Ontario

ESA Exemptions Toolkit: Information Technology Professionals

Prepared by the Ministry of Labour – Current to October 18, 2017

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Tab 1

Review of Special Rules and Exemptions under the Employment Standards Act, 2000: Information Technology Professionals

On May 30, 2017, the Government of Ontario announced that there would be a review of the regulatory exemptions and special rules under the *Employment Standards Act, 2000* (ESA). The first phase of this review is now underway.

The Ministry of Labour is seeking input on the current exemptions that apply to information technology professionals (IT professionals). The Ministry invites feedback from all interested stakeholders on the impact of the exemptions.

Other exemptions and special rules being examined in this phase of the review are as follows:

- Managerial and Supervisory Employees
- Residential Building Superintendents, Janitors and Caretakers
- Pharmacists
- Architects
- Residential Care Workers
- Homemakers
- Domestic Workers

This document outlines key information regarding the current exemptions applicable to IT professionals, the rationale for the current exemptions and additional background information that may assist you in responding to the Ministry of Labour's questions about the occupation. This document should be read together with the following documents also contained in this *Exemptions Toolkit*:

- ***Guide to the ESA and Bill 148*:** The document at **Tab 2** provides more detailed information about the minimum standards in the ESA from which IT professionals are currently exempt. The document also outlines proposed changes to the ESA that are contained in Bill 148, the *Fair Workplaces, Better Jobs Act, 2017* that are relevant to the occupation.

- ***Ministry of Labour Policy Framework*:** The Ministry of Labour has an established policy framework to address whether exemptions to the minimum standards in the ESA should be granted to an occupation or sector. The document at **Tab 3** provides an overview of the conditions and criteria that the Ministry uses in its analyses. These conditions and criteria will be applied to IT professionals in this exemptions review.

- ***Questions for Discussion*:** The document at **Tab 4** contains the questions that you should respond to through the Regulatory Registry website. These questions are designed to provide the Ministry of Labour with information that will facilitate an informed and balanced analysis of the exemptions applicable to IT professionals.

Who Is Covered by the ESA Exemptions Applicable to IT Professionals?

The exemptions applicable to IT professionals are found in O. Reg. 285/01, *Exemptions, Special Rules and Establishment of Minimum Wage*, which is one of the regulations of the ESA.

The term “information technology professional” is defined in O. Reg. 285/01 as an employee who is primarily engaged in the investigation, analysis, design, development, implementation, operation or management of information systems based on computer and related technologies through the objective application of specialized knowledge and professional judgment.

The exemptions were intended to apply only to those employees who work with “information systems” and “use specialized knowledge and professional judgment in their work.” The exemptions are not intended to apply to employees who perform routine tasks that do not require specialized knowledge and professional judgment.

The Ministry of Labour is aware that the IT professionals exemption is at times misapplied, either inadvertently or intentionally. For example, employees who appear to do routine computer support, maintenance and upgrading functions are sometimes incorrectly classified as “IT professionals”.

What ESA Exemptions are Applicable to IT Professionals?

The ESA provides the minimum standards for most employees working in Ontario. It sets out the rights and responsibilities of employees and employers in most Ontario workplaces.

As set out in O. Reg. 285/01, IT professionals are exempt from the following parts of the ESA:

- Part VII: Hours of Work and Eating Periods
- Part VIII: Overtime Pay

(See clauses 4(3)(b) and 8(l)) of O. Reg. 285/01.)

Prior Rationales for the ESA Exemptions and Background Information:

The exemptions applicable to IT professionals have been in place since 2001 and were created in response to requests by industry stakeholders.

Industry stakeholders have argued that timely support from information technology professionals is often needed to preserve the integrity of information technology systems and to prevent problems or deficiencies in their operation from becoming worse.

Employees who appear to do routine computer support, maintenance and upgrading functions, or have jobs such as designing computer games, are sometimes incorrectly told by employers that they fall within the definition of “IT professional”.

Other Canadian jurisdictions allow for exemptions from minimum employment standards for information technology-related work. For example, in Alberta, “information systems professionals” are exempt from maximum hours of work, rest periods, eating periods and overtime pay. In British Columbia, “high technology professionals” are exempt from hours of work, rest periods, eating periods, overtime and statutory holiday pay. In Nova Scotia, information technology professionals are exempt from overtime pay.

