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WORKING TIME AND FLEXIBILITY IN CANADA

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Introduction

Canada is a federal state and, under its constitution, legislative jurisdiction over labour and employment is vested primarily in its provinces and territories. As a result, there is no generally applicable national regime regulating hours of work, but rather a patchwork of laws with limited reach. It is not possible to cover all these laws in a brief overview and so we have chosen to focus on the laws of Ontario, Canada's most populous province. However, it is also fair to say that while provincial laws vary, the law of Ontario reflects the general pattern of hours of work laws in Canada. As will be seen, while the development of the hours of work regime was initially driven by the demand to protect employees from long hours, it has also accommodated the demand of employers for flexibility and arguably, in recent years, flexibility for employers has come at the expense of protection for employees.

In 2015, Canada's[82] 15.2 million employees[83] aged 15 and over worked on average 35 hours per week. At the same time, this average hides hours-polarization: whereas 18% of employees work fewer than 30 hours per week, 50% work 40 hours or more per week. There is also a strong gender dimension to hours of work: women are more likely to work fewer than 30 hours per week than men (25% of women (1,862,276) compared to 12% of men (885,469)) and men are more likely to work 40 hours or more per week than women (35% of women (2,605,516) compared to 65% of men (4,992,720)). Furthermore, while only 4% of employees report working 50 or more hours per week, excessively long hours are more common among men than among women. These trends are not surprising since approximately 82% (or 2 million) employees work full-time,[84]

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[82] This brief statistical profile focuses on Canada for reasons of sample size and data availability and also since, as Canada's most populous province, the picture for Ontario is analogous.

[83] Employees are the group addressed herein because the self-employed are not covered by most labour and employment laws, including those regulating hours of work. As a consequence, a sizeable segment of the employed population is excluded as self-employment constituted 15% (2,759,830) of total employment in Canada in 2015.

[84] Statistics Canada, the source for these data, defines full-time employees as those who usually work 30 hours or more per week at the main or only job, although the ESA does not define full-time except insofar as it sets 44 hours as the standard threshold for receipt of overtime pay as discussed in *Q. 6*.

averaging 39.2 hours per week, whereas approximately 18% (or 2.7 million) work part-time,[85] averaging 17.4 hours per week. As in other contexts, women predominate in part-time work; whereas 68% (or almost 1.9 million) of part-time employees are women, who work on average 17.7 hours per week, just 32% (or 885,469) are men, who work on average 16.7 hours per week. Furthermore, of all women employed part-time between the ages of 25-44, 33% (189,146) state that they are doing so for caregiving reasons in contrast to 4% (7,803) of men. Part-time hours are also common among young people, such that 48% (1,152,422) of employees aged 15-24 hold this status, fully 72% (833,220) of whom work part-time so they can attend school. This profile of hours of work reflects patterns common in high-income countries, such as Australia and various EU member states (e.g., the United Kingdom and the Netherlands) where many women and young employees often report engaging in less than full-time hours involuntarily while some men, particularly in certain industries (e.g., many industries in the primary sector), report working excessive hours.

1. Does the regulation of working time in your country establish a daily, weekly and/or annual limit of working hours? If so, what is the maximum working hours?

The *Employment Standards Act*, of Ontario (ESA) establishes daily and weekly limits on hours of work but does not directly address the question of annual limits on hours of work for employees. With regard to daily hours, the law establishes a default of 8 hours a day but permits the employer to establish a longer regular working day (s. 17). There is no prescribed limit on how long that day can be but another section of the ESA requires an employer to provide at least 11 consecutive hours free from performing work each day (s. 18) so, effectively, the longest regular working day an employer can establish is 13 hours. The limit on daily hours may be exceeded with the written agreement of the employee, but the employee generally cannot agree to waive the requirement of 11 consecutive hours off work each day (s. 17(2)). As well, the daily hours of work may be exceeded without written agreement in exceptional circumstances as defined by the ESA. Exceptional circumstances include emergencies and unforeseen events that would disrupt the provision of essential services to the public or continuous operations (s. 19). The maximum weekly hours of work for most employees is 48 (s. 17). This limit may also be exceeded by written agreement of the employee, but that agreement must be approved by the Director of Employment Standards (Director). The general upper limit is 60 hours in a week (s. 17(3) & 17.1). Longer weekly hours than those approved may only be worked in the exceptional circumstances described above.

