

# Employment Standards Review 2005

## Discussion Guide

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*Employment Standards for Modern Workplaces  
and Modern Families*



**Manitoba**

*Building for the Future*

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# Introduction

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Manitoba's *Employment Standards Code* sets out the minimum rights and obligations for all of the province's workers and employers. It is of particular importance to people in non-unionized workplaces who rely most heavily on the Code for protection and guidance.

In order to be effective, it is imperative that employment standards legislation keeps pace with our ever-changing social and economic realities. Manitoba's *Employment Standards Code*, however, has not undergone significant review or revision in about thirty years. While the 1998 *Employment Standards Code* consolidated the Acts that existed at that time, it made no substantial changes to the rules governing the workplace.

Since the Code last underwent major revision, there have been significant changes in the nature of work. There has been a shift away from the standard 8-hour day and 40-hour week toward alternatives such as salaried arrangements and incentive-based compensation like commission, flat-rate and piece-work; a move towards more temporary and part-time employment relationships; and changing work processes and technologies. At the same time, changes in the relationship between work and family and in the composition of labour markets have given rise to calls for improved work-life balance and better protection for vulnerable workers. Other jurisdictions have modernized their employment standards provisions to reflect these developments, leaving Manitoba's standards behind those in many other provinces.

The Manitoba Government is undertaking a review of the current legislation to provide the flexibility required by many of today's workers, employers and families while improving protections for vulnerable workers. The Manitoba Government invites you to share your views on modernizing the province's *Employment Standards Code* to:

- **Reflect the realities of the modern economy by increasing flexibility and modernizing protection, coverage and compliance.**
- **Reflect the changing face of today's labour force and the demands on today's families.**

This Discussion Guide provides a framework for input by addressing the specific provisions under review within these broad themes.

## Your Role in the Review

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The Manitoba government invites your input into the 2005 Review of *The Employment Standards Code*.

Please provide your written comments by **January 16, 2006** to:

Secretary  
Employment Standards Code Review  
614-401 York Avenue  
Winnipeg MB R3C 0P8  
Fax: (204) 948-2085  
E-mail: [esreview@gov.mb.ca](mailto:esreview@gov.mb.ca)

A series of public meetings will also be held in December 2005 according to the following schedule:

Community	Date & Time	Location
Winnipeg	Thursday, December 1 6:00 p.m. – 10:00 p.m.	Winnipeg Convention Centre 375 York Avenue
Thompson	Tuesday, December 6 12:00 p.m. – 7:00 p.m.	St. Lawrence Hall 114 Cree Road
Brandon	Wednesday, December 7 12:00 p.m. – 6:30 p.m.	Classroom "A" Agricultural Extension Centre 1129 Queens Avenue
Winnipeg*	Monday, December 12 12:00 p.m. – 4:30 p.m. 6:30 p.m. – 9:00 p.m.	Winnipeg Convention Centre 375 York Avenue

\* French interpretation will be available by advance request for the December 12 Winnipeg meeting.

If you are interested in making a presentation, please notify the Review Secretary by **Friday, November 25, 2005**. The toll-free telephone number is 1-866-531-0918.

*Please note that all submissions are subject to **The Freedom of Information and Protection of Privacy Act** and may be disclosed during and after the review process through various means, including written reports and the Internet.*

# Reflecting the Realities of the Modern Economy: Flexibility, Protection, Coverage and Compliance

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Many areas of today's economy require a degree of flexibility that may be difficult to achieve within the parameters of traditional labour standards, particularly when those standards have not been updated in three decades. However, it is important that increased flexibility not be achieved at the expense of basic protections.

## 1 Hours of Work and Overtime

Hours of work and overtime are particularly complex areas of employment standards because of the constantly evolving types of employment relationships, the wide variety of employment arrangements that exist and the unique features of different workplaces and industries. These factors, combined with the need to strike the right balance between flexibility and protection, means that there are few simple solutions to the issues that arise in the context of hours of work and overtime. In seeking the best approach, it is helpful to address the issues under four broad categories of workers.

### (a) Hourly Workers

Manitoba's standard work week of 40 hours and standard work day of 8 hours, with overtime paid at the rate of time and one-half, is similar to many other Canadian provinces.

In some cases, employers and/or workers may want greater flexibility in their hours of work arrangements. Workers, for example, may find that some other arrangement is a better fit with their family responsibilities or employers may want a better fit with their business cycles. However, overtime rules may deter people from entering into such alternate arrangements.

The current legislation allows for obtaining a variance to hours of work based on certain criteria, including agreement by the majority of employees. Variances usually take the form of "averaging agreements", where working hours may exceed the standard in a given day or week, but the average working hours over a weekly, bi-weekly or monthly period conform to the 40 hour/week standard; otherwise, overtime is payable. While this is common practice across the country, Manitoba is the only jurisdiction where the hours of work variance is dealt with by an adjudicative body, the Labour Board, rather than by the Director of Employment Standards. Shifting this administrative responsibility to the Director would help streamline the process for requesting and granting variances.

