

ONTARIO LABOUR RELATIONS BOARD INFORMATION BULLETIN NO. 28

This Information Bulletin describes what happens when an employer, recruiter (or person acting on behalf of either), foreign national or director of a company applies for a review of a decision of an Employment Standards Officer under the *Employment Protection for Foreign Nationals Act, 2009* ("EPFNA").

A. Applications for Review under the Employment Protection for Foreign Nationals Act, 2009

If you disagree with a decision of an Employment Standards Officer, EPFNA provides that an Application for Review may be made to the Ontario Labour Relations Board ("Board"). An Application for Review may be made regarding three types of decisions:

- (i) an Order (for example, an Order to Repay Costs, an Order to Repay Fees, an Order for Compensation and/or Reinstatement, or a Compliance Order),
- (ii) the refusal to issue an Order, and
- (iii) a Notice of Contravention.

The Board is a quasi-judicial administrative tribunal and its decision-making is completely independent of the Ministry of Labour, Training and Skills Development (Director of Employment Standards).

The Director of Employment Standards is a Responding Party to all Applications for Review.

B. What form do I need to apply for review and where do I find it?

The Application for Review is Form A-114

Form A-114 can be downloaded from the Board's website at www.olrb.gov.on.ca or is available from the Board (505 University Avenue, 2nd Floor, Toronto, Ontario, M5G 2P1 - Tel. no. [416] 326-7500).

C. Time Limits and Payment Requirements

(i) Time Limits

Applications for Review **MUST** be received by the Board within **30 calendar days** after service of: the Order, the letter advising you of the Order or Notice of Contravention, or the letter advising of the refusal to issue an Order, as the case may be.

An application which is not filed within the 30-day period may be dismissed by the Board without a hearing into the merits of your case, unless the Board exercises its discretion to extend the time-limit.

If you want the Board to consider your application even though it has been filed after the 30-day time limit, you should include with your application detailed reasons why an extension of time should be granted by the Board. This should include any facts you intend to rely on and any legal submissions you wish to make.

(ii) Payment Requirements and Proof of Payment

No payment is required to complete an Application for Review, if you are:

- A foreign national; or
- A director applying for a review of a Director Order to Repay Costs or a Director Order to Repay Fees, issued against you personally; or
- Applying to review a Notice of Contravention and/or Compliance Order.

Payment is required as follows:

- If you are an Employer, Recruiter (or person acting on behalf of either) seeking to review an Order to Repay Costs or an Order to Repay Fees, you **MUST** pay the TOTAL amount of the Order (including the administrative cost, if ordered) to the Director of Employment Standards, in trust.
- If you are an Employer, Recruiter (or person acting on behalf of either) seeking to review an Order to Pay Compensation and/or Reinstatement, you **MUST** pay the TOTAL amount of the Order or \$10,000 (whichever is less) to the Director of Employment Standards in trust.

As an alternative to making payment in trust, you may provide an irrevocable letter of credit in favour of and approved by the Director of Employment Standards for the required amount. You are required to use the template for the letter of credit on the Ministry of Labour, Training and Skills Development website at www.labour.gov.on.ca/english/es/pubs/letterofcredit.php.

Your payment or letter of credit must be delivered to the Director of Employment Standards, together with the "tear away" portion of the order, at:

Director of Employment Standards
Employment Practices Branch,
Ministry of Labour, Training and Skills
Development
400 University Avenue, 9th Floor
Toronto, ON M7A 1T7

Where payment is required, your application will not be processed by the Board without **proof of payment** from the Director.

D. Delivering the Application before Filing it with the Board

(i) Delivering the Application to the Director of Employment Standards and to the Responding Parties/Affected Parties

Before filing the Application for Review with the Board, you must deliver a copy of it to:

- (i) the Director of Employment Standards
- (ii) the other party(ies) and;
- (iii) any other person who may be affected by the application.

The application should consist of:

- 1) A copy of the completed Application for Review form (A-114),
- 2) All supporting documents (including the officer's order or notice, or letter refusing to issue an order, and the officer's reasons for decision),
- 3) Proof of payment to the Director in trust, or a statement that an irrevocable letter of credit acceptable to the Director of Employment Standards has been provided, if applicable.