During the Changing Workplaces Review, Special Advisors Murray and Mitchell received submissions with respect to the existing exemptions applicable to IT professionals, but found

that the rationale for the exemptions remained unclear and concluded that the exemptions seemed overbroad.

In the Interim Report, the Special Advisors considered recommending the elimination or variation of the exemptions applicable to IT professionals without further review. In the Final Report, the Special Advisors noted that while further correspondence did not persuade them that the existing exemptions applicable to IT professionals were justifiable, the exemptions applicable to IT professionals presented sufficient complications that warranted a more careful review before any final decisions are made with respect to this occupation.

The Special Advisors' commentary can be located at:

- Pages 161, 164 and 166-68 of the Interim Report; and
- Pages 156-57 of the Final Report.

The Interim and Final Reports are available online at https://www.labour.gov.on.ca/english/about/workplace.

Notice to Consultation Participants

Submissions and comments provided are part of a public consultation process to solicit views on reforms to Ontario's employment and labour law regime that may be recommended to protect workers and support business in the context of changing workplaces. This process may involve the Ministry of Labour publishing or posting to the internet your submissions, comments, or summaries of them. In addition, the Ministry may also disclose your submissions, comments, or summaries of them, to other parties during and after the consultation period, including relevant regulatory bodies for professionals. Therefore, you should not include the names of other parties (such as the names of employers or other employees) or any other information by which other parties could be identified in your submission.

Further, if you, as an individual, do not want your identity to be made public, you should not include your name or any other information by which you could be identified in the main body of the submission. If you do provide any information which could disclose your identity in the body of the submission this information may be released with published material or made available to the public. However, your name and contact information provided outside of the body of the submission, such as found in a cover letter, will not be disclosed by the Ministry unless required by law. An individual who provides a submission or comments and indicates a professional affiliation with an organization will be considered a representative of that organization and his or her identity in their professional capacity as the organization's representative may be disclosed.

Personal information collected during this consultation is under the authority of the Employment Standards Act, 2000 and the Labour Relations Act, 1995, and is in compliance with subsection 38(2) of the Freedom of Information and Protection of Privacy Act.

If you have any questions regarding the collection of personal information as a result of this consultation you may contact the Ministry's Freedom of Information Office, 400 University Avenue, 10th Floor, Toronto, Ontario, M7A 1T7, or by calling 416-326-7786.

Tab 2

Guide to the *Employment Standards Act, 2000* and Bill 148, *Fair Workplaces, Better Jobs Act, 2017*:

Information for Information Technology Professionals

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I. Introduction

(a) Purpose

The purpose of this Guide is to provide an overview of the minimum employment standards of the ESA from which information technology professionals (IT professionals) are currently exempt. If the exemptions for IT professionals were eliminated, these are the standards that would apply.

The ESA already recognizes that some flexibility may be needed for employers and employees to agree to vary minimum standards, within certain limits. There are rules about the extent to which minimum standards can be varied, to ensure that parties are still meeting the general intent of the ESA. If the exemptions for IT professionals were eliminated, some variances would be available to IT professionals' employers and employees in applying the minimum standards of the ESA. The Guide explains this in more detail.

In addition, Bill 148, the *Fair Workplaces, Better Jobs Act, 2017* (Bill 148), proposes a number of significant amendments to the ESA that would, if passed, alter existing minimum employment standards or add new standards. The Guide describes where Bill 148 would implement changes to ESA standards that would apply to IT professionals if the exemptions were eliminated, and Bill 148 proposals that would introduce new ESA standards that would apply to IT professionals. Where Bill 148 proposes to amend provisions within Parts of the ESA that already apply to IT professionals, those changes are not summarized here.

Following public consultation after First Reading, Bill 148 was amended by Standing Committee on August 21, 2017. Bill 148 has passed Second Reading and has been referred to the Standing Committee on Finance and Economic Affairs. More information about the Bill and its status is available on the Legislative Assembly website at http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=4963.

Please monitor the status of Bill 148 as you prepare your submission to the Ministry of Labour.

The information in this document is current to October 18, 2017. Further amendments to Bill 148 after this date are not captured and, as a result, the accuracy of information regarding Bill 148 in this document is not guaranteed.

