everyone is entitled to. These are sometimes called "statutory holidays". In Ontario, public holidays include: New Years Day, Good Friday, Victoria Day, Canada Day, Labour Day, Thanksgiving Day, Christmas Day and December 26. For federally regulated employees covered under the Canada Labour Code, public holidays are called "general holidays" and include Remembrance Day.

Regular wages: wages other than overtime pay, public holiday pay, premium pay, vacation pay, termination pay and severance pay.

Severance: the end of the employment relationship. Severance pay is the amount required to volunteered to be paid by an employer to an employees whose employment ends, usually to compensate the employee for wages and benefits lost when the employment relationship terminates.

Statutory Holiday: See "public holiday".

Temporary Lay-off: a lay-off with a set term. A lay-off is temporary if there is a set period after which employment will resume. Temporary lay-offs that do not result in a return to work after the required period become terminations.

Termination (dismissal): the end of employment. Usually refers to situations where an employer ends the employment of the employee. Termination may be with, or without cause.

Termination Pay: is the amount of money which must be paid to an employee if the employer does not give enough notice of termination. The amount of termination pay is based on how much notice the employee is entitled to.

Union: An organization who represents the interests of workers/employees in their dealings with management or employers. The basic unit of union organization is called the local (sometimes the lodge or branch) which is responsible for local administration. Unions represent workers in dealing with grievances, and in negotiating collective agreements.

Vacation: Time off work. In employment law, vacation usually refers to legally protected time off work, usually with pay.

Wages: Under the Employment Standards Act, wages are money payable by an employer to an employee under the terms of an employment contract, oral or written, express or implied as well as any payment required to be made by an employer to an employee

under the ESA, and any allowances for room or board under an employment contract or required allowances. Wages does **not** include tips and other gratuities, any sums paid as gifts or bonuses that are dependent on the discretion of the employer and that are not related to hours, production or efficiency, expenses and travelling allowances, or most employer contributions to a benefit plan and payments to which an employee is entitled from a benefit plan.

Wrongful Dismissal: A dismissal is wrongful when an employer dismisses or terminates an employee without giving the employee notice of that termination. A dismissal is also wrongful where an employer dismisses or terminates an employee without giving notice of termination because the employer wrongfully feels that there is cause for termination.

3. Laws Governing Your Workplace: The Basics

All workers are entitled to certain basic protections under labour and employment laws. The set of laws that apply to you usually depend upon who you work for. It is important to know, for example, whether or not your workplace is unionized. It's also important to note whether your place of work is regulated under Federal or Provincial laws.

If your workplace is unionized, then your workplace entitlements and standards are outlined in a document called the collective agreement, which is negotiated between representatives of the company and union. If you do not belong to a union, in Ontario, the Employment Standards Act, 2000 (ESA) sets the minimum basic employment protections and entitlements. Certain places of work fall outside the ESA, which for the most part include federally regulated positions such as banks or airlines. These employers would be covered under Federal legislation called the Canada Labour Code (CLC).

Both the ESA and the CLC set out the bare minimum that employers are required to meet in areas like minimum requirements for wages; hours of work; vacation entitlement; sickness, maternity and parental leave; notice requirements for termination and rules about severance. For unionized employees, this information is contained in the collective agreement.

3.1 The Collective Agreement

When addressing workplace issues of a unionized employee, the first step is to examine the terms of the collective agreement. It is also a good idea to determine whether any specific provisions or policies concerning HIV/AIDS in the workplace have been adopted and are in fact being implemented.

Your basic workplace entitlements, such as minimum wages, notice on dismissal, leave entitlements, etc, are outlined in the collective agreement. Collective agreements must at a minimum meet those basic standards outlined in the Employment Standards Act, 2000, which is discussed below. Collective agreements usually provide a better level of protection for employees than that available under the ESA for non-unionized employees.

Conflicts under the collective agreement are usually resolved through a process called "arbitration", where representatives of the employee (usually provided by the union) and the company go before an independent decision maker, known as the arbitrator. Not all employee grievances go before an arbitrator. The collective agreement will establish which grievances are subject to arbitration and which are not. Grievances related to your HIV/AIDS status should not

be excluded for that reason alone. In fact, collective agreements are prohibited from including discriminatory provisions that are contrary to the Ontario or Canadian Human Rights Codes or the Canadian Charter of Rights and Freedoms.

As your representative in the workplace, your union is under an obligation to represent your interests fairly. If you are not satisfied with how your union is handling your employment needs, you may have to file a complaint against the union itself. In situations like this, it is recommended that you first refer to the collective agreement and the terms of your union membership. If informal attempts at resolving the situation with the union fail, you should then seek the advice of an experienced labour lawyer about which legal action may be taken against your union, and if necessary, your employer, according to the terms of your collective agreement and applicable labour laws.

3.2 The Employment Standards Act, 2000

The Employment Standards Act, 2000 ("ESA") outlines basic workplace standards that all workers in Ontario are entitled to. The only exceptions to protection under the ESA are:

- employers and employees under federal jurisdiction such as banking, airlines, inter-provincial transportation and radio and television broadcasting (who would be covered under the Canada Labour Code – see 3.3, below);
- Employees of the Crown (who are excluded from most provisions of the ESA);
- Police officers;
- People who hold political, judicial, religious or trade union offices;
- Participants in work experience programs authorized by school boards, colleges or universities;
- People required to do community participation to qualify for social assistance;
- Inmates taking part in work programs.

Discrimination against workers and their dependents living with HIV/AIDS in regards to access to and receipt of benefits from any statutory social security programs and occupational schemes is prohibited. If your employer breaches the requirements of the ESA, you can file a claim with the Ministry of Labour. You are encouraged to first discuss the issue with their employer, following which a formal letter outlining the situation and the remedies you are seeking should be written (copies of such should also be kept). If this step fails, a complaint may be filed by contacting the Employment Standards Information Center or by visiting a nearby office of the Ministry of Labour. The Employment Standards Information Centre may be reached at 1-800-531-5551. See also the Ministry of Labour website at www.gov.on.ca/lab/.

Employment standards officers from the Ministry of Labour are empowered to investigate possible violations of the ESA and inspect workplaces. Ultimately, employers can be forced to comply with the ESA, including compensating or reinstating employees. In fact, employers can be prosecuted under the ESA and be required to pay a fine up to $50,000 or serve up to twelve months in jail for violations under the ESA.

3.3 The Canada Labour Code

Like the Employment Standards Act, the Canada Labour Code sets the minimum standards for employment for federal employers. The CLC applies to employers

and the people who work in the following industries or areas:

- Interprovincial and international services such as:
  - railways;
  - highway transport;
  - telephone, telegraph, and cable systems;
  - pipelines;
  - canals
  - ferries, tunnels, and bridges;
  - shipping and shipping services;
- Radio and television broadcasting, including cablevision
- Air transport, aircraft operations, and aerodromes;
- Banks;
- Undertakings for the protection and preservation of fisheries as a natural resource;
- Undertakings declared by Parliament to be for the general advantage of Canada such as
  - most grain elevators
  - flour and seed mills, feed warehouses and grain-seed cleaning plants;
  - uranium mining and processing;
  - certain individual undertakings such as Hudson Bay Mining and Smelting Company

Most federal Crown corporations, such as the Canada Mortgage and Housing Corporation and Canada Post Corporation, are covered by federal legislation. Federal public service employees are also covered by Part II of the CLC, which deals with Occupational Safety and Health. However, they are not covered by Part III of the Labour Code which deals with Labour Standards and Workplace Equity. The Government of Canada has stated, however, that the minimum standards of the Code will be met in the public service as a matter of policy.

3.4 The Labour Relations Act

The Labour Relations Act (LRA) is provincial legislation that covers the operation of trade unions. The LRA is the legislation which sets the rules for the creation of unions and the negotiation, contents and operation of collective agreements, including the rules for dealing with problems when they arise. The LRA creates the Ontario Labour Relations Board, which is a Tribunal (like the Human Rights Tribunal for human rights matters or the Social Benefits Tribunal for matters related to social assistance) which hears appeals of problems which come up under the Labour Relations Act, and some issues which come up under the Employment Standards Act, the Occupational Health and Safety Act and some other pieces of legislation. The LRA would come into play in the example of a unionized employee who felt that she or he was not being fairly represented by their union in a dispute with the employer.

3.5 The Occupational Health and Safety Act

The Occupational Health & Safety Act (OH&S) is provincial legislation which sets out the minimum standards which employers are required to meet in order to ensure that health and safety standards are met within your workplace. As a general rule, the OH&S covers all workplaces in Ontario, across all sectors of employment, and all levels of employees, from supervisors/management through to and including the most junior level. There is a very limited list of workplaces which are not covered. They include:

- Work done by the owner or occupant, or a servant in a private residence, or on the land connected to it;
- Farming operations;

- Federally regulated industries like:
  - Post offices
  - Airlines & airports
  - Banks
  - Some grain elevators
  - Telecommunication companies
  - Interprovincial trucking, shipping, railway and bus companies.

The OH&SA provides protections to workers in several specific ways. It gives workers the right to participate in the process of monitoring workplace health and safety issues, usually through participation in joint health and safety committees. Both management and workers participate in these committees. The OH&SA also sets out a right for workers to know about and/or be advised of health or safety issues in their workplace, including the right to be trained about health and safety risks. Workers also have the right, in specific circumstances, to refuse to work in unsafe or hazardous conditions, or to stop work that is taking place in unsafe or hazardous conditions.

On the employer side, the OH&SA requires employers to take all reasonable precautions to protect the health and safety of workers. The OH&SA also requires that workplaces that regularly employ 20 or more employees have joint health and safety committees, at least 50% of which are comprised of worker representatives. Committees are also required on construction projects regularly employing 20 or more workers and expected to last at least three months. Committees are also required in workplaces, other than construction projects, with fewer than 20 employees where there are designated substances. Some professions or occupations have specific regulations under the OH&SA to deal with their workplaces, including teachers, health care workers, firefighters, miners, and x-ray technicians.

The OH&SA is enforced by inspectors who are given powers to inspect workplaces and make orders under the Act. The decisions of inspectors can be appealed to the Ontario Labour Relations Board (see section 3.6).

3.6 The Ontario Labour Relations Board

The Ontario Labour Relations Board (OLRB) is an administrative tribunal created under the Labour Relations Act (LRA) to deal with appeals of decisions made under the Employment Standards Act, the Labour Relations Act, and the Occupational Health & Safety Act. The matters that can be heard by the OLRB include applications by unionized employees where they feel the union has not fairly represented them in a dispute with the employer. The OLRB is also responsible for hearing applications regarding unfair reprisals against employees who have tried to enforce their rights under the ESA, the OH&SA or the LRA.

3.7 The Ontario Human Rights Code

The Ontario Human Rights Code (OHRC) is quasi-constitutional legislation which creates human rights protections in Ontario. Quasi-constitutional means that this legislation comes above other provincial legislation, including the Employment Standards Act, the Occupational Health & Safety Act, and the Labour Relations Act. The purpose of the OHRC is to ensure that individuals are able to live free from discrimination. The quasi-constitutional status of the OHRC also means that collective agreements must be in line with, and meet the minimum requirements of the rights and protections set out in the OHRC. In the context of employment, the OHRC also sets out the duty of employers not to discriminate against employees on

protected grounds (including HIV/AIDS as a disability), as well as the duty on employers to accommodate a disability. You will find at section 4 a brief discussion of the ways in which the OHRC provides protections to PHAs in the area of employment. You will find a much more detailed discussion of human rights and HIV/AIDS in Chapter 4 of this manual.

3.8 The Canadian Human Rights Code

In the same way that the Ontario Human Rights Code (OHRC) establishes human rights protections within the province of Ontario, the Canadian Human Rights Code (CHRC) creates the same kinds of protections on the national level. As a result, the CHRC sits above the Canada Labour Code (CLC). In the context of employment, the CHRC also sets out the duty of employers not to discriminate against employees on protected grounds (including HIV/AIDS as a disability), as well as the duty of employers to accommodate a disability. You will find at section 4 a brief description of the ways in which the OHRC and the CHRC provide protections to PHAs in the area of employment. You will find a much more detailed discussion of human rights and HIV/AIDS in Chapter 4 of this manual.