You must deliver your application package to the Director of Employment Standards by one of the following methods (the preferred method of delivery is email):

EMAIL: appforreview.directorofES@ontario.ca

REGULAR MAIL/COURIER OR HAND DELIVERY:

Director of Employment Standards
Employment Practices Branch
Ministry of Labour, Training and
Skills Development
400 University Avenue, 9th Floor
Toronto, ON
M7A 1T7

OR FAX: 1-855-251-5025

You must also deliver your application package to all other parties and affected persons by hand delivery, courier, fax, email to the other parties if on consent, any other way agreed upon by the parties (Rule 6.4 of the Board's Rules of Procedure).

(ii) Certifying Delivery of the Application

Complete the Certificate of Delivery at the end of the application (A-114), indicating when and how you delivered the application to the Director of Employment Standards, the party(ies) and any other affected persons.

Note: Delivering the application to the Director of Employment Standards is not the same as filing it with the Board. You must do both.

E. Filing the Application with the Board

Not later than five days (not including weekends, statutory holidays or any other day the Board is closed) after delivering the application to the Director of Employment Standards and all other affected parties, you must file one copy of the application with the Board.

The application may be filed with the Board by hand, courier, regular mail or by filing it electronically. If the application is not filed within five days after delivering the package to the Director of Employment Standards, the party(ies) and any other affected persons, the matter may be terminated.

If you are an employer, recruiter (or person acting on behalf of either) appealing an order, your application **MUST** be filed with proof of payment.

F. What Happens Next? How the Application is Processed by the Board

Once your application is delivered to the other parties and filed with the Board, the Board will send you a letter confirming receipt of the application.

(i) Mediation

After you receive the Board's letter confirming receipt of the application, one of the Board's Mediators will contact you about a mediation meeting. The purpose of the meeting is to try to help the parties reach an agreement to settle the application and therefore avoid the need for a hearing. The mediation usually takes place in the Regional Centre closest to the workplace. Regional Centres are located in Ottawa, Sault Ste. Marie, Sudbury/North Bay, Thunder Bay, Timmins, Toronto and Windsor. The Mediator may also try to settle the matter over the telephone.

Please bring all documents and materials that you want the Mediator to consider with you to the mediation. **Mediators do not decide the case. They do not represent any of the parties nor do they act as advisors to any of the parties in the case, including the Director of Employment Standards.** Their role is to help the parties reach a settlement of the Application. During your meeting, the Mediator will often try to explain prior Board decisions addressing the issues in dispute to the parties. This is done to assist you assess your position and evaluate any settlement offers. The mediator will not provide legal advice.

In order to encourage frank and open discussion between the parties, the Mediator considers everything said in the mediation to be confidential. The Mediator does not provide his/her file or forward your documents to the Board. The Mediator and the Board do not have any of the documents which you may have given to the Employment Standards Officer. After the mediation, if you want a document considered in the hearing you must file it with the Board 10 days before the scheduled hearing.

If a settlement is reached between the parties, a decision of the Board is issued. If there is money in trust to be paid out according to the settlement, it is the Director of Employment Standards which makes the payout, and not the Board. If a party needs to seek enforcement of the settlement because it

claims it has been breached, they can write to the Board and state their position.

(ii) Dismissal prior to a Hearing

Before or after a Mediator meets with the parties, the Board may be asked to dismiss the application because it does not make out an arguable case. If it does not, the application may be dismissed by the Board without a consultation or hearing. If this happens, all of the parties will be sent a Decision of the Board that sets out why the application was dismissed.

(iii) The Hearing

(a) Scheduling the hearing

If you cannot settle the application, a hearing will be held in the Regional Centre closest to the workplace. The Board will send you a Notice of Hearing giving the date, time and location of the hearing. The hearing date is set without consultation with the parties.

The hearing is a legal proceeding that will determine your rights and obligations. If you have information or evidence to present to the Board, you must attend the hearing when it is scheduled. **If you do not attend, the hearing will proceed without you and a decision will be made based on the evidence before the Board.**

(b) Adjournment of the hearing

Sometimes it is impossible to attend the hearing on the date it is scheduled. If you need an adjournment, you may ask the Board to adjourn the hearing to a different date. You should make your request as soon as possible, otherwise there may not be enough time to consider your request and the hearing will go ahead as scheduled.