[85] Statistics Canada, the source for these data, defines part-time employees as those who usually work less than 30 hours or more per week at the main or only job. The ESA does not define part-time, although, notionally, as explained in Q 6, it could be interpreted as suggesting that anyone working less than the legal maximum is a part-time worker for the purposes of the hours of work regime.

An employee may revoke a written agreement to work excess hours with two weeks written notice (s. 17(6)).

Unionized employees are bound by the ESA and collective agreements cannot waive the limits described above. However, where agreement to work excess hours is required, the union can give it and the agreement is then binding on individual employees represented by the union (s. 6). Of course it goes without saying that unionized and non-unionized employees may contract for more favourable conditions than the legislated minimums (s. 5). Finally, many employees are exempt from laws governing maximum hours. These exemptions are discussed in *Q. 3*.

2. What is the regulation regarding daily, weekly and annual rest periods?

As noted above, employees are entitled to 11 consecutive hours free from work each day. The ESA also provides that employees are entitled to either 24 consecutive hours of rest in a week or 48 consecutive hours of rest in a two week period (s. 18(4)). Employees may be required to work during these periods in the exceptional circumstances described above. In addition, employees cannot be required to work more than 5 consecutive hours without a 30-minute eating period free from work. However, with the employee’s agreement, which does not have to be in writing, two eating periods within five consecutive hours may be substituted, provided that in total they provide at least 30 minutes free from work (s. 20). Eating periods are not required to be paid (s. 21) and are not counted as working time for the purpose of calculating hours of work or entitlement to overtime (see *infra.*). In addition, the ESA provides for 9 paid statutory holidays. To qualify, employees must generally work their regularly scheduled shift before and after the holiday. Employees who agree to work on a statutory holiday are entitled to either be paid public holiday pay (calculated at their regular pay over the past four weeks divided by 20) plus premium pay calculated at one and a half of their normal rate of pay or to be paid for the day at their regular rate of pay and be given a substitute day off with public holiday pay (ss. 24-32). Some employees, such as those in the hospitality industry, may be compelled to work on public holidays. Finally, employees are entitled to two weeks annually of paid vacation (s. 33(1)). The employer is entitled to determine when the vacation is to be taken and it shall be given in either a two-week period or in two one-week periods unless the employee requests in writing that it be taken in shorter periods (s. 35). Employees may forego taking a vacation with the agreement of their employer and the Director, but they may not waive vacation pay (s. 41).

3. Are there special regulations for working hours and rest periods in response to certain personal characteristics of employees (for example, age) or for certain professions? If so, indicate these maximum working hours.

In Ontario, a series of exemptions and special rules encompassing working hours and rest periods exist under the ESA and apply across a range of industries and occupations in order to accommodate a particular organization of working time. Conceptually, working time exemptions related to working hours and rest periods affect three occupation –or industry–based clusters in particular –namely, those with irregular working-hours, with long working-hours, and with combined irregular and long working-hours. They also affect a group otherwise difficult to categorize – managerial/supervisory employees.

The first group of working time exemptions relates to occupations and industries that have irregular work schedules that make it difficult for employees to get the requisite hours of work and rest and eating periods. The most notable group to which these exemptions apply are employees in the film and television industry –where an industry-wide exemption excludes these employees from protection relating to maximum daily and weekly hours of work, daily and weekly/bi-weekly rest periods, time off between shifts, and eating periods. Other groups of employees who work in industries where irregular hours have become normative, and are legally accommodated in various ways, include embalmers and funeral directors, employees in mineral exploration and mining, employees working at live performances, trade shows, and conventions, public transit employees, and employees in automobile manufacturing.

A second group of working time exemptions relates to occupations and industries in which long working hours have been become normative. Historically, the ESA dealt with long working-hours through a system of special permits that enabled the scheduling of ‘excess’ hours beyond weekly maximums up to an annual maximum of 100 hours per employee. In 2000, the ESA introduced the scheme described in *Q. 1* that enables the scheduling of hours exceeding 48 in a week (to a maximum of 60) if employee consent and Director approval is secured. Exemptions related to long working hours are specific to occupations that typically require employees to work longer than standard full-time hours. There are also some special rules and exceptions related to long work hours. For example, paramedics and emergency medical attendants have special rules related to daily rest and eating periods.

