

Exclusions, Variances and Averaging Agreements under the *Employment Standards Act*

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OVERVIEW

Part 1 of this paper will discuss the employees and other types of workers (e.g. independent contractors) who are partially or totally excluded from the protections provided by the British Columbia *Employment Standards Act* (the "ESA") and the associated regulation, the *Employment Standards Regulation*² (the "Regulation"). Part 2 of this paper will discuss some of the options available to employers and employees to voluntarily modify certain ESA provisions that would otherwise apply to the employee(s), to allow for more flexibility in the working relationship. These options include variance and averaging agreements.

PART 1 -EXCLUSIONS FROM THE ESA

When attempting to determine someone's entitlements under the ESA, an important preliminary consideration is whether that person is in fact covered by the ESA and, if so, whether they are covered by all of the provisions in the ESA or only some of them.

There are two general types of exclusions provided for under the ESA:

- I. Total exclusions: some professions, certain employees and people working under non-employment relationships (e.g. independent contractors) and federally-regulated employees are excluded from ALL of the protections provided by the ESA; and
- II. Partial exclusions: other employees, including managers and unionized employees in some circumstances, are excluded from only SOME of the protections provided by the ESA.

² B.C. Reg. 396/95

This paper does not intend to exhaustively discuss all of the exclusions under the ESA; rather, it is merely intended as an overview of this issue.

I. TOTAL EXCUSIONS UNDER THE ESA

The following are the key total exclusions under the ESA:

- A. Specifically excluded professions & employees, as stipulated in the Regulation;
- B. Independent contractors; and
- C. Federally regulated employees.

Each of these total exclusions is discussed below.

A. Excluded Professions & Employees

Section 3(1) of the ESA states that the ESA applies to all employees save for those who are excluded by the Regulation. Thus, when trying to determine whether a certain category of professional or employee is excluded from the ESA, the first place to look is the list of total exclusions in the Regulation. The Regulation stipulates that the following professions and employees are totally excluded from the protections of the ESA:

1. Section 31 of the Regulation contains a list of professions that are totally excluded from the protection of the ESA including, but not limited to, the following: architects, lawyers, accountants, chiropractors, dentists, professional engineers, insurance agents, physicians and surgeons, podiatrists, optometrists, real estate agents, etc. An important limitation on the exclusions under section 31 is that the exclusion only applies if the person is actually working in that profession as specifically defined under the ESA; and
2. Section 32 of the Regulation contains a list of other employees that are totally excluded from the protection of the ESA, including to the following: secondary students working at their school or

in certain school-related jobs, sitters, and persons working in certain government-funded programs.

B. Independent Contractors

Another category of worker that is totally excluded from the protection offered by the ESA is independent contractors. Much has been written on the subject of determining whether a worker is legally an employee or an independent contractor. This paper will not cover this topic in any detail; it will merely try to alert readers as to how contextual such a determination is.

It is important for organizations wishing to hire an independent contractor (the “payer”) to realize that the determination of the legal status of the ostensible independent contractor (the “payee”) will not turn solely on their title or how they are paid. Rather, it will turn upon a careful analysis of the relationship between the payer and the payee. Put another way, it is important for payees to realize that, regardless of whether they entered into a contract pursuant to which they are purportedly hired as an independent contractor, they may in fact have the same rights as any other employee, both under the ESA and in other areas.

While determining whether a payee will be found at law to be an employee or an independent contractor can be difficult, the basic principles that apply to making this determination are relatively straightforward.

A useful summary of these principles is found in a publication by the Employment Standards Branch (the “Branch”) found on its website, titled “Interpretation Guidelines Manual: British Columbia Employment Standards Act and Regulations”, which discusses this issue under the heading “ESA Section 1 -

Definitions Employee.”³ It states as follows:

The courts have developed several common law tests to distinguish between employees and independent contractors. These tests have been adopted and refined by Labour Boards and Arbitrators.

