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By Email (CWR.SpecialAdvisors@ontario.ca)

C. Michael Mitchell and Honourable John C. Murray
Changing Workplaces Review, ELCPB
400 University Avenue, 12th Floor
Toronto, Ontario M7A 1T7

Dear Sirs:

Re: Changing Workplace Review
Submissions regarding the *Employment Standards Act*

On behalf of our client, Arbor Memorial Inc. (“Arbor”), we are submitting the following comments and suggestions regarding the *Employment Standards Act* (“ESA”) for your consideration.

I. About Arbor

Arbor operates cemeteries and funeral homes in eight provinces. Arbor was founded in 1947, when the Company opened its first cemetery in London, Ontario. Today, Arbor is headquartered in Toronto and operates 21 cemeteries and 47 funeral homes in Ontario. Including head office staff, Arbor employs approximately 1,600 employees in Ontario.

II. Arbor’s Submissions

As an employer with deep roots in the community and a long, proud history, Arbor is committed to compliance with all applicable law, including the ESA.

Arbor respectfully submits that the objective of protecting employees is best served by:

- Employment standards legislation that non-lawyers with reasonable diligence are able to understand;
- Legal requirements that are clear and straightforward to apply and administer;

- Ministry of Labour which provides clear, consistent guidance that employers can rely on in response to inquiries regarding the application of the legal requirements;
- Inspections and audits that are geared towards increasing compliance by educating employers and providing advice on the application and administration of the legal requirements; and
- Employment standards officers who are trained to deal with employment standards complaints in a manner which respects natural justice and procedural fairness.

With those general principles in mind, we set out below Arbor's submissions regarding specific requirements of the ESA, for your review and consideration.

A. ***Vacation and Vacation Pay***

1. *Current Requirements*

The ESA's vacation and vacation pay system presumes that employees earn vacation during one year and take it in the following year. Vacation pay is 4% of wages earned in the year in which vacation is earned. Vacation pay is required to be paid out in a lump sum prior to a period of vacation, unless the employee agrees in writing to be paid vacation pay at a different time.

2. *Problems Arising from Current Requirements*

While these requirements appear simple, they are cumbersome to administer when applied to the following circumstances:

- Many employers allow employees to take vacation in the same year in which the vacation is earned. For employees who work irregular hours and/or earn wages other than straight hourly pay (e.g., commission, override commission and bonus), it is impossible to determine what vacation pay is at the time the vacation is taken in order to pay it out in a lump sum (because the year is not over yet and it would be impossible to determine what 4% of wages for that year would be). As a result, employers who allow employees to take vacation earlier than the ESA requires (i.e., employers who provide a superior benefit) may find themselves in an inadvertent situation of underpayment or overpayment of vacation pay.
- One of the solutions to the above-noted problem under the current ESA is for an employer to obtain employees' agreement to pay vacation pay accrued on variable pay at the same time as the payment of the variable

pay (e.g., 4% in addition to each commission paycheque). However, because individual employees are free to agree or withhold his/her agreement to an alternate time or manner to pay vacation pay, an employer may well be put in a situation where a part of its workforce agrees to be paid vacation pay at the same time as variable pay is paid whereas the balance of the workforce does not agree, making it impossible for an employer to establish one practice for all employees. This makes the administration of vacation pay unduly cumbersome and increases the risk for inadvertent errors.

- Most employees understand vacation as a period of time off during which they continue to receive pay as though they are working. This is a concept that can be readily understood by employees and employers. However, that is not what the ESA requires. Instead, vacation pay is 4% of wages earned in the year in which the vacation was earned. This calculation results in anomalies for employees who earn wages that are not dependent on hours of work. For such employees, the requirement that vacation pay be 4% of wages results in employees being compensated twice during a period of vacation.
- For example, many salespeople are paid commission weeks, months or even years after the sales were made and the efforts associated with making the sales were expended. Furthermore, many managers earn “override commission” on the basis of sales made by salespeople who report to the manager. During a period of vacation by such salespeople and managers, commission and override commission continue to be paid in the normal course, in accordance with what employees expect during a period of vacation (i.e., to be paid as though they were at work). However, because the ESA requires vacation pay to be 4% of wages and wages include commission and override commission, these employees are actually being paid wages as though they were working, plus 4% of those wages paid during a period of vacation. In other words, these employees are earning more while they are on vacation compared to when they are actually working.

3. *Submissions*

In order to address the problems arising from the current requirements, we submit that the following changes should be made to the ESA.

- Give an employer the following options in the timing and manner of paying vacation pay, without requiring employee consent:

- As a lump sum, before a period of vacation (i.e., current default requirement);
 - On each paycheque as a percentage of pay; or
 - Continue paying employees during a period of vacation as though they are working.
- With respect to employees who earn commission or override commission, adopt the position taken by the Alberta Ministry of Labour, as follows:

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
- 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.

The full fact sheet published by the Alberta Ministry of Labour is attached as Appendix "A" to this letter, and is available online at <https://work.alberta.ca/documents/Commission-Pay-Plans-and-Min-Comp-Entitlement.pdf>.