(b) The ESA

The ESA sets out the rights and responsibilities of employees and employers in most Ontario workplaces. The ESA establishes a "floor" of minimum employment standards with respect to the following major areas:[1]

[1] There are other standards with no exemptions, such as those dealing with payment of wages, equal pay for equal work and lie detectors, are not reviewed here.

- Maximum Hours of Work
- Rest Periods
- Eating Periods
- Overtime Pay
- Minimum Wage
- Public Holidays
- Vacation with Pay
- Pregnancy and Parental Leave
- Emergency Leave
- Other Leaves of Absence (Organ Donor Leave, Family Medical Leave, etc.)
- Termination and Severance of Employment

Currently, IT professionals are exempt from the following parts of the ESA:

- Part VII: Hours of Work and Eating Periods
- Part VIII: Overtime Pay

II. ESA Provisions from which IT Professionals are Currently Exempt

This section of the Guide is an overview of all of the minimum ESA standards from which IT professionals are currently exempt. Where Bill 148 proposes amendments to these standards, the proposed changes are identified in text boxes.

(a) Part VII: Hours of Work and Eating Periods

Part VII of the ESA (sections 17 to 21.1) establishes three general categories of hours of work standards: daily and weekly maximums on the number of hours that employees may work, mandatory periods of rest, and eating periods. Part VII also outlines circumstances in which employers and employees can agree to modifications of the minimum standards and when employers can require employees to work.

The hours of work standards recognize that employees need a balance between their work and personal/family lives. Limits on hours of work and mandatory eating periods also support the health and safety of workers, and higher value-added production per hour worked – well-rested, healthy individuals are more productive.

The relevant employment standards are as follows:

Daily Limit on Hours of Work:

The maximum number of hours most employees can be required to work in a day is eight hours or the number of hours in an established regular workday, if it is longer than eight hours. The only way the daily maximum of eight hours can be exceeded is by written agreement between the employee and employer.

Weekly Limit on Hours of Work:

The maximum number of hours most employees can be required to work in a week is 48 hours. The weekly maximum can be exceeded only if there is a written agreement between the employee and employer and the employer has received the approval of the Director of Employment Standards.[2]

An agreement between an employee and an employer to work additional daily or weekly hours, or an approval from the Director of Employment Standards for excess weekly hours, does not

[2] The ESA provides a limited exception where an application for approval from the Director is pending. If, after 30 days after serving an application for excess hours on the Director, the employer has not received an approval or notice of refusal, the employer may require employees to start working more than 48 hours as long as certain conditions are met including, the employee does not work more than 60 hours in a work week or the number of hours the employee agreed to in writing, whichever is less.

relieve an employer from the requirement to pay overtime pay where overtime hours are worked.

Rest Periods: Hours Free from Work – Daily:

In most cases, an employee must receive at least 11 consecutive hours off work each day. Generally, an employee and an employer cannot agree to provide an employee with less than 11 consecutive hours off work each day. The daily rest requirement applies even if:

- The employer and the employee have agreed in writing that the employee's hours of work will exceed the daily limit.

- The employer and employee have agreed in writing that the employee's hours of work will exceed the weekly limit and the employer has received an approval from the Director of Employment Standards to exceed weekly limits on hours of work.

This rule does not apply to employees who are on call and called in to work during a period when they would not normally be working.

This requirement cannot be altered by a written agreement between the employer and employee.

Rest Periods: Hours Free from Work – Between Shifts:

Employees must receive at least eight hours off work between shifts.

However, this rule does not apply if the total time worked on both shifts is not more than 13 hours. For example, Mabel works at a business that operates 24 hours a day. She is on split shifts, working from 6 a.m. to 11 a.m. and then from 2 p.m. to 7 p.m. The total time of her two shifts is 10 hours. Mabel does not have to have eight hours off between the split shifts, because the hours she worked do not exceed 13 hours.

An employee and employer can also agree in writing that the employee will receive less than eight hours off work between shifts.

Rest Periods: Hours Free from Work – Weekly or Bi-Weekly:

Employees must receive at least:

- 24 consecutive hours off work in each work week; or

- 48 consecutive hours off work in every period of two consecutive work weeks.