4. Human Rights Protections in the Workplace

A major cause of unfair discrimination in employment is the perception that people with HIV/AIDS are a danger to their colleagues. Not only are such attitudes factually incorrect, but they serve to undermine the human dignity to which everyone is entitled and guaranteed under the Canadian Charter of Rights and Freedoms, as well as the Canadian Human Rights Code (CHRC) and the Ontario Human Rights Code (OHRC). On a more personal level, the stress that results from being treated in a degrading or dehumanizing fashion due to one's positive status is most likely to result in stress and trauma, and affects our ability to stay strong and healthy. Finally, in terms of HIV-prevention, it is now widely accepted that adherence to and protection of the basic human rights of people living with HIV/AIDS is a critical factor in preventing the stigma and discrimination associated with the disease, and enhancing the quality of life of PHAs both in and outside of the workplace.

For these reasons, hiring practices attract human rights protections from HIV/AIDS discrimination. This section aims to outline basic protections while one is attempting to gain employment. You will find a more detailed discussion of these protections in Chapter 4, Human Rights and HIV/AIDS.

4.1 Scope of Protection

You are protected under human rights law from HIV/AIDS discrimination in the workplace. Just like the employment entitlements discussed earlier, knowing whether to pursue a complaint of discrimination with the Canadian Human Rights Commission (federal) or the Ontario Human Rights Commission (provincial) depends on who you work for. If you work for a federally regulated company, then you are protected from employment discrimination under the Canadian Human Rights Act. Otherwise, you are protected by the Ontario Human Rights Code ("the Code") and should bring any complaints of discrimination to the Ontario Human Rights Commission.

Both the Ontario Human Rights Code and Canadian Human Rights Act explicitly ensure equal treatment without discrimination in the

workplace. The Ontario Human Rights Commission's (OHRC) policy statement on HIV/AIDS-Related Discrimination states that people are protected in employment, services, housing, contracts, and memberships in trade unions from discrimination based upon HIV/AIDS. This protection extends to related medical conditions and to anyone who has or is believed or perceived to have HIV/AIDS.

4.2 HIV/AIDS as a Disability

Discrimination is prohibited on the basis of specific listed grounds, such as race, age, disability, creed and sex. HIV/AIDS is included within the meaning of disability. As a result, the Ontario Human Rights Commissions Policy on HIV/AIDS-Related Discrimination states that "all persons who have or have had, or who are believed to have or have had, or are perceived to have, AIDS or AIDS-related illnesses, are entitled to the protection of the Ontario Human Rights Code in employment, services, housing, contracts and membership in trade unions." Friends and family are also protected from unequal treatment since discrimination on the basis of association is also prohibited.

Under the Code, it is also prohibited to discriminate based on the perception that someone is likely to become disabled in the future. As a result, people who are infected with HIV or those diagnosed with AIDS are equally protected from discrimination, including on related medical conditions and if perceived or believed to have HIV/AIDS.

Thus, under these protections, health care workers with HIV infection are able to compete for jobs and continue to work at their usual occupation. Also, if an employer excludes an HIV-infected worker, the employer must prove that the exclusion was justified based upon medically or scientifically proven grounds associated health and safety risks. For example, human rights laws do not permit restrictions upon people living with HIV/AIDS in the food processing industry, nor have they found any basis for fears among coworkers or customers.

4.3 "Prima facie" case of discrimination

If you or someone you know feels that they have been discriminated against on the basis of HIV/AIDS status, or any perception thereof, a complaint should be brought to the relevant Human Rights Commission. A prima facie case of discrimination is one where, if your allegations are believed, these allegations would be enough to warrant a decision in your favour if there was no reply from your employer.

Knowing whether your claim consists of a prima facie case requires being able to place it within an accepted category of discrimination. Your claim may fall into two possible categories of discrimination: direct and "adverse effect". Naturally, the type of action you seek from your employer and their potential defences to your claim will depend on whether you allege direct or adverse effect discrimination. For more detail on how to proceed with a human rights complaint, refer to the chapter on "HIV/AIDS and Human Rights".

4.4 Duty to Accommodate

It is not enough to simply treat people living with HIV/AIDS in the same manner as everyone else in the workplace. Having HIV/AIDS alters our otherwise ordinary patterns and day-day activities, which may require sensitivity from employers in accommodating the particular needs of employees that would not compromise their ability to perform their employment duties.

Human rights law establishes a broad duty on an employer to accommodate the needs of persons with disabilities, including HIV/AIDS. The employer is required to accommodate a disability up to a point called "undue hardship". The concept of "undue hardship" looks at the factors of cost, health and safety risks to the person and to others, as well as the availability of funding to offset costs. For more details on employee and employer obligations in regards to accommodation, see Section 4.5. of the chapter on "Human Rights and HIV/AIDS".

For people living with HIV/AIDS, the employer's duty to accommodate takes precedence over the concerns of other employees. More specifically, an employer is unable to take action based upon the concerns of co-workers with respect to working with or close to an individual infected with HIV/AIDS.

4.5 Testing

The Ontario Human Rights Commission emphasizes that any employment-related medical examination is limited to testing one's ability to perform the essential duties of a particular job. Accordingly, the Commission's Policy On Employment-Related Medical Information states that it is not permitted under the Human Rights Code to conduct medical examinations or inquiries as part of any applicant screening process, and can only be requested after an offer of conditional employment has been made, preferably in writing.

It is the policy positions of both the Canadian and Ontario Human Rights Commissions that testing or other protective measures in dealing with HIV infection or HIV-related illness are not permitted. In most employment scenarios, people infected with HIV/AIDS pose virtually no risk to those with whom they interact, especially as HIV/AIDS is transmitted through bodily fluids.

However, the Commissions will look at the validity of mandatory testing on a case-by-case basis where the employer says that special measures must take place in the workplace because of the particular employment circumstances. Specifically, an employer may require psychological or physical testing in order to measure one's ability to perform job requirements. Under the Ontario Human Rights Commission's Policy on Employment-Related Medical Information, an employer may only request a medical examination after a conditional offer of employment is made, preferably in writing and for the sole purpose to measure an individual's ability to perform the job.

If you are tested for HIV/AIDS after you are hired, the testing must be based upon a reasonable, or bona fide, concern in respect to your job duties If not, then there has been a breach of the Code and a complaint should be made with the applicable human rights commission. In addition, it's important to remember that you must give informed consent before testing for HIV/AIDS can be done. If you were tested for HIV antibodies without your consent, or if your employer is asking you to have medical testing done for work, contact HALCO or a lawyer immediately regarding your legal options.

5. Basic Workplace Rights And Entitlements

As a general rule, employees living with HIV/AIDS are not required to disclose their medical status. Employers do not have any automatic right to know about your specific diagnoses. Whether or not to disclose your HIV status at work, and to whom, should be entirely up to you. If you have particular concerns about whether you might have an

obligation to disclose your status at work, contact HALCO for more information. At the outset, people living with HIV/AIDS should be encouraged to seek confidential advice from their personal physicians or other health care professionals regarding precautions that may be necessary in the workplace. Some employees may be required under law to undertake certain reasonable precautions in order to ensure their own safety and that of others in the workplace.

As a general rule, the basic minimum rights of employees are contained in the Employment Standards Act (ESA) or the Canadian Labour Code (CLC) for federal employees. For unionized employees, these rights and entitlements will be set out in the collective agreement.

Some professions or individuals are not covered by the minimum standards set out in the ESA. In particular the rules about hours of work and eating periods; overtime pay; minimum wage; public holidays; and vacation with pay do not apply to the following:

- Qualified practitioners of:
  - architecture
  - law
  - professional engineering
  - public accounting
  - surveying
  - veterinary science
- Registered practitioners of:
  - chiropody
  - chiropractic
  - dentistry
  - massage therapy
  - medicine
  - optometry
  - pharmacy
  - physiotherapy
  - psychology
- Practitioners under the Drugless Practitioners Act
- A teacher
- A student of any of the above professions
- Commercial fishers
- Real estate agents working for a registered broker
- Traveling salespeople

5.1 Confidentiality

As mentioned above, it is extremely unlikely that there would be any requirement on an employee to have to disclose his or her HIV status at work. Even in situations where a PHA has to seek some accommodation at work, it should not be necessary to have to provide a specific diagnosis. It should be sufficient to provide medical documentation outlining what restrictions exist and what modifications are required to accommodate them. In some cases, however, PHAs may have decided to disclose their HIV status to a supervisor or a co-worker or to the Human Resources department at work. In theory, that information should remain confidential. According to the Ontario Human Rights Commission's Policy in HIV/AIDS-Related Discrimination, "all health assessment information, including HIV testing results, should remain exclusively with the examining physician and away from an employee's personnel file in order to protect the confidentiality of the information." In practice, however, it can be very difficult to control the flow of information with respect to someone's health information in the workplace, and the legal remedies are quite limited if a breach of confidentiality occurs. For this reason, it is strongly encouraged that PHAs consult HALCO or their local ASO with any questions or concerns about disclosing information.

5.2 Wages & benefits

The "minimum wage" is the lowest rate

required by law that an employer can pay an employee. You are eligible for minimum wage regardless of whether you work full-time, part-time, casually, or by the hour/commission/piece rate/flat rate or salary. Some exceptions to minimum wage laws exist that are industry and job specific. For more detail on this and other issues (such as how to calculate minimum wage if earning commission), see "How Are You Covered by the ESA", published by the Ministry of Labour for Ontario at www.gov.on.ca/LAB/english/es/factsheets/fs_wage.html.

The minimum wage in Ontario is set by the provincial government, and is found in the Employment Standards Act (ESA). The provincial government recently introduced changes to the ESA which increased the minimum wage for the first time in over 8 years. The wage has been set to increase a little bit each year until 2007.

Current hourly minimum wages for most employees and particular jobs are (Feb 1 '04 – Jan 31 '05):

Type of Work	Wage (hourly)
General Workers (most workers)	$7.15
Liquor Servers (employees who regularly serve liquor directly to customers or guests in licensed premises)	$6.20
Students under 18 years of age, working not more than 28 hours a week	$6.70
Homeworkers (people paid to do work in their own homes, e.g., sew clothes for clothing manufacturers, answer telephone calls for a call centre, etc.)	$7.87
Hunting and Fishing Guides (paid for in blocks of time, rather than by the hour)	• Working less than five consecutive hours in a day, $35.75 • Working five hours or more in a day, $71.50

For federally-regulated employees, the minimum wage is in fact the one set by the government in the province where you work. This means that federal employees working in Ontario are eligible for the minimum wages set out above. Any adjustment to the minimum wage in Ontario is automatically reflected for federally-regulated employees. One significant difference, however, is that there is no distinction in minimum wage based on age. Under the Canada Labour Code, employees who are 17 and under are entitled to the adult minimum wage in the province where they work.

Your employer may make deductions from your wages as long as they fall within those required under federal or provincial law. This would include deductions for income taxes, employment insurance or Canada Pension Plan contributions. It would also include deductions mandated by a court order, such as cases where money is owed to another party (like child or spousal support, or a garnishment of wages), or with your written authorization. Under the ESA, amounts are also specified for how much an employer is deemed to have paid the employer as wages for room or board or both.

5.3 Hours of Work

The ESA and the CLC (for federal employees) have specific rules about limits on the number of hours of work that an employer can require of an employee.

As a general rule, under the ESA, employees cannot be required to work more than 48 hours a week. There are, however, a lot of exceptions to the rule. Currently in Ontario, employers and employees can enter into written agreements to work up to 60 hours a week, without having to get any approval from the Ministry of Labour. There are a lot of concerns about the vulnerability of workers who may not feel that they can exercise their right to refuse to work more than 48 hours a week. In Ontario, the government is currently exploring changes to the ESA which might have an impact on agreements to work more than 44 hours a week.

