



Employment Update

Employment and Labour Group

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MANAGERS MAY BE ENTITLED TO OVERTIME!

Elizabeth J. Forster

It is a commonly held assumption that managerial employees are not entitled to overtime pay. This is not necessarily the case. Depending on the type and duration of work performed, a managerial employee might be entitled to overtime pay.

The *Employment Standards Act, 2000* (“ESA”) requires that overtime pay (equal to at least time and a half regular pay) be paid for each hour of work by a non-exempt employee in excess of 44 hours per week. Regulations under the ESA provide that the overtime pay provisions do not apply to:

a person whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis.

This provision is commonly used to justify withholding overtime pay for managerial and supervisory employees.

The Regulation’s exemption, however, only applies in the case of a manager or supervisory employee who performs non-managerial work on an **irregular or exceptional basis**. It does

not necessarily apply to work done by all managers and supervisors.

The limited application of this exemption was recently discovered by *Glendale Golf and Country Club, Ltd.* The Club’s executive chef applied to the Ministry of Labour for an order requiring the club to pay him overtime. In response, the Club relied on the managerial exemption. Throughout the hearing, no one disputed that the executive chef’s position was supervisory or managerial.

However, one of the chef’s duties was to assist cooks during peak hours. As a result of a number of resignations in the kitchen, the executive chef was called upon to spend more time doing front line cooking. The Ontario Labour Relations Board found that while the executive chef held a position that was supervisory or managerial in character, he was required to perform non-supervisory and non-managerial tasks. The Board found that for a two month period, the front line cooking was taking up over 50% of all the chef’s hours of work. As a result, the Board reasoned that the performance of these non-supervisory duties could not be characterized as “irregular”. The Board further found that the performance of these duties was not “exceptional” because they were not “out of the ordinary”.

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Elizabeth Forster represents employers, trade unions and employees. She has been involved in hearings before the Ontario Labour Relations Board, grievance arbitrations, collective agreement negotiations, Human Rights cases, and prosecutions under Occupational Health and Safety Act.

Elizabeth's work also includes wrongful dismissal actions, actions for breach of fiduciary duties and other employment and employee issues as well as labour-related actions. She advises clients on employment contracts, employment policies, non-competition and confidentiality agreements and employee pension and benefit-related issues.

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The Ontario Labour Relations Board went on to hold that under Section 22 (9) of the ESA, if an employee performs exempted work and work that is not exempt, the employee is entitled to overtime pay provided the time spent performing the non-exempt work constitutes at least half of the time the employee worked during the week. Therefore, as the executive chef spent more than 50% of his time performing the work of a line chef he was entitled to overtime pay on all of the overtime hours worked regardless of its character.

The Club learned the hard way that any exemptions from the overtime requirements will be strictly applied.

If you have any questions about an employer's overtime obligations, please contact any member of our Labour and Employment Group. ■

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