³ The Interpretation Guidelines Manual can be found on the Branch website at <http://www.labour.gov.bc.ca/esb>.

The director will consider a number of tests, as outlined below, to find an employee/employer relationship. No test is exhaustive in exploring the relationship. All tests must be examined and considered together.

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Control test

One of the most important factors in distinguishing between an employee and an independent contractor is the nature and degree of control exercised by the payer over the payee. The "control test" determines whether one person is in a position to order not only what is to be done, but also how it is to be done. Where such control exists, the courts have generally regarded the relationship as that of an employer and employee.

There are four factors traditionally used in the control test:

1. **Selection** - the payer retains the power to select the worker.
2. **Dismissal** - the payer has the right to suspend or dismiss the worker.
3. **Method of work** - the payer has the right to control the method in which the job is carried out.
4. **Remuneration** - the payer sets the payment scale for wages or other remuneration to the worker.

Four-fold Test

This determines who in the relationship has:

Control -See Control Test above.

Ownership of tools - Does a person use tools, space, supplies, and equipment owned by another person? If so, this would indicate an employment relationship. In a clear-cut case of an employment relationship, employers provide all the necessary equipment and tools for the employee to do their job, including maintaining the equipment and purchasing supplies. Individuals who are forced to purchase and/or finance equipment through the company to retain or get work are generally employees. In other words, regardless of whether the individual owns their own equipment, because he/she has very little choice in critical matters, such as financing, they are an employee.

Independent contractors own their own equipment; if necessary, finance the purchase of equipment through a financial institution of their choosing; and, maintain the equipment as they see fit using service providers of their own choosing. Companies with whom independent contractors contract may, because of customer requirements, set specifications for equipment; however, may not establish brands, makes or colours.

Chance of profit - Does a person have little or no chance of profit? If so, this would imply an employment relationship.

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Risk of loss - Does a person carry the financial risk involved in the provision of the work or services? If so, this would indicate a contractual relationship.

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Organizational or Integration Test

The organization or integration test determines if the work a person performs is integral to, or contributes to, the operation of the business. The more integrated the work is with the employer's business, the more likely it is that the person is an employee.

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Permanency Test

This test determines the duration of the relationship. The longer and more continuous the relationship, the greater chance that it is an employment relationship.

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Economic Reality Test

This test examines the relationship between the parties in order to determine whether a particular individual is carrying on business for himself/herself. There are five criteria normally used in the assessment of the relationship:

1. **Control** - see Control test
2. **Risk** - see Four-fold test
3. **Financial investment** - is there a capital outlay by the person performing the contract?
4. **Lasting relationship** - is there a permanent relationship between the person providing the service and the person paying for the service?
5. **Diversity** - is the person performing the service permitted to provide similar services to other parties and actively involved in searching out other work?

In sum, the Branch (as well as the Courts in British Columbia) will carefully consider various factors in making this determination, including but not limited to the following:

1. The payee's job duties and responsibilities;
2. The payee's financial investment in the relationship;
3. Whether the payee also works for other payers aside from the payer in question;
4. Whether the payee can hire others to perform the work the payee has contracted with the payer to perform, or whether the payee can take other actions to maximize his or her profit;

5. The control exercised over the payee by the payer including whether the payer can hire or fire the payee or his or her employees;
6. How long the relationship has existed between the payer and payee; and
7. How the dependent payer is on the payee to run its business.

For this reason, “employers” who want to avoid liability towards individuals ostensibly working for them as independent contractors should be very careful to ensure that they have set up the relationship properly at the outset to minimize their liability for unpaid overtime pay, vacation pay, failure to make appropriate statutory deductions, etc. Similarly, payees should not automatically assume that they do not have rights under the ESA. Given the complexity of this issue, it is recommended that legal advice be sought anytime a possible employer is attempting to create a legally binding independent contractor relationship with a worker, especially if that person will be working exclusively for them. Similarly, where a payee has potentially significant rights should they be determined to be an employee, it is also advisable for them to obtain legal advice.

