

**Emerging Trends in Employment & Labour Law**

2018 Employment Standards Code Changes:  
A year later – What have we learned and key issues that have arisen that all Employers should be aware of.



**B** BROWNLEE LLP  
Barristers & Solicitors

---

---

---

---

---

---

---

---

Presented by:



Colin Fetter  
Edmonton Office  
cfetter@brownleelaw.com  
Direct: 780-497-4867



**B** BROWNLEE LLP  
Barristers & Solicitors

www.brownleelaw.com

---

---

---

---

---

---

---

---

Long – Term Illness and Injury Leave (Section 53.97)

Seemed pretty simple on first read and application

- New statutory unpaid job protected leave up to 16 calendar weeks per calendar year
- 90 days prior employment and medical certificate required
- Given much broader Human Rights protections for absent ill employees, this new statutory protective leave period “appeared” to have potential little practical effect.

www.brownleelaw.com



---

---

---

---

---

---


---

---

**Long – Term Illness and Injury Leave (Section 53.97)**

Hidden practical concerns

- The only exception written in Section 53.97 of the Code for termination during this 16 weeks is if the Employer suspends or discontinues in whole or in part the business or undertaking in which the Employee is employed.
- The Employment Standards Online Fact Sheet gives a further exception allowing termination listed as **“the reason for termination is unrelated to the Employee requesting or taking the leave”**.
- Significant conflict between the Statutory and Fact Sheet wording.

www.brownleelaw.com 

---

---

---

---

---

---

---

---

---

---


**Long – Term Illness and Injury Leave (Section 53.97)**

Scenarios of risk/concern:

- The Employer begins disciplinary investigation and the Employer triggers this statutory sick leave
- Just cause conduct is discovered while the Employee is on leave

Practical recommendations:

- Significant grey area- seek legal advice
- Unfortunately, yet another reason to package out on a without cause basis rather than use progressive discipline

www.brownleelaw.com 

---

---

---

---

---

---

---

---


---

---

**Averaging and Flexible Averaging Agreements**

**Example of the Model**

<p><b>Averaging Agreement (Long term)</b></p> <p>Rather than working 8 hours per day, 5 days per week (40 regular weekly hours), an employee works:</p> <ul style="list-style-type: none"> <li>• Weeks 1-2: 8.5 h/day for 5 days (42.5 h/wk);</li> <li>• Week 3: 8.0 h/day for 5 days (40 h/wk);</li> <li>• Week 4: Three 9.0 h/day and one 8.0 h/day (35 h/wk)</li> <li>• Every 4th Friday is a day off.</li> </ul>	<p><b>Flexible Averaging Agreement (Short term)</b></p> <p>Rather than working 8 hours per day, 5 days per week (40 regular weekly hours), an employee:</p> <ul style="list-style-type: none"> <li>• Takes a shorter lunch break each day (totaling 8 hours over the 2-week period);</li> <li>• Gets every 2<sup>nd</sup> Friday off at regular pay.</li> </ul> <p style="text-align: center;">OR</p> <ul style="list-style-type: none"> <li>• Busy day at work. Boss asks employee to stay an extra 2 hours (1.0 hours total) at regular pay;</li> <li>• In exchange, employee can leave work 2 hours early on another day that week.</li> </ul>
--	---

www.brownleelaw.com 

---

---

---

---

---

---

---

---


---

---

**Averaging and Flexible Averaging Agreements**

**Signed by:**

<b>Averaging Agreement (Long term)</b>	<b>Flexible Averaging Agreement (Short term)</b>
<b>Non-Union:</b>	<b>Non-Union:</b>
<ul style="list-style-type: none"><li>Individual employee; or</li><li>Group of employees where the majority binds the whole group (ex. a department). (Also binds new employees hired to that group during the term.)</li></ul>	<ul style="list-style-type: none"><li>Individual employee only.</li></ul>
<b>Union:</b>	<b>Union:</b>
<ul style="list-style-type: none"><li>Collective Agreement.</li></ul>	<ul style="list-style-type: none"><li>Collective Agreement.</li></ul>

[www.brownleelaw.com](http://www.brownleelaw.com) 