A third group of occupational and industrial exemptions are for employees whose hours are characteristically both long *and* irregular. These may be further subdivided into pseudo-residential/on-call occupations, seasonal occupations, and information

technology occupations. The first subgroup of occupations encompass those employees who reside in their place of work, or may spend very long hours there in a pseudo-residential or on-call situation: residential building superintendents, janitors and caretakers (who live on the premises); homecare employees who provide homemaking or personal support services; residential care workers; and firefighters. These employees are exempt from many working time standards, including daily rest periods, eating periods, and hours of work.

Three seasonal occupations also have exemptions from working time provisions: landscape gardeners, swimming pool installation/maintenance employees, and hunting and fishing guides. For example, employees in landscaping and swimming pool installation/ maintenance are exempt from hours of work provisions.

Most anomalously, information technology professionals are exempt from all of the working time provisions of the Act.

Finally, representing a group unto itself, managerial or supervisory employees are exempt from, among other provisions addressed in *Q. 4*, the ESA's working time standards related to maximum daily and weekly hours of work, daily and weekly/bi-weekly rest periods, and time off between shifts (i.e., they only remain covered by the eating period provision).

4. Is overtime allowed and, if so, what is the maximum annual limit of overtime? Are these hours included within the maximum working hours? How is overtime compensated?

As discussed in *Q. 1* and *2*, overtime hours above the normal daily and weekly limits are permitted up to the ceiling established by law. There is no annual limit on overtime hours. Discussions of overtime hours in Canada largely focus on the question of compensation. In Ontario, the ESA provides that generally workers become entitled to premium compensation at one and a half times their normal rate of pay for each hour above 44 hours in a week (s. 22).

However, the ESA also provides for a lot of flexibility in this area. First, with the employee's agreement and approval from the Director, weekly hours may be averaged over an agreed upon number of weeks so that overtime pay would only be required if the average weekly hours of work over that period exceeded 44. The overtime averaging agreement must include an expiration date no longer than two years for non-unionized employees (there is no limit for unionized employees) and the agreement is not revocable prior to its expiration (s. 22(2-6)). As well, an employee may agree to be

compensated by receiving one-and-a-half hours of paid time off for each overtime hour worked in lieu of overtime pay (s. 22(7)).

Additional flexibility is provided by the creation of exemptions and special rules governing overtime entitlement for various groups of workers. These are separate from the exemptions regarding hours of work discussed in *Q. 3*, although in many cases there is an overlap. It has been estimated that about 15% of the Ontario workforce is either exempt or covered by some kind of special rule regarding overtime pay entitlements. We cannot comprehensively address the scope of these exemptions but will mention a few key ones. The largest exemption is for managerial and supervisory employees who are not entitled to overtime pay regardless of the number of hours they work, a finding consistent with these employees' exclusion from standards governing maximum hours of work, rest periods, and time off between shifts as discussed in *Q. 3*. Other groups of workers fully exempt from the overtime pay entitlement include information technology professionals, teachers, engineers, residential care workers, and farm workers. Some groups of workers have special rules that require them to work more than 44 hours before they become entitled to overtime pay. These groups include hospitality workers, truck drivers, fruit and vegetable processing workers and workers on road building who variously have to work in excess of 50, 55 or 60 hours to qualify.

5. Does the regulation on working time allow the employer to unilaterally determine or alter the working hours of workers initially established? If so, determine under which circumstances and conditions.

In *Q. 1*, we addressed the authority of the employer to increase length of the working day beyond 8 hours or a greater length initially established. However, apart from emergencies, increasing the working day beyond 8 hours requires the agreement of the employee or, in the case of unionized workers, the agreement of the union. In *Q. 2* we discussed mandatory rest periods. Here we deal with the question of the right of the employer to vary hours within the above parameters. That is, when can employers shorten the working day or week or increase the length of the working day or week for employees whose normal hours are less than 8 hours a day or 48 hours a week. The ESA does not prevent the employer from unilaterally shortening the working day[86] or working week and leaves the question of short hours or irregular hours (within the maximum hours limits) to be addressed by contract.

[86] There is a minor exception to this. If an employee, other than a student, is scheduled for a shift of three or more hours, come into work and is sent home before three hours, the employee is entitled to be paid for at least three hours at the minimum wage. O.Reg. 285/01, s. 5(7).

