

## Member's Quarterly

Spring 2016 Edition

## Ask the Expert

# Overtime: Does Your Policy Comply?

*Review your policy to avoid litigation*

**Q:** What do employers need to know about overtime?

**A:** Employers often view overtime pay as an expense that should be reduced. On the other hand, many employees want to work overtime and all employees want to be paid handsomely for working extra hours. As a result of these conflicting views on overtime pay, employment lawyers often receive questions about the obligations on employers to pay employees for overtime.

The *Ontario Employment Standards Act* (the "Act") contains sections that employers must follow regarding overtime. Exceptions arise when an employer's employment contracts or collective agreement provide for a greater right or benefit for overtime than what is required in the Act. There are several potential dangers and traps for employers to consider when employees work overtime.

Below are the answers to common questions that employers have regarding overtime work and pay.

## 1. What does the *Employment Standards Act* require employees to pay for overtime?

The Act typically requires overtime pay at a rate of 1½ times the employee's regular rate of pay for every hour worked in excess of 44 hours per week. The Act also exempts some categories of employees from overtime pay. The most common exemption is managerial and supervisory employees. The Act does not provide for any daily overtime but considers overtime on a weekly basis (A full list of exemptions is found in O. Reg. 285/01, Exemptions, Special Rules and Establishment of Minimum Wage).

Some employers will provide in their employment contracts or in a collective agreement for overtime pay at a higher rate of pay or start the overtime pay trigger at a lower hours threshold, or on a daily basis.

## 2. Who is a managerial or supervisory employee?

The Act sets out a stringent test for the managerial or supervisory employee exemption. The Act and its Regulation make it clear that an employee's job title does not determine whether or not the employee is a manager or supervisor. Many employees have the job title of a manager (such as account manager or product manager) but, in their day to day activities, their work does not differ from the work done by non-managerial employees. These employees are not managers or supervisors under the Act.

When determining whether or not an employee should be paid overtime, the relevant question is whether the work done by the employee is supervisory or managerial in character and whether the employee provides non-supervisory or non-managerial tasks on an "irregular or exceptional basis".

## 3. Does overtime need to be approved?

A very common and potentially costly misconception among employers is that if an employee works overtime without approval, the employee is not entitled to be paid for the overtime. This is not the case. An employer is not permitted to refuse to pay an employee for unapproved overtime worked.



Dan Palayew  
B.A., LL.B.  
Partner,  
Borden Ladner  
Gervais LLP



Erin Durant  
Associate,  
Borden Ladner  
Gervais LLP

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Unapproved overtime has caused many large employers headaches in recent years as class action lawsuits have been commenced by employees seeking compensation for "unapproved" overtime pay. One employer settled such an action for approximately \$95 million plus legal fees of approximately \$10.45 million (*Fulawka v. Bank of Nova Scotia*).

#### 4. How can an employee limit unapproved overtime?

Employers can limit the amounts of unapproved overtime that is paid by having clear overtime policies that state that all overtime worked needs to be pre-approved by management. If an employee works overtime contrary to the policy, the employee would still need to be paid. However, the policy should provide for discipline that will occur if an employee frequently fails to obtain approval prior to working overtime. This will allow an employer to take progressive disciplinary steps if a particular employee continues to work overtime without obtaining approval from management.

#### 5. Time off in Lieu of Pay

Another way that employers reduce overtime costs is to encourage employees to take time off in lieu of overtime pay. This practice is permitted by the Act if certain criteria are met. The employee must agree to take time off in lieu of pay (they cannot be forced to do so) and the paid time off work must 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.

If the employment relationship ends before the paid time off is taken, the employer must pay the employee for their overtime (*Employment Standards Act, 2000*, S.O. 2000).

### Summary

Although many employers are familiar with the basic overtime principles, it is important to review overtime policies from time to time to ensure that they are in compliance with the Act, that they are clear and that they are being followed. Increased litigation involving overtime pay, particularly surrounding "unapproved" overtime and compensation for "managers" or Ask theOTT01: 7239807: v1, has put a target on the back of many employers. Employers can face potentially expensive litigation if their overtime policy is not being followed or if the policy violates the Act.

*Dan Palayew is Partner/Regional Leader Labour & Employment Group with Borden Ladner Gervais LLP and can be reached at [dpalayew@blg.com](mailto:dpalayew@blg.com).*

*Erin Durant is an Associate with Borden Ladner Gervais LLP and can be reached at [edurant@blg.com](mailto:edurant@blg.com).*