Requiring Employees to Work in Exceptional Circumstances:

In exceptional circumstances, and only so far as is necessary to avoid serious interference with the ordinary working of the employer's establishment or operations, an employer can require an employee to work:

- More than the normal limit of eight hours a day, or the established regular work day if that is longer;
- More than the 48 hours per week (or the greater number of weekly hours agreed to and which are the subject of an approval from the Director of Employment Standards);
- During a required period free from work.

Exceptional circumstances exist when:

- There is an emergency;
- Something unforeseen occurs that interrupts the continued delivery of essential public services, regardless of who delivers these services (for example, hospital, public transit or firefighting services, even if the employee only indirectly supports these services, such as an employee of a company that is contracted to prepare and deliver patient meals to a hospital);
- Something unforeseen occurs that would interrupt continuous processes;
- Something unforeseen occurs that would interrupt seasonal operations (that is, operations that are limited to or dependent on specific conditions or events--such as winter ski operations);
- It is necessary to carry out urgent repair work to the employer's plant or equipment.

Examples of exceptional circumstances include:

- Natural disasters (very extreme weather);
- Major equipment failures;
- Fire and floods;
- An accident or breakdown in machinery that would prevent others in the workplace from doing their jobs (for example, the shutdown of an assembly line in a manufacturing plant).

Examples of situations that do not fall under the exceptional circumstances exemption include:

- When rush orders are being filled;
- During inventory taking;
- When an employee does not show up for work;
- When poor weather slows shipping or receiving;

- During seasonal busy periods (such as Christmas);
- During routine or scheduled maintenance.

Eating Periods:

Employers are required to provide eating periods to employees, but they are not required to provide other types of breaks. Eating periods are scheduled by employers. Ensuring that employees have the right to eat at reasonable intervals is supportive of good health, and contributes to safety and productivity on the job.

An employee must not work for more than five hours in a row without getting a 30-minute eating period (meal break) free from work. However, if the employer and employee agree, the eating period can be split into two eating periods within every five consecutive hours. Together these must total at least 30 minutes. This agreement can be oral or in writing.

Meal breaks are unpaid unless the employee's employment contract requires payment. Even if the employer pays for meal breaks, the employee must be free from work in order for the time to be considered a meal break.

Note: Meal breaks, whether paid or unpaid, are not considered hours of work, and are not counted toward overtime.

Coffee Breaks and Breaks Other Than Eating Periods:

Employers are required to provide employees with eating periods as described above. Employers do not have to give employees "coffee" breaks or any other kind of break.

Employees who are required to remain at the workplace during a coffee break or breaks other than eating periods must be paid at least the minimum wage for that time. If an employee is free to leave the workplace, the employer does not have to pay for the time.

Night Shifts:

The ESA does not put restrictions on the timing of an employee's shift other than the requirements for daily rest and rest between shifts described above. In addition, the ESA does not require an employer to provide transportation to or from work if an employee works late.

Written Agreement Requirements for Exceeding Daily Limits on Hours of Work:

An employer and an employee can agree in writing that the employee will work more than eight hours a day or his or her established regular workday, if the established regular workday is longer than eight hours.

These agreements are valid only if, prior to making the agreement, the employer gives the employee the most recent Information Sheet for Employees About Hours of Work and Overtime Pay prepared by the Director of Employment Standards that describes the hours of work and

overtime pay rules in the ESA. In order to be valid, the agreement must include a statement in which the employee acknowledges receipt of the Information Sheet.

In most cases, an employee can cancel an agreement to work more hours by giving the employer two weeks' written notice, while an employer can cancel the agreement by providing reasonable notice.

Director Approval Required to Exceed Weekly Limits on Hours of Work:

An employer and an employee can agree in writing that the employee will work more than 48 hours a week, but the agreement is subject to approval by the Director of Employment Standards.

These agreements are valid only if, prior to making the agreement, the employer gives the employee the most recent Information Sheet for Employees About Hours of Work and Overtime Pay prepared by the Director of Employment Standards that describes the hours of work and overtime pay rules in the ESA. In order to be valid, the agreement must include a statement in which the employee acknowledges receipt of the Information Sheet.