For workers with individual contracts of employment, express provision may be made to guarantee hours of work, but few workers would have such protection. However, in some cases the common law may imply a term in the contract of employment that the worker is entitled to some number of hours of work or arrangements regarding scheduling. In such a case, unilateral employer alteration of those terms would constitute a breach of contract. The problem, however, is that the only remedy available to the employee is to claim that the breach amounts to a constructive dismissal which entitles them to sue for failure to provide reasonable notice of termination. In some cases, the amount of notice could be substantial, but the point here is that the employee must give up her job to get a remedy for the employer's unilateral alteration of hours, an option which many employees would find unappealing.

For unionized workers, the collective agreement may contain provisions regarding work time reductions or the distribution of work. As a general matter, management rights permit employers to alter hours of work subject only to express or implied restrictions in the collective agreement. Few collective agreements prohibit employers from reducing its staffing requirements. Rather, collective agreements tend to address the distribution of reductions in the hours of work and the general norm is that seniority governs. Effectively, this means that employers may be free to reduce work across the board for all employees but that if reductions in the hours of work are to be unequally distributed then this is to be done by seniority.

We have not addressed the question of temporary lay-offs here, but briefly the ESA does not prohibit lay-offs. It does, however, stipulate a limit on the number of weeks of temporary lay-off before the lay-off is treated as a termination that triggers a statutory entitlement to notice and severance pay. The ESA also stipulates that if an employee earns less than half of her normal wages during a week, it is a week of lay-off for the purposes of calculating whether a temporary lay-off has become a termination. For common law purposes, a temporary lay-off may constitute a breach of contract that would enable the worker to claim that she had been constructively dismissed.

Finally, for workers whose regular hours are less than 8 in a day or 48 in a week, the ESA does not prohibit the employer from unilaterally requiring them to work additional hours, up to these maximums. However, if there is an express or implied term of the contract about the number of hours they have been hired to perform then a refusal to perform those additional hours would not be a breach of contract by the employee.

6. Do workers have the right to unilaterally adapt, modify or reduce their working hours due to work-family balance reasons? If so, determine under which circumstances and conditions.

The ESA provides workers with limited rights to take time off for work-family balance reasons. This is accomplished through the provision of rights to unpaid leaves that have developed incrementally over a number of years. Workers have a right to unpaid leave time for the following family reasons: pregnancy (s. 46), parental (s. 48), family medical (s.49.1), family caregiver (s. 49.3), critically ill child care (s. 49.4), crime-related child death or disappearance (s. 49.5) and personal emergency (s. 50). The amount of time allowed depends on the reason for the leave. For example, pregnancy leave can normally be for 17 weeks, parental leave (available after the birth or adoption of a child) can last for 35 weeks, family medical leave (available to care for family members with a serious medical condition that poses a significant risk of death) is for 8 weeks in a 26 week period, and personal emergency leave (available for personal illness, injury or certain emergencies), is for up to 10 days. As well, there may be qualifying conditions that have to be met before a worker is entitled to a leave. For example, personal emergency leave is only available to employees who work for employers regularly employing 50 or more workers, pregnancy leave is available to employees who started their employment at least 13 weeks prior to the expected due date, while family caregiver leave is available without regard to the number of weeks of employment prior to taking the leave.

The ESA provides workers on leave with a variety of rights (ss. 51-53). As noted, these are unpaid leaves, but in some cases employees may be entitled to collect employment insurance while they are off work. At the end of the leave, the worker has a right to be reinstated in her previous job if it still exists or to a comparable position if it does not. The worker is also entitled to the wage rate earned at the beginning of the leave or to a higher rate if one applies. However, the statute does not protect workers on leave from lay-offs that would have affected their position if they had not been on leave. A worker who suffers a violation of her leave rights may obtain an order of reinstatement or be compensated for any loss she experienced (which may go beyond mere compensation for wage loss) or get a combination of the two (s. 104).

In addition to the ESA, in limited circumstances the Human Rights Code (HRC) provides workers with a right to reduce or modify their work hours for family reasons. The HRC prohibits discrimination in employment on the ground of family status and recently the courts have held that the prohibition on family status discrimination may require an employer to accommodate an employee's child care responsibilities. However, the court made it clear that the employer's duty to accommodate arose in

limited circumstances: it applied only to the parent's legal responsibilities and not for personal choices and the parent must have made reasonable efforts to meet their responsibilities through reasonable alternative arrangements. In short, the employers' duty to accommodate a parent's legal childcare responsibilities is a backstop when all else has failed.

