

Hours of Work & Overtime – Model Legislation Proposals

The following comments and proposals are based on a review of the changes that were made to the *Employment Standards Act* in 2002, Judy Fudge's chapter 10 in the 2011 UBC Press book *A Life In Balance? Reopening the Family-Work Debate* edited by Catherine Krull and Justyna Sempruch (based on her 2006 report for the Federal Labour Standards Review Commission), the BC Federation of Labour's November 2011 *Fair Standards* lobbying submission, Dave Ages' suggestions of May 10, 2011, the Canada Labour Code Part III, the Harry Arthurs Federal Labour Standards Review Report *Fairness at Work* of 2006, the Mark Thompson ES Review Report of 1994, and the February 2012 CCPA – Nova Scotia legislative proposals report of Kyle Buott, Larry Haiven and Judy Haiven *Labour Standards Reform in Nova Scotia: Reversing the War Against Workers*.

ESA Section 1 – Definitions

Subsection (2) states that: *An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.*

Propose: The above subsection be amended to read as follows:

An employee is deemed to be at work while on call at a location designated by the employer.

[Note: This deletes the exclusion of Live-in Caregivers from the standard “at work” definition, and more broadly means that if an employee is not free to do anything for his or her self because their employer restricts their activity, then employees in such circumstances are defined to be “at work”.]

Section 31 – Hours of Work Notices

The whole of this section was repealed in 2002. It required that employers must display hours-of-work notices in each workplace where they can be read by all employees. It also required a 24 hour notice of a change in shift unless as a result of the change the employee will be paid overtime wages or the shift is extended before it ends.

Propose: This pre 2002 section be restored except that the minimum notice period be 48 hours (instead of 24) unless there is an emergency circumstance, in which case the minimum notice period is 24 hours, and notices must also be written in the first languages of those employees where a significant number in the workplace do not have English as their first language.

Add a subsection (4) **Family Friendly Work Scheduling** as follows:

If in the event of a planned shift schedule change, employees affected by such change must give their formal consent to the change before it can be instituted. Such affected employees will not unreasonably withhold consent but in any case family responsibilities will constitute a valid reason for withholding consent to a shift schedule change.

Section 32 – Meal & Rest Breaks (title change)

Propose: Add: *An employer who requires an employee to work or to be available for work during a meal break shall pay the employee double the regular wage for the ½ hour meal break worked.*

 Add: *An employer must ensure that no employee works more than 7 hours in any shift, exclusive of a meal break, without two paid rest breaks of 15 minutes each (one rest break per half shift).*

Section 34 – Minimum Daily Hours

This section was changed in 2002 so that the minimum number of hours of pay to an employee required to report for work was reduced from 4 hours to 2 hours, whether or not the employee starts work (previously it was 4 hours pay if work had been started and 2 hours if work had not been started). And a minimum of 4 hours of pay was only preserved if the employee was previously scheduled to work for more than 8 hours. Also repealed was the requirement of a minimum of 2 hours of pay to school students reporting for work on a school day.

Propose: The pre 2002 provisions be restored in full.

New Section: Minimum Weekly Hours – Temporary Foreign Workers

Currently migrant employees working in BC under the Live-in Caregiver Program or other temporary foreign worker programs have no guarantees that for the time that they are bound to work under contract for a designated employer for a period of months or years they will be paid for a minimum number of hours per week. Under this arrangement, employers of temporary foreign workers have the right to provide their workers fewer hours of work than their contract requires or to pay them for fewer hours than specified in the contract.

Propose: *If an employee is working for a designated employer under a federal temporary foreign worker program, including the Live-in Caregiver program, the minimum number of paid hours of work per week of employment of the employee, regardless of the number of hours or days actually worked in any one week, shall be the greater of number of hours per week of work specified in the employer/employee contract or 35 hours.*

Section 35 – Maximum Hours of Work

This section was partially replaced/re-written in 2002 from overtime wages required to be paid after 8 hours per day or 40 hours per week, or if working a flexible work schedule covered by a collective agreement an average of over 8 hours per day or 40 hours per week to these provisions not being applicable if an employee is working under a new Section 37 individual Hours Averaging Agreement.

Propose: Restore all pre 2002 provisions, except that the section be prefaced with the Canada Labour Code Sections 169 and 171 language that: *a) the standard hours of work of an employee shall not exceed eight hours in a day and forty hours in a week; b) no employer shall cause or permit an employee to work longer hours than eight hours in a day or forty hours in any week; and c) an employee may be employed in excess of the standard hours of work but, subject to [restored] Sections 37 and 38 [Flexible Work Schedules], the total hours that may be worked by an employee in any week shall not exceed forty eight hours in a week or such fewer total number of hours as may be prescribed by the regulations as maximum working hours in an occupation or industry.*

In the alternative, establish a new higher standard based on 7 hours per day and 35 hours per week, where the above language becomes:

a) the standard hours of work of an employee shall not exceed seven hours in a day and thirty five hours in a week; b) no employer shall cause or permit an employee to work longer hours than seven hours in a day or thirty five hours in any week; and c) an employee may be employed in excess of the standard hours of work but, subject to [restored] Sections 37 and 38 [Flexible Work Schedules], the total hours that may be worked by an employee in any week shall not exceed forty four hours in a week or such fewer total number of hours as may be prescribed by the regulations as maximum working hours in an occupation or industry.