In addition, employers who would like to make an application for approval for excess weekly hours are required to make their application in a form provided by the Ministry of Labour at Ontario.ca/ESAforms. An employer who makes an application for excess weekly hours must post a copy of the application in their workplace on the day the application is submitted where it is likely to come to the attention of the employee(s) identified in the application. When the approval or a notice of refusal of the application is received, this must be posted in place of the application.

In most cases, an employee can cancel an agreement to work more hours by giving the employer two weeks' written notice, while an employer can cancel the agreement by providing reasonable notice. Once the agreement is revoked, an employee is not permitted to work excess daily or weekly hours even if the employer has an approval from the Director of Employment Standards for excess weekly hours.

(b) Part VIII: Overtime Pay

Part VIII of the ESA (sections 22 to 22.2) establishes minimum standards regarding overtime.

This standard compensates employees for the extra effort of working long hours and for the inconvenience associated with the unpredictable need to work such hours. Generally speaking, overtime begins after an employee has worked 44 hours in a work week. Hours worked after 44 must be paid at the overtime pay rate.

Overtime Pay:

Overtime pay is 1½ times the employee's regular rate of pay. (This is often called "time and a half.") For example, an employee who has a regular rate of $12.00 an hour will have an overtime rate of $18.00 an hour ($12.00 × 1.5 = $18). The employee must therefore be paid at a rate of $18.00 an hour for every hour worked in excess of 44 in a week.

No Overtime on a Daily Basis:

Unless a contract of employment or a collective agreement states otherwise, an employee does not earn overtime pay on a daily basis by working more than a set number of hours a day.

Overtime is calculated only:

- On a weekly basis; or
- Over a longer period under an averaging agreement.

Agreements for Paid Time Off Instead of Overtime Pay:

An employee and an employer can agree in writing that the employee will receive paid time off work instead of overtime pay. This is sometimes called "banked" time or "time off in lieu."

If an employee has agreed to bank overtime hours, he or she must be given 1½ hours of paid time off work for each hour of overtime worked.

Paid time off must be taken within three months of the week in which the overtime was earned or, if the employee agrees in writing, it can be taken within 12 months.

If an employee's job ends before he or she has taken the paid time off, the employee must receive overtime pay. This must be paid no later than seven days after the date the employment ended or on what would have been the employee's next pay day.

Calculating Overtime Pay:

The manner in which overtime pay is calculated varies depending on whether the employee is paid on an hourly basis, on a fixed salary, or has a fluctuating salary. Overtime pay calculations may also be affected by public holidays. For more information about how overtime pay is

calculated in different scenarios, see the Ministry of Labour's Guide to the ESA, available at https://www.ontario.ca/document/your-guide-employment-standards-act.

Averaging Agreements:

Sometimes employers may need employees to work extra hours during a peak period in order to fill customer orders. Likewise, employees may need to work variable hours to meet family or other responsibilities. For example, perhaps an employee needs to take a child once a month for a day of special medical treatment, but cannot afford to lose a day's pay. Instead the employee would like to work extra hours in the preceding weeks, to make up the time.

An employer and an employee can agree in writing to average the employee's hours of work over a specified period of two or more weeks for the purposes of calculating overtime pay. Under such an agreement, an employee would only qualify for overtime pay if the average hours worked per week during the averaging period exceed 44 hours.

- For example, if the agreed period for averaging an employee's hours of work is four weeks, the employee is entitled to overtime only after working 176 hours during the four work weeks (44 hours × 4 weeks = 176 hours).

Note that averaging periods cannot overlap one another and must follow one after the other without gaps or breaks.

Where a union does not represent employees, averaging agreements must contain an expiry date that cannot be more than two years from the date the averaging agreement takes effect. Where the agreement applies to unionized employees, the employer and union may agree to any expiry date.

An averaging agreement cannot be revoked by either the employer or employee(s) before its expiry date, unless both the employer and employee(s) agree in writing to revoke it.

In addition to having agreements in writing, the employer must also obtain an approval to average hours of work for overtime pay purposes from the Director of Employment Standards.

If, however, an employer has not received either an approval or a notice of refusal from the Director within 30 days of serving the application on the Director and has met all other conditions as set out in the ESA, the employer may begin averaging employees' hours but only over two-week periods.

An approval to average hours of work for overtime pay purposes expires on the date on which the averaging agreement between the employer and employee expires, or on any earlier date specified by the Director in the approval. The Director of Employment Standards may also unilaterally revoke an approval to average hours of work by providing the employer with reasonable notice.