B. ***Public Holidays, Public Holiday Pay and Pay for Working on Public Holidays***

1. *Current Requirements*

Employees have the right to refuse to work on a public holiday. Public holiday pay is an average day's pay over the four work weeks prior to the public holiday. Where an employee agrees to work on a public holiday, the employer is required to pay the employee for the hours actually worked on the public holiday and give the employee an alternate day off with public holiday pay or, with the employee's consent, the employer may compensate the employee by paying 1.5 times pay for hours worked, plus public holiday pay.

2. *Problems Arising from Current Requirements*

- For employers which run operations which requires year round coverage, the ability of employees to refuse to work on public holidays poses a significant challenge. This is true even for employers who are not considered "continuous operations" under the current ESA. For instance, Arbor may be called upon by a customer to transport a deceased's body from a residence (e.g., private residence or retirement home) on a public holiday; a request which, for health and safety reasons, cannot be delayed. Arbor is also required to keep its grounds and properties safe year round by, for example, clearing snow and ice. Not being able to require employees to work on public holidays makes it difficult (in some circumstances, impossible) to meet those demands.
- For employees who work irregular hours and/or earn wages other than straight hourly pay, the current method of calculating public holiday pay can result in public holiday pay that exceeds or understates what an employee is paid on a regular basis for a day of work (e.g., where a significant sale closes in the four work weeks leading up to a public holiday, or where fewer sales close in the four work week window due to the seasonal nature of the business). Furthermore, it is subject to manipulation by both employees (e.g., timing sales to close in the four work weeks leading up to the public holiday) and employers (e.g., timing payment of a quarterly or annual bonus to occur outside of the four work week window).
- Furthermore, if the purpose of the public holiday pay calculation (i.e., averaging over the four work weeks prior to the public holiday) is to determine what an employee's average pay for a day is, the inclusion of significant bonus payments made during the four week window distorts

the calculation by including “extraordinary” amounts which is by no means a “regular” part of an employee’s daily or weekly pay.

- For employees who earn wages other than straight hourly pay (e.g., employees paid in whole or in part by commission), it is not clear how the requirement to pay regular wages for hours actually worked on the public holiday would apply.
- For employees who earn wages other than straight hourly pay (e.g., employees paid in whole or in part by commission), there is a complete lack of guidance regarding how 1.5 times pay for hours worked should be calculated.

3. *Submissions*

In order to address the problems arising from the current requirements, we submit that the following changes should be made to the ESA.

- For employers who provide services to the public on a 24/7 basis, allow employers to require employees to work on public holidays.
- In the alternative, allow employers to require employees to work on public holidays provided that such requirement is set out in a written employment agreement which is accepted by the employee at the time of hire.
- With respect to employees who earn commission or override commission, adopt and apply the position taken by the Alberta Ministry of Labour regarding vacation pay to public holiday pay, as set out above (i.e., an employer is deemed to have fulfilled the requirements of the public holiday provisions if an employee is given a day off and continues to receive commission and/or override commission as though s/he is at work).
- Exclude bonus (and commission, for employees who are not on straight commission) payments from the calculation of public holiday pay.
- In the alternative, allow employers to fulfill the public holiday pay requirement by paying a specified percentage on each paycheque, without requiring employee consent.

C. *Managerial Exclusion*

1. *Current Definition*

- A person whose work is supervisory or managerial in character and who performs non-supervisory or non-managerial tasks only on an irregular or exceptional basis is excluded from various provisions of the ESA.
- The test for “supervisory or managerial” in Ontario is the most stringent amongst the provinces: performance of non-supervisory or non-managerial duties, even if it is only a small portion of the person’s duties, will take the person outside the exclusion as long as they are a regular part of the person’s job.

2. *Problems Arising from Current Definition*

- In practice, few managers perform exclusively managerial or supervisory duties. In particular, in service industries, managers are often called upon to deal with customers’ concerns and resolve problems on an operational level. Although this does not mean that these managers’ duties are any less managerial or supervisory in nature, by the ESA’s definition, regular performance of non-managerial or non-supervisory duties would take these managers out of the exclusion.
- There is much uncertainty regarding what constitutes performance of non-managerial or non-supervisory duties on an “irregular or exceptional basis.” For example: over what time period should the determination be made? How often should an employer review the non-managerial or non-supervisory duties performed by a manager in order to determine if the managerial exclusion still applies?

3. *Submissions*

In order to address the problems arising from the current requirements, we submit that the following changes should be made to the ESA.

- Re-define the definition of the managerial exclusion to eliminate the requirement that non-managerial or non-supervisory duties can only be performed on an “exceptional or irregular basis” and to align with the definition under the B.C. *Employment Standards Act*, which states (emphasis added):

“manager” means

(a) a person whose **principal employment duties** consist of supervising or directing, or both supervising and directing, human or other resources, or

(b) a person employed in an executive capacity;

The full interpretation guidelines regarding this issue published by the B.C. Employment Standards Branch is attached as Appendix “B” and can be accessed online at <http://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/igm/esr-definitions/esr-def-manager>.

D. *Travelling Salespersons Exclusion*

1. *Current Definition*

“Travelling Salespersons,” as defined under the ESA, are excluded from various provisions of the ESA including minimum wage, hours of work, and overtime pay.

Paragraph 2(1)(h) of Regulation 285/01 defines the exempt employees as follows:

a salesperson, other than a route salesperson, who is entitled to receive all or any part of his or her remuneration as commissions in respect of offers to purchase or sales that,

(i) relate to goods or services, and

(ii) are normally made away from the employer’s place of business.