The Canada Labour Code (CLC) has slightly different rules about hours of work for federally regulated employees. With some exceptions, the general rule under the CLC is that standard hours of work are 8 hours a day or 40 hours a week. The maximum number of hours which can be worked per week, however, is 48 hours, just like under the ESA. As under the ESA, it is also possible for employers to average hours of work over two or more weeks in order to assess whether overtime is payable. There are also provisions to allow for more than the maximum hour of work per week, including some rules that are specific to certain industries.

In addition to the limits on the number of hours worked, there are certain rules about time away from work. For example, the ESA requires the employees have at least a 30 minute eating break for every five consecutive hours of work. This can be taken, on agreement, in two 15 minutes blocks, but they must happen within a five hour period. Employers are not required to pay you for eating breaks.

Employees are also entitled to at least 11 hours free from work each day. A day is a 24 hour period, and not necessarily a calendar day. There is no way under the ESA for employers and employees to agree to waive this rule, even if the employee has agreed to work more than 8 hours, or whatever the regular number of work hours is in a day. The only exception to this rule is employees who are on-call and who are called into work in a period when they would otherwise not be expected to work. Employees are also entitled to at least 8 hours off between shifts, unless the total time worked on both shifts is less than 13 hours. An employer and employee can agree to waive the rule about 8 hours between shifts, but the work must still comply with the rule requiring at least 11 hours free from work each day.

Finally, the basic provisions in the ESA require that employees get at least 24 consecutive hours free from work in each work week, or at least 48 hours free from work in each period of two consecutive work weeks. This rule is also not subject to any change through an agreement between employees and employers.

Under the Canada Labour Code, the rules about time off from work are slightly different. The basic protection provided under the CLC is that employees are entitled to at least one full day of rest per week, and this day is preferably a Sunday.

5.4 Overtime

Though employers and employees can agree to work more than the maximum number of hours in a week (48), employers are still

required to pay an overtime rate for hours worked in excess of 44 hours a week. The basic overtime rate established by both the ESA and the CLC is 1 ½ times your regular hourly rate. This is often called "time and a half". However, there are a lot of exceptions which can make it difficult for employees to get overtime pay for overtime hours. The rules about overtime pay apply to all employees regardless of whether they are full-time, part-time, students or casual workers.

Because overtime is based on working more than a certain number of hours per week, it is not calculated on a daily basis. In a simple example, if Sunita works 50 hours in one week, she would normally be entitled to 6 hours of overtime pay (50 - 44 = 6). If Sunita's regular hourly wage is $10.00, then her overtime pay would be $10 x 1.5, or $15.00 an hour. In this example, Sunita should be paid $440 (44 hours x $10) **plus** $90 (6 hours x $15) for a total pay of $530 for her 50 hour work week.

One of the most serious exceptions to the overtime pay rule involves the concept of "averaging". Under the ESA, and employer and an employee can agree, in writing, to an averaging agreement with respect to overtime hours. The ESA says that employers and employees can agree to average hours of work over a four week period without having to get approval from the Ministry of Labour. Averaging over more than four weeks can be agreed to if the agreement is approved by the Ministry. These kinds of agreements always favour the employer over the employee, because the employer ends up having to pay fewer of the hours worked as overtime pay than under a straight weekly calculation. Under a four week averaging agreement, then, an employee would only be entitled to overtime for anything over 176 hours worked (44 hours x 4 weeks). This means that if you work 48 hours in each of the first two weeks, and 40 hours each of the last two weeks, you're not entitled to any overtime pay because your total average hours over four weeks is 176, even though you worked 4 extra hours in each of the first two weeks.

Averaging is also possible under the CLC, normally over a period of two or more weeks. In the case of averaging of hours of work, overtime is only payable where the averaging results in more than the standard number of hours per week are worked. For weeks in which a general holiday occurs, then the standard hours for that day (usually 8 hours) is deducted from the total for that week.

5.5 Taking time off

In the real world, employees are often in a position where they need to and/or are entitled to take time off of work. This can be especially important for PHAs who need to ensure time off work to maintain and preserve their health. It's important to know what your rights are with respect to time off work in order to maintain employment. The following sections discuss the various minimum rules about time off from work. It is important to remember that the rules that follow are the basic **minimums** established by law. If you have an employment contract or are unionized and under a collective agreement, then the rules contained in those documents will apply, provided they match or are better than the rules in the ESA, or the CLC, whichever legislation applies.

5.5.1 Vacation

The ESA and the CLC both talk about your rights to vacation in two ways. There is basic right to vacation **time** and a basic right to vacation **pay**. How vacation pay is provided to you will depend on your employer, but you do have a right to receive it.

The ESA entitles workers to a minimum of four percent of their gross wages as vacation pay and two weeks of vacation time each 12-month vacation entitlement year. Vacations must usually be scheduled in blocks of one or two weeks, unless requested otherwise in writing to your employer. The basic rules under the ESA say that normally, vacation pay is due to you before you take your vacation, but there are some exceptions to this rule. If you get paid by direct deposit, the vacation pay can be paid on or before the pay day that relates to the period of your vacation. If you're taking less than a week of vacation at a time, the pay can be made on or before the pay day for period in which the vacation falls. If you have agreed in writing with the employer, the vacation pay can be paid in stages on each paycheque. Finally, if you agree in writing with the employer, you and the employer can arrange for vacation pay to be paid at any time.

All workers are also entitled to paid public holidays, of which there are eight in Ontario, regardless of how long they have been working. In Ontario, there are eight public holidays guaranteed under the ESA: New Year's Day, Good Friday, Victoria Day, Canada Day, Labour Day, Thanksgiving Day, Christmas Day and Boxing Day. It's important to note that Easter Monday, the Civic Holiday in August, and Remembrance day are not considered public holidays in Ontario. Some employers may give employees these days off, with or without pay, but they are not required to do so under the ESA.

While generally all employees covered under the ESA have the right to refuse to work on public holidays, there are some specific exemptions. Employees in the following sectors may be required to work on public holidays:

- hotels, motels and tourist resorts
- restaurants and taverns
- hospitals and nursing homes
- continuous operations (industries that don't shut down operations more than 1 time per week).

For federally regulated employees, the CLC guarantees two weeks of vacation for every 12 months of continuous employment. After six years of continuous employment with the same employer, the vacation entitlement increases to three weeks. Vacation pay under the CLC is four percent for the first six years, and six percent after six years of continuous employment. The CLC also includes a general rule that says that vacation pay must normally be paid to an employee at least 14 days before the start of your vacation, but it can also be paid during or immediately following the vacation if that is your employer's established practice.

The CLC also has provisions for what are called General Holidays for federally regulated employees. The CLC includes one day in addition to the eight listed above under the ESA – Remembrance Day. General holidays with pay are available to all federally regulated employees provided they have been employed 30 days prior to the holiday.

Under both the ESA and the CLC employees must take their vacation within 10 months of the right to it, and employers are required to issue any outstanding vacation pay to employees on termination.

Many people often ask whether they can be required to work on public holidays. The short answer is yes. Normally, however, employees who are required to work on public holidays are entitled to a higher rate of pay. Under the ESA, most employees have the right to not work on public holidays and to be paid for that day. However, if an employee agrees to work on a public holiday, they are entitled to either regular pay for the hours worked on the public holiday, plus pay

at a rate of 1 ½ times their regular pay for each hour worked on the public holiday; or their regular pay for the public holiday, plus a substitute day off with public holiday pay. Public holiday pay is calculated by adding up all the employee's regular wages, plus all vacation pay payable in the four weeks before the public holiday, divided by 20.

Under the CLC, employees are entitled to regular pay plus time and half pay for hours they are required to work on public holidays. Employers can also negotiate to provide a substitute holiday. Where there is a collective agreement, the employer and the union must agree in writing to the substitute holiday. Where there is no collective agreement, the employer most post notice of the substitute day and have the approval of 70% of the employees. Just like under the ESA, there are specific exemptions to the general holiday rules for certain sectors or types of employees.

5.5.2 Parental and Pregnancy Leave

The Employment Standards Act sets out the minimum provisions in law regarding parental and pregnancy leave from work. Basically, the act requires that employees be granted leave for pregnancy or parental leave, subject to eligibility rules, without losing their job. The parental and pregnancy leaves guaranteed under the ESA are unpaid leaves.

The Canada Labour Code also sets out minimum provisions for federally-regulated employees not covered by a collective agreement. In most ways, the CLC sets the same standards with respect to leave, though there are a couple of exceptions listed below.

It is important to note the difference between pregnancy and parental leave, as provided under the ESA and CLC, from pregnancy (maternity) and parental benefits under the Employment Insurance Act (EI). This section talks specifically about the right to unpaid leave from your work with a right to return to work. For more information about the income supports available for maternity and parental benefits under EI, please see section 7.1.3.

Under the ESA, every employee, whether full-time, part-time, contract or permanent has the right to take pregnancy or parental leave, provided they were hired at least 13 weeks before the expected due date of the child. Under the CLC, an employee must have completed at least six months of continuous employment with the same employer before being eligible for leave.

Pregnancy leave entitles a pregnant employee to 17 weeks of unpaid leave without the risk of losing her job. She can also choose to take fewer than the full 17 weeks. However, pregnancy leave cannot be taken in more than one stage. She is guaranteed a position when she returns. If her own job is not available, then she is guaranteed a job of equal pay. She is also entitled to continue to earn seniority and pay increases over the period of her leave. Normally, the employee must give her employer a minimum of two weeks written notice prior to taking pregnancy leave. If an employee decides not to return to work at the end of her pregnancy leave, or wishes to change her return date, she must provide the employer with a minimum of four weeks written notice.

Parental leave is for a maximum of 37 weeks. Under the ESA, a birth mother who takes pregnancy leave is only entitled to 35 weeks of parental leave. All other parents are eligible for the maximum 37 weeks. Parental leave is available for the birth parent, the adoptive parents (whether not the adoption has been finalized legally), or to a person who is in a relationship of some permanence with the biological or adoptive parents of a child and intends to treat the child as his or her own.

To be eligible under the ESA, the parent must have been hired at least 13 weeks before the date on which the leave is to begin. Under the CLC, eligibility requires being employed with the same employer for at least six consecutive months prior to the start of the leave. A parent on parental leave still has the right to earn seniority while on leave, is guaranteed a job to return to at the same rate of pay, and is also entitled to benefit from any salary increases which may have occurred during the period of leave. Under the ESA each parent has a right to 37 weeks of unpaid leave. Parents can choose to take their parental leave at the same time or consecutively, however parental leave must at least be started within 52 weeks of the birth of the child, or of the child coming into the parent's care. Under the CLC, the 37 weeks of parental leave must be shared between the two employees, provided they are both federally-regulated employees subject to the Code.

5.5.3 Sickness

The ESA does not provide for any basic amount of sickness leave at all. In most cases the right to any sick days or provisions with respect to missing work would be set out in a contract of employment or a collective agreement in the case of unionized employees. If there is no contract of employment, or if the contract has no provisions for sick leave, there is no basic minimum criteria that employers must meet. The closest that the ESA gets to sickness pay is the rules with respect to Emergency Leave (see section 5.5.4 for more details).

This means that you are not automatically entitled to any time off work for sickness with pay. Normally this means that if you are sick and unable to work, you must take time off work without pay.

If your workplace has provisions for time off work for sickness then those rules would apply in case you were unable to work. Some workplaces include benefits for short-term disability. Others expect that you would access benefits under the Employment Insurance sickness benefits program. (for more information on short term disability see Chapter 5 on Disability, Sickness and Life Insurance. For more information on EI sick, see section 7.1.2).