Employers who would like to make an application for an approval to average hours of work for overtime pay purposes are required to make their application in a form provided by the Ministry of Labour. The application form is available on the Ministry's website at Ontario.ca/ESAforms.

An employer who receives an approval to average overtime pay must post a copy of the approval in the workplace where it is likely to come to the attention of the employee(s) identified in the approval and to keep it posted until it expires or is revoked and then remove it.

What Cannot Be Done:

An employee can make an agreement to take time off in lieu of overtime pay or, with the approval of the Director of Employment Standards, an agreement to average hours of work for overtime pay purposes. However, an employer and an employee cannot agree that the employee will give up his or her right to overtime pay under the ESA. Agreements such as these are not allowed and the employee is still entitled to overtime pay.

In addition, an employer cannot lower an employee's regular wage to avoid paying time and a half after 44 hours (or another overtime threshold that applies) in a work week. For example, if Josée's regular pay is $15.00 an hour, her employer cannot drop her regular rate in a week when overtime was worked to $12.00 an hour and then pay her $18.00 (1½ × $12.00) for overtime hours worked instead of $22.50 (1½ × $15.00).

Bill 148 Proposals Relevant to IT Professionals:

There may be circumstances in which employees have jobs that require them to do more than one type of work and there are different rates of pay for the different kinds of work.

Bill 148 would amend section 22 of the ESA to establish a rule for calculating overtime pay for employees who have two or more regular rates for work performed for the same employer. For ease of administration, overtime pay of one and one-half times would be based on the regular rate for the type of work performed during the overtime hour(s), not on a blended pay rate, if an employee has more than one position.

For example, if an employee spent three hours of overtime performing work that had an hourly rate of $15.00/hour and two hours of overtime performing work that an hourly rate of $12.00/hour, then the employee's overtime pay would be: $67.50 (1½ × $15.00 x 3 hours) plus $36 (1½ × $12.00 x 2 hours), for a total of $103.50.

III. New Parts to the ESA Proposed in Bill 148 that would Apply to IT Professionals

Bill 148 proposes a number of changes to minimum employment standards that fall within Parts of the ESA that already apply to IT professionals. For example, under Part XIV, Leaves of Absence, Bill 148 proposes to split the current Crime-Related Child Death or Disappearance Leave into two separate leaves: Child Death Leave and Crime-Related Child Disappearance Leave. A new leave, Domestic or Sexual Violence Leave, is also proposed. Changes proposed in Bill 148 that concern standards that fall within Parts of the ESA that already apply to IT professionals are not set out in this document.

Bill 148 is currently in Second Reading Debate. More information about the Bill and its status is available on the Legislative Assembly website at http://www.ontla.on.ca/.web/bills/bills_detail.do?locale=en&Intranet=&BillID=4963.

In addition to the changes already described in the Guide, Bill 148 would introduce two new Parts to the ESA that would apply to IT professionals if the Bill becomes law. These Parts are:

- Requests for Changes to Schedule or Work Location – New Part VII.1 of the ESA; and
- Scheduling – New Part VII.2 of the ESA.

The new Parts are described below.

(a) New Part VII.1 of the ESA

Bill 148 proposes to add a new Part VII.1 (Requests for Changes to Schedule or Work Location) to the ESA. Employees would have the ability to request changes to their schedule or work location after they have been employed for at least three months. Employers who receive these requests would be required to discuss them with the employee and either grant them or provide reasons for denial.

(b) New Part VII.2 of the ESA

Proposed Part VII.2 (Scheduling) would establish minimum standards regarding scheduling. These provisions would come into force on January 1, 2019.

Three Hour Rule:

An employee who regularly works more than three hours a day and is required to report to work but works less than three hours, despite being available to work longer, is entitled to be paid a minimum of three hours' pay at the employee's regular rate. There would be an exception where an employer is unable to provide work for the employee because of fire, lightning, power failure, storms or similar causes beyond the employer's control that result in the stopping of work.