C. Federally Regulated Employees

Employees who are federally regulated rather than provincially regulated (e.g. certain individuals working in the areas of aviation, broadcasting, banking, etc) are also excluded from the ESA.

II. PARTIAL EXCLUSIONS UNDER THE ESA

The following are the key partial exclusions under the ESA:

- A. Managers;
- B. Unionized employees; and
- C. Other employees excluded from parts of the ESA by virtue of Part 7 of the Regulation.

A. Managers

Sections 34(f) and 36 of the Regulation state that managers are excluded from Parts 4 and 5 of the ESA (hours of work, overtime entitlement and statutory holiday pay). Managers are covered by all of the other provisions of the ESA.

However, as with independent contractor status, determining who is in fact legally a “manager” under the ESA is not always easily determined. Many people who hold the title "manager" will not actually meet the definition of a manager under the ESA, and therefore will be entitled to the full ambit of statutory minimum protections afforded by the ESA (thus triggering, for example, a retroactive claim for overtime).

Section 1 of the Regulation defines a "manager" as follows:

"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 Branch has published a Factsheet on its website, titled "Manager" (dated November of 2007)⁴, which states that:

The Employment Standards Regulation defines a "manager" as:

- a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or
- a person employed in an executive capacity

To determine if an employee is a manager, the Employment Standards Branch considers:

- How much can the individual, on their own or otherwise, materially and substantially affect the employment conditions of those for whose work they are held responsible by the organization?
- What kind of responsibilities does the employee have with regard to company resources, even if there are certain checks on their authority?

⁴ The Factsheet can be found on the Branch website at <http://www.labour.gov.bc.ca/esb>.

Duties

Typically, managers have the ability to act independently and make decisions using their own discretion. This may include things such as:

- Ensuring company policies are followed
- Authorizing overtime, time off or leaves of absence
- Calling employees in to work
- Altering work processes
- Establishing or altering work schedules
- Training employees
- Committing or authorizing the use of company resources
- Managing a budget

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Executive Capacity

A person is said to be in an executive capacity when he or she makes key decisions which are 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.

They are the controlling mind of the business. They need not be the owner. They are sometimes given titles such as General Manager, Manager of Operations, Comptroller, or Director of Store Development.

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What is not considered:

Determining who is a manager **is not** based on:

- The title given to a position or the fact that other employees refer to that person as a 'manager'.
- The form of payment of wages (e.g. salary, hourly wage, commission).
- The responsibility to open and close the business for the day.

Thus, an individual must either be working in an executive capacity or must have significant supervisory/human resources responsibilities to be considered a manager under the ESA.

B. Unionized Employees

With respect to Unionized employees, Section 3 of the ESA addresses:

1. Which provisions of the ESA do not apply to unionized employees (see Section 3(6) of the ESA – an example is certain enforcement provisions, where specified);
2. Which provisions are deemed incorporated (i.e. ‘read in’) into a collective agreement, where the agreement is silent on a specific issue (see Sections 3(3) and 3(5) of the ESA – an example is with respect to statutory holidays); and
3. Which provisions of the ESA do not apply in a unionized workplace, where the matter is dealt with in the collective agreement (see Sections 3(2) and 3(4) of the ESA – an example is overtime).

Where Section 3 does not clearly specify whether the ESA applies in a unionized context, the correct answer is likely that the ESA does apply by virtue of Section 4 of the ESA, which states that ESA provisions cannot be waived (i.e. it provides minimum statutory rights that cannot be contracted out of except where expressly specified, although generally additional rights can be contractually negotiated).