---

---

---

---

---

---

---

---


---

---

**Averaging and Flexible Averaging Agreements**

**Averaging Period**

<b>Averaging Agreement (Long term)</b>	<b>Flexible Averaging Agreement (Short term)</b>
<ul style="list-style-type: none"><li>1 to 12 weeks.</li><li>Must specify the number of weeks over which the hours will be averaged.</li></ul>	<ul style="list-style-type: none"><li>Cannot exceed 2 weeks</li></ul>

[www.brownleelaw.com](http://www.brownleelaw.com) 

---

---

---

---

---

---

---

---


---

---

**Averaging and Flexible Averaging Agreements**

**Term**

<b>Averaging Agreement (Long term)</b>	<b>Flexible Averaging Agreement (Short term)</b>
<ul style="list-style-type: none"><li>Max. 2 years (unless in a Collective Agreement)</li></ul>	<ul style="list-style-type: none"><li>No limit. Effective until terminated</li></ul>

[www.brownleelaw.com](http://www.brownleelaw.com) 

---

---

---

---

---

---

---

---


---

---

**Averaging and Flexible Averaging Agreements**

**Minimum Weekly Hours**

<b>Averaging Agreement (Long term)</b>	<b>Flexible Averaging Agreement (Short term)</b>
<ul style="list-style-type: none"><li>None specified, but practically speaking it is full-time employees.</li></ul>	To be eligible, the employee must work at least 35 regular hours per week.

www.brownleelaw.com 

---

---

---

---

---

---


---

---

**Averaging and Flexible Averaging Agreements**

**Regular Work Days**

<b>Averaging Agreement (Long term)</b>	<b>Flexible Averaging Agreement (Short term)</b>
<ul style="list-style-type: none"><li>Maximum 12 <u>regular</u> hours per day; and</li><li>Maximum 44 <u>regular</u> hours per week (for 1-week averaging periods) or <i>average</i> of 44 hours per week (if averaging period is more than 1-week).</li></ul>	Maximum 10 <u>regular</u> hours per day.

www.brownleelaw.com 

---

---

---

---

---

---


---

---

**Averaging and Flexible Averaging Agreements**

**Overtime**

<b>Averaging Agreement (Long term)</b>	<b>Flexible Averaging Agreement (Short term)</b>
<ul style="list-style-type: none"><li>Averaging Agreement must describe how overtime pay and lieu time will be calculated.</li><li>Must comply with the <i>Employment Standards Code and Regulation</i>. OT is paid for:</li><li>Hours in excess of 12 hours per day or;</li><li>Hours in excess of 44 hours per week (on average, if applicable).</li></ul>	<p>Flexible Averaging Agreement must describe how overtime pay and lieu time will be calculated. Legislation contains deemed provisions.</p> <p>Employee is eligible for overtime if:</p> <ul style="list-style-type: none"><li>The employee works more than 10 regular hours in a day; or</li><li>Exceeds 44 regular hours in a week or an average of 44 hours per week (if averaging period = 2 weeks).</li></ul>

www.brownleelaw.com 

---

---

---

---

---

---


---

---

**Averaging and Flexible Averaging Agreements**

**Work Schedules**

<p><b>Averaging Agreement (Long term)</b></p> <ul style="list-style-type: none"> <li>• Agreement must specify the work schedule.</li> </ul>	<p><b>Flexible Averaging Agreement (Short term)</b></p> <ul style="list-style-type: none"> <li>• Agreement must specify the work schedule.</li> <li>• Must also identify all work days and the number of hours to be worked on each work day.</li> </ul>
---	--

www.brownleelaw.com 

---

---

---

---

---

---

---

---


---

---

**Averaging and Flexible Averaging Agreements**

**Temporary Changes to Schedules by Employer**

<p><b>Averaging Agreement (Long term)</b></p> <ul style="list-style-type: none"> <li>• Must give at least 2 weeks' advanced notice of change.</li> <li>• If you do not provide the required notice, all time +8 hours/day is treated as overtime.</li> <li>• Notice not required when due to (a) an accident; (b) urgent work is necessary; or (c) other unforeseen or unpreventable circumstances.</li> </ul>	<p><b>Flexible Averaging Agreement (Short term)</b></p> <ul style="list-style-type: none"> <li>• No statutory provisions. Flexible Averaging Agreements are generally meant to be flexible!</li> </ul>
--	--