In some cases, employers have 'point-based' systems for dealing with absence from work. If a person misses a day of work they earn a certain number of points. Often these workplaces will have a set limit on the number of points that can be earned in a given period. In situations like this, PHAs may often be at a disadvantage because of the need for increased doctor's appointments and absences due to health. It might be possible to make a human rights argument, in situations like this, that the rules about absence might have an adverse effect on PHAs and that the employer has an obligation to accommodate PHAs with more flexibility around absence. For more information about accommodation see section 4 in this chapter, and a more detailed discussion in Chapter 4 on Human Rights and HIV/AIDS.

Unlike the ESA, however, federally-regulated employees covered under the Canada Labour Code do have a basic protection with respect to sickness. The CLC gives employees protection against being fired, demoted, disciplined, laid-off or suspended because they are unable to work due to illness or injury for up to 12 weeks without pay. Seniority rights and pension and benefit plans continue during this period. With respect to benefit programs, the CLC says that employers must continue to pay the employer's share of group benefits plan, provided that the employee pays, within a reasonable amount of time, their share of contributions if that is required.

If the employee does not contribute their share of contributions to the plan, the employer is not required to continue making its share of payments. This last point is particularly important for PHAs because of the risk of losing access to group benefit programs including long term disability and extended health benefits like drugs, hospital and dental coverage.

5.5.4 Emergency Leave

Under the ESA, an employee can take a job-protected leave of absence of up to ten days per year without pay in cases of personal illness, injury or medical emergency. However, the emergency leave provision only applies if their employer regularly employs more than 50 people. An employee could also qualify for the emergency leave provisions in the case of illness, injury, medical emergency, death or other urgent matter concerning any of the following individuals:

- their spouse (including common law) or same sex partner;
- parent, step-parent or foster parent of the employee or their spouse/same sex partner;
- grand parent, step-grandparent, grandchild or step-grandchild of the employee or their spouse/same sex partner;
- spouse or same-sex partner of a child of the employee;
- the employee's brother or sister; and
- a relative of the employee who is dependent on the employee for their care and assistance.

The ten days of an emergency leave do not have to be taken consecutively, although an employer is allowed to count a half-day as a full day of leave. Of course, the employee must advise the employer of their intention to take leave without pay prior to doing so, or if that is not possible then as soon as possible after beginning it. The employer must reinstate the employee in the position he/she held prior to taking leave.

5.5.5 Family Medical Leave

The Employment Standards Act also provides a new kind of leave which was added in June 2004. Family medical leave gives employees the right to a job-protected leave of up to 8 weeks, unpaid, if they need to provide care or support for a family member who is ill. Care and support means providing psychological or emotional support, arranging for care by a third party provider or directly providing or participating in the care of the family member. A medical doctor would have to provide verification that the family member suffers from a serious medical condition that is likely to result in death within 6 months. Under the ESA, family member includes:

- your spouse (including same-sex spouse);
- your parent, step-parent or foster parent;
- your or your spouse's child, step-child or foster child.

The leave can be taken by more than one person, but the total number of weeks taken by all people can't be more than 8 weeks. The full 8 weeks do not have to be taken all at once, or consecutively, but they do have to be completed within the 26 week period set out on the medical certificate. Under Family Medical Leave, a week is a period of 7 days, starting on a Sunday and ending on a Saturday. If you actually leave work in the middle of a week, your leave is deemed to have started at the beginning of that week, and ends on the Saturday, and counts as one of the eight weeks, even if you were at work on Monday and Tuesday.

Family medical leave ends on the earlier of:

- the last day of the week in which your relative dies;
- the last day of the week in which the 26 week on the certificate expires; or
- the last day of the eight weeks of family medical leave.

Unlike emergency leave, any employee covered by the ESA is eligible to take family medical leave. You do not have to be employed for a certain amount of time to qualify, and you do not have to work in a workplace with more than 50 employees. An employee may be entitled to both leaves. They are separate leaves and the right to each leave is independent of any right an employee may have to the other leave. An employee who qualifies for both leaves would have full entitlement to each leave.

An employee is expected to notify their employer in writing that they intend to take family medical leave, but they are not required to give any notice. If you are unable to provide notice before the leave begins, you are expected to provide written notice as soon as possible.

Just like parental and maternity leaves under the ESA, the family medical leave provides job-protected, **unpaid** leave from work. It does not provide any income support during this period. The compassionate care benefit under the Employment Insurance Act, may provide some income support for up to 6 out of the 8 weeks of leave. Being eligible for family medical leave does not automatically mean you are eligible for EI compassionate care benefits. See section 7.1.4 for more information about the compassionate care benefit under EI.

Although the family medical leave is limited to 8 weeks of leave, it is possible for a second leave of 8 weeks to be granted if your relative does not die within the first 26 week period listed on the first medical certificate. To qualify for a second leave, a second medical certificate would have to be issued stating that the family member has a serious medical condition that is likely to result in death within 26 weeks.

Family medical leave, like emergency, pregnancy and parental leaves, protects your job. Your employer cannot fire you for taking the leave, and your job must be protected during the leave period. Your employer is not required to pay you during your leave, but is required under the ESA to continue making its share of contributions to any pension or benefit plans. You are also entitled to continue collecting seniority and vacation entitlements during the period of your leave.

5.5.6 Bereavement Leave

The Employment Standards Act does not provide for a specific bereavement leave. The Emergency Leave rules are the closest thing to bereavement leave and are discussed in more detail in section 5.5.2, above.

The Canada Labour Code, on the other hand, provides a right for federally-regulated employees to three days of bereavement leave, with pay, if a member of their immediate family dies. The leave is available to any federally-regulated employee who has completed at least three consecutive months of employment. An employee who has not yet completed the three months of employment is still entitled to three days of leave, but without pay. The leave has to be taken in the three days following the person's death. If some of those days are normally days off work, or holidays, then there is no right to the leave for those days. For example, if your relative died on Friday and you normally do not work on Saturday or Sunday, you would be entitled to one paid day of leave for the Monday. If the death occurs during your vacation, you also would not be

eligible for paid bereavement leave.

6. Can I be fired? Termination of Employment & Severance

One of the most common questions about employment and the law is whether or not someone can be fired for no reason. The answer is yes. As long as certain basic rules about notice of termination and pay are met, you can normally be fired at any time. This often comes as quite a shock to most employees, and can be a very devastating lesson for PHAs who may find themselves suddenly without work or access to work-related health benefits.

The rules about termination of employment can be quite different depending upon the status of the employee. For this reason it is very important for employees, and especially PHA employees, to know whether or not they are unionized and subject to a collective agreement, as well as knowing whether they are subject to the Employment Standards Act, or the Canada Labour Code.

It is especially important in the case of PHA employees to consider whether or not the termination is based on their HIV status or some other disability, and whether or not they might have an argument for a human rights claim. Remember that employers are required to accommodate a disabled employee up to the point of undue hardship. See section 4 of this chapter, or Chapter 4 of this manual for a more detailed discussion of your human rights at work and how to enforce them.

Finally, it is also possible for an employer to terminate an employee "with cause" or for "just cause". This means being fired because you have done something wrong. As a general rule, the grounds for termination with cause are usually when an employee engages in willful misconduct, disobedience or willful neglect of duty that is more than trivial and that has not been condoned by the employer. Also, the ESA says that the right to notice of termination and pay in lieu of notice are only available after three months of continuous employment in a job.

More detailed explanations of the rules about termination and severance are set out below. Being aware of this information will give an employee the best chance of ensuring that their rights have been respected.

6.1 Non-unionized employees

In general, an employee whose employment is being terminated is entitled to either reasonable notice of their dismissal, reasonable compensation instead of notice, or a combination of both. If these basic rules are met, then it is legal for an employer to fire you without any specific reason. The Employment Standards Act (ESA), or in the case of federally-regulated employees the Canada Labour Code (CLC), establishes certain basic minimum requirements in terms of periods of notice or pay in lieu of notice. If you are subject to an employment contract which provides more generous periods of notice or pay, then that contract would apply. If there is no contract, then the minimums set out in the legislation will apply.

There are some basic exceptions to the rules about right to notice of termination. First, if you are terminated with cause (because you engaged in willful misconduct, disobedience, willful neglect of your duties which was more than trivial and was not condoned by your employer), then you are not entitled to notice or pay in lieu of notice. In addition, being fired for cause will also make you ineligible to qualify for employment insurance benefits. It is very important to note that you cannot be dismissed because you attempted to exercise your rights under the ESA or the CLC, or

tried to find out about your rights under the ESA or CLC. This includes refusals to work in excess of the daily or weekly hours of work rules under the ESA, or for taking medical leave, for example.

Secondly, notice of termination is normally required to be in writing. If you are served with notice of termination, you are normally expected to work during the period of notice. Payment in lieu of notice means that you are not expected to work through the notice period, but your employer pays you a lump sum amount equal to the wages you would have earned during the notice period. You also have the option, if you are given notice of termination, of resigning instead of working out the notice period. In this case, you would have to provide the employer with two weeks written notice of your intention to resign.

Finally, there are certain situations where you would not be entitled to notice of termination, even under the ESA. There is no right to notice or termination, or pay in lieu of notice if:

- you were hired on the basis of a contract that is to expire at the end of a fixed term or completion of a specific task, unless the termination happens before the end of the term, or before the completion of the task;
- you were on a temporary lay-off;
- your contract of employment has become impossible to perform or has been frustrated by a fortuitous or unforeseeable event or circumstance, (unless the Human Rights Code prohibits termination on those grounds -- see Chapter 4 and Section 4 of this chapter);
- your employment is terminated after refusing an offer of reasonable alternative employment with the employer or through a seniority system;
- you are on temporary lay-off and you don't return to work when recalled within a reasonable amount of time;
- you were terminated as a result of a strike or lock-out at your work
- you are a construction employee;
- you have a work arrangement where you are able choose whether or not to accept work when requested;
- you were terminated because you reached the age of retirement

6.1.1 Notice of Termination

An employer must give advance notice to an employee if they are to be dismissed. Minimum notice periods prior to dismissal are set out in the Employment Standards Act, where they are calculated according to an employee's total years of service. The following chart shows the amount of notice, or pay in lieu of notice that an employee is entitled to, based on years of service in the ESA:

Length of Employment	Notice
Less than 3 months	None
More than 3 months, less than 1 year	1 week
1 year, but less than 3 years	2 weeks
3 years, but less than 4 years	3 weeks
4 years, but less than 5 years	4 weeks
5 years, but less than 6 years	5 weeks
6 years, but less than 7 years	6 weeks
7 years, but less than 8 years	7 weeks
8 years or more	8 weeks

Under the ESA, the only exceptions to these notice periods are that no notice is required if

you are fired or terminated with cause (see section 6.1.5); if you are temporarily laid off; or if there is a mass termination at your place of work.

Under the ESA, a mass termination occurs when an employer terminates the employment of 50 or more employees within the same four-week period. In that case, the notice periods are as follows:

Number of Employees Terminated	Notice
50 – 199	8 weeks
200 – 499	12 weeks
500 or more	16 weeks

Federally-regulated workers are protected under the Canada Labour Code. Here, those who have completed three consecutive months of continuous employment are entitled to two weeks of written notice, or two weeks pay in lieu of notice, subject to certain exceptions. There is no system of increased weeks of notice based on years of employment under the CLC.

As indicated earlier, if there is a contract of employment which provides for more generous notice provisions, then that contract would apply. The notice periods set out in the charts above are only the very minimum required by law.

6.1.2 Lay-off versus Termination

In some cases, your employer may not have enough work for you, and lay you off. Depending on the circumstances, this may or may not be the same as being terminated, and you may or may not be entitled to notice, or pay in lieu of notice.

The ESA defines a "temporary lay-off" as a situation where an employer cuts back, suspends or stops your employment without permanently ending it. Your employer is not required to give you any notice of a temporary lay-off. To be considered temporary, the lay-off must not last longer than 13 out of any period of 20 consecutive weeks. A temporary lay-off could also last up to 35 weeks out of any period of 52 consecutive weeks, but only if you continue to receive "substantial" payments from your employer, or you are receiving payments under an EI sub-plan that tops up your EI benefits. For unionized employees under a collective agreement, it is possible that a temporary lay-off could be longer than 35 weeks if your employer recalls you within the time frames in the collective agreement (see section 6.2, below)

In general however, any lay-off that does not meet these criteria would be considered termination, and if the employer did not provide notice of termination, you would be entitled to pay in lieu of notice.

