

Overtime Exemptions – Workers who substantially control their hours of work

Most employees are entitled to be paid 1 1/2 times their wages for hours worked beyond eight hours in a day or for hours worked beyond 40 hours in a week. An employee is only entitled to overtime for work that is requested, acknowledged or authorized by the employer. In some cases, employees are not entitled to overtime wages because they have substantial control over their hours of work and earn at least twice the Manitoba average industrial wage.

Who is exempt from overtime and hours of work under this provision?

Employees who have substantial control over their hours of work and earn a regular annual income of at least two times the Manitoba average industrial wage are exempt from overtime. Both criteria are required for an employee to be exempt from overtime.

What is the Manitoba average industrial wage?

Employment Standards will announce the Manitoba average industrial wage in June of each year. It is calculated using information available from Statistics Canada for the previous year. In 2008, the Manitoba average industrial wage was \$39,042.64. Therefore, to qualify for this exemption from after June 1, 2009 an employee must have a regular annual wage greater than \$78,085.28 per year.

What has the Industrial Average Wage been in previous years?

Employment Standards updates the Industrial Average Wage in June of each year.

<i>Year</i>	<i>Average Wage</i>	<i>Overtime Threshold</i>
2008	\$39,042.64	\$78,085.28
2007	\$36,491.00	\$72,982.00
2006	\$35,195.16	\$70,390.32
2005	\$34,000.00	\$68,000.00

Will this apply to employees paid by the hour or the week?

Yes, regardless of how employees are paid, if they earn more than twice the Manitoba average industrial wage per year they meet the earning criteria. This also applies to employees who receive a base salary that is under the

required level, but receive production bonuses or commissions that would raise their earnings above the required level.

In any case, employees also need to have substantial control over their hours of work.

How is substantial control over hours of work defined?

Most employees are told by the employer when they are required to work, what days they will work, the hours they will work. Although these employees can request changes to their schedules, they do not have the final say if the request would be allowed. Most employees do not have substantial control over their hours of work.

Other employees have the ability to organize their work schedule to suit the needs of themselves and clients. They may need to check in with their employer occasionally, but the employer generally doesn't set the schedule or control their day-to-day activities. These employees would generally have "substantial control over their hours of work."

Who determines if employees have substantial control of the hours of work?

The employer is responsible for establishing the terms and conditions of employment. If an employer believes that this exclusion applies to their employees, they must be able to show that the employee has substantial control over the hours of work.

Each work relationship is different. If an employee can choose to work or not work at their discretion, might have substantial control of their hours of work. When trying to determine if an employee has substantial control over the hours of work the employer should consider the entire working relationship.

Some employees establish their schedule based on their clients availability, not when the rest of the office works. Would they have substantial control over the hours of work?

Many factors affect if employees controls their hours of work. When employees work is not as important as the flexibility to adjust a schedule without the need for approval from employers.

Do both criteria need to be met to be exempt from overtime?

Yes, to be exempt from overtime, employees must have substantial control over their hours of work and earn an annual regular wage of greater than twice the Manitoba industrial average wage.

An employee only worked part of the year, making \$40,000 in five months. They control their own hours; does this provision apply to them?

Generally, all employees are entitled to overtime. If an employer wants to use this exemption to exclude an employee from overtime, they must be able to show how the employee meets both criteria. The best way to show an employee has met the income threshold is their past performance.

If a full year of work has not been completed it would be up to the employer to show that the employee would meet the threshold. In the example an employee who earns \$40,000 in five months would be on pace to earn \$96,000 a year. The employer may be able to show that this was likely and the employee would have earned more than the threshold.

For more information contact the Employment Standards Branch:

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This is a general overview and the information used is subject to change. For detailed information, please refer to current legislation including *The Employment Standards Code* and *The Worker Recruitment and Protection Act*, or contact the Employment Standards Branch to ask for advice.

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