

Member's Quarterly

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Feature

The Employer's Obligation to Retain Records

Failure to keep proper records will land you in court

To many music aficionados, collecting records may be a hobby, but for employers, maintaining employee records is a statutory requirement that may be easy to overlook.

Under section 14(1) of the Alberta *Employment Standards Code* (the "Code"), an employer is required to keep up-to-date records of the following information for each employee:

- regular and overtime hours of work, recorded on a daily basis;
- wage rate and overtime rate;
- earnings paid showing separately each component of the earnings for each pay period;
- deductions from earnings and the reason for each deduction;
- time off instead of overtime pay provided and taken; and
- any other information required by the regulations.

Section 14(4) of the *Code* sets out further categories of employee information that must be kept by the employer.

There are exemptions to some of the recordkeeping requirements but even if an employer is not required to keep them, it may be wise to do so.

The Risk of Deficient Records

Not keeping the statutorily required records can lead to penalties and fines.

Another consideration is that, without proper records, employers may face an evidentiary obstacle if employees allege that they were not paid their proper entitlements. Under section 87(2) of the *Code*, if an officer is unable to determine the amount of earnings to which an employee is entitled for the purpose of making an order because the employer has not made or kept complete and accurate employment records, the officer may determine the amount in any manner that the officer considers appropriate. Even worse, if the employee has a journal showing, for example, that they worked 12 hours per day for 7 days per week, the employer then has no documentary means of disputing such evidence.

In *Condominium Corporation No 8722942 v. Buck*, 2019 ABPC 305, the employer sued two former employees for fraudulently paying themselves vacation pay on termination. The employer alleged that the employees had in fact used in excess of their allotted vacation days.

However, the court found that the employer was statutorily obliged to keep records of the vacations showing start and finish dates and the period of employment in which the annual vacation was earned. Since the employer failed to produce any records of the vacation time as required by the *Code*, the court accepted the employee's evidence instead.

In *Workeneh v. 992591 Alberta Ltd.*, 2006 ABPC 244, the employee was a caregiver claiming constructive dismissal and entitlement to overtime and holiday pay. The employer and employee disputed whether



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the employee worked between 10:00 p.m. and 7:00 a.m. The court found that the employee did, from time to time, provide home care during that period of time. However, the court mentioned that the employer did not provide a log or journal to the employee for the recording of such overtime hours, which was provided to other employees who were paid on an hourly basis. As such, the court ultimately determined overtime based on the terms of the contract relating to the employee's shift rather than the employer's arguments.

So, for employees who may work without supervision, it will still be crucial for the employer to require the employee to track their hours.

Pay Statements

In addition to keeping records, under section 14(2) of the *Code*, an employer must also provide a written statement, at the end of each pay period, to each employee setting out, in respect of the employee, the information set out in section 14(1) of the *Code* and the period of employment covered by the statement.

In addition to the administrative penalty, not providing a clear breakdown in a pay statement may lead to an entire employment agreement being void.

In *RG Bissett Professional Corp v Kusick*, 2018 ABQB 406 ("RG Bissett"), the employee filed a complaint with Alberta Employment Standards claiming vacation pay and holiday pay for the two years prior to the termination of his employment. Under the employment agreement, the employer agreed to pay the employee a gross salary of 40% of his monthly receipts of fees, inclusive of vacation pay entitlement.

The umpire found that this clause was inconsistent with the employer's obligation to provide the employee with a written statement separating out his vacation and holiday pay. As such, the clause amounted to an agreement where a provision of the *Code* did not apply, and was therefore against public policy and void.

For employers, stating that the salary includes vacation pay and/or holiday pay can be risky and should be avoided. The different entitlements must, at a minimum, be listed as separate items in the pay statement.

Other Records to Keep

Note that this article describes the minimum standards for recordkeeping required under the *Code*, and there are requirements under other legislation for employers to keep records, including but not limited to, labour standards, occupational health and safety, and tax legislation. It is crucial that employers stay up to date regarding their recordkeeping obligations.

Employer Takeaway

Not only is an employer statutorily required to keep certain employee records, employers should keep additional records, such as correspondence, acknowledgements or other agreements, in the event of any future disputes with employees. Based on past decisions, the courts and umpires will generally expect the employer to provide the proper records, and failing to do so can lead to the court or umpire calculating entitlements that may be more than the employer expects. Accurate records of the employee's entitlements are essential.

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