For federally-regulated employees, the CLC also defines what is a temporary lay-off versus termination. A lay-off is temporary (and therefore does not require termination notice, pay or severance pay) where:

- it's because of a strike or lock-out;
- it's for 12 months or less and it's mandatory under the minimum work rule in the collective agreement;
- it's for three months or less;
- it's for more than three months and your employer:
    - tells you in writing at or before the lay-off that you will be recalled on a set date, or within a set period no more than six months from the date of the lay-off; **and**
    - recalls you within those time frames.
- It's for more than three months and:
    - your employer continues to

pay you money through this period in an amount you have agreed to;
    - your employer continues to pay to your pension or group insurance plan;
    - you get payments under an employment insurance sub plan; or
    - you would be entitled to get payments under a supplementary plan but are disqualified for them under the EI legislation;
- it's for more than three months and less than 12 months and you maintain recall rights under a collective agreement through the whole period.

Any other lay-off that doesn't meet these terms under the CLC would automatically be considered a termination.

6.1.3 Severance

Severance is the general term used to describe when the relationship between an employer and employee ends. When employment ends, it is said to be "severed". Severance pay, or severance packages, are terms used to describe the general concept of compensating workers for loss of seniority or employment benefits when their employment is severed.

Under the ESA, employment is "severed" when the employer:

- dismisses or stops employing someone, including in cases of bankruptcy or insolvency;
- "constructively" dismisses the employee and the employee resigns in response within a reasonable period of time;
- lays the employee off for 35 weeks or more in any period of 52 consecutive weeks;
- lays the employee off because all of the business at an establishment is permanently discontinued; or
- gives the employee written notice of termination and the employee resigns after giving two weeks' written notice, and the resignation takes effect during the required notice of termination period.

Many people mistakenly believe that they are eligible for severance pay or severance packages. While this may be the case for some individuals, in fact the basic employment protections and rules about severance are fairly limited.

To qualify for severance pay under the ESA, an employee needs at least five years of employment with an employer who has an annual payroll in Ontario of 2.5 million dollars or more. One exception to this rule happens where 50 or more employees have been terminated within a four week period (due to permanent discontinuance of all or part of a business). In this case, employees with at least five years service can qualify for severance even if the company does not meet the usual payroll threshold.

Severance pay under the ESA is calculated according to one weeks' regular wages or salary for each year or part year of employment, to a maximum of 26 weeks. Severance pay is in addition to any eligibility for termination pay.

The CLC also has some basic severance entitlements for federally regulated employees. Under the CLC severance pay is available where an employee has completed at least 12 months of employment with the same employer. The amount of severance pay is equal to two days regular wages for every completed year of service, or for five days wages in total, which ever is greater.

It is important to remember that even for those who are entitled to it, severance pay is not available to any employee who resigns or otherwise terminates his or her own employment. It is also not available if you are terminated or fired with cause (see section 6.1.5 for more information).

6.1.4 Constructive Dismissal

Constructive dismissal happens where there is a change in your employment that is so serious that you consider that you've been terminated or fired from the job you had before the change. You might experience constructive dismissal if significant changes in your employment are forced on you by your employer. The change must be about a fundamental term of the employment contract, and you must resign within a reasonable time because of the change. For example, your employer tells you that you are not terminated, but if you want to keep your job you're going to have to work from a different location three hours away. Other changes which could be considered might be changes in wages (usually a reduction in pay), changes in job responsibilities or working conditions.

In order for changes to amount to constructive discrimination they have to be more than trivial. Having the start time of your job move from 9 a.m. to 7 a.m. would probably not be considered enough to be a constructive dismissal. You cannot argue constructive dismissal if, as an employee, you agree to accept the changes. This is why it is important to seek legal advice quickly if you are presented with a fundamental change in your employment situation. If you simply accept the change and later claim that you were constructively dismissed, you will have the additional problem of having to explain why you accepted the change at first.

In situations of constructive dismissal, it's up to you to show that the change created a situation that an objective person would find unreasonable, unfair and impossible given all the circumstances and facts. You do not have to prove that the employer intended to create a situation that would make you leave. You would only have to show that the employer did something that caused a fundamental change in the terms of employment that caused you to leave.

PHAs often wonder whether significant changes in the terms of employee benefits might be enough to argue constructive dismissal. Say, for example, you are a PHA working for a company which has excellent benefits, including 100% drug coverage and very generous short term and long term disability packages which is one of the main reasons you work there. At one point the employer changes insurance carriers and your benefits are changed. Drug coverage is now only 70/30, there is no short term disability package and the LTD has been reduced. You could certainly argue that this was a change to a fundamental term of the employment contract – the benefits are part of what you earn for working. The difficulty with constructive dismissal situations, however, is that in order to argue that you have been constructively dismissed, you have to take the position that the job is no longer the one you had and that you had to leave it, which means losing access to the reduced benefits as well.
Constructive dismissal claims can be difficult to argue and quite complicated. It is often only employees who have access to resources to support themselves during the time that they are making a claim for constructive dismissal who are able to pursue any kind of remedy.

Chances are, if you lose your job as a result of discrimination based upon your HIV/AIDS status, it occurred in a subtle, covert manner, like a constructive dismissal. In such cases,

you have recourse to legal remedies under the concept of constructive dismissal. Constructive dismissal claims could be argued in court as a law suit, or they could form the basis of a human rights complaint, as in the example below:

CASE STUDY: Canadian Pacific Ltd. v. Canada (Human Rights Comm.) and Fontaine
Mr. Fontaine was HIV positive and working as a cook for a Canadian Pacific railroad gang. Once news of his positive status spread throughout his workplace, some refused to eat the food he prepared while his superior expressed concern about safety for other workers. Since these circumstances lead Mr. Fontaine to leave his job, a federal human rights tribunal found in a hearing that he had been constructively dismissed – even though Mr. Fontaine had not been expressly fired or threatened with dismissal.

6.1.5 Just Cause

As mentioned at the beginning of this section, it is in fact very easy for you to be terminated. For non-unionized employees, your employer doesn't need a reason to terminate you, provided that he or she has given you the right amount of notice, or termination pay in lieu of that notice.

Of course, it is also possible for your employer to fire you "with cause". This means that the employer believes you did something wrong and that you should be terminated as a result. Being fired "with cause" has a significant impact for employees. In addition to losing a job and the pay and benefits that go with it, being fired for cause also makes you ineligible for EI benefits, and can also make you ineligible for social assistance from Ontario Works for three months from the date you were fired.

In Ontario, the ESA says that "cause" can include willful misconduct, disobedience or willful neglect of duty. Things like not showing up for work, not doing your job or ignoring or going against the instructions of your employer could all be seen to be misconduct, disobedience or neglect. Dismissal for cause can also include criminal conduct, harassment or some kinds of incompetence. Dismissal because of 'downsizing' or redundant positions would not be dismissal for cause.

In situations where an employee is being fired with cause, the focus is on the conduct of the employee. As a general rule, terminating an employee for cause is usually not based on performance but more on whether there is a history of misconduct, or a very serious single incident. If a case were to go to court, the employer would have to show that is more probable than not that the misconduct occurred.

6.1.6 Wrongful Dismissal

Wrongful dismissal is a term used to describe situations where someone is fired from their employment unfairly. Many people who are legally terminated under the ESA or CLC may in fact believe that they have been "wrongfully dismissed". Terminations of employment that are disputed can be addressed through a number of different mechanisms. If the termination is believed to have been because of a ground that is protected under the Ontario Human Rights Code, then there might be a remedy by filing a human rights complaint. For example, if a PHA was terminated because of absenteeism and lateness, but the employer had failed to accommodate the PHA's disability, a human rights complaint could be filed. Some wrongful dismissal issues are best dealt with by filing an employment standards claim. For example, if a PHA is let go from her job of six

years, but only given two weeks termination pay, she can file an employment standards claim to get the six weeks of termination pay to which she is entitled. Finally, some situations may need you to sue for wrongful dismissal in court.

Since wrongful dismissal is not covered by the ESA, except for requiring minimum notice payments, an employee must go to court to claim damages from wrongful dismissal. Where the dismissal involves discriminatory actions or conduct by the employer or co-workers, an action for wrongful dismissal may be brought against the employer. If you must bring an action against your employer for failure to give notice, the Court will consider such things as the nature of your job, length of service, your age, and the availability of similar employment, in order to determine a reasonable length of notice to which you are entitled. The actual amount of damages you receive will be calculated based upon the salary and benefits you would have received during the notice period. Any income you may have earned over that same period, however, will be deducted from that amount, and employees are expected to "mitigate" their damages – meaning that they are expected to look for and accept other comparable work in order to minimize the harm they suffer as a result of the dismissal.

Suing in court can be a complicated process and should not be started without getting some basic legal advice about the details of your case. This is because starting a claim in court for wrongful dismissal means you are not allowed to pursue any claims related to the same termination or severance under the Employment Standards Act.

More detailed information about wrongful dismissal claims can be found in section 8.5 of this chapter.

The CLC, on the other hand, contains a section specifically dealing with the concept of "unjust dismissal". Unjust dismissal protections are available to any federally regulated employee who has worked a minimum of 12 consecutive months for an employer, and is not covered by a collective agreement, with the exception of managers. Lay-offs due to lack of work, or discontinuance of the business are not considered unjust dismissals.

The policies surrounding employment legislation for federally regulated employees also discusses the concept of "progressive discipline" in cases where the employer is concerned about your work. Progressive discipline means that your employer is expected to let you know that there are problems or issues with your work and to work with you to find ways to improve it. As a general rule, it is only after applying the principles of progressive discipline that an employer would be justified in terminating you with cause under the CLC. As discussed below, whether or not an employer undertook progressive discipline will have an impact on determining if you have been unjustly dismissed.

6.1.7 What you should get paid and when

In cases of termination, both the ESA and the CLC set out the rules about what you should get in terms of notice and pay, and when your employer is required to provide it. Both pieces of legislation also create a process for you to enforce your rights.

If your employer gives you notice of termination, as a general rule they will either expect you to work out the notice period, or pay you termination pay equal to the pay you would have received if you had worked through the notice period. Under the CLC, the notice rules are very basic, and only

provide for 2 weeks of notice, or pay in lieu of notice. As discussed above, under the ESA, the period of notice (or the amount of pay in lieu of notice), would depend on the length of time you worked there. Finally, the notice period, or the amount of termination pay may be more than (but in no cases should be less than) what is required under the legislation if there is a contract of employment or a collective agreement.

In the case of termination, however, there are usually other amounts which should be paid to you as well. The most common of these is vacation pay. Under the ESA and the CLC, employees are entitled to vacation pay of 4%. Under the CLC, federally regulated employees are entitled to 6% vacation pay after completing six years of employment with the same employer.

When you are terminated, you should receive a payout of any vacation pay owing to you. Vacation pay is calculated using your "gross wages" over the year. The ESA specifically says what is included in gross wages and what is not. Vacation pay is calculated as 4% of:

- regular earned wages, including commissions;
- bonuses and gifts that are non-discretionary or are related to hours of work, production or efficiency
- allowances for room and board
- overtime pay
- public holiday pay
- termination pay

The calculation for vacation pay does not include the following:

- tips and gratuities
- discretionary bonuses and gifts that are not related to hours of work, production or efficiency (like a Christmas bonus unrelated to performance);
- expenses and traveling allowances
- contributions made by en employer to a benefit plan and payments from a benefit plan that employees are entitled to.

As a general rule, if you are terminated vacation pay and other monies owing to you must be paid out either within 7 days of the termination of employment, or on what would have been your next pay day, whichever is later. In cases where you may have already received part of your vacation pay for a given year at the time of termination, the employer is required to pay out to you the balance of vacation pay owed to you.

