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# Variances

Some employers and employees need the flexibility to establish work arrangements and schedules that do not strictly meet the requirements of the *Employment Standards Act*. In these cases, the employer and affected employees can apply to the Director of Employment Standards for a "Variance".

The Director has the authority to grant a variance from the following sections of the Act:

a) a time period specified in the definition of "temporary layoff";
b) section 17(1): paydays;
c) section 25: special clothing;
d) section 33: split shifts;
e) section 34: minimum daily hours;
f) section 35: maximum hours of work;
g) section 36: hours free from work;
h) section 40: overtime wages for employees not on a flexible work schedule;
i) a period specified in section 37(1) number of weeks covered by an agreement to average hours of work;
j) section 64: notice and termination pay requirements for group terminations.

Applications for variances can be made by sending a letter to the Director of Employment Standards. The letter can be sent to any Employment Standards Branch office.

The employer and more than 50 percent of the affected employees must support the application and sign the letter.

The letter must include the following information:

a) The employer's name, address and telephone number;
b) The sections of the Act the Director is requested to vary;
c) A detailed description of the variance being requested;
d) How long the variance will be in place;
e) The reason for requesting the variance;
f) The name and home telephone number of each employee who signs the application;
g) The name of each employee who will be affected by the variance.

When considering a variance application, the Director must ensure that it is not inconsistent with the purposes of the *Employment Standards Act* and Regulation. The Director will also consider whether, on balance, the employees benefit from the variance.

The Director's decision to grant or reject a variance application will normally be communicated to the applicants within two weeks of the date the application is received. In some cases the Director may need additional time to study the application or may request additional information from the applicant.

Once a variance has been approved it will be issued in the form of a Determination (a decision).

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A copy of the variance must be displayed in the workplace where all affected employees can read it.

## Overtime variances

Overtime variances are the most requested variances. Generally these variances average hours of work over a specified shift cycle.

The variance application should include a schedule showing the proposed shift cycle and the actual days and hours to be worked in the cycle.

Any hours worked over 12 in a day are paid at double time, and any hours worked over an average of 40 in a week over the course of the shift cycle are paid at time and one half.

If an employee who is covered by a variance works hours that are not part of the regularly scheduled hours in a shift cycle, those extra hours must be paid at overtime rates.

The regular overtime provisions of the Act may apply where the employer has contravened the requirements of a variance.

In order to be covered by the terms of the variance, an employee must work or earn wages for the full shift cycle. If an employee does not work a full shift cycle, overtime is payable. This does not apply in the event an employee quits or is terminated during a cycle.

Variances generally identify a group of employees by occupation or classification. Employees within the group who are not covered by the variance should be identified by name.

If a variance applies to a specific employee, the employee must be identified on the variance, and the variance will lapse if the employment of that employee ends.

The parties must adhere to the schedule set out in the variance, except in circumstances beyond the control of both parties.

## Statutory holiday pay

An employee covered by a variance is entitled to statutory holiday pay once he or she has been employed for 30 days. The requirement that employees work 15 of the 30 days prior to the statutory holiday does not apply to employees covered by a variance.

## Length of variance

Initial variance applications may be approved for a period of up to two years. Upon renewal, variances can be approved for up to five years.

## Cancelling a variance

An employer may cancel a variance as long as employees are not negatively affected. To cancel a variance the employer must:

- Notify the Employment Standards Branch and the employees affected by the cancellation; and
- Pay overtime to all employees who are not given the opportunity to finish their shift cycle as per the terms of the variance.

If the employees affected by a variance wish to cancel it, they must notify the Employment Standards Branch and the employer. If the employer wants the variance to remain in place it must prove majority support.

The Director of Employment Standards may cancel a variance if the employer is found to be in non-compliance with the variance.