2. *Problems Arising from Current Definition*

In Arbor’s respectful submission, this exclusion does not go far enough to address the new reality in service-based industries: i.e., value and revenue is not generated through physical presence at work, but through providing services to customers at a time and in a manner which is appropriate in the circumstances. In response to that changing reality, employers have responded by rewarding their employees for the amount of business they generate while giving them substantial control over their own hours of work. Unfortunately, the ESA has not caught up and its requirements are still tied to the idea, appropriate in a manufacturing-based economy, that employees provide value through physical presence and performance of duties at the workplace.

Furthermore, the requirement that sales be made “away from the employer’s place of business” under the current ESA is of no consequence where employees are allowed to “come and go” as they wish.

3. *Submissions*

In order to address the problems arising from the current requirements, we submit that the following changes should be made to the ESA.

- Re-define the exclusion to align with a similar exclusion under the Manitoba *Employment Standards Code*, which exempts the following employees from the hours of work and overtime pay provisions:

an employee who has substantial control over his or her hours of work and whose annual regular wage is at least two times the Manitoba industrial average wage, as defined by regulation.

We submit that clear criteria should be established regarding: what constitutes “substantial control”; how to deal with employees’ whose degree of control over their hours of work change over time; how to deal with employees’ whose income fluctuates below and above the threshold; for new employees who are paid on a commission basis, how to determine whether the employee’s annual income would be above the threshold, etc.

The full interpretation guidelines regarding this issue published by Manitoba Employment Standards is attached as Appendix “C” and can be accessed online at <http://www.gov.mb.ca/labour/standards/doc.overtime-hours-control,factsheet.pdf>.

- Develop a new “High Income Earner” exclusion, under which employees who earn higher than a threshold level of annual income have the option to lawfully contract out of all or some of the ESA’s requirements.
- If the current “Travelling Salespeople” exclusion is maintained, we submit that clear criteria should be established regarding issues such as: what constitutes “regularly and normally” scheduled to work at the employer’s place of business (i.e., 50% vs. 20% of the time), the time frame and frequency to be used for determination of the exclusion, how to deal with periodic fluctuations in the amount of time spent outside vs. at the employer’s premises, the tracking of hours worked outside the employer’s premises, and what constitutes making a sale away from the employer’s premises.

E. *Averaging of Hours of Work*

1. *Current Requirements*

An employer may average hours of work for the purpose of calculating overtime pay over the lesser of (a) the number of weeks in the averaging period approved by the Director of Employment Standards and (b) the number of weeks in the averaging period set out in a valid written agreement that is signed by the employee. (For example, if the employer and employee have agreed to an averaging period of four weeks, but the Director has approved an averaging period of only two weeks, select “2 weeks”.)

2. *Problems Arising from the Current Requirements*

- The current provision for overtime averaging is contingent upon agreement by individual employees. As employees are free to withhold their agreement, the requirement for employee consent puts an employer in a situation where it is impossible to achieve a standardized averaging arrangement, even where the peaks and valleys of business activities indicate that averaging is appropriate.

3. *Submissions*

In order to address the problems arising from the current requirements, we submit that the following changes should be made to the ESA.

- Replace the current averaging provisions with one that is aligned with those under the *Canada Labour Code*, which provides for averaging of hours of work based on operational requirements and without the requirement of employee consent. Any averaging arrangement is subject to the approval of the Federal Labour Program after an examination of the employer’s operational requirements and the “peaks and valleys” of hours of work.

The full interpretation guidelines regarding this issue published by the Federal Labour Program is attached as Appendix “D” and can be accessed online at

http://www.esdc.gc.ca/en/esdc/acts_regulations/labour/interpretations_policies/averaging_hours.page.

Thank you for your consideration of our submissions. We would be happy to discuss any of the above noted issues with you at your convenience.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP


Bonny Mak Waterfall

BM/cp
Enclosures

cc Arbor Memorial Inc.

Appendix A

Employment Standards

Rights and responsibilities at work

PHONE: 780-427-3731

TOLL-FREE: 1-877-427-3731

ONLINE: work.alberta.ca/esfactsheets

Commission Pay Plans & Minimum Compensation Entitlement

October 2016

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.

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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Step 1: Total Ming's wages during the one week pay-period.

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

Step 2: Total Ming's work hours during the one-week pay-period.

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

Step 3: 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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This fact sheet contains general information, not legal advice. To interpret or apply the law, you must consult the *Employment Standards Code* and *Employment Standards Regulation*. This information is provided 'as is', without representation or warranty. The Government of Alberta will not be responsible for any loss or damage arising from your reliance on this information. This fact sheet is provided for your personal or educational use; it cannot be reproduced for commercial distribution.

Appendix B

Interpretation Guidelines Manual British Columbia Employment Standards Act and Regulations

EMPLOYMENT STANDARDS REGULATION - PART 1 - INTERPRETATION

ESR Section 1 – Definitions – Manager

Contents:

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[Text of Legislation](#)

[Policy Interpretation](#)

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Summary

This section contains definitions for terms that arise throughout the Regulations.

Text of Legislation

"**manager**" means

- (a) a person whose principal employment duties consist of supervising or directing, or both supervising and directing, human or other resources, or
 - (b) a person employed in an executive capacity;
-

Policy Interpretation

Subsection (a)

For purposes of this section, a "manager" includes employees whose principal responsibility is the supervision and/or direction of "human resources" (*i.e., employees or contractors*), or "other resources" (*financial and material resources*).