Finally, it is important to ensure that your termination pay is properly calculated. There are certain rules regarding how that pay is calculated because it is based on your earnings in a period of time immediately before your termination. Under the ESA, if you are given notice of termination, your employer is not allowed to reduce your wages or your rate of pay during the notice period. The employer is required to pay you your regular wages for a regular work week for the notice period. Regular wages means your regular pay, but does not include overtime, vacation, public holiday, premium termination or severance pay. Regular work week is the hours you regularly work each week. If you do not have a set number of hours in a week, then your termination pay is based on the average amount of regular wages you earned per week for the weeks you worked in the 12 weeks before the notice was given to you.

The rules about severance pay are very similar under the ESA. This means that normally, severance pay is owed to you 7 days after the termination of employment or on your next pay day, whichever is later. However, in the case of severance pay, the ESA says that you can agree in writing with your employer to have the severance pay paid out to you in installments over a maximum period of three

years. If, however, the employer misses a scheduled payment, you are entitled to have all of the balance paid out to you at that time.

6.1.8 The Record of Employment (ROE)

The Record of Employment, or ROE, is a very important document for employees who experience an interruption in earnings. An interruption in earnings can include being terminated, having to stop work because of illness or injury, or experiencing a drop in income because of illness of 60% or more. Employers are required to produce Records of Employment under the regulations of the Employment Insurance Act. The ROE contains information about when you started your employment, when you ended your employment, and what your regular pay is. The ROE also contains a section where the employer states the reason for the interruption in earnings. This is the information which is used to determine whether or not you are eligible for income support benefits from Employment Insurance, and is usually a key source of information when looking at disputes about termination.

The EI legislation says that the ROE must be provided to the employee within 5 days of the interruption in earnings, or within 5 days of the employer becoming aware of the interruption in earnings. Employers are supposed to provide one copy of the ROE to the employee, one copy to the Employment Insurance Commission and keep one copy on file.

One very common problem experienced by employees is when the employer fails to provide an ROE on time. This can often create long delays for employees and problems because of an interruption in income. You should always ask your employer for an ROE as soon as your job is terminated. It's also important to keep a record for yourself of your attempts to get the employer to issue the ROE.

If your employer has not provided you with an ROE within the time they are allowed, don't wait to apply for other benefits you may be entitled to. Waiting too long could mean that you end up losing some weeks of benefits. If you have been unable to get an ROE, you can provide a statement to EI containing evidence of your hours of insurable employment and your insurable earnings, as well as your attempts to get the employer to issue an ROE. One of the easiest ways to do this is to provide copies of your pay stubs.

6.2 Unionized Employees

About 28% of employees in Ontario are unionized. As a general rule, unionized employees enjoy much greater job security than do non-unionized employees. Unionized employees are collectively represented by their union in negotiations with the employer. The action of negotiating the terms and conditions of employment between the union and the employer is called "collective bargaining". In Ontario, the operation of unions is subject to the Labour Relations Act. The LRA contains the rules about the how unions get bargaining rights (get certified) and the ways in which trade unions and employers engage in collective bargaining.

Unionized jobs are generally better protected and the relationship and rules established between an employer and the employees are contained in a document called the "collective agreement". Collective agreements generally spell out quite clearly and specifically what the rules are with respect to dismissals, terminations and lay-offs. Collective agreements also set out the rules with respect

to wages, seniority, and benefits. It is usually harder for an employer to terminate the employment of a unionized employee than a non-unionized employee who only has a right to the minimum notice set out in the relevant employment standards legislation (ESA or CLC).

When dealing with employment-related problems, the main difference between unionized and non-unionized employees is the existence of a collective agreement. Even if you are not a member of a union, you may be subject to a collective agreement, if there is one governing your workplace. The collective agreement takes the place of the basic rights contained in the ESA (or the CLC for federal employees), and is the way in which the problems are addressed. Unionized employees are expected, and usually required, to first bring up the problem they are experiencing with a representative of the union. This is the process called "grieving" or "filing a grievance".

When talking about termination, the rules about how much notice you get, what termination pay is, and whether or not you are eligible for severance pay is all contained in the collective agreement. If you feel that the employer is not living up to its obligations under the collective agreement, your first step is to speak with a union representative. They will advise you of what steps to take, and can help you start a grievance.

A more detailed discussion of the process is provided below, in section 8.3. If the early stages of addressing the issue are not successful, the issue you are grieving may be referred for arbitration.

Generally, an employer is not permitted to fire a unionized employee for a single incident of misconduct. Appropriate warnings must be given in writing, coupled with progressively more severe forms of discipline. Based on this practice of "progressive discipline", your employee records should reflect incidents of increased seriousness that culminates in a final incident, which must also be deserving of discipline.

The employment of a unionized employee may be terminated for reasons unrelated to misconduct or poor performance, such as mandatory retirement. Firing for no justifiable reason may also occur in cases of incapacity of the employee due to illness or injury. Since one's HIV/AIDS status may in fact affect employment capacity, termination may legitimately occur if you are no longer fit to carry out your employment duties. The Ontario Human Rights Code still has precedence over the terms of a collective agreement, however. Therefore, if there is an issue with respect to a PHA having difficulty doing his or her job, the employer is still under a legal obligation to accommodate his or her disability to the point of undue hardship. Only if you cannot be accommodated can the employer then terminate you because of your disability.

The collective agreement also sets out when an employee can be fired for a justifiable reason, or what is known as "just cause". If you are fired for just cause, your employer is not required to provide you with compensation. Some common grounds for termination of employment for just cause include insubordination, dishonesty or sexual harassment.

Cases of wrongful dismissal of a unionized employee may be referred under the terms of the collective agreement to arbitration, as described above, where representatives of the union and the employer make arguments before an arbitrator, who in turn makes a decision about the employee's claim against the employer.

7. Employment Insurance

Employment Insurance (EI) is a federal insurance plan that provides some income support during periods of unemployment. Most people pay into the EI plan during periods of employment. You accumulate hours of "insurable employment" when you are working and paying into the plan. In order to access benefits from the plan, you must meet the eligibility rules, including having made enough contributions.

7.1 Types of EI Benefits

There are a number of different types of EI benefits which may be available to help you financially if you find yourself out of work, or unable to work for periods of time. EI benefits include financial support for periods of unemployment (EI regular benefits), as well as a collection of benefits known as "special benefits". Special benefits include EI sickness benefits, EI maternity and parental benefits, and EI compassionate care benefits. Each of these types of benefits is described in greater detail below.

7.1.1 EI Regular Benefits

You are entitled to employment insurance regular benefits provided you have worked a minimum of 420 to 700 insurable hours in the last 52 weeks, depending upon where you live and the unemployment rate in your area at the time of filing your claim. As is commonly known, contributions to the EI plan are made through deductions from your pay in the form of employment insurance premiums, which in 2004 amount to $1.98 for every $100 of salary up to a $39,000. The maximum EI contribution any person would make in any tax year is $772. In addition to the amounts deducted from your pay, your employer makes a contribution on your behalf of 1.4 times your contribution (in 2004 this amounts to $2.77 per $100 of insurable earnings). By contributing such premiums during your employment, your hours worked qualify as insurable hours and thus allow you to be eligible for EI benefits.

As a general rule, EI regular benefits are available if you qualify and you find yourself without work through no fault of your own. If you are fired from your job because of your own misconduct, you are not eligible to receive benefits. (In such instances you must again work the required minimum number of insurable hours in order to receive regular benefits.) Likewise, you will not be paid regular benefits if you voluntarily quit your job without just cause. However, you may be eligible for sickness, maternity or parental benefits even if you quit your job provided you have enough insurable hours to qualify for these benefits.

Employment insurance benefits may be received from fourteen (14) weeks to a maximum of 45 weeks, depending upon the unemployment rate in your area at the time you file your claim and the amount of insurable hours you have accumulated in the last 52 weeks or since your last claim (whichever is shorter). You are entitled to receive up to 55% of your average insured earnings, up to a maximum of $413 per week. You should note that these payments are subject to provincial and federal taxes, and these taxes will be deducted from your EI benefits before they are paid to you. If you belong to a low-income family earning an income of less than $25, 921 and are in receipt of the "Child Tax Benefit", you may receive a higher benefit rate which can include the "Family Supplement".

You should immediately apply for EI benefits once you have stopped working and provide a copy of your "Record of Employment" ("ROE") from your employer, which serves

as proof of your employment period and rate of pay. If within fourteen (14) days of your last day of work you still have not received your ROE, then submit an EI application along with proof of your employment, such as pay slips, T4 slip or a work schedule. Be careful to file your claim immediately as waiting past four weeks may result in a loss of eligibility for benefits. If you encounter difficulties obtaining your ROE from your employer, contact your local Human Resources of Canada Centre (HRCC) office where you will be asked to explain your efforts in this regard and provide alternate proof of employment. The HRCC office can contact your employer on your behalf and temporarily calculate your EI claim, provided they can determine whether your employment was insurable.

For detailed steps on filing your EI claim you should visit your local HRCC office to obtain an EI application or submit one via the internet at www100.hrdc-drhc.gc.ca/ae/ei/dem-app/English/home2.html.

Once your application has been approved and processed, you must serve a two-week waiting period before you receive your benefits. Note that any earnings during this period, or throughout receipt of benefits, may be deducted from your claim.

It is also important to note that as a condition of receiving EI regular benefits you will have to submit regular claimant reports confirming that you continue to be ready, willing and able to work, and reporting any income which you may have earned during the time you have been getting EI. This also means that you are not allowed to receive EI regular benefits when you are outside of the country. These reports can now be filed either online, or by telephone using the telephone access code that is printed on the first benefit statement that you receive after applying for benefits.

7.1.2 EI Sickness Benefits

You may be eligible for sickness benefits, often called EI Sick, if illness, injury or quarantine prevents you from working. To be eligible for sickness benefits you must show that your regular weekly earnings have fallen by more than forty percent (40%) and that you have accumulated at least 600 insurable hours over the past year (or since your last EI claim). To apply, submit an EI application on-line or in person at an HRCC office as soon as you stop working along with proof of employment, and forward your Record of Employment once it is received. You must also include a medical certificate, which confirms that you are unable to work because of your illness, injury or quarantine, **and** that you would otherwise be available for work. Once again, delays in filing your application may result in a reduction of your benefits by up to forty percent (40%).

Sickness benefits may be received for up to 15 weeks, following the two week waiting period. The two week waiting period can be waived if you receive sick pay from your employer following your last day worked. (In certain cases, you may actually receive a combination of sickness, maternity or parental benefits up to a maximum of fifty (50) weeks. Contact your local HRCC office to determine whether you are eligible and how to calculate your benefits entitlements.) As with regular EI benefits, any earnings made or allocated during the waiting period will be deducted in the first three weeks of payment of your benefits. If you work while receiving sickness benefits any earnings you receive will be deducted dollar for dollar from your benefits. The following earnings will not affect any type of EI claim: disability pensions from Canada and Quebec plans; workers' compensation payments from a permanent settlement; supplemental insurance benefits under a

private plan approved by HRDC for sickness benefits, supplemental payments to maternity or parental benefits provided by employer, private sickness or disability wage-loss insurance, retroactive raises in your wages or salary.

You do not have to submit claimant reports when receiving EI sickness benefits, provided you have signed a declaration of exemption at the time you make your application for benefits. However it is important to remember that you do still have an obligation to report any earnings during this period. You are also not allowed to receive EI Sick benefits outside of the country, unless you are out of the country to receive medical care that is not available to you here.

7.1.3 EI Maternity/Parental Benefits

EI Maternity benefits are available to the birth mother of a child for up to 15 weeks. The benefits can start as early as 8 weeks before the expected due date of the child, or starting in the week the child is born. Maternity benefits are not available to an adoptive mother. EI parental benefits are available to either biological or adoptive parent of a child, provided they have met the minimum requirement for insurable hours. EI Parental benefits can be paid for a maximum of 37 weeks. One parent can take the whole 35 weeks, or they can be shared between the parents, as long as each parent has made enough contributions.

