



Employment Update

Employment and Labour Group

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“The failure to pay [...] employees at the overtime rate, or to allow them to bank their overtime at the overtime rate, may cause an unexpected liability.”

DISPELLING SOME POPULAR MYTHS ABOUT OVERTIME

David Greenwood

There is a popular belief that salaried employees are not entitled to overtime. This mistaken belief can prove costly for employers.

Pursuant to the *Employment Standards Act, 2000*, all employees, except those that fall within specified exemptions, are entitled to overtime. The Act makes no distinction between salaried employees or hourly employees.

In recent years, there has been a proliferation of claims made against employers for unpaid overtime. The most notable examples are the class action lawsuits that have been commenced against large employers, including the banks. But this is not an issue facing only large employers. Many small companies rely upon employees who work more than the applicable threshold for overtime. The failure to pay these employees at the overtime rate, or to allow them to bank their overtime at the overtime rate, may cause an unexpected liability. If the employer has a number of employees who work overtime, overtime liabilities can significantly affect profit and expense projections if not in the employer's budget.

Moreover, it does not matter that the employer has not approved the overtime worked. The focus is whether or not the overtime was actually worked. A properly drafted overtime policy can assist an employer in dealing with managing overtime, but it will not provide perfect protection from liability for overtime if worked. Rather, employers must be diligent in ensuring that employees do not exceed the overtime thresholds. If employees do work overtime, the employer must be sure to maintain accurate records of the overtime worked and make provisions for it to be paid to the employee or credited to the employee's overtime “bank”. This will help employers avoid unexpected overtime claims and liabilities in the future.

Here are some other popular overtime myths:

Myth: If employees do not use banked overtime hours those hours will be lost.

Truth: An employer cannot cause an employee to forfeit banked overtime.

Myth: Supervisory or management level employees are not entitled to overtime.

Truth: Supervisory or management level employees may be entitled to overtime for work that is not directly related to

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David Greenwood has represented clients in files involving wrongful dismissals, constructive dismissals, human rights complaints, pension issues, disability claims, allegations of employee fraud, theft of confidential and proprietary information, breach of fiduciary duties and misappropriation of corporate opportunities. Additionally, David is frequently consulted in respect of reorganizations and mass terminations and is routinely retained to draft or to negotiate employment agreements, employee policy manuals and other employment related contracts.

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supervisory or managerial duties and if that work is not performed on an irregular or exceptional basis.

Myth: Overtime is paid after 44 hours of work.

Truth: There are different overtime thresholds for different industries or job categories. Most of the exceptions and thresholds are set out in O Reg 285/01 *Exemptions, Special Rules and Establishment of Minimum Wage*.

Our clients will be pleased to note that there are no limits on the overtime that can be worked by lawyers! ■

EXPECT THE BEST

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