Principal employment responsibilities"

Appendix B

Employment responsibilities of a manager include where the person exercises authority and discretion while performing certain actions or roles on behalf of the employer, and is personally accountable for the results. Accountability in this context is linked to the employer's business objectives as opposed to the routine completion of a task. It is essential for the definition of "manager" that the responsibility that the employee has is principal to his/her employment.

A conclusion about whether the **principal** employment responsibilities consist of supervising and/or directing employees, or other resources, depends on a total characterization of that person's responsibilities, and may include, but is not limited to:

- the amount of time spent supervising and directing;
- the person's employment duties and the reasons for them;
- the degree to which the person exercises management power and authority and its impact on the business;
- the priority placed on the responsibilities by the employer; and
- the nature and size of the business.

"Supervising and/or Directing"

If a person is performing either supervising or directing functions as his or her principal employment duties he or she will be considered a manager. Supervising and/or directing describes the function of overseeing and controlling activities of staff and business resources and accountable for the outcome of such activities including, but not limited to, responsibility for:

- hiring, supervising, evaluating, disciplining and terminating staff;
- directing what work is to be done, how it is to be completed, when it is to be completed and being accountable for the outcome of such work (i.e. monitoring and evaluation);
- developing, delivering, and evaluating programs and services
- leading projects including strategic planning, budgeting, project monitoring and evaluation;
- committing and/or authorizing the use of company resources;
- preparing, delivering and evaluating business and marketing plans; and
- developing, monitoring, and evaluating financial plans including budgets, cost estimates and tenders.

"Other resources" of the employer include:

- financial resources including budget planning, implementation, monitoring, and evaluation; and
- material resources including product or services, research and development, and marketing.

Example

Ally works for a large retail chain as a Pharmacy Manager. The retail chain hires the

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employees she supervises. Ally is not a pharmacist but is responsible and accountable for supervising and directing the day-to-day activities of the department including staff. She is in charge of merchandising, advertising, budget and policy development and other administrative functions related to the operation of the pharmacy.

Ally is a manager as defined in this section.

Example

Pat, a project leader for a corporation, is responsible and accountable for overseeing a contract to implement a new computer system including the purchase and installation of computer equipment. Pat has no employees reporting to her but is responsible for a large budget including the monitoring and evaluation of financial status reports while reporting to the executive vice president in charge of project management.

Pat is a manager as defined in this section.

Lead Hand or Shift Supervisor

An employee working as a lead hand or shift supervisor is usually not considered to be a “manager” because, while they may supervise the work of other employees on their particular shift, it generally is not their principal responsibility. In such instances they are generally not given the authority to determine staffing levels, discipline staff or commit company resources.

Example

Erwin is hired as a shift supervisor in a fast food outlet. While he spends most of his time serving customers and taking cash, he is also in charge of three or four other employees. As shift supervisor, Erwin assigns duties from a list of routine tasks, deals with customer complaints, calls in staff to fill in for staff absences, balances the cash at the end of the shift and locks the restaurant. Erwin sometimes assists in interviewing job applicants but is not responsible for choosing who will be hired.

While Erwin spends some time supervising staff, his principal duty is serving customers. He does not have sole responsibility for disciplining nor does the employee have a large degree of discretion to change work routines, decide on staffing levels or alter shift schedules.

Erwin is not a manager as defined in this section.

Subsection (2)

“Executive capacity” includes:

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The exercise of substantial authority in making key decisions critical to the business such as:

- how many employees are to be employed.
- what product should be purchased or produced.
- what services should be provided.
- from whom should supplies be purchased.
- at what price should products be sold.

Duties that involve active participation in the control, supervision, and administration of business affairs.

A person employed in an executive capacity is considered to be a “controlling mind” of the business. They need not be the owner. They may have titles such as General Manager, Manager of Operations, comptroller, or Director.

Job title or payment method does not define “manager”:

The fact that a person is classified as a manager, or is identified by other employees as one, does not of itself mean that the person is a manager. The form of payment (salary, hourly wage, commission) is not necessarily indicative of a “manager”.

Manager may be entitled to extra pay for extra work:

Although a manager is excluded from the hours of work and overtime provisions of the Act, they are entitled to be paid for all hours worked, *according to their terms of employment*. In some cases this could result in a manager being entitled to additional compensation. Where there is evidence to support findings that the employer and the employee agreed that a specific number of hours of work would be compensated by a specific amount of wages, the employee would be entitled to extra wages for the extra time worked based on their regular rate of pay.

Example

Bill, a "manager", accepts an offer to work for \$50,000 a year. Part of the agreement is that the annual salary is to cover all hours worked. Generally speaking, Bill works 45 hours a week. During the spring, he works 55 hours a week.

Bill is not entitled to extra pay for the additional hours worked as he agreed to be paid the \$50,000 a year regardless of the number of hours worked. If he had agreed to work for \$50,000 a year based on a 45 hour work week, Bill may have been entitled to further compensation.

Exclusions from the Employment Standards Act

Under s.36 of the Employment Standards Regulation, a “manager” is excluded from Statutory Holidays.

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Under s.34(f) of the Employment Standards Regulation, a “manager” is excluded from the hours of work and overtime requirements of the Act.