Minimum Pay for Being On Call:

An employee would be entitled to a minimum of three hours' pay at the employee's regular rate where the employee is either on call to work and is not required to work, or is required to work but works less than three hours, despite being available to work longer. An employee's entitlement would be limited to three hours' pay during a twenty-four hour period, beginning at the start of the first time during that period that the employee is on call (even if the employee is on call multiple times during those twenty-four hours). There would be transitional provisions for collective agreements that are in effect on January 1, 2019. A collective agreement provision that addresses payment for being on call would prevail over the on-call provisions in the ESA where there is a conflict between the provisions. The collective agreement provision would prevail until the earlier of the expiry of that collective agreement or January 1, 2020.

Right to Refuse:

An employee would have the right to refuse requests or demands to work or to be on call on a day that the employee is not scheduled to work or to be on call, if the request or demand is made with less than 96 hours' notice of the shift. The right to refuse would not apply if the employer's request or demand to work is to deal with an emergency, to remedy or reduce a threat to public safety, or for other reasons prescribed in a regulation. An employee would be required to provide the employer with notice of the refusal as soon as possible. There would be transitional provisions for collective agreements that are in effect on January 1, 2019. A collective agreement provision that addresses an employee's ability to refuse the employer's request or demand to perform work or be on call would prevail over the right to refuse provisions

in the ESA where there is a conflict between the provisions. The collective agreement provision would prevail until the earlier of the expiry of that collective agreement or January 1, 2020.

Cancellation of Shift:

An employee would be entitled to pay for three hours of work at the employee's regular rate in the event of cancellation of a scheduled shift or an on call shift within 48 hours before the shift was to begin. There would be an exception where an employer is unable to provide work for the employee because of fire, lightning, power failure, storms or similar causes beyond the employer's control that result in the stopping of work. There would also be an exception if the nature of the employee's work is weather-dependent and the employer is unable to provide work for the employee for weather-related reasons, or where the employer is unable to provide work for such other reasons prescribed in a regulation. There would be transitional provisions for collective agreements that are in effect on January 1, 2019. A collective agreement provision that addresses payment when the employer cancels the employee's scheduled day of work or on call period would prevail over the cancellation provisions in the ESA where there is a conflict between the provisions. The collective agreement provision would prevail until the earlier of the expiry of that collective agreement or January 1, 2020.

Limit on Entitlement:

An employee's entitlement under this new Part VII.2 in respect of one scheduled day of work or on call period would be limited to the employee's regular rate for three hours of work. This would prevent "double-dipping".

Tab 3

Ministry of Labour Policy Framework – Guiding Principles, Conditions and Criteria:

The basic premise behind the ESA is that all employees and employers, with limited exceptions, should be covered by the Act. As a result, a strong rationale is needed to exempt employees from the protections of the ESA. Doing so means that a particular group of workers will no longer have protections that are considered to be minimum standards in employment.

Exemptions also affect the competitive positions of employers – not only in the industries where they apply, but in other industries that compete for labour, capital and other resources with these sectors.

Despite the foregoing, there are situations where a standard cannot be applied to a particular industry or occupation for reasons that warrant an exemption from the ESA. In some cases exemptions are necessary for the optimal performance of the labour market and economy, and can contribute to social goals.

With the above considerations in mind, a rigorous process must be used to determine whether a reduction in fundamental employment protections is justified. The Ministry of Labour's established conditions applicable to industry or occupational exemptions are set out below. The conditions are consistent with the principle – supported by previous governments and the Special Advisors in the Changing Workplaces Review – that exemptions may be granted only in exceptional circumstances.

Governing Conditions and Criteria:

First, the occupation or industry must meet Core Condition A and/or Core Condition B.

> **Core Condition A:** The nature of work in an industry is such that it is impractical for a minimum standard to apply. Applying the standard would preclude a particular type of work from being done at all or would significantly alter its output. The work could not continue to exist in anything close to its present form.
>
> "Nature" of the work relates to the characteristics of the work itself. It does not relate to the quantity of work produced by a given number of employees. The relevant question is whether applying a minimum standard would hamper the viability of the tasks being performed?
>
> **Core Condition B:** Employers in an industry do not control working conditions that are relevant to the standard.

Second, if one or both of the Core Conditions is met, a further Supplementary Condition must be met.

> **Supplementary Condition:** The work provides a social, labour market or economic contribution that argues for its continued existence in its present form, even in the absence of one or more minimum standards applying to it.

