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CASE IN POINT: EMPLOYMENT STANDARDS

# Going into overtime

Recent class action suits for big money shows the importance of being familiar with and following statutory overtime requirements

## BACKGROUND

### A growing awareness of overtime

**AT SOME POINT** in their working lives, almost everyone works overtime. Some put in a few extra hours and never give it another thought. Others, as evidenced by the recent increase in overtime class action litigation, have been thinking about it a lot. Employees are becoming more aware of their right to limit hours of work and to receive overtime pay. In turn, employers are discovering a failure to comply with legislated employment standards can lead to class actions by employees who have worked hours beyond the statutory requirements for overtime pay. As evidenced by some of the recent actions, these suits can run into the hundreds of millions of dollars.

Madeleine Loewenberg and Lorenzo Lisi take a look at some of the factors that have contributed to the rise of the class action overtime lawsuit in Ontario and what employers can do to avoid getting caught in a similar situation.

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The hours of work and overtime provisions of employment standards legislation set limits on the hours that can be worked in a day and a week, govern when overtime must be paid, provide for employee consent to extend the number of hours worked and indicate how an authorization to exceed hours of work can be obtained. Employers who don't pay attention to these standards can find themselves liable for big overtime claims such as those in the CIBC, Scotiabank, KPMG and Canadian National Railway class actions.

The general and immutable rule under Ontario's *Employment Standards Act* (ESA) is the maximum number of hours that can be scheduled in a week is 48. In addition, there is a maximum number of hours that can be scheduled in a day. The ESA permits either an eight-hour workday or a workday of no more hours than are normally scheduled for a particular

employee. In short, if an employee normally works from nine to five, the ESA prevents the employer from unilaterally requiring the occasional late night.

To extend the work week beyond 48 hours, the employer and employee must agree in writing. The agreement must specify the employee has received the Ontario Ministry of Labour's most recent information bulletin regarding the operation of the hours of work provisions of the ESA and consents to work overtime. The employer must also apply for an approval to work excess hours. Failure to satisfy each of these preconditions means the employee cannot work more than 48 hours a week.

An employee can revoke his agreement to work extra hours by giving the employer two weeks' notice. An exception to this arises where the employee agreed to work in excess of eight hours a day at the time of hire. In this case, the agreement to work extra hours in a day requires mutual consent to be revoked.

The employer can revoke its agreement to schedule extra hours after pro-

viding reasonable notice to the employee. The Employment Standards Branch of the Ontario Ministry of Labour does not require common law reasonable notice be given but employers should consider providing common law reasonable notice in order to avoid facing a constructive dismissal claim. Such a claim might be asserted where an employee alleges the reduction in his hours of work has resulted in a significant decrease in his level of compensation.

In addition to limits on the hours that can be worked each week, an employee must receive 11 hours free from work each day, 24 hours free from work each week, and 48 hours free from work every two consecutive weeks. Also, an employee must receive eight hours of work free between shifts, unless successive shifts do not require the employee to work more than 13 hours.

### Overtime pay

Regardless of the number of hours the employee agrees to work, overtime must be paid after 44 hours in Ontario and it must be paid at 1.5 times the normal pay rate. Even salaried employees get paid overtime and cannot agree to accept a salary inclusive of overtime.

To avoid paying overtime, the parties can enter into an overtime averaging agreement. This allows the employer to average out the hours in two or more consecutive weeks of work to calculate whether overtime is payable. This agreement must be in writing, have an expiry date of no more than two years, cannot be revoked unless by mutual agreement and approval must be sought from the Min-

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## Claims for statutory minimums handled by courts

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istry of Labour. Absent an agreement that meets these criteria and an approval, overtime is payable after 44 hours is worked in a week.

### Managers and supervisors

Managers and supervisors are not subject to either the hours of work or the overtime provisions of the ESA. It is extremely important to note that calling an employee a manager or supervisor will not entitle the employer to take advantage of the exemption. The supervisor or manager must be performing work that is truly supervisory or managerial in nature, such as hiring, firing, imposing discipline, setting policy or having the authority to budget or make purchases. The manager or supervisor can only be performing non-managerial or non-supervisory work on an irregular or exceptional basis. For example, if a retail manager is regularly ringing in purchases and making sales, it is likely he will be entitled to receive overtime pay, regardless of title.

### The rise of the class action

Class actions in respect of statutory entitlements have gained increasing recognition recently, particularly in Ontario. This is likely due to three factors:

- The recent amendments to the *Class Proceedings Act, 1992*.
- The courts' pronouncement that employees are not required to pursue ESA entitlements through the Ministry of Labour.
- The amount of damages sought in class actions to recover statutory entitlements.

Examples of the types of damages being sought by employees are as follows:

In *Fresco v. CIBC*, a claim was made for general damages of \$500 million and aggravated and punitive damages of \$100 million. The basis for the claim: CIBC routinely refused to pay overtime

when overtime hours were worked.

In *Corless v. KPMG Inc.*, a claim was made for general damages of \$20 million and aggravated and punitive damages of \$10 million. The basis for the claim: Managers set performance targets that could not be met in a standard work week, necessitating overtime hours that were never paid. The *Corless* litigation was certified as a class proceeding on Aug. 7, 2008, as a component of a settlement approved by the court. The settlement resulted in a \$10 million payout to current and former KPMG employees.

In *Fulwka v. Bank of Nova Scotia*, a claim was made for general damages of \$250 million and aggravated and punitive damages of \$100 million. The basis for the claim: Employees were routinely working overtime without overtime pay.

In *McCracken v. Canadian National Railway*, a claim was made for general damages of \$250 million and aggravated and punitive damages of \$50 million. The basis for the claim: Employees were incorrectly classified as supervisors and managers to avoid overtime payments.

### 7 steps employers can take

There are at least seven steps an employer can take to protect itself against a claim for unpaid overtime.

- Know the provisions of employment standards legislation.
- Don't schedule an employee for more than 44 hours a week and make sure employees leave work at the end of those 44 hours. Allowing an employee to stay late, even if the employee wants to do so, is not lawful. Similarly, taking the position that an overtime request was "refused" but the employee continued to work past the allotted time, will not be a sufficient defense.
- Review and revise job descriptions and performance targets to determine whether they invite a claim that overtime hours were required to satisfy targets.

- Obtain agreements to average overtime and extend the hours of work, in compliance with employment standards. Near compliance does not exist — either the agreements are obtained in conformity with the employment standards legislation or they are invalid.

- Keep accurate records of the hours worked and the monies paid for that work. Not only is record keeping specifically required under the ESA — the records that must be kept are also legislated — but a failure to keep records will make it difficult for the employer to prove what hours were worked or that overtime pay was provided.

- Limit travel time throughout the day and the amount of electronic work being performed at night. Travelling within the course of the workday is "work." So is typing a memorandum in front of the television at night.

- Conduct a review of all wage and hourly policies to ensure they exist and they comply with employment standards legislation. Issue new policies as required.



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