You do not have to submit claimant reports when receiving EI maternity or parental benefits, provided you have signed a declaration of exemption at the time you make your application for benefits. However it is important to remember that you do still have an obligation to report any earnings during this period.

7.1.4 EI Compassionate Care Leave

The EI Compassionate Care benefit is a new benefit which came into effect in January 2004. The Compassionate Care benefit provides for up to 6 weeks of benefits to someone who has to be absent from work in order to provide care or support for a family member who is at risk of dying in the next six months. A family member means your spouse or common-law partner; your child or the child of your spouse or common-law partner; your parents; the spouse or common-law partner of one of your parents. Care and support means providing psychological or emotional support; arranging for care by a third party or providing or participating in the care yourself.

7.2 Qualifying for EI

As a general rule, in order to qualify for any of the EI benefits, you have to prove that you have met the minimum number of insurable hours of employment. For maternity, parental, sickness and compassionate care benefits, the minimum requirement is 600 hours of insurable employment in the last 52 weeks, or since your last claim ended.

All of these types of benefits also require that you serve a two week waiting period before benefits are payable. For this reason it is important that you make arrangements financially to cover this period.

You are not eligible for EI regular benefits if you quit your job or were fired with cause from your job – this means that if you were laid off or terminated from your job through no fault of your own, you could claim EI regular benefits. In addition, for EI regular benefits, you must be ready, willing and able to accept work in order to continue receiving benefits. For EI maternity, parental and

compassionate care benefits, you must be otherwise able to work.

7.3 Applying for EI

It is possible to apply for all types of EI benefits online. You can also get the application forms at your local Human Resource Canada Centre. You can also call 1-800-206-7218. Some types of benefits will require additional documentation to prove eligibility. For example, for sickness benefits, you will have to provide a medical certificate completed by your physician and providing proof of your illness, injury or quarantine. You are responsible for paying any fee that the doctor charges for completing this form. You will also have to provide a completed Record of Employment (ROE) from your employer. Your employer is required by law to provide you with an ROE within five calendar days of the date your earnings are interrupted, or the employer becomes aware of the interruption of earnings. An "interruption of earnings" means being terminated, having to stop work because of illness or injury, or experiencing a drop in income because of illness of 60% or more. This document will be used by EI to confirm that you have met the minimum number of insurable hours in order to receive benefits. Finally, you will also have to provide EI with proof of your Social Insurance Number (SIN), and if your SIN starts with a 9, proof of your immigration status.

7.4 Appealing EI Decisions

It is generally possible to appeal decisions under the Employment Insurance Act. The EI appeals system is made up of several levels of appeal if you disagree with a decision that has been made about your eligibility for a benefit or the amount of your benefit. You can also appeal decisions about overpayments or penalties assessed against you.

The EI system has a two stage appeals process. The first level for all appeals is called the Board of Referees. In some cases, it is possible to appeal a decision of the Board of Referees to the Board of Umpires. Below is a very brief description of these processes.

Most community legal clinics and workers rights organizations have experience with EI related claims. It is a good idea to contact your local clinic or agency to discuss your options if you disagree with an EI claim. If you are close to the time limit for appealing and haven't been able to speak with someone about your claim, file the appeal anyway. It can be withdrawn later, but if you don't appeal within the time frame, you could lose your right to appeal.

The first level of appeal for EI matters is the Board of Referees. There is a time limit of 30 days from when you received notice of the decision in which to file your appeal with the Board of Referees. Appeals have to be made in writing, and should be sent to your local HRCC. There is a specific appeal form for this. However, even if you don't have an appeal form you can still write to the HRCC and tell them you want to appeal the decision. Make sure to include information about what decision you are appealing, your name, address, social insurance number and signature. If the 30 day period has passed, you can still appeal and request an extension of time. You will have to provide an explanation of why you missed the 30 day deadline. If HRSDC decides not to extend the time, there is no appeal.

Once you file your appeal, you will receive an Acknowledgement of Receipt letter back from the Board of Referees. This letter should also contain information about what sections of the legislation are being used to make the decision about your benefits. Some time later,

you will also be sent an "appeal docket" which is a booklet containing copies of all of the information used by HRSDC to make their original decision. The docket will also contain their notes about their reasons for the decision, as well as copies of your EI applications and correspondence with HRSDC. The docket will also come with a Notice of Hearing, which will tell you when and where your hearing will take place. Hearings are usually held in government office buildings, or local hotels or motels.

You are allowed to bring someone to the hearing with you to help you out. It could be a lawyer or advocate or a friend or family member. You are also allowed to bring witnesses with you, if you have them. The Board members will hear what you have to say and may ask you (and your witnesses if you have any) questions. They will not give you a decision at the hearing itself, but will usually send you a written decision within one to two weeks.

If you disagree with the decision reached by the Board of Referees, you may have the right to appeal to the Umpire. If you are going to appeal you must do it in writing and within 60 days of receiving the decision from the Board of Referees. There is an appeal form for the Umpire, but you can also appeal in writing. If you do not use the form, make sure you include your name, address and social insurance number as well as the reasons for your appeal.

Appeals to the Umpire are limited to certain kinds of issues. You can appeal a decision of the Board of Referees to the Umpire if you believe:

- You were not given a fair opportunity by the Board of Referees, or the Board did something beyond its jurisdiction;
- The board made a mistake in the law when deciding on your appeal
- The board was mistaken about the facts in your case

Generally, you cannot bring new facts into your appeal to the Umpire, unless it was impossible to have access to these facts before your appeal was heard by the Board of Referees.

The Umpire is usually a judge and has the power to change the decision of the Board of Referees or to order that the Board of Referees hear your appeal again.

8. Remedies for Employment-Related Problems

As discussed in the sections above, there are a number of different laws that create the rules and protections for employees who have employment-related problems. For PHAs, these problems can get quite complicated. Sometimes the best solution is to file a human rights complaint. Sometimes the best solution is to file a claim under the Employment Standards Act or the Canada Labour Code. If you are unionized, the first step is to bring the problem to your union representative.

The first step in addressing any employment-related problem is to figure our which set of rules applies to you. The first few sections of this chapter can help you to figure out whether you are covered under particular kinds of legislation. This section will discuss what steps are taken to enforce the rights you have as an employee.

8.1 Claims under the ESA

If you believe that your rights under the ESA have been violated, you have the right to file an employment standards claim. The most commonly filed claims have to do with unpaid wages or vacation pay, or termination and

severance pay.

Generally, you must file a claim for wages within **six months** of the date they were supposed to be paid to you. For example, your boss terminated you on January 3rd. She did not give you any notice and did not pay you termination pay. She also owes you vacation pay. Normally, you must file your claim with the Ministry of Labour before July 3rd.

There are a couple of exceptions to the six month rule. First, if the issue is unpaid vacation pay, the time limit for filing the claim is 12 months from the date that the vacation pay was due to be paid to you. Secondly, if the employment standards officer finds that your employer has violated the same rules under the ESA as the one you are complaining about, then you can recover wages related to the violations as far back as 12 months from the date that you filed your claim.

It is also possible, in some situations, for the time limits to be extended. If, for example, your employer misled you about your rights under the ESA and you didn't file a claim because of that information, and you filed a claim as soon as you found out you could, then the six or 12 month rule might be extended.

Finally, there is a time limit of two years in certain situations. The two year time limit applies to any of the non-monetary rules under the ESA. This means where the employer didn't meet their requirements under the ESA but it's not a requirement that involves money, like not giving enough time for meal breaks, or not providing a wage statement. The two year limit also applies to claims that are about reprisals. Reprisals are situations where your employer took some action against you because you tried to enforce your rights, or find out about your rights under the ESA; or took, tried to take or planned to take pregnancy, parental or emergency leave.

Claims under the ESA can be started by using an ESA claim form. These forms are also available through your local Ministry of Labour office, or by calling 1-800-531-5551.

When you contact a Ministry of Labour office about an employment standards matter, they will first ask whether you are unionized or covered under a collective agreement. If you are, you will be referred back to your union representative to grieve the problem under the collective agreement. If you have already tried this step, please see section 8.4, Non-Representation, below. The Ministry of Labour representative will also ask you whether you have started a court action against your employer about the same issue you are calling about. You cannot file an employment standards claim about a failure to pay wages or discrimination in benefit plans if you have already started a court action on these issues. You cannot file a claim about termination or severance pay if you have already started a wrongful dismissal action in court.

If you are in fact covered by the ESA and your issue is one that is handled by the Ministry of Labour your claim will be filed.

Normally the first step in investigating a claim is to determine whether you can resolve the problem yourself with your employer. This might happen through advice about what your rights are, and how to bring them up with your employer. The ministry staff person could also contact your employer to tell them a claim has been filed and see whether the issue can be resolved. If neither of these steps works, then the claim is assigned to an employment standards officer for a full investigation.

The investigation itself can be done by phone or in writing and could include "fact-finding" meetings with you, the employer or both. You have the right to bring someone with you to a meeting with the officer if you wish. At the end of the investigation, the employment standards officer will make a decision about whether or not the employer has violated the Employment Standards Act.

If the decision is that the employer has complied with the ESA, then you will get a written notice of that decision. If the decision is that the employer has not complied with the ESA, then the officer will tell the employer of its decision and tell them what they have to do to comply with the ESA. The employer can then voluntarily comply with the decision. The officer can also require the employer to post a notice about the ESA, and/or a copy of parts of the report that include the results of the officer's investigation or inspection.

If the employer doesn't voluntary comply the officer has the ability to make an order. There a number of different orders that can be made, depending on the situation:

- an Order to Pay Wages which says the employer must pay you wages owed to you;
- a Compliance Order which says that the employer has to start or stop doing something to comply with the ESA;
- a Notice of Contravention which orders the employer to pay a penalty for violating a part of the ESA;
- an Order to Pay Compensation and/or Reinstate, in cases involving Emergency Leave, Family Medical Leave, or Parental and Pregnancy leave and situations where you have been penalized for exercising or trying to exercise your rights under the ESA.

The ESA has some set limits on penalties and the amounts of compensation that can be ordered. First, in the case of wages owing, the employer standards officer cannot issue an order to an employer to pay wages for an amount more than $10,000 for an individual employee. Penalties, which can be assessed against employers who violate the ESA, are payable to the Ministry (and not to you). The limits on penalties are:

- up to $50,000 and/or 12 months in jail if the person is an individual;
- up to $100,000 if the person is a corporation;
- up to $250,000 if the person is a corporation and has been convicted of one offence under the ESA before;
- up to $500,000 if the person is a corporation and has been convicted of more than one offence under the ESA before.

8.1.1 Appealing an Employment Standards Officer's Decision

If you disagree with the decision taken by the employment standards officer, you have a right to appeal that decision to the Ontario Labour Relations Board. Technically, you are requesting the OLRB to review the officer's decision. Usually, in the case of employees, you are asking for a review of the decision of the officer not to make an order against your employer. You must appeal the decision, in writing, within 30 calendar days of being served notice of the officer's decision. Under the ESA, "served" usually means the day that the letter was sent to you. If you were advised by fax of the decision, it is the day the fax was received. The right to seek a review is available to both you and to the employer.

Appeals are submitted in a form called an "Application to Review" and are sent to the OLRB at 505 University Avenue, 2nd Floor, Toronto, Ontario, M5G 2P1. You are not required to send copies of your application to

the employer. The Board will do that for you. After your application is received by the Board, they will send you a letter acknowledging that your application was received.

The OLRB is a quasi-judicial administrative tribunal at arms-length from the Ministry of Labour (much like the Social Benefits Tribunal, the Ontario Rental Housing Tribunal or the Human Rights Tribunal). Their job includes reviewing decisions made under the Employment Standards Act. As mentioned above, they can review these decisions based on an application from you, or from your employer, or a director of your employer.