www.brownleelaw.com 

---

---

---

---

---

---

---

---


---

---

**Averaging and Flexible Averaging Agreements**

**Termination**

<p><b>Averaging Agreement (Long term)</b></p> <p><b>Non-Union:</b></p> <ul style="list-style-type: none"> <li>• Can be terminated by the employer or the employee (or majority of group) on 30 days' notice.</li> </ul> <p><b>Union:</b></p> <ul style="list-style-type: none"> <li>• Terminate in accordance with Collective Agreement.</li> </ul> <p><b>All:</b></p> <ul style="list-style-type: none"> <li>• Termination takes effect at the end of the last averaging period.</li> </ul>	<p><b>Flexible Averaging Agreement (Short term)</b></p> <p><b>Non-Union:</b></p> <ul style="list-style-type: none"> <li>• Can be terminated by the employer or employee on 30 days' notice.</li> </ul> <p><b>Union:</b></p> <ul style="list-style-type: none"> <li>• Terminate in accordance with Collective Agreement.</li> </ul> <p><b>All:</b></p> <ul style="list-style-type: none"> <li>• Termination takes effect at the end of the last averaging period.</li> </ul>
--	---

www.brownleelaw.com 

---

---

---

---

---

---

---

---

---


---

### Averaging and Flexible Averaging Agreements

#### Copy of Agreement

<b>Averaging Agreement (Long term)</b>	<b>Flexible Averaging Agreement (Short term)</b>
--	--

- Must provide a copy to every affected employee.
- Group Agreements Only:
- Must post on employer's website and post in conspicuous places in the workplace.
- Must provide a copy to the employee.

www.brownleelaw.com 

---

---

---

---

---

---

---

---

---

---

### Averaging and Flexible Averaging Agreements

#### Grandfathering

<b>Averaging Agreement (Long term)</b>	<b>Flexible Averaging Agreement (Short term)</b>
--	--


- Old Compressed Work Week Agreements are grandfathered to:
- n/a

**Non-Union:**

- December 31, 2018 or termination of the Compressed Work Week Agreement.

**Union:**

- The day the subsequent Collective Agreement is entered into

www.brownleelaw.com 

---

---

---

---

---

---

---


---

---

---

### Maternity Leave

- Maternity leave entitlement after 90 days vs. 52 weeks;
- Changed to align ESC provisions to the new federal EI changes;
- Maternity leave is extended to 16 weeks (was 15 weeks) to allow for the 1-week wait period for EI benefits;
- If pregnancy "terminates" +16 weeks before due date, mother cannot take maternity leave;
- If pregnancy "terminates" <16 weeks before due date, mother is eligible for maternity leave (either 16 weeks after leave began or 6 weeks after "termination")

www.brownleelaw.com 

---

---

---

---

---

---

---


---

---

---

### Parental Leave

- For the parent taking maternity leave, parental leave still commences upon expiration of the maternity leave;
- For the other parent, eligible after 90 days of employment;
- Length of parental leave increased to 62 consecutive weeks (previously 37 weeks) to align to EI changes;
- Parental leave must be taken within 78 consecutive weeks of the child's birth. (Previously 52 weeks.)

www.brownleelaw.com 

---

---

---

---

---


---

---

---

### Job Protection- Exceptions

- 18 months Job Protected leave (52(1), however s.52(2) states:
  - *Subsection (1) does not apply if an employer suspends or discontinues in whole or in part the business, undertaking, or other activity in which the employee is employed, but the obligation of the employer to reinstate the employee with alternative work in accordance with section 53.1 continues to apply.*
- Employee must be reinstated if the operation which was suspended is resumed within 52 weeks following the end of the employee's leave
- Fixed Term Contract Employees – remain subject to term set out in contract

www.brownleelaw.com 

---

---

---

---

---

---

---

---



**BROWNLEE LLP**  
Barristers & Solicitors

## Questions?

Colin Fetter  
Edmonton Office  
cfetter@brownleelaw.com  
Direct: 780-497-4867

www.brownleelaw.com

---

---

---

---

---

---

---

---