Employment Standards
Rights and responsibilities at work

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# Commission Pay Plans & Minimum Compensation Entitlement

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Part 2 of the Employment Standards Regulation (Regulation) makes provision for basic minimum wage. This applies to employees who are remunerated wholly or partly by commission or other incentive pay plans.

It is important to determine whether an employee who is paid by commission is receiving at least the minimum compensation as set out in the employment standards legislation. For a more detailed discussion on incentive-based pay, see the "Incentive-Based Pay Plans and Minimum Compensation Entitlement" Fact Sheet at http://work.alberta.ca/esfactsheets.

## Definition of terms

### Commission

Commission is a type of incentive-based wage that is calculated on the amount of business done. Examples include percentage of sales, percentage of gross or net profits and lump sum payments per transaction.

### Draw

A draw is payment made to an employee in anticipation of earning future commission. Unless there is evidence to support a different meaning, the word "draw" is interpreted to mean the parties intend that the funds will be repaid at some point in time during the employment relationship.

### Earnings

Earnings means wages, overtime pay, vacation pay, general holiday pay and termination pay.

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**Guarantee**

A guarantee is a fixed amount paid to an employee on a regularly scheduled basis even if the amount of commission earned is less than the amount of the guarantee. Unless there is evidence to support a different meaning, the word “guarantee” is interpreted to mean that the parties do not intend that the difference between commission earned and the guarantee be repaid by the employee.

**Wages**

Wages includes salary, pay, money paid for time off instead of overtime pay, commission or remuneration for work, however calculated, but does not include:

- overtime pay, vacation pay, general holiday pay and termination pay,
- a payment made as a gift or bonus that is dependent on the discretion of an employer and that is not related to hours of work, production or efficiency,
- expenses or an allowance provided instead of expenses, or
- tips or other gratuities.

## Earning commission

An employee typically has to satisfy a variety of conditions before commission is earned. These conditions may be in the form of a written employment contract, verbally agreed to or established by past practice or industry standard.

While these are not meant to be an exhaustive list, all or most of the following steps are common to transactions where employees earn commission:

- employee solicits clients to purchase products or services,
- employee or other authorizing individual enters into an agreement (written or verbal) with clients to purchase products or services,
- employee or other individual delivers products or provides services,
- client pays for products or services in full or by installments, and
- employer allows a period of time to pass to ensure the client does not return the products or dispute services that were provided before crediting the salesperson with the commission.

Employees earn their commission either upon completion of the entire process or at certain points during the process. The employment contract will determine when a commission is earned and will outline the exact nature of the employee’s responsibilities in this process.

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## Commission and minimum wage

Many employees who are paid commission are exempt under section 2 of the Regulation from recording daily hours of work and are entitled to a weekly minimum wage (currently $486 per week). For those employees not exempted from recording daily hours of work, the prevailing hourly minimum wage applies (currently $12.20 per hour). Only a small number of employees are exempt from the minimum wage. They include real estate brokers, security salespersons and insurance salespersons paid entirely by commission. For more information, please see the "Minimum Wage" Fact Sheet at http://work.alberta.ca/esfactsheets.

In determining whether the minimum wage has been paid to an employee who is paid entirely or partly by commission, the amount of commission earned is compared to what the employee would have received had the minimum wage been paid. If the total commission is less than the minimum wage, the employee must be paid at least the minimum wage. If the commission is greater than the minimum wage, then the commission must be paid.

Where employees are subject to the hourly minimum wage, this determination must also take into account an employee's entitlement to overtime and general holiday pay. For more information on this process, see the "Incentive-Based Pay Plans and Minimum Compensation Entitlement" Fact Sheet at http://work.alberta.ca/esfactsheets.

To determine whether an employee who receives a commission is receiving at least the minimum wage, follow these steps:

Step 1**:** Total the employee's wages earned during the pay period established by the employer.

Step 2**:** Total the employee's work hours during the pay period established by the employer.

Step 3**:** Divide the total in Step 1 by the total in Step 2.

- If the result is the same or more than minimum wage ($12.20 per hour) then the employee is entitled to the wages in Step 1.
- If the result is less than minimum wage ($12.20 per hour), then the employer must pay the employee more than the wages in Step 1.