Related Information

Employment Standards Tribunal Decisions

F.S.I. Culvert Inc. BC EST#D301/97

Dusty Investments Inc. operating as Honda North, BC EST#D43/99

Kamloops Golf and Country Club Limited, BC EST#D278/01

429485 B.C. Limited Operating Amelia Street Bistro; BC EST #D479/97

Northland Properties Ltd., BC EST #D423/98

Executive Capacity : Benny’s Bagels Ltd. BC EST#D387/98

Terri McConkey, BC EST#D417/99

Extra hours extra pay: BC EST #404/98 and #383/02

Related sections of the Act or Regulation

ESA

- [s.40, Overtime wages for employees not working under an averaging agreement](#)
- [Part 5 Statutory Holidays](#)

ESR

- [s.34, Exclusion from hours of work and overtime requirements](#)
- [s.36, Exclusion from statutory holiday pay requirements](#)

Other

See [Employment Standards Factsheets](#)

Factsheets

Appendix B

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Statutory Holiday Dates

Statutory Holidays

Manager

Overtime Exemptions – Workers Who Substantially Control Their Hours of Work

Most employees are entitled to be paid 1½ times their wages for hours worked beyond eight hours in a day and 40 hours in a week. Employees are only entitled to overtime for work that is requested, acknowledged or authorized by the employer. In some cases, employees are not entitled to overtime wages because they have substantial control over their hours of work and earn at least twice the Manitoba Industrial Average Wage.

Who is exempt from overtime and hours of work under this provision?

Employees who have substantial control over their hours of work and earn a regular annual income of at least two times the Manitoba average industrial wage are exempt from overtime. Both criteria are required for an employee to be exempt from overtime.

What is the Manitoba Industrial Average Wage?

Statistics Canada establishes the Manitoba Industrial Average Wage each year. If employees make twice that amount and have substantial control over their hours of work, they may be exempt from overtime.

<i>Year</i>	<i>Manitoba Industrial Average Wage</i>	<i>Twice the Manitoba Industrial Average Wage</i>
June 1, 2016 May 31, 2017	\$45,768.84	\$91,537.68
June 1, 2015 May 31, 2016	\$44,869.24	\$89,738.48
June 1, 2014 May 31, 2015	\$43,134.00	\$86,268.00
June 1, 2013 May 31, 2014	\$42,021.72	\$84,043.44
June 1, 2012 May 31, 2013	\$40,890.20	\$81,780.40

Appendix C

Does it matter if the employee gets paid by the hour, by salary, or by commission?

No matter how they are paid, if employees earn more than twice the Manitoba Industrial Average Wage per year, they meet the earning criteria for the overtime exemption. This also applies to employees who receive a base salary that is under the required level, but receive production bonuses or commissions that would raise their earnings above the required level. Employees must also have substantial control over their hours of work to meet the exemption for overtime.

How is "substantial control over hours of work" defined?

Some employees have the ability to organize their work schedule to suit the needs of themselves and clients. They may need to check in with their employer occasionally, but the employer generally does not set the schedule or control their day-to-day activities. These employees would be considered to have "substantial control over their hours of work."

Most employees are told by the employer what days and hours they are required to work. They can request changes to their schedules, but do not have the final say. These employees do not have substantial control over their hours of work.

Who determines if employees have substantial control of the hours of work?

Employers are responsible for establishing the terms and conditions of employment. It should be clear to employees they are allowed to control their hours of work. Also, employers must be able to show an employee falls under this exemption if they are not paying overtime wages.

When establishing the terms and conditions of employment, employers need to consider the entire working relationship and understand every situation is different. Employers should also remember the employee needs to make two times the Manitoba Industrial Average Wage to satisfy the exemption for overtime.

Are employees who establish their own schedule based on clients' availability exempt from overtime?

For employees to be exempt from overtime, they must have the flexibility to adjust a schedule themselves without the need for approval from employers.

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Will the overtime exemption apply if an employee controls the hours, but has only worked part of the year and not earned twice the Manitoba Industrial Average Wage?

If an employer wants to use this exemption to exclude an employee from overtime, they must be able to show that the employee meets both criteria (ie. has substantial control over hours of work and would earn more than twice the Manitoba Industrial Average Wage). Past performance is the best way to show the employee would have made the income criteria.

The determination for the income criteria is based on wages over the course of a year. If a full year of work has not been completed, it is up to the employer to show the employee would have met the income criteria.

For more information contact Employment Standards:

Phone: 204-945-3352 or toll free in Canada 1-800-821-4307

Fax: 204-948-3046

E-mail: employmentstandards@gov.mb.ca

Website: www.manitoba.ca/labour/standards

This is a general overview and the information used is subject to change. For detailed information, please refer to current legislation including *The Employment Standards Code*, *The Construction Industry Wages Act*, *The Worker Recruitment and Protection Act*, or contact Employment Standards.

Date Published: August 29, 2016

Appendix D

Labour Program

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Averaging of Hours of Work Provisions - 802-1-IPG-053

- [LS IPGs](#)
- [Disclaimer](#)

Effective Date: November 5, 1998

1. Subject

The application of provisions allowing the averaging of hours of work contained in subsection 169(2) of part III of the [Canada Labour Code](#) and section 6 of the [Canada Labour Standards Regulations](#).

