

EMPLOYEE OVERTIME: THE RULES AND THE RISKS

*By Barry W. Kwasniewski**

A. INTRODUCTION

In recent years, some of the most hotly contested and expensive lawsuits in Canada have related to employee overtime claims. Several of Canada's largest companies¹ have been targeted in large class action lawsuits for non-payment of overtime pay allegedly owing to employees and former employees. Most employers, including charities and not-for-profits, have employees who may work overtime and require compensation for these extra hours. However, overtime rules under the Ontario *Employment Standards Act, 2000*² (the "ESA") are rather complex and confusing. This article will provide both an overview of the rules relating to overtime and general comments to employers as to how to minimize the risk of disputes regarding overtime claims.

B. OVERTIME PAY

In Ontario, provincially regulated employers are subject to the overtime provisions set out in the ESA and its regulations. Under the ESA, employees who are not exempt from overtime pay must be paid overtime for any hours worked in excess of 44 hours in a week, at a rate of pay of at least 1.5 times the regular hourly rate. These requirements are only minimum ESA entitlements. Therefore, employees may have greater entitlements under their employment contracts, whether these contracts are verbal or in writing. It is always preferable to have employment contracts in writing in order to avoid any uncertainty as to either the employer's or the employee's rights.

An employee may also be compensated for overtime by taking time off instead of overtime pay at the rate of one and one-half hours of paid time off work for each hour of overtime worked. Both the employer and the employee need to agree to this form of compensation. The paid time off work needs to be taken within three months of the work week in which the overtime was earned, or, with the employee's agreement, within 12 months of that work week.

* Barry W. Kwasniewski, B.B.A., LL.B., practices employment and risk management law with Carters' Ottawa office. This article is reproduced with permission from *Charity Law Bulletin* No. 214, June 24, 2010.

¹ Including *The Canadian Imperial Bank of Commerce, KPMG LLP, The Bank of Nova Scotia, Canadian National Railway Company, and BMO Nesbitt Burns*

² S.O. 2000, c.41

When an employer and an employee agree in writing, the overtime hours can be averaged over a two week period or more. These agreements must be approved by the Director of Employment Standards at the Ontario Ministry of Labour.

It is important to note that while the ESA states that employers cannot normally require or commit an employee to work more than 48 hours in a week, this weekly maximum does not affect the employer's legal duty to pay overtime after the employee works 44 hours in a week.

C. OVERTIME EXEMPTIONS

ESA regulation 285/01³ lists those persons and categories of workers who are not subject to the overtime rules. In addition to certain professionals, such as architects, lawyers, professional engineers, public accountants, surveyors and veterinarians, some exemptions that frequently are applied include:

- Persons whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis;
- Persons employed as students to instruct or supervise children;
- Persons employed as a student at a camp for children;
- Commissioned salespersons, other than route salespersons, who normally make sales away from the employer's place of business; and
- Information technology professionals.

D. THE SALARIED EMPLOYEE

Employers are often under the misconception that salaried employees are not entitled to overtime. While many salaried employees may fall within the supervisory or managerial exception referred to above, this is not always the case. Therefore, unless they fall within one of the statutory exceptions, salaried employees are entitled to overtime pay. The rate of overtime pay is calculated on the basis of dividing the employee's weekly salary by the number of hours regularly worked, and multiplying that hourly rate by 1.5.

³ http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_010285_e.htm

E. MANAGING THE RISK OF OVERTIME

In light of the trend for employees to claim what they perceive to be their due compensation for overtime, employers must adopt strategies to both assess their current exposure to and reduce their future risk of employee overtime claims. Employer strategies should include:

- Specify the number of hours that the employee is to work in a written employment contract, which should also specify the overtime threshold (keeping in mind the minimum requirements of the ESA);
- Review your organization's current overtime policies to ensure that they are in compliance with employment standards legislation;
- Communicate overtime policies to employees and enforce these policies;
- If the organization has any doubt, seek advice as to whether a particular employee or category of employee is exempt or not from the overtime rules;
- Make sure that employees subject to overtime maintain and submit accurate records of their hours of work on a weekly basis, including any hours worked at home;
- Whenever possible, ensure that overtime hours are authorized by management in advance, and require employees to refrain from working overtime should they fail to follow this policy;
- Maintain complete and accurate records of actual hours worked;
- Properly manage the employees' workload so that the work can be accomplished during regular hours, rather than through more costly overtime hours; and
- Avoid any informal arrangements regarding overtime with particular employees, which likely would not be in compliance with the ESA.

F. CONCLUSION

Given the financial risk to employers that could result from unpaid overtime claims, not-for-profits and charities need to take a proactive approach in managing employee overtime. As with other issues involving the rights and duties of employers and employees, attention to prevention of overtime disputes will reduce the risk of costly overtime claims and will be conducive to a more productive work environment.