**Example**

Ming is employed to install carpets. Ming gets paid each week and receives $10 per square metre of carpet that he installs. During one week, Ming installed 39 square metres of carpet. During that week, Ming worked 7 hours on Monday, 6 hours on Tuesday, 6 hours on Wednesday, 7 hours on Thursday, 5 hours on Friday, and 7 hours on Saturday. Sunday was Ming's day off.

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<u>Step 1</u>**:** Total Ming's wages during the one week pay-period.

- $10 per square metre x 39 square metres = $390 earned

<u>Step 2</u>**:** Total Ming's work hours during the one-week pay-period.

- 7 + 6 + 6 + 7 + 5 + 7 = 38

<u>Step 3</u>: Divide $390 by 38.

- $390 / 38 = $10.26
- Based on this, we now know that Ming received less than the minimum wage for that week of work because $10.26 is less than $12.20.

## Recovery of a draw

Where an employee is paid a draw and the commission earned in that pay period is less than the draw, the difference may be recovered from the employee's future commissions. Providing that the employer and employee clearly agree to a negative balance being carried forward, this practice is acceptable to Employment Standards. Recovery of a draw cannot result in the employee receiving less than the minimum wage in any pay period.

### Example

An employer has a bi-weekly pay period and the employee is entitled to a draw equal to the weekly minimum wage. The draw for the employee is $972 (2 x $486) in each two-week pay period. The employee must receive at least $972 every pay period. Employment terminates at the end of the fourth pay period.

| Pay period | Commission earned | Draw or Commission paid | Balance* <Negative> |
|---|---|---|---|
| **1** | $0 | $972 | <$972> |
| **2** | $2,000 | $1,028 | $0 |
| **3** | $0 | $972 | <$972> |
| **4** | $500 | $972 | <$1,444> |

* Balance is a carry-over that can only be zero or negative because section 8 of the *Employment Standards Code* (Code) requires that earnings be paid within 10 days of the end of the pay period in which they were earned.

In this example, a negative balance of $1,444 exists in the last pay period. The employer cannot recover this negative balance, as the employee is entitled to receive minimum wage each pay period, including the last pay period.

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Suppose the employment relationship terminates after the fifth pay period during which the employee earns $2,500 in commission.

| **Pay period** | **Commission earned** | **Draw or Commission paid** | **Balance** <Negative>** |
|---|---|---|---|
| **4** | $500 | $972 | <$1, 444> |
| **5** | $2,500 | $1,056 | $0 |

** Here the employer can recover the negative balance of $1,444, as the employee will still receive more than the minimum wage in the last pay period.

## Recovering commission on returned goods or cancelled contracts

An employer may be able to recover commission paid to an employee if the goods are subsequently returned or a contract is cancelled. Recovery of commission by the employer will be allowed if it is authorized in the employment contract. Where there is no employment contract or it does not address the issue, Employment Standards will consider the past practice of the employer to determine if recovery is permitted.

Where Employment Standards determines that the recovery of commissions was expressly agreed to or has been standard practice, recovery will be allowed. Therefore written authorization from the employee is not required. However, recovery of commission cannot result in the employee receiving less than the minimum wage for that pay period.

## Override commissions and annual vacation pay

Where an employee is paid an override (a percentage of sales generated by other employees), it is not unusual for the override to continue to be credited to the employee for sales made while they were away on vacation. This may result in the employee receiving more or less vacation pay than if they had been paid using the Code's minimum standards for calculating vacation pay.

In all cases the "set" wage (monthly salary, hourly or otherwise) component of the employee's compensation plan must meet the requirements for vacation pay in sections 39 and 40 of the Code. See the "Vacations and Vacation Pay" Fact Sheet at http://work.alberta.ca/esfactsheets.

The following two methods of calculating vacation pay entitlements on the override portion of the compensation plan are acceptable to Employment Standards:

- Pay the employee their override as if they had been at work during their vacation, or

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- Pay the appropriate percentage of the total override earned in the year for which the vacation pay is being calculated. If this option is used, the employer does not have to pay an override to the employee on sales generated during their absence on vacation.

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