2. Issue

There is a need to communicate a national approach in the administration of averaging.

Averaging is provided for in subsection 169(2) of the *Canada Labour Code* which states:

"Where the nature of the work in an industrial establishment necessitates irregular distribution of the hours of work of an employee, the hours of work in a day and the hours of work in a week may be calculated, in such manner and in such circumstances as may be prescribed by the regulations, as an average for a period of two or more weeks."

The *Canada Labour Standards Regulations* prescribe that averaging may be adopted for periods of two or more consecutive weeks when the irregular distribution of hours results in either (a) no regularly scheduled hours, or (b) regularly scheduled hours where the number of hours differs from time to time (s. 6(1)).

While the requirement to pay overtime is reviewed at the end of an averaging period, there are two types of flexibility allowed by averaging, both of which may be available to an employer:

1. removal of the requirement to pay overtime after eight hours in a given day or 40 hours in a given week, or both, and,
2. removal of the limit of 48 hours of work in a given week.

Labour Affairs Officers (LAOs) ascertain whether the criteria that qualify an employer to adopt averaging have been met and whether averaging provisions are being correctly applied. These criteria are:

- there must be operational necessity (i.e., the nature of the work must necessitate an irregular distribution of the hours of work of an employee); and
- there must be an absence of regularly scheduled hours or regularly scheduled hours must differ from time to time.

3. Questions and Answers

A. What is meant by the phrase "the nature of the work necessitates" (operational necessity)?

The type of activity in which the enterprise is engaged must require an irregular distribution of hours of work. There must be a substantial need. In the context of part III of the *Canada Labour Code*,

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necessity is something other than an "exceptional" or "emergency" condition because these situations are covered by sections 176 and 177 of the Code.

The need for irregular distribution of hours is normally caused by external factors over which an enterprise has little or no control, most commonly climate and seasonal demands. An example is the working of long hours during the summer season to make equipment repairs that cannot be easily carried out in the winter months.

Other examples of external factors are:

- tour bus operators work long hours in the summer and other holiday seasons;
- non-driving employees of moving companies have hours of work that fluctuate because the estimated time of a move may vary due to unpredictable factors and the number of moves varies from one day to another, and from one season to another;
- pilots and mechanics of small air operators also have irregular working hours, which are usually connected to climatic conditions; and,
- the distribution of television production work may also vary depending on factors such as availability of equipment, production facilities, technicians and interviewees, as well as weather when shooting outside events.

Economics may also induce necessity. For example, in seed cleaning operations the grain seeds must be taken from the field within a short period of harvesting or the quality will deteriorate. Similarly, businesses operating in remote locations are subject to economic factors that may affect the scheduling of work.

B. What are some illustrations of situations where the nature of work necessitates irregular distribution of hours with the result that the employees have no regularly scheduled hours of work?

These situations occur frequently in the transport industry, e.g., furniture moving (non-driving personnel). It is common practice to require an employee to check to see whether work is available at specified times. If work is available, the employee is assigned to a job. If work is not available, the employee does not come in to work, or if already at the workplace, goes home.

These employees have **scheduled reporting times but they do not have regularly scheduled daily or weekly hours**. Consequently, their employer may average whatever hours the employees actually work.

In addition, when employees have no regularly scheduled daily or weekly hours, but are called in as required, averaging is also appropriate.

The work of other employees, such as pilots of charter and non-scheduled operators in remote areas, despite receiving a salary or special premium for being available on-site to work as demand requires, may also be eligible for averaging.

C. In which cases of regularly scheduled hours can averaging be adopted?

A situation where employees have regularly scheduled hours, but the number of hours **actually worked** differs from time to time would not qualify for averaging. For example, a bus driver may have a regular schedule, but may work longer hours on occasion because of heavy traffic. The following schedule illustrates this situation (numbers shown in parentheses are the number of hours actually worked and RDO means regular day off):

Schedule 1

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Total
RDO (0)	8 (8)	8 (8)	8 (12)	8 (8)	8 (8)	RDO (0)	40 (44)

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8 (8)	8 (8)	8 (8)	8 (8)	RDO (0)	RDO (6)	8 (8)	40 (46)
RDO (0)	8 (8)	8 (8)	8 (8)	8 (8)	8 (8)	RDO (4)	40 (44)
8 (4)	8 (8)	8 (8)	8 (8)	RDO (8)	RDO (0)	8 (8)	40 (44)

In this situation, averaging would not be permitted because the number of hours **scheduled** do not differ from time to time. The number of hours scheduled are eight hours every working day, and 40 hours every week. The number of hours actually worked differ from day to day and from week to week, but this does not alter the fact that the operation does not meet the averaging criteria.

In contrast, the following schedule would qualify for averaging if required for reasons of operational necessity (numbers shown in parentheses are the number of hours actually worked and RDO means regular day off):

Schedule 2

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Total
RDO (0)	12 (12)	12 (12)	4 (6)	4 (4)	8 (8)	RDO (0)	40 (42)
RDO (4)	4 (4)	4 (4)	12 (12)	12 (12)	8 (8)	RDO (0)	40 (42)
8 (8)	10 (10)	10 (10)	RDO (4)	RDO (0)	12 (12)	RDO (0)	40 (44)
12 (10)	4 (4)	4 (4)	8 (8)	4 (4)	4 (4)	RDO (10)	36 (44)

In this situation, averaging would be permitted because the number of hours **scheduled** differs from time to time. As with the first example, the number of hours actually worked differ from the hours scheduled, but this factor has no bearing on whether averaging can be adopted.