7. And due to work-life balance needs (for example, training or education)?

With very limited exceptions, the answer is no. Personal emergency leave may be taken for unspecified urgent matters that may involve non-family work-life issues. As well, persons who are reservists in the Canadian military are entitled to unpaid leave when they are called up for active duty (s. 50.2). There are no other statutory entitlements to adjust one's hours of work. Of course employees may request or negotiate a contractual right to accommodation for other work-life needs, but there is no obligation on the part of the employer to agree.

8. What is the definition and legal regime of part-time work? Does the regulation of part-time work allow part-time workers to perform overtime?

The ESA does not define part-time work and does not separately regulate it. Part-time workers have the same rights as full-time workers. With regard to working time, there is no difference between a worker who works less than the legal maximum and an employee who works 10 hours a week. Notionally, anyone working less than the legal maximum is a part-time worker for the purposes of the hours of work regime. The only difference is that a worker whose regular work day is less than 8 hours in a day is not protected by statute against being required to work up to 8 hours without her agreement. Hours worked in excess of a worker's normally scheduled part-time hours are not compensated at the overtime rate unless the hours worked exceed 44 hours in the week. Part-time workers have no right to convert to full-time work if full-time work that they are qualified to perform becomes available. Similarly, full-time workers have no right to convert to part-time work if part-time work which they are qualified to perform becomes available.

That said, collective agreements often include contract provisions governing the rights of part-time workers, but the existence of such rights and their content will of course depend on the terms of the particular agreement.

9. Does your legal system recognized the so-called zero hour contract? This is, a contract that does not require the specification of working time and working hours are determined by the employer?

The ESA does not prohibit zero-hours contracts or stipulate that an employee is entitled to a minimum number of hours of work in a day, week or year. In fact, the ESA makes almost no provision regarding the rights of workers who are "on call" or regarding the scheduling of shifts.

The only mention of "on call" workers is found in s. 18 of the Act which requires employers to provide 11 consecutive hours free from work in a given day. Section 18(2) of the act says the requirement does not apply to on call workers who are called in during a period in which the employee would not otherwise be expected to perform work for that employer. The meaning of this exemption is not clarified in the official Guide to the ESA but presumably it would allow on call workers to be denied the right to have 11 consecutive hours free from work. More generally, the ESA regulations stipulate that on call workers are not considered to be working unless they are on call while at the employer's premises. (O.Reg. 281/01, s. 6). As a result, in principle an employer could require a worker to be on call 24 hours a day, 7 days a week, 52 weeks a year, but be under no obligation to provide them with any work or pay.

Finally, there is no statutory requirement that shifts be scheduled in advance or that workers are entitled to some minimum period of notice if their scheduled shift is unilaterally altered by the employer. Of course, as in other areas we have discussed, some workers may enjoy greater contractual protection either through their individual contract of employment or a collective agreement.

10. Has the evolution of the regulation of working time increased or decreased flexibility in managing working time?

The work time regime in Ontario (and in Canada generally) has evolved to increase flexibility for the employer. This employer-centered flexibility has manifested itself in various ways. For example, in 2000, the permit system for long weekly hours (above 48) was replaced by rules that require employee consent and that removed the cap on annual excess hours. As well, in that year, as a result of industry lobbying, IT professionals were exempt from hours of work regulation. In 2001, the wording of the managerial and supervisory exemption was also modified to capture employees who perform some non-supervisory work and, in 2005, exemptions were created for employees in public transit, live performance, trade shows and conventions, and mineral exploration and mining.

Moreover, the regime has failed to develop protections that address the changing reality of work. The regime was originally devised to address the concerns of full-time workers whose primary concern was long hours and entitlements to overtime pay. The needs of workers engaged in precarious forms of employment, including part-time, temporary and on call workers for rights to minimum hours or advance notice of schedules, have not been addressed despite the growth this kind of employment. Indeed, one minimal protection that required employers to pay workers with regularly scheduled shifts of three hours or more for at least three hours if they were sent home early was removed in 2014.

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