

Clarity Needed in Employment Standards Averaging Agreements and Treatment of Statutory Holidays

Issue

Bill 17: the Fair and Family-friendly Workplaces Act was first read on May 24, 2017, receiving Royal Assent on June 7, 2017 with the final regulations being passed in early December 2017 with a number of changes coming into force on January 1, 2018. One of the primary reasons for this bill being introduced was due to the fact that the rules that govern our workplaces had not been updated since 1988. The purpose was to provide Albertans with modern, balanced workplace legislation that protects the rights of hardworking Albertans and helps businesses to stay competitive⁶⁹. However, due to the lack of consultation on the legislation leading up to and after it was introduced, there were some gaps identified by employers, particularly related to averaging agreements and the treatment of statutory holidays. Further amendments need to be made in order to clarify the implementation of these standards to ensure employees continue to benefit from averaging agreements and flexible work environments, as well as to help businesses better understand the legislation and remain competitive.

Background

Alberta's Employment Standards Code provides minimum standards of employment that applies to approximately 85% of all employment relationships in Alberta. Alberta's workplaces have evolved since the Employment Standards Code was last updated in 1988, including growth in part-time jobs, shift work and flexible schedules. According to the Government of Alberta, the changes made to the Code have been passed to support family-friendly workplaces, modernize legislation, and align the minimum employment standards with the rest of Canada⁷⁰.

However, since the legislation was passed there have been a number of concerns expressed by employers about the lack of clarity in certain areas, particularly those related to averaging agreements and the treatment of statutory holidays. Ultimately these changes could be interpreted to provide less flexibility for employees and higher costs for employers, resulting in unintended consequences for many Albertans.

Previously, compressed work week arrangements were used to allow for fewer work days in a work week, but more hours of work in a work day, paid at the employees regular wage rate. Additionally overtime agreements were previously used to allow an employer and an employee to enter into an agreement whereby an employee would take time off with pay at their regular wage rate, in place of overtime. This

⁶⁹ Alberta Hansard, May 25, 2017: http://www.assembly.ab.ca/ISYS/LADDAR_files/docs/hansards/han/legislature_29/session_3/20170525_1330_01_han.pdf#page=17

⁷⁰ Employment Standards Code changes: <https://www.alberta.ca/employment-standards-changes.aspx#toc-2>

time would be taken at a time the employee otherwise could have worked and received regular wages from that employer.

As of January 1, 2018, compressed work week arrangements have been renamed “Averaging Agreements”. Any banked time is earned and taken at time and a half, rather than straight time if there is not an averaging agreement in place. Employers and employees will now be allowed to agree to average work hours over a period of one to 12 weeks for the purpose of determining overtime eligibility. Work weeks may also be compressed as part of these agreements with employers that require longer cycles requiring a permit.

There are two types of averaging agreements that now exist as of January 1, 2018:

- hours of work averaging agreements (HWAA)
- flexible averaging agreements (FAA)

These agreements allow employers to schedule an employee, or group of employees, to work longer hours per day paid at the employee’s regular wage rate. The employer will average an employee’s hours of work over a period to determine overtime pay or time off with pay. Employers would use an hours of work averaging agreement (HWAA) for any averaging agreement between 1 and 12 weeks. HWAA’s can be between groups of employees and an employer or an individual employee and employer. Conversely, FAA’s between the employer and employee can be entered into only at the employee’s request and can only be used for a two week period. FAA’s also can only be entered into if the employee works at least 35 hours per week.

While HWAA’s and FAA’s provide more flexibility than was originally anticipated under the revised employment standards, there are still gaps and a lack of clarity that exists in the employment standards regulations, in addition to increased regulatory and administrative burden for business to interpret and implement these changes.

Currently there is uncertainty around the term limit of two years for HWAA’s. If an averaging agreement can only be over 12 weeks, there is uncertainty if this can be a repeated cycle of agreement that cannot exceed 2 years unless it is part of a collective agreement and if a predetermined schedule must be set up for each of the 12 week periods. There is also uncertainty around when overtime would actually apply in an averaged period and how an HWAA is applied for employees whose regular work week is less than a typical 40 or 44 hour work week. The Code is also silent regarding how time is earned and given if an employee works a standard typical work week that is less than 8/44, but wishes to bank time that would still fall under the typical overtime threshold. For example, if an employee regularly works 6 hours per day, but some days works 7 or 8 hours and wishes to bank those additional hours at straight time to be used at a later date, there currently isn’t any information that clarifies if this is permissible under the Code.