The Appendix provides further examples.

D. What is meant by regularly scheduled hours that differ "from time to time"?

Averaging may be adopted where there is an irregular distribution of hours that results in regularly scheduled hours that differ from time to time. The number of scheduled hours may differ on a daily or a weekly basis, or both.

A variance in regularly scheduled hours must occur within a cycle of two or more weeks if the averaging period is adopted pursuant to section 6 of the *Canada Labour Standards Regulations*.

Variances in regularly scheduled hours do not refer to changes in scheduling. They refer to variations in the number of hours scheduled on a daily or weekly basis (or both) within schedules. The variation in the number of hours scheduled must be based upon operational necessity.

Averaging may be adopted if only the daily hours vary, but the pattern of daily scheduled hours must vary from one week to another. The averaging period must cover at least two weeks (see Example 5 in the Appendix).

Averaging is not intended to cover hours worked in excess of eight per day or 40 per week in order to change shifts. This is covered by section 7 of the *Canada Labour Standards Regulations* which states:

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"Notwithstanding the requirements of these Regulations, section 174 of the Act does not apply in circumstances where there is an established work practice that:

- requires or permits an employee to work in excess of standard hours for the purposes of changing shifts;
- ...
- permits an employee to work in excess of standard hours as the result of his exchanging a shift with another employee."

E. What are the criteria for determining whether hours of work qualify for an averaging period?

The *Canada Labour Standards Regulations* require that an employer who wishes to average hours of work or change the number of weeks in the averaging period must post, at least 30 days before, a notice of the employer's intention and provide a copy of the notice to the Labour Regional Head and every trade union representing affected employees who are subject to a collective agreement. (s. 6(3)).

The Regulations also require an employer who has adopted an averaging plan and wishes to alter the number of weeks or cease to use averaging must post, at least 30 days before, a notice and provide a copy to the Labour Regional Head and every trade union representing affected employees who are subject to a collective agreement. (s. 6(12)).

In most instances, the appropriate point to begin an averaging period is halfway between the high and low period, so that peaks and valleys are balanced within an averaging period. The averaging period adopted must be long enough to accommodate any fluctuations in the hours of work but should not be longer than necessary to balance the peaks and valleys.

Establishments in some industries may have regular schedules where the hours of work do not vary from month to month throughout the year, except for unusually high peaks, for instance, at the time of planting or harvesting or, in the case of non-driving staff in the household moving industry, in the summer months. Where the additional hours worked in these periods create peaks that cannot be absorbed and leveled out, a longer averaging period is warranted.

For example:

If a 13-week averaging period is not sufficient, a 26-week period may provide ample space for seasonal fluctuations to be averaged over two 26-week periods.

In some situations, where there is one extreme peak period whose starting point cannot be predicted, a 52-week period may be necessary.

One way to establish that the duration of a period is not sufficient is to balance a company's peak periods against periods when fewer hours of work are available by analyzing the historical data contained in the company's time and payroll records for the preceding year. This will give an indication of the company's needs.

F. Can averaging apply to casual, part-time and seasonal employees?

Part III of the *Canada Labour Code* and the *Canada Labour Standards Regulations* do not distinguish between types of work arrangements. Averaging may be adopted for a class of employees that includes different types of work arrangements (full-time, scheduled or unscheduled, permanent, part-time, casual or seasonal), provided the criteria for averaging are met. These employees, who are in non-standard work situations, are subject to the same maximum and standard hours as the full-time employees in the same averaging situation.

G. For workers subject to averaging, how are standard hours, maximum hours and overtime calculated?

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The standard hours of work of an employee subject to averaging are 40 times the number of weeks in the averaging period; maximum hours of work are not to exceed 48 times the number of weeks in the averaging period. For example, in a two week averaging period, standard and maximum hours are 80 hours and 96 hours, respectively.

At the end of each averaging period, overtime is paid to employees who work hours in excess of the standard hours, excluding those hours for which overtime has been paid already, in the averaging period. The calculation of overtime owing is based on standard hours that are reduced, pursuant to section 6(7) of the *Canada Labour Standards Regulations*, by 8 hours for each day in the averaging period which is a day:

- of bereavement leave with pay;
- of annual vacation with pay;
- of leave of absence with pay under subsection 205(2) of the Code;
- general or other holiday with pay; or,
- that is normally a working day in respect of which the employee is not entitled to regular wages (for example, when an employee is off on unpaid sick leave).

Under paragraph 6(7)(e) of the *Canada Labour Standards Regulations*, it is important to note that, in general, every day for which an employee is **scheduled** to work is "normally a working day".

It is usually the case that an employee receiving a base salary is considered to be "entitled to regular wages" for the purposes of paragraph 6(7)(e) of the Regulations. Therefore, no reduction is made in standard hours for the averaging period for an employee, who is absent from work on paid sick leave.

Averaging provisions under section 169 of Part III of the *Canada Labour Code* and section 6 of the Regulations are meant to address hours of work for both scheduled and non-scheduled workers.