Except in extremely urgent situations, you must ask the other parties, including the Director of Employment Standards for their consent to the adjournment before making the request to the Board. If the other parties will not consent, you should advise the Board's Registrar in writing setting out the reasons for your request. A copy of your request must also be sent to the other parties who will have an opportunity to respond. The Board considers the other parties' positions on your request and will issue a decision.

(c) What can I expect to happen at the hearing?

The question for the Board is whether there has been a violation of the *Employment Protection for Foreign Nationals Act, 2009* and if so, what the appropriate order should be. The Board does not review the Employment Standards Officer's conduct or procedures in coming to its decision. The Board starts its hearing with a "clean slate" in order to make its decision.

You can be represented by a lawyer or other representative at the hearing, but are not required to be. The Board will not provide a lawyer or representative for you.

At the hearing, the applicant will likely be asked to make a brief opening statement explaining what they are seeking and why they think the Employment Standards Officer was wrong. The Director of Employment Standards and other party(ies) will also be given a chance to explain their positions. Unless everyone agrees about the facts, the parties will need to present evidence. This can involve witnesses giving evidence and/or the introduction of documents as evidence. Usually, but not always, the applicant gives its evidence first. (In an Application for Review of a Notice of Contravention, the onus is on the Director of Employment Standards – not the applicant – to establish its case and so the order of making statements to the Board and calling evidence may be reversed.)

(d) Bringing Documents and Witnesses to the Hearing

You must be able to prove your case at the hearing.

Each party must file with the Board, not later than 10 days before the first date set for the hearing or case management hearing, one copy of all documents upon which it will be relying on to support its case. At the same time, each party must deliver a copy of those documents to each of the other parties, including the Director of Employment Standards. Documents filed with the Board must be arranged in consecutively numbered pages and have a table of contents describing each document.

You must also arrange to have any witnesses you intend to call on to give oral testimony present at the hearing. If you are unsure whether your witness(es) will come to the hearing, you may serve on them a Summons from the Board ordering that person to attend and to bring with them whatever documents you describe in the Summons. Contact the Board and request that a Summons form be sent to you. Please allow sufficient time before the hearing to obtain the Summons and serve it in person, with the required payment for travel and attendance, on your witness. You are responsible for the

attendance of your witnesses. If you fail to ensure their attendance the hearing may proceed without their evidence.

(e) After the Hearing and the Decision of the Board

The Board decides the case based only on information presented at the hearing. You cannot give additional information after the hearing unless the Board specifically asks you to do so. You may not communicate privately with the Board about the case before, during or after the hearing.

The Board's decision is final and binding on the parties. There is no appeal from the decision except by a process called judicial review, which takes place at the Superior Court of Justice, Divisional Court.

(f) Enforcement of the Board's decision

The Board is not responsible for implementing or enforcing its decision. If you are having difficulty in this regard you should seek assistance from the Ministry of Labour, Training and Skills Development, Employment Practices Branch. The Ministry, not the Board, is responsible for the distribution of funds from the trust account which the employer pays into when it files an application for review.

G. Board Hearings/Decisions are Public

Board hearings are open to the public unless the panel decides that matters involving public security may be disclosed or if it believes that disclosure of financial or personal matters would be damaging to any of the parties. Hearings are not recorded and no transcripts are produced.

The Board issues written decisions, which may include the name and personal information about persons appearing before it. Decisions are available to the public from a variety of sources including the Ontario Workplace Tribunals Library, and over the internet at www.canlii.org, a free legal information data base. Some summaries and decisions may be found on the Board's website under *Highlights* and Recent Decisions of Interest at www.olrb.gov.on.ca.

IMPORTANT NOTE

IN ACCORDANCE WITH THE *ACCESSIBILITY FOR ONTARIANS WITH DISABILITIES ACT, 2005*, THE BOARD MAKES EVERY EFFORT TO ENSURE THAT ITS SERVICES ARE PROVIDED IN A MANNER THAT RESPECTS THE DIGNITY AND INDEPENDENCE OF PERSONS WITH DISABILITIES. PLEASE TELL THE BOARD IF YOU REQUIRE ANY ACCOMMODATION TO MEET YOUR INDIVIDUAL NEEDS.