C. Other Exclusions or Special Rules under Part 7 of the Regulation

Under Part 7 of the Regulation, many employees are excluded from some ESA provisions or have special rules that apply to them under the ESA. The following is a summary of some, but not all, of the employees affected in this manner by Part 7 of the Regulation:

1. Section 33 of the Regulation excludes the following from many provisions of the ESA and Part 4 of the Regulation (minimum wages): students training with the College of Registered Nurses of British Columbia, students training to be a licensed practical nurse and auxiliary or volunteer firefighters;

2. Section 34 of the Regulation excludes a long list of employees from Part 4 of the ESA (hours of work and overtime), including but not limited to the following individuals where captured by the specific language of Section 34: fishing or hunting guides, certain employees working in mineral exploration, teachers and teacher's aides, certain other employees working in education (certain faculty members, instructors, professors, tutors, etc), police officers and firefighters, live-in home support workers, and night attendants or residential care workers;
3. Section 34.1 of the Regulation contains a partial exclusion for farm workers from most of Parts 4 (hours of work and overtime) and all of Part 5 (statutory holidays) of the ESA;
4. Section 34.2 of the Regulation contains special hours of work and overtime pay rules for livestock brand inspectors;
5. Section 35 of the Regulation excludes resident caretakers from much of Part 4 (hours of work and overtime) of the ESA;
6. Sections 37 to 37.15 of the Regulation excludes another long list of employees from various provisions of the ESA, or stipulates that specific rules apply to these employees. This list includes but is not limited to (as defined in the relevant section): fishers, taxi drivers, logging and other truck drivers, newspaper carriers, employee's working in the oil and gas industry, loggers, some employees working in the high technology industry, siculture workers, construction workers, municipal police recruits, aquaculture workers, and some employees working in the mining industry;
7. Section 37.14 of the Regulation provides specific rules for commission sales people; and
8. Sections 38 to 44 of the Regulation contain various other specific exclusions too numerous to cover in this paper.

The above list of exclusions is not exhaustive. It is also important to emphasize that many of the job descriptions discussed above are very specifically defined in section 1 (the definition section) or Part 7 of

the Regulation in a manner that limits their applicability. A review of the case law will also be required in certain cases, to see how the definitions have been statutorily interpreted.

PART 2 - VARIANCES & AVERAGING AGREEMENTS UNDER THE ESA

There are two general mechanisms in the ESA by which an employer and employee can voluntarily agree to modify some of the ESA requirements, to grant them greater flexibility in their employment relationship (not including in a unionized workplace, as discussed above):

- A. Variances; and
- B. Averaging agreements.

A. Variances

The first mechanism is that an employer and “any of the employer’s employees” can jointly apply to the Director of the Branch (the “Director”) for a variance under section 72 of the ESA. Section 72 of the ESA lays out the 10 categories of variances that the Director may grant. Notable inclusions on this list include the following:

1. Time period specified for “temporary layoff”, section 1(1) definition;
2. Minimum daily hours - ESA, section 34 requirements;
3. Maximum hours of work -ESA, section 35 requirements;
4. Hours free from work - ESA, section 36 requirements; and
5. Overtime wages for employees not working under an averaging agreement (see discussion of averaging agreement below) - ESA, section 40 requirements.

In other words, variances can be obtained from a fairly broad range of ESA provisions.

Sections 30 of the Regulation and 73 of the ESA discuss the process of applying for a variance and the factors the Director will take into consideration when deciding whether to grant a variance. A variance

can be requested by sending the Director a letter requesting a variance and outlining the scope and application of the proposed variance. To apply for a variance, the employer must first have the majority of the “affected employees” sign the application letter, indicating that they consent to the proposed variance. “Affected employees” includes any employees who would work under the proposed variance. The Director will then interview some or all of the affected employees, to ensure they understand the impact of the proposed variance and are actually in favour of it being implemented in the workplace. Section 30(2) of the Regulation stipulates that the following issues must be addressed in the application letter for a variance:

- 2) The letter must be signed by the employer and a majority of the employees who will be affected by the variance and must include the following:
 - (a) the provision of the Act the director is requested to vary;
 - (b) the variance requested;
 - (c) the duration of the variance;
 - (d) the reason for requesting the variance;
 - (e) the employer's name, address and telephone number;
 - (f) the name and home phone number of each employee who signs the letter.