- Scheduled workers who can average are workers whose schedules vary, such as airline pilots who may be scheduled for flights of varying durations.
- Non-scheduled workers are those for whom work is sporadic and unreliable such as non-driving workers employed by a moving or trucking company where employees work only as work becomes available.

H. What happens if employment is terminated during an averaging period?

If the termination is at the employee's choice, the employee is entitled only to be paid at the regular rate for the hours worked during the completed part of the averaging period.

On lay-off or termination of employment by the employer, the employee is entitled to overtime pay for all hours worked in excess of 40 times the number of weeks in the completed part of the averaging period.

If the employee has already received overtime pay for any hours in the averaging period, these hours are not counted in determining the overtime to be paid to the employee on termination of employment.

I. What happens when an employee begins employment after the averaging period has commenced?

In order to integrate this employee into the averaging period, the employer must refer to subsection 6(7)(e) which requires that the standard and maximum hours of work be reduced by eight hours for every day during an averaging period that, for the employee, is a day that is normally a working day for which the employee is not entitled to regular wages. Subsection 8(e) limits the weekly reduction to 40 hours. Therefore, the hours of an employee, who begins work at the beginning of the 11th week of a 16-week averaging period, would be reduced by 400 (10 × 40) for the period before the employment relationship began.

4. Examples

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The following are a few examples to demonstrate how standard hours are reduced in particular situations.

- Scheduled hours which vary with a regular weekly, monthly or annual base salary (e.g. \$4,000 per month every month):

Mary is an airline pilot who has a base salary and works scheduled hours that vary. Her base salary is considered regular wages. Over a two week averaging period she has one holiday, one day of bereavement leave with pay, one day on which airplanes were grounded due to inclement weather, and on the other day Mary was absent due to illness. Mary's standard hours for the two week period are reduced by 16 hours for the holiday and bereavement leave. Her standard hours are not reduced for the two days of absence due to grounded airplanes and illness, respectively, because her base salary ensures that she is entitled to regular wages and paragraph 6(7)(e), therefore, does not apply.

Mary's standard hours for the two week period are reduced by 16 hours of the holiday and bereavement leave. Her standard hours are not reduced for the two days of absence due to grounded airplanes and illness, respectively, because her base salary ensures that she is entitled to regular wages and paragraph 6(7)(e), therefore, does not apply.

- Scheduled hours which vary without a regular weekly, monthly or annual base salary:

Joseph is an employee of ABC Trucking and has scheduled hours that vary. He is paid by the hour for the hours actually worked. His two week period, like Mary's, includes a holiday, one day of bereavement leave with pay, one day for which he was told not to come in for lack of work, and one day on which he did not report for work because he was ill.

Joseph's standard hours are reduced by 32 hours for the period. Like Mary, Joseph's hours would be reduced by 16 hours for the holiday and bereavement leave. As no base salary is received by Joseph and therefore no regular wages are in effect, paragraph 6(7)(e) applies. The hours are further reduced by 8 each for the day on which Joseph was told not to come in for lack of work, and for the day on which he was ill. These two days were normally working days but for which he was not entitled to regular wages. Such cases are rare since most employers with scheduled workers normally do not have scheduled hours of work that vary and therefore do not qualify for averaging.

- Non-scheduled hours:

Rob is an employee of ABC Trucking and has no scheduled hours. He reports each morning and occasionally works several hours for the day. His two week period, like Mary's, includes a holiday, one day of bereavement leave with pay, one day for which he reported but did not receive work, and one day on which he did not report for work because he was ill.

Rob's standard hours for the period are reduced only by 16 hours for the period for the holiday and bereavement leave. Rob's standard hours are not reduced under paragraph 6(7)(e) for the day on which there was no work and the day on which he was ill. Rob does not have any normal working days as his work is unscheduled. Consequently, the hours for these two days are not reduced as they were not normally working days.

Appendix - Examples of Irregular Distribution of Hours Where Employees Have Regularly Scheduled Hours

If the nature of the work necessitates this irregular distribution of daily and weekly hours, then the operations meet the criteria for averaging.

Example 1

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Total
3	0	0	8	8	8	0	27

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0	10	10	10	10	10	0	50
0	8	8	8	8	8	3	43
n/a	120						

Example 2

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Total
8	0	0	9.5	9.5	9.5	0	36.5
0	8	8	8	8	8	0	40
2	9.5	9.5	7.5	0	7.5	7.5	43.5
n/a	n/a	n/a	n/a	n/a	n/a	n/a	120

In Examples 1 and 2, scheduled hours vary on a daily and on a weekly basis.

Example 3

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Total
11	6	6	0	0	0	3	26
11	11	4	0	0	0	0	26
n/a	n/a	n/a	n/a	n/a	n/a	n/a	52

Example 4

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Total
0	10	4	6	10	10	0	40
0	9	9	4	9	9	0	40
n/a	n/a	n/a	n/a	n/a	n/a	n/a	80

In Examples 3 and 4, scheduled hours vary on a daily basis but weekly hours do not vary.

Example 5

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Total
10	0	0	0	0	10	10	30
10	10	0	0	10	10	10	50
n/a	n/a	n/a	n/a	n/a	n/a	n/a	80

Example

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Total
0	11	11	11	11	11	11	66
11	0	0	0	0	0	0	11
n/a	n/a	n/a	n/a	n/a	n/a	n/a	77

In Examples 5 and 6, scheduled hours vary on a weekly basis only.

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