

## EMPLOYMENT & LABOUR RELATIONS BULLETIN

July 2007

### UH OH OVERTIME!

Be afraid. Be very afraid! That is, if you are an employer that has been indifferent to the hours worked by your employees.

In a headline grabbing manoeuvre last month, Canadian Imperial Bank of Commerce (“CIBC”) teller Dara Fresco filed a class action lawsuit against her employer seeking to represent all current and former part-time and full-time non management, non unionized tellers and other front-line customer service employees working at CIBC retail branch offices across Canada. She has claimed \$500 million in general damages (or an accounting for unpaid overtime hours worked by the class) and \$100 million in punitive, aggravated and exemplary damages.

Fresco has charged that CIBC breached the class members’ employment contracts and the *Canada Labour Code* by failing to pay overtime pay to employees for excess hours that the class members were required or permitted to work. She has attacked CIBC’s overtime policies and practices which she claims:

- 1) provide that employees will only be paid overtime pay if overtime is approved in advance, except in extenuating circumstances;
- 2) encourage or permit employees to only record their standard hours of work, even if they actually work longer hours; and
- 3) discourage employees from submitting claims for overtime.

Fresco has also asserted that CIBC assigns extra duties and sets performance standards in such a way that employees must work beyond their regular hours in order to meet basic job requirements.

Although the merits of this case are yet to be decided, and indeed the class has not yet been “certified” (approved to proceed) by the court, it shines a spotlight on an employer’s overtime obligations and may attract the attention of dissatisfied employees. Therefore employers need to understand their obligations and ensure that they comply with them. That is not as easy as it sounds. The rules respecting hours of work and overtime are detailed, complex and different in every jurisdiction. Below are answers to some important questions that every employer should ask.

#### 1) *What is the overtime threshold?*

The answer to this question depends upon what legislation applies to the employer. Federally-regulated employers, such as CIBC, must comply with the *Canada Labour Code* which provides that employees are entitled to overtime pay after 8 hours of work in a day or 40 hours of work in a week. However, the vast majority of employers are subject to provincial employment law. Therefore the remainder of this Bulletin will focus on legislation applicable to provincially-regulated employers in Ontario.

In Ontario, provincially-regulated employers are subject to the *Employment Standards Act, 2000* (the “ESA”). Under the ESA, employees must generally be paid overtime pay for hours worked over 44 in a week; there is no daily threshold (although there are different rules for employees in certain industries).

However, employers should be aware that employment standards legislation, such as the ESA, only sets out minimum standards. Employees may have greater entitlements under their employment contracts (which can be oral or written, explicit or implied).

2) *At what rate is overtime pay earned?*

Under the ESA, overtime pay is at least 1½ times the employee's regular rate for each hour of work in excess of the overtime threshold.

3) *Are salaried employees entitled to overtime pay?*

They may well be. Only certain specific groups of employees are not entitled to overtime pay. Some exemptions that are frequently applied are as follows:

- 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
- certain professionals such as lawyers, accountants, dentists and doctors
- commission salespersons, other than route salespersons, who normally make sales away from the employer's place of business
- information technology professionals

Employers should be cautious about applying the above exemptions based solely upon an individual's job title or qualifications. Each of these exemptions is subject to the interpretation of the Employment Practices Branch of the Ministry of Labour and the Ontario Labour Relations Board.

4) *What is the test for supervisory/managerial employees?*

The Ministry considers all of the facts of a particular case to determine if an employee fits within the managerial exemption. One relevant factor is whether the person supervises other employees, but some individuals may be considered managers even if they do not have supervisory responsibilities. Other examples of managerial functions are: authority to hire and fire employees, responsibility for substantial purchases, financial control and budgeting, production planning, and the regular exercise of discretion and independent judgment in management affairs. However, none of these factors alone is conclusive.

Further, even if an employee has some supervisory or managerial duties, the employee may not be exempt if the employee also performs non-supervisory or non-managerial duties on anything but on irregular or exceptional basis.

5) *What else should an employer know?*

The ESA contains numerous detailed provisions relevant to overtime and hours of work. It is not possible to cover them all in this short bulletin. Some examples of the ESA requirements are as follows:

- employees cannot be compelled to work overtime, except in certain exceptional circumstances
- employees must give written consent to work overtime, after the employer gives them certain information prepared by the Ministry of Labour
- employees cannot work more than 48 hours in a work week, unless the employer has obtained approval from the Director of Employment Standards
- employees generally must have 11 consecutive hours free from work each day, eight hours free from work between shifts (unless the time worked on the shifts does not exceed 13 hours), and 24 consecutive hours free from work every week (or 48 hours every two weeks)
- employers can only give time-off in lieu of overtime pay if the employee agrees in writing and the time-off is taken within three months (or within 12 months if the employee agrees in writing)
- overtime rules and requirements apply if the employer requires or permits an employee to work excess hours
- employers are required to keep records of employees' hours and can be fined if they fail to do so

## 6) *Employer Due Diligence*

Every employer should have a clearly articulated and frequently communicated overtime policy. That policy should be consistently applied and enforced. If consent is required to work overtime, processes should be in place to confirm such consent and to ensure overtime work is not performed without consent. Employers should also ensure that positions which are intended to fall within exemptions actually comply with applicable legal tests.

Any member of our Employment and Labour Relations Group would be pleased to discuss your overtime and hours of work obligations.

*Written by Lyndsay Wasser*

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*The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.*

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