The Director has the sole discretion to determine whether to grant the requested variance, and can impose time limits or other conditions, or can limit its application to specific employees.

The general purpose of a variance is to allow for a more flexible arrangement so long as it is fair to the employee and the majority of affected employees will agree to it; variances are not intended as a mechanism to allow employers to bypass the ESA requirements at the expense of employees. For example, a variance can be used to accommodate employee preferences, that would not otherwise meet the strict requirements of the ESA. It can also be used to address an employer’s changing business circumstances, where the majority of the affected employees can consider. For example, the Director can consider whether the employer is facing business difficulties or needs greater flexibility for a special project, and whether therefore the Director feels that in light of this it is within the spirit of the ESA to grant a variance.

If granted, a variance will generally be granted for a term of up to 2 years, although variances can often be extended beyond the initial term. The variance must then be posted in the workplace, so affected employees can read the variance to ensure it is being implemented appropriately.

It is important to understand that variances are seen by the Branch as a special privilege, granted at the sole discretion of the Director. Thus, the terms of the variance must be carefully complied with, or the employer may face problems in the future. The Director also has the authority to revoke a variance at any time if the terms are not being complied with. For this reason, it is strongly recommended that careful thought be put into how the variance should be framed up front so that the employer and employee end up with a variance that meets their needs and that works in practice as anticipated.

B. Averaging Agreements

Another option that employers and employees have to vary the requirements of the ESA is to enter into an averaging agreement under section 37 of the ESA. As with a variance, an averaging agreement allows employers and employees to modify certain requirements of the ESA to allow for more flexibility in the workplace. However, unlike a variance, averaging agreements are used for one sole purpose: to allow for different work arrangements other than the “normal” arrangement contemplated by the ESA without triggering the overtime pay provisions under sections 35, 36(1) or 40 of the ESA.

To provide some background to this, the normal work week contemplated by the ESA is a 40 hour work week, with an employee working 5 days a week and 8 hours per day. Thus, the general rule is that overtime pay is payable anytime an employee works more than 8 hours per day or more than 40 hours per week. Employees are also expected to have at least 32 consecutive hours free from work each week.

An averaging agreement allows employers and employees to agree that they would like to average the employee's hours over a period of 1, 2, 3 or 4 weeks for the purposes of determining the employee's entitlement to overtime wages. In other words, the same statutory requirements apply, but the hours or

work can be averaged over the agreed upon period of time (for example, the hours of work will be averaged over a 4 week period). Thus, a more flexible work week can be agreed upon, so long as the hours worked average out to 40 hours or less per week over the requisite averaging period. However, one important limit on averaging agreements is that an employee is still entitled to overtime pay of twice the employee's regular hourly wage for any hours worked over 12 hours per day, regardless of whether their hours average out to less than 40 hours per week under the requisite averaging agreement.

Another major difference from a variance is that an averaging agreement does not require the approval of the Director. Averaging agreements also do not need to be filed with the Branch. It is something that can simply be agreed upon between the employer and employee.

However, as with variances an employer wanting to implement an averaging agreement must very careful to confirm that the averaging agreement is properly implemented up front, or it may be deemed invalid.

Notably, section 37(2) of the ESA states as follows:

- (2) An averaging agreement under subsection (1) is not valid unless
 - (a) the agreement
 - (i) is in writing,
 - (ii) is signed by the employer and employee before the start date provided in the agreement,
 - (iii) specifies the number of weeks over which the agreement applies,
 - (iv) specifies the work schedule for each day covered by the agreement,
 - (v) specifies the number of times, if any, that the agreement may be repeated,
 - and
 - (vi) provides for a start date and an expiry date for the period specified under subparagraph (iii),
 - (b) the schedule in the agreement under paragraph (a) (iv) is in compliance with subsection (3), and
 - (c) the employee receives a copy of the agreement before the date on which the period specified in the agreement begins.