Within FAA’s, the same confusion exists with employees who work under 40 or 44 regular hours or even those under a 35 hour per week work week and whether they are able to have flexible hours banked up to the 8/44 threshold. Additionally the website states that the daily overtime threshold cannot exceed 10 hours, yet it states that the daily and weekly hours of work must not exceed 12 hours per day or an average of 44 hours per week under the same FAA section.

Clarity is also needed to define whether or not the “normal” overtime rules of 8/44 are presumably ignored in an averaging agreement situation, whether an HWAA or FAA.

Concern has also surfaced regarding Employment Standards silence on the issue of how general holiday pay is treated on a day that is typically not a regular work day, when an employer would typically provide an employee with a paid day off in lieu of the general holiday. It can be standard practice for many employers to provide employees a paid regular work day off in lieu of a general holiday falling on a

weekend or non-regular work day, whereas under the Employment Standards currently, that employee must be paid on that general holiday regardless of whether it is a work day. The code remains silent on an employer's ability to provide a paid work day off in lieu of the general holiday when it falls on an unscheduled work day.

In the labour survey conducted by Employment and Social Development Canada in 2016⁷¹ Canadians and stakeholders alike indicated that flexible work arrangements are available in many workplaces across Canada through employer human resource policies, informal workplace practices and collective agreements. Over 73 percent of those who responded to the survey question about whether they had asked for flex work in the past five years, said that they had and flexible scheduling and flexible work locations were said to be the top two types of flex work requested. Survey respondents and stakeholders recognized that flex work is—and should be—part of today's workplace reality. They generally agreed that flex work has advantages for employees and employers and pointed to a wide variety of benefits including reduced absenteeism and "presenteeism" (i.e. a drop in work activities while at work); workers who are healthier and feel they are better able to support their families and friends; more effective recruitment and retention, especially among millennials, workers with care responsibilities and older workers; more diverse, inclusive, engaged and healthy workplaces; increased labour market participation by workers with chronic illnesses, disabilities and mental health issues; and greater productivity and more innovative, more effective ways of working.

There was also general agreement that flexible work arrangements have real, positive impacts for many different types of workers (e.g. workers with care responsibilities, millennial and older workers and workers with disabilities) and that realizing these benefits requires not seeing flexible working as a one-size-fits-all solution. Building on the theme of "one size does not fit all," several employer and labour organizations and at least one think tank highlighted that the need for flex work is often unpredictable and that it is important for workplaces to have flexible work arrangements that respond to episodic, short-term and longer-term flexibility requirements. It was also noted that it is important for employees, employers and policy-makers to recognize that flexibility in work arrangements is related to but distinct from flexibility to take leave from work.

Overall, stakeholders and survey respondents agreed that the process for making requests should be as simple and straightforward as possible; clear about the conditions under which a request can be made (and the reasons for which a request can be denied); well documented and transparent; and handled fairly and without reprisal.

As such, we recognize that there is still much work that can be done to ensure that both employers and employees have the flexibility and clarity to enter into work arrangements that are beneficial to both an employer and employee for their respective workplace situations and environments. A one-size fits all solution is not the best solution and any further amendments should be simple to understand and easy to administer. If policy on flexible arrangements is seen to be too much of a cost or administrative burden for employers, less flexibility for employees will ultimately be the result for many.

⁷¹ Flexible Work Arrangements: What was heard Employment and Social Development Canada: <http://www12.esdc.gc.ca/sgpe-pmps/servlet/sgpp-pmps-pub?lang=eng&curjsp=p.5bd.2t.1.3ls@-eng.jsp&curaactn=dwnld&pid=51394&did=4875>

The Alberta Chambers of Commerce recommends the Government of Alberta:

1. Evaluate the cost and administrative impact that legislated labour changes have on employers;
2. Evaluate how the legislated changes within averaging agreements will positively or negatively impact flexible work environments for employees by consulting with employer groups;
3. Work with employer and stakeholder groups to find a more flexible solution to averaging agreements that will not result in more cost and administrative burden for employers and result in more flexible work environments for employees;
4. Ensure there is clarity in the regulations so that changes are easy for employers to interpret and implement;

Revise the code to clearly indicate that employers can provide a paid work day off in lieu of the general holiday that an employee would not regularly be working.