Third, consideration must be given to two other factors before an exemption is granted or maintained:

1. The employee group to whom the exemption or special rule would apply be readily identifiable, to prevent confusion and misapplication of the exemption/special rule.

2. Both employees and employers in the industry agree that a special rule or exemption is desirable.

Tab 4

Questions for Discussion: Information Technology Professionals

Your responses to the questions below will assist the Ministry of Labour as it conducts its review of ESA exemptions applicable to Information Technology Professionals (IT professionals).

Before responding, we recommend that you consult the *Guide to the ESA and Bill 148*, as well as the *Ministry of Labour Policy Framework*. These documents contain additional background information that may help you prepare your answers.

In addressing the questions below, please keep in mind that the Ministry of Labour is seeking information regarding IT professionals who are employees.

Hours of Work, Eating Periods and Overtime:

1. How many hours do IT professionals typically work on a daily and weekly basis? If the response depends on the employment setting (e.g. an external client engagement, an internal IT department, etc.), please identify these differences.

2. What factors drive IT professionals' scheduled hours of work?

    - For example, how do professional standards and legislative requirements, employer scheduling practices, and client needs bear on IT professionals' scheduled hours of work?

3. To what extent do or can IT professionals structure their own hours of work?

4. How closely is an IT professional's performance or productivity linked to the number of hours spent working?

5. How much of the work performed by IT professionals takes place away from their employer's place of business and/or away from supervision by their employer?

6. To what extent do the duties of IT professionals' work regularly include the need to deal with unpredictable events, circumstances or demands arising from one or more of the following:

    - Client needs;
    - Workplace staffing;
    - Product perishability;
    - The nature of technology; and/or
    - The nature of the work process.

7. To what extent is continuity of involvement by a single IT professional required because of discretionary decision-making expertise or authority?

8. If IT professionals were subject to the hours of work, eating period and/or overtime requirements of the ESA, would the nature of the work performed by IT professionals change?

    - For example, would certain parts of the work performed by IT professionals be precluded altogether? Would the output of certain IT professionals be significantly altered? Would the work in its present form be fundamentally changed? Please elaborate.

9. The hours of work requirements of the ESA recognize the importance of work-life balance and mental health, and health and safety. How do IT professionals achieve this balance in light of the profession's current exemptions? Are there any specific concerns which the Ministry of Labour should be aware of that are related to the profession's current hours of work exemption in the ESA? (*Please note that all employers, regardless of any ESA exemption or special rule, are still required to abide by Ontario's occupational health and safety laws.)

10. What proportion of IT professionals work in remote workplaces that create challenges in transporting them to the worksite? Please elaborate.

Miscellaneous:

11. Is there any additional information about the profession that you wish to provide that may be relevant to the Ministry of Labour's exemptions review process with respect to IT professionals?

Notice to Consultation Participants

Submissions and comments provided are part of a public consultation process to solicit views on reforms to Ontario's employment and labour law regime that may be recommended to protect workers and support business in the context of changing workplaces. This process may involve the Ministry of Labour publishing or posting to the internet your submissions, comments, or summaries of them. In addition, the Ministry may also disclose your submissions, comments, or summaries of them, to other parties during and after the consultation period, including relevant regulatory bodies for professionals. Therefore, you should not include the names of other parties (such as the names of employers or other employees) or any other information by which other parties could be identified in your submission.

Further, if you, as an individual, do not want your identity to be made public, you should not include your name or any other information by which you could be identified in the main body of the submission. If you do provide any information which could disclose your identity in the body of the submission this information may be released with published material or made available to the public. However, your name and contact information provided outside of the body of the submission, such as found in a cover letter, will not be disclosed by the Ministry unless required by law. An individual who provides a submission or comments and indicates a professional affiliation with an organization will be considered a representative of that organization and his or her identity in their professional capacity as the organization's representative may be disclosed.

Personal information collected during this consultation is under the authority of the Employment Standards Act, 2000 and the Labour Relations Act, 1995, and is in compliance with subsection 38(2) of the Freedom of Information and Protection of Privacy Act.

If you have any questions regarding the collection of personal information as a result of this consultation you may contact the Ministry's Freedom of Information Office, 400 University Avenue, 10th Floor, Toronto, Ontario, M7A 1T7, or by calling 416-326-7786.