In addition, sections 37(3) to (6) of the ESA outlines the following rules regarding averaging agreement:

- (3) A work schedule in an agreement under this section must not provide for more than the following hours of work for the employee:
 - (a) 40 hours, if the agreement specifies a 1 week period under subsection (2)(a)(iii);
 - (b) an average of 40 hours per week, if the agreement specifies more than a 1 week period under subsection (2)(a)(iii).

- (4) An employer under this section who requires, or directly or indirectly allows, an employee to work more than 12 hours a day, at any time during the period specified in the agreement, must pay the employee double the employee's regular wage for the time over 12 hours.
- (5) An employer under this section who requires, or directly or indirectly allows, an employee to work more than an average of 40 hours a week within the period specified in the agreement must pay the employee 1 1/2 times the employee's regular wage for the time over 40 hours.
- (6) An employer under this section who requires, or directly or indirectly allows, an employee to work more than the hours scheduled for a day during the period of the agreement must pay the employee
 - (a) 1 1/2 times the employee's regular wage for,
 - (i) if fewer than 8 hours were scheduled for that day, any time worked over 8 hours, or
 - (ii) if 8 or more hours were scheduled for that day, any time worked over the number of hours scheduled, and
 - (b) double the employee's regular wage for any time worked over 12 hours that day.

Section 37(9) of the ESA also outlines the following additional rules regarding averaging agreements that use an averaging period of more than 1 week:

If the period specified in an averaging agreement is more than 1 week, the employer must either

- (a) ensure that for each week covered by the agreement, the employee has an interval free from work of 32 consecutive hours, whether the interval is taken in the same week, different weeks or consecutively any time during the weeks covered by the agreement, or
- (b) pay the employee 1 1/2 times the regular wage for time worked by the employee during the periods the employee would otherwise be entitled to have free from work under paragraph (a).

Thus, it is important to realize that employees are still entitled to overtime pay under an averaging agreement, if they work more than the hours per day scheduled for them under the averaging agreement, if they work more than an average of 40 hours per week, if they work more than 12 hours per day, or if their hours are being averaged out for a period of more than 1 week and they do not receive an interval free from work of 32 consecutive hours in any given week.

Thus, as with variances, it is recommended that once an averaging agreement is agreed upon, the terms of the averaging agreement should be strictly complied with. However, section 37(10) does state that an employer and employee may agree to adjust the work schedule, at the employee's

written request, so long as the total number of hours scheduled in the agreement remains the same.

Notably, this does not encompass an employer request – if the employer wants to negotiate changes, a revised averaging agreement should be prepared.

Section 37(13) of the ESA states that copies of averaging agreements must be retained by the employer for 2 years after the employment relationship ends.

C. Variance and Averaging Agreements -Practical Considerations

In sum, both variance and averaging agreements share some key similarities:

1. Both variances and averaging agreements allow for employers and employees to opt out of the normal requirements under the ESA, to allow for a more flexible work arrangement; and
2. Both variances and averaging agreements must be carefully implemented. To have an enforceable variance or averaging agreement, the relevant provisions of the ESA and the Regulation should be carefully reviewed in advance, to ensure the variance or averaging agreement is properly drafted and implemented.

However, when weighing the pros and cons of a variance or averaging agreement there are also a number of key differences to keep in mind:

1. Variance agreements are obtained by applying to the Director, and require the Director's consent. If approved, the variance will be filed with the Branch. On the other hand, averaging agreements can be agreed upon between the employer and affected employee(s) without the involvement of the Branch, so they are generally somewhat quicker and easier to finalize;
2. Variance agreements can be obtained in relation to 10 different provisions of the ESA. On the other hand, averaging agreements can only be used in one general situation, namely to average out affected employee(s) hours over a 1-4 week period for the purposes of calculating their entitlement to overtime wages; and

3. Variances only require the approval of the majority of affected employees (although the Director could certainly consider the dissenting viewpoints of employees who do not consent), whereas averaging agreements must be agreed to by all affected employees.