- **Should we change the process for issuing an hours of work variance?**
- **What criteria should determine whether a variance is issued?**

## **(b) Salaried Employees**

Salaried arrangements are an increasingly popular way to reflect the flexibility required by certain occupations. Often salaried employees are expected to work variable hours on a daily or weekly basis with no corresponding variation in their pay.

There are two basic issues with respect to salaried arrangements. The first arises from the fact that the Manitoba Code, like others across Canada, has no specific provisions for salaried workers. Basically, an employment contract that states the salary and the number of hours the employee is expected to work is acceptable as long as it provides the employee with at least minimum wage for all standard hours worked (i.e. 8 hours per day or 40 hours per week) and at least 1 1/2 times the minimum wage for all overtime hours worked. However, failure to provide the required information can lead to various problems. The lack of clarity in the contract can leave employers liable for outstanding overtime and can result in an employee working more hours and for a far lower per-hour wage than he/she anticipated.

The second issue concerns how to best protect salaried employees while maintaining a degree of flexibility. Some have suggested salaried employees should have a degree of control over their time and workplace activities that corresponds to the flexibility enjoyed by their employers under such arrangements.

- **Should the Code contain specific provisions regarding salaried employees?**
- **What criteria should determine whether a salaried employee is covered by hours of work and overtime provisions?**

## **(c) Incentive-Based Workers**

To provide the flexibility required in some industries, many employment relationships are structured so that workers are paid according to output rather than to time. In those cases, compensation is based on commission, flat-rate or piece-work. These arrangements are currently considered lawful as long as the worker earns at least minimum wage, including applicable overtime for excess hours worked. However, one of the issues associated with such arrangements is the difficulty in determining what the overtime rate should be because the "hourly" rate varies according to the worker's output. Therefore, when issues arise regarding overtime for incentive-based workers, the minimum wage is adopted as the regular wage for the purposes of calculating the overtime. The result is that the overtime rate for incentive-based workers is often out of line with their actual earnings per hour.

Providing greater clarity regarding overtime rates for incentive-based workers would help preserve flexibility while ensuring adequate protections for such workers.

- **Should the Code contain specific provisions regarding incentive-based workers?**
- **What is the best system for ensuring that incentive-based workers are adequately protected under hours of work and overtime?**

**(d) Managers**

Since salaried employees may also be designated as managers, providing greater clarity regarding hours of work and overtime as they apply to managers would likely help clarify some of the issues related to salaried workers.

Currently the Manitoba Code does not have a definition of “manager”. However, managers are excluded from overtime and hours of work provisions based on the definition of “employer”.

Like many other provinces, Manitoba uses the following factors in considering whether an individual is an employer and may therefore be deemed a manager: the power to hire, discipline, and/or terminate, determine wages paid, promote, and otherwise control employees. Other factors considered are the degree to which the individual controls his or her time and activities at work and the extent to which they perform tasks similar to the people considered to be their “subordinates.”

Explicitly defining manager in the Manitoba Code would help clarify rights and obligations for this group of workers.

- **Should the Code provide a definition of a manager?**
- **What should the definition include?**

## **2 Exclusions from the Code: Agricultural Workers**

Exclusions are common to employment standards legislation across the country. Among the groups commonly excluded from certain provisions (such as hours of work, overtime and statutory holidays) are certain types of agricultural workers.

Unlike other provinces, Manitoba excludes all workers employed in agriculture, fur farming, dairy farming, and in growing horticultural or market garden products from all provisions of the Code.

The original intent of agricultural exclusions was to reflect the unique operational requirements of the family farm. However, Manitoba's blanket exclusion appears out of line not only with other jurisdictions but with the realities of the modern agricultural industry. Changes in the industry, such as the growth of large confined livestock operations, have fundamentally altered the nature of work in the sector. Some industries that are classified as agricultural have now taken on many of the features of factory production. Therefore, many of Manitoba's agricultural workers may be denied the basic protections that appear appropriate given their working environment.

In addition, there is the matter of which type of agricultural worker should be included or excluded from certain provisions. Manitoba, unlike other jurisdictions, does not specify different occupations within the agricultural sector for purposes of the Code.

- **Should agricultural workers be covered by certain provisions of the Code?**
- **Which type of agricultural worker should be covered, and by which provisions?**



### **3 Promoting Compliance**

The effectiveness of employment standards legislation rests largely on the degree of compliance. While the Employment Standards Division attempts to resolve issues through dialogue and voluntary cooperation, periodically an investigator has to take some other course of action.

