ALBERTA DOING AWAY WITH FLEXIBLE AVERAGING AGREEMENTS

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Effective September 1, 2019, the latest amendments to Alberta's *Employment Standards Code* (the legislation that prescribes minimum standards of employment in provincially-regulated workplaces) and its Regulation will do away with Flexible Averaging Agreements ("FAAs"): the flexible scheduling arrangements which had been introduced by the previous NDP government under the *Fair and Family Friendly Workplaces Act*.

Flexible Averaging Agreements

Currently, employers and individual employees who work at least 35 hours weekly may – at the employee's request – enter into an FAA that allows the employer to average the employee's hours of work over a period of up to two weeks in order to determine overtime pay or time off with pay. FAAs also allow the employer and employee to:

- establish a daily overtime threshold, which cannot exceed 10 hours; and
- provide paid time off at the employee's straight time rate when the employee works more than their scheduled hours in a day, but not overtime hours. This concept, called "flexible time", is unique to FAAs.

However, effective September 1, 2019, employers and employees will no longer be able to enter into new FAAs. Instead, they will have to enter into Hours of Work Averaging Agreements ("HWAAs"), which are explained below in more detail.

According to legislative debates on the pending amendments, proposed changes to overtime banking rules under Bill 2: *The Open for Business Act* (pursuant to which employees will be entitled to just one hour off work with pay for each one hour of overtime worked) will minimize the impact of eliminating FAAs faced by employees.

Hours of Work Averaging Agreements

HWAAs can be between groups of employees (with majority consent binding all members of the group) and an employer or an individual employee and employer. They allow the employer to average hours of work over a period of up to 12 weeks in order to determine overtime pay or time off with pay. HWAAs also allow the

employer and employee to establish a daily overtime threshold, which cannot exceed 12 hours.

Overtime is payable under HWAAs based on the greater of:

- the amount of daily overtime hours worked in excess of scheduled daily time on any day in the averaging period, or
- hours worked in excess of an average of 44 hours per week over the averaging period.

HWAAs require a written agreement containing specific terms, including a work schedule which identifies all the work days and the number of hours to be worked on each of those work days in the averaging period. In contrast to FAAs, if a group HWAA applies, any new employees hired into the group after the HWAA is made are deemed to consent and are bound by the terms of the HWAA.

What Employers Should Know

Under the transitional provisions of the amendment, existing FAAs will remain valid until the earliest of:

- the date the FAA is cancelled (employers and employees may agree to cancel an FAA at any time, or either party may cancel it unilaterally upon 30 days' notice),
- in the case of an FAA entered into as part of a collective agreement, the date a subsequent collective agreement is entered into, or
- September 1, 2021.

Employers shifting to the HWAA model should note that HWAAs impose more stringent notice requirements and corresponding overtime liabilities where employers must make changes to an employee's work schedule. For more information about these pending amendments, please contact a member of McMillan's Employment & Labour Relations Group.

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A Cautionary Note