Add a new section/subsection titled **Voluntary Overtime** (adapted from Saskatchewan Labour Standards Act, Section 12) as follows:

(1) Notwithstanding any other provision of this Act, no employer shall, without the consent of the employee, require an employee to work or to be at his disposal for more than 44 hours in any week, except in the case of emergency circumstances.

(2) Where an employee refuses to work or to be at the disposal of an employer contrary to the employer's requirement under subsection (1) and where no emergency circumstances exist, no disciplinary action shall be taken against the employee by the employer.

(3) In any prosecution alleging a violation of this section, the onus shall be upon the employer to prove that an emergency existed or that the employee was discriminated against for good and sufficient reason.

(4) For the purposes of subsections (1) and (2), "emergency circumstances" means any sudden or unusual occurrence or condition that could not, by the exercise of reasonable judgment, have been foreseen by the employer.

Section 36 – Hours Free From Work

This section (subsection (1)(b)) was amended in 2002 from double time pay required to be paid if an employee is required to work during the per weekly 32 hour **free from work** period to 1½ times regular pay for such work.

Propose: Restore the pre 2002 double time pay provisions.

New Section: Breaks Between Periods of Work (Split Shifts)

Adapted from Saskatchewan Labour Standards Act, section 13.2:

(1) No employer shall require and employee to work or to be at the disposal of the employer for periods that are scheduled so that the employee does not have a period of eight consecutive hours of rest in any 24 hours, except in emergency circumstances within the meaning of [the Voluntary Overtime section above].

(2) No employer shall take disciplinary action against an employee who refuses to work or to be at the disposal of the employer according to a schedule that does not allow the employee to have a period of eight consecutive hours of rest in a period of 24 hours where no emergency circumstances exist.

(3) Payment of wages at an overtime pay rate by an employer does not constitute a defence to a charge alleging contravention of this section.

Section 37 – Flexible Work Schedules for Groups of Employees Not Covered by a Collective Agreement

This section was repealed and replaced in 2002 by a new Hours Averaging Agreements provision. Under the new provision employers are permitted to enter into hours averaging agreements with individual employees without ESB oversight for periods of 1, 2, 3 or 4 weeks to determine overtime pay eligibility. In addition these agreements are not registered with the ESB and are not subject to the approval of 65% of all employees in the workplace as was the case under the previous Section 37 provisions.

Propose: Restore the pre 2002 flexible work schedules provisions, except that to obtain the approval of at least 65% of all employees to such a flexible schedule under subsection (c) a secret ballot vote of such employees be supervised by the Director of the Employment Standards Branch or designate.

Section 38 – Flexible Work Schedules for Employees Covered by a Collective Agreement

This section was repealed in 2002 and not replaced.

Propose: Restore the pre 2002 flexible work schedules provisions.

Section 40 – Overtime Wages for Employees Not on Flexible Work Schedules

This section heading was changed in 2002 to Overtime Wages for Employees Not Under an Averaging Agreement. In addition the requirement to pay double time wages for work over 11

hours per day was changed to double for work over 12 hours per day; the requirement to pay double time for work over 48 hours per week was repealed and not replaced; and the requirement that maximum hours of work at regular pay are reduced by 8 hours for each statutory holiday in the week and if a statutory holiday is worked such hours are not counted when calculating overtime pay was repealed and replaced with the requirement to include the hours worked on a statutory holiday in the count of regular hours worked when calculating weekly overtime hours to be paid at overtime rates.

This section continues to require the payment of 1½ times the regular wage for work over 8 hours per day and/or over 40 hours per week.

Propose: Restore the pre 2002 overtime wages provisions. In addition provide that for employees who are regularly scheduled to work 7 or more hours and up to 8 hours each day and/or 35 or more hours and up to 40 hours each week, that overtime wages of 1½ times the regular wage will be paid for all hours worked in excess of those regularly scheduled.

Section 41 – Overtime Wages for Employees on a Flexible Work Schedule

This section was repealed in 2002.

Propose: Restore the pre 2002 provisions (consistent with the restoration of Sections 37 and 38).

Section 42 – Banking of Overtime Wages

Subsections (4) and (6), requiring the pay out of banked overtime wages within 6 months after the overtime wages are earned, were repealed in 2003.

Propose: Restore the pre 2003 provisions.

Section 43 – Standards for those Covered by a Collective Agreement

This section was repealed in 2002. It required that the hours of work, overtime and special clothing provisions of a collective agreement, when taken together, must meet or exceed the requirements of the Act, and if not the provisions of the Act are deemed to form part of the collective agreement, with the grievance procedure applying for the resolution of any dispute about the application or interpretation of those requirements.

Propose: Restore the pre 2002 provisions.

Regulations:

Under Part 7, Section 34, of the Employment Standards Regulations there are numerous industries and occupations that are excluded from the Hours of Work and Overtime requirements

of the Act. Many of these exclusions are discriminatory, outdated, or just plain ludicrous. For example, that underground miners don't get overtime pay if trapped in the mine after their shift ends, etc.. We therefore call for a thorough and comprehensive review of all the Hours of Work and Overtime **exemption regulations**.

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