However, when confronted with blatant or persistent non-compliance, the tools at the Division's disposal are limited in scope and power. The investigator may issue an order, in which case an employer must simply pay what they owe to the worker. A small administrative fee is also levied in conjunction with an order, but it is based on the amount owing rather than on the nature of the violation. While prosecution may be undertaken, it is expensive and rarely pursued, and seldom results in meaningful fines. The end result is that there are no significant deterrents to violating the legislation.

Other jurisdictions have responded to this issue by strengthening compliance measures. In some jurisdictions, administrative penalties can be issued that reflect the nature of the violation rather than simply the amount owed to workers. Some jurisdictions also exert public pressure by publishing the names of violators. Education can also play an important role in improving compliance, since in some cases the violation may result more from a lack of understanding of the legislation than from a conscious intent by the parties to evade their responsibilities. There are also jurisdictions that require employers to post a summary of employment standards legislation in the workplace.

- **Should Manitoba change its enforcement tools under the Code?**
- **Which enforcement tools are most likely to promote greater compliance?**

# Reflecting the Changing Face of Today's Labour Force and the Demands on Today's Families

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The decline of a long-term attachment to a single employer, an increase in part-time work and the growth of service and retail employment have altered our labour force and created new challenges for the protection of workers. In addition, developments such as the increasing number of women in paid employment have intensified the need for better balance between paid work and other responsibilities. A number of specific legislative areas touch directly upon these themes.

## 4 Termination Notice

Manitoba is among a small number of Canadian jurisdictions that do not have a system of “graduated notice”, under which the notice given by employers when they plan to terminate the employment relationship is based on the worker’s length of service.

Instead, the Manitoba Code requires that the employer and worker provide notice of at least one pay period. This means that the notice period varies depending on the length of the pay period at a particular workplace. More importantly, it means that in Manitoba, unlike in most other jurisdictions, a worker with twenty years of service can be provided with the same notice period as one with two months of service.

Furthermore, Manitoba is the only jurisdiction in Canada that allows employers to unilaterally establish their own notice period. In some cases, the employer’s policy may be that workers’ employment can be terminated without notice.

In cases where a worker quits without providing proper notice, Manitoba is one of the few jurisdictions that allows an employer to collect a financial penalty from the worker.

- **Should Manitoba change the system for providing termination notice?**
- **What would be the best system of termination notice?**

## **5 Statutory Holiday Pay for Part-Time Workers**

The increasing number of part-time and casual workers in the labour force has prompted many jurisdictions to improve treatment of such workers in areas such as statutory holiday pay.

Manitoba's Code currently requires a worker to earn wages for 15 of the 30 days prior to a statutory holiday in order to qualify for holiday pay. Consequently, many part-time workers are denied this benefit. Other jurisdictions extend this benefit to part-time workers by calculating statutory holiday pay as a percentage of the worker's gross earnings in the four-week period leading up to the holiday.

- **Should Manitoba change the eligibility requirement for part-time workers to qualify for statutory holiday pay?**
- **What formula should be used to calculate the amount of statutory holiday pay for part-time workers?**

## **6 Wage Deductions**

In the retail and service sectors in particular, employers sometimes make deductions from a worker's pay to recover certain costs. However, Manitoba is unlike most other jurisdictions in that the Code does not specify which types of deductions are permissible or not. Instead, in Manitoba deductions are allowed provided the employer has obtained specific authorization from workers. In some instances these deductions take workers' earnings below the minimum wage.

- **Should the Code be more specific about which deductions are permissible or prohibited?**
- **What criteria should determine which deductions are permissible or prohibited?**

## **7 Employment of Children**

In Manitoba, a permit from the Director of Employment Standards is required for any person under the age of 16 to start employment in any occupation. The legislation states that the Director shall not issue a permit if, in his or her opinion, the safety, health or well-being of the child is likely to be adversely affected. In this case, well-being includes consideration of the education and social development of young workers. The legislation also prohibits the employment of a child where a substantive part of the work is done with machinery.

Many jurisdictions have more specific provisions in the legislation, such as prohibiting the employment of any child under the age of 12 or prohibiting children from working in certain industries. Most jurisdictions also have clear rules in their legislation that protect the education and development of children.

- **Should the Code be more explicit on which industries or occupations children may not be employed in?**
- **What criteria should govern the process for permitting the employment of children?**

## **8 Unpaid Leaves and Work-Life Balance**

In recognition of the changing face of the workforce and the increasing demand for work-life balance, provisions such as maternity, parental, and compassionate care leave have become standard features of employment standards in all Canadian jurisdictions, including Manitoba.

However, where Manitoba falls outside the Canadian mainstream is with respect to other types of leaves, such as those for bereavement, family responsibility and illness. All jurisdictions except Manitoba provide unpaid leaves in some or all of these areas.

- **Should the Code provide more unpaid leaves?**
- **What is the best approach to take in providing those leaves?**