The first stage in the OLRB's process for review of decisions under the ESA is to assign a Labour Relations Officer to the file. The LRO's job is to attempt to resolve the issue through mediation. The LRO is a neutral party. Like mediators under the OHRC, they cannot be called as witnesses if the case ends up going to a hearing. And like the mediation process under the OHRC, everything which happens at mediation is confidential and cannot be used as evidence at a hearing. You are allowed to bring someone with you to the hearing, including a lawyer if you have one.

The LRO will contact you and try to set a time and place for the meeting. Meetings are usually held in one of the regional office closest to the workplace, or could be done by telephone. The LRO's job is not to make a decision in the case, but to see whether you and the employer can reach an agreement, or settlement. If you do reach a settlement, then the terms of the agreement are usually written down, and then turned into an order by the Board. If you don't reach an agreement in mediation, then the file is referred for a hearing before the Board.

If you do go to a hearing, you'll get a Notice of Hearing from the Board with a time and place for the hearing. No one will check with you beforehand to see if you are available. Just like at mediation, you have the right to bring someone with you, including a lawyer. But a lawyer is not provided for you. At the hearing, the Board will hear from both sides, and look at any evidence that is brought. They will normally not look at anything after the hearing, unless it's something that they specifically request at the hearing, but was not then available.

After the hearing, the Board will make a decision, and let you and the other side know what their decision is. There is no appeal from this decision, except for a Judicial Review, which is a process where you can ask the court for permission to have the Board's decision reviewed to see whether they made a mistake.

8.2 Claims under the Canada Labour Code

The Canada Labour Code applies in circumstances where federally-regulated employees are not covered under a collective agreement. The process for claims under the CLC is slightly different. Normally, claims, or complaints by employees under the CLC will focus on either the recovery of wages, or arguments about unjust dismissals.

First, there is no formal process for filing complaints about hours of work, vacation time and the other common areas of concern. Instead the CLC creates inspectors who have the right to investigate employers covered under the CLC and determine whether the correct amounts have been paid to you. The inspectors can initiate an inspection on their own, but they can also respond to inquiries from employees who believe that they are not getting what they are entitled to from their employer.

In cases which involve payment of wages, you can complain in writing to the local Labour Program office of HRSDC. There is no specific time limit set out in the legislation. If the inspector finds there are wages to be paid, or that there are no grounds for an order to pay wages, it will notify the parties in writing. In the case of an order, it will send an order to the employer telling him or her to pay you, with a copy to you. If the inspector finds that there are no wages owing to you, he or she will send you a notice in writing saying that they are not going to issue an order. The order or the letter to you will be served in person, or by registered or certified mail. If it's mailed to you, it is assumed that you got it on the seventh day after it was mailed.

If you disagree with the inspector's decision, you can appeal in writing, to the Minister. The appeal must be done within 15 days after the date you received the notice.

The minister can then appoint someone to act as a referee. The referee has the power to hold meetings, to require that you attend, to ask for information and evidence. The Referee can then make a decision about your case. Referees have the power to support, strike down or change the decision, or parts of the decision of the inspector, and award costs in the proceedings.

There is no set time frame in the legislation for how long a referee has to undertake the review and make a decision on your case. You will be notified in writing of the outcome. The decision of the referee is final and binding, meaning there is no further appeal.

In cases of unjust dismissal, you can request, in writing, a written statement from your employer which outlines the reasons for your dismissal. If you make this request in writing, your employer is required to reply to you within 15 days after you have made the request. If you are not satisfied with the reasons, you have the right to file a complaint alleging unjust dismissal at your local Labour Program office of HRSDC within 90 days of the dismissal. It's important to note that the deadline for filing the complaint is counted from the date of the dismissal and not the date that you receive a reply with reasons from the employer. If you have requested and not received a reply from the employer, and you are approaching the 90 day time limit, do not delay. File the complaint, and provide information about how and when you requested reasons from your employer and the fact that you have had no response.

Once your complaint is received, it is assigned to a Labour Affairs Officer (LAO). Like the process under the ESA, the first task of the LAO is to try to work out a settlement between you and the employer through mediation. Mediation is voluntary, but it is strongly encouraged. Also like other mediation processes, mediation under the CLC is confidential and cannot be used as evidence if the matter is not resolved at this stage.

If a settlement is reached at the mediation stage, the process ends at this stage. If, however, a settlement is not reached at the end of mediation the employee can request that the complaint be referred to an adjudicator.

It is up to the Minister of Labour to decide whether or not a complaint about unjust dismissal will be referred to an adjudicator. If an adjudicator is appointed, a date is set for a hearing. It is usually up to the employer, at such a hearing, to prove that the dismissal was justified. At the conclusion of the hearing, the adjudicator has the power to order your employer to reinstate you with or without compensation for lost wages; pay you compensation for lost wages without reinstating you; or do anything fair to remedy the consequences of the dismissal, like clear

your employee record or pay your legal costs.

The decision of an adjudicator is final and binding. There is no process for appealing it.

8.3 Grieving with your Union

For unionized employees covered by a collective agreement, the process for addressing problems with your employer is different than the situations above. If you believe that a term of your collective agreement has been violated you should first speak with your union steward, or with a representative of the executive of your local. These are the individuals who are there to help you settle any disputes you may have with your employer.

If you are in any doubt about your rights, refer to your collective agreement. This document will not only set out the terms of the contract between you and the employer, but will also spell out the steps involved in cases of dispute. Unionized employees are always required to first address the issue through their union. This is why employees under a collective agreement are often told by the human rights commission or the employment standards office to go back to the union to settle the dispute.

A grievance is a written complaint against management about an alleged breach of the collective agreement or an alleged injustice. It is common for the grievance procedure to have several stages, with each moving to a higher level of union and employer representatives to try to find a solution. It is also common for the collective agreement to set time limits in which a grievance must be started (usually within a certain number of days of the incident being complained about). The collective agreement will also usually have time limits for each stage of the grievance process. Grievances can usually be filed by you, or by the union on your behalf.

If, after all the grievance procedures have been exhausted the dispute has still not been settled, then most collective agreements provide for a referral to arbitration. If the collective agreement does not provide for referral to arbitration, then it is deemed to do so under the terms of the Labour Relations Act.

Arbitration is where a third party is brought in to hear the issues involved in the dispute and to make a final and binding decision about what the resolution shall be. Arbitration can be by a single arbitrator, or an arbitration board with a chairperson. The Labour Relations Act also allows for the possibility of mediator-arbitrators whose first task is to seek a settlement through mediation and if that is not possible, to move to arbitration and make a decision about the dispute.

As mentioned above, the decision of an arbitrator or the chairperson of an arbitration board is final and binding. There is no appeal from this level of decision making.

8.3.1 Non-Representation

Every employee subject to a collective agreement has a full right to representation by the union where he or she believes that the terms of the collective agreement have been breached. In Ontario, the Labour Relations Act which governs the establishment of unions and collective agreements, says that unions who are entitled to represent employees in a bargaining unit have a "duty of fair representation". The legislation says that they shall not act in a manner that is arbitrary, discriminatory, or in bad faith.

Sometimes PHAs are reluctant to take up an issue related to their employment with the

union because they are concerned about discrimination not only from the employer but from the union or union representatives themselves. Sometimes they have tried to address the issue through the proper grievance mechanisms but the union or union representative will not take them seriously or follow through on the complaint.

In situations where the union has refused or failed to act on your behalf, it is possible to address this issue directly with the Ministry of Labour in Ontario with a claim of unfair representation. The same is true for the Canada Labour Code, which also places a duty of fair representation on the union and union representatives. In order to start this process it is usually a good idea to contact a local community legal clinic for basic advice, or to contact the Ministry of Labour directly with your complaint.

8.4 Wrongful Dismissal Claims

If you have been dismissed from your employment wrongfully, it may be possible to sue your employer for what is known as "wrongful dismissal". It is very important to get some legal advice if you believe that you have been wrongfully dismissed. This is because there are a number of different ways to proceed, and choosing one option might mean that other options are no longer available for you.

One very important consideration is that you are not allowed to file a claim under the Employment Standards Act and sue for wrongful dismissal at the same time, for the same incident. You must choose to do one or the other. If you decide to sue for wrongful dismissal, you will not be permitted to file an ESA claim. If you have started an ESA claim and then decide that you want to sue instead, you will have to withdraw the ESA claim within two weeks of filing it, or else your court action will not be able to go ahead.
The next important decision has to do with which court you use to sue your employer. Generally, if you are suing in court, there are two options: Small Claims Court or Superior Court of Justice. If your claim is for an amount up to $10,000 you should file the suit in Small Claims Court. The Small Claims Court has simple rules and is designed for people who do not have legal representation. The small claims process is set out in very clear steps in a publication called How to Make Small Claims Court Work for You. All the forms that are required to start a small claims court action are also available online, where you can print them out. At this point, it is not possible to fill them out online.

If the amount you are suing for is more than $10,000 you can proceed in one of two ways. First, you can sue in small claims court and waive the amount of your claim over $10,000. Secondly, you can sue in the Superior Court of Justice. Superior Court is more complicated than small claims and should not be attempted without legal advice.

If you are the person suing in small claims court, you are called a "plaintiff". The person being sued is called the "defendant". A claim is begun by filling out and filing a "Form 7A: Plaintiff's Claim", where you provide information about you, your employer and information about your claim. The filing fee is currently $50. The guide to the small claims court provides detailed instructions about what forms are required for various stages and how to fill them out.

It is not possible to bring a separate lawsuit that is based solely on a breach of the Ontario Human Rights Code or the Canadian Human Rights Act.

The proper procedure is to file a complaint with the relevant Human Rights Commission. However, in the case of a wrongful dismissal

that is based on HIV/AIDS discrimination, it has been possible to simultaneously bring a legal action for wrongful dismissal and a complaint with the Commission. It is also possible to bring a complaint to the relevant Human Rights Commission while maintaining an arbitration proceeding.

If you feel you have a complaint to bring to the Commission, you must do so within six months of the last incident of discrimination. You must also have a reasonable basis to support your claim and can not bring it forward with any intentions of bad faith. When bringing a complaint to the Commission, the first step that will be taken will be to resolve the issue informally between you and the other party through mediation. As mentioned earlier, it is recommended you refer to the chapter on "HIV/AIDS and Human Rights" for more details on filing complaints with the Commission. It is the policy of the Ontario Human Rights Commission to expedite HIV/AIDS related discrimination due to the need for urgency given the personal circumstances of potential complainants in such cases. The Commission will also initiate complaints related to discriminatory HIV/AIDS related policies or actions that come to its attention.

Of note, in addition to providing monetary compensation, you may request that the Commission seek additional remedies when bringing a complaint under the Ontario Human Rights Code. Such remedies include the implementation of an institutional policy of equal treatment of people who are living with HIV/AIDS, educational programmes, additional types of accommodation that are required.

9. Advocacy and Resources

Performing employment duties while living with HIV/AIDS can involve many issues including confidentiality, accommodation of fatigue or regular use of medication, leaves of absence, and others. These issues may be best dealt with through the inclusion of comprehensive HIV/AIDS policies within the workplace. A number of excellent resources, including sample polices on HIV/AIDS are available through the Canadian HIV/AIDS Information Centre. Successful implementation of potential HIV/AIDS-related policies and programmes, however, requires dialogues between employers, workers, government and workers infected or affected by HIV/AIDS and their representatives and advocacy groups. Some initiatives which can be steps in this direction include:

- Educating and training for people in the workplace through information dissemination, testimonials to encourage greater openness and provide better support to those affected;
- Creating a supportive working environment, including monitoring human rights violations; and
- Counselling and training for people living with HIV/AIDS to counter impact of stigma and discrimination and how to seek remedies for such.

Coupling HIV/AIDS policies in the workplace along with our basic entitlements under employment laws shows how both can help in successfully challenging issues of stigma and discrimination in the workplace. These laws and policies ensure that people living with HIV/AIDS are in a position to maintain self-sufficiency and human dignity.