

# Overtime 101

## Overtime and Key Exemptions in Ontario

By: Matthew Curtis

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# Overview

- Part I: Review of Overtime in Ontario
  - When does overtime “kick in”?
  - How to calculate overtime?
  - Time in lieu of overtime
- Part II: Popular Exemptions from Overtime
  - IT Professional Exemption
  - Managerial Exception
  - Commissioned Salesperson Exemption
- Part III: Common Employer Errors on Overtime
- Part IV: Tips to Reduce Overtime Liability

# When are employers required to pay overtime?

- General Threshold
  - Employers are required to pay an employee overtime pay of at least **1.5 times** his or her regular rate for each hour worked in excess of **44 hours** per work week
  - Work week is defined as a recurring period of seven consecutive days beginning on Sunday and ending on Saturday
    - Exception: where a period of seven consecutive days is otherwise selected by the employer
- Applies to all employees, including salaried workers
  - Exception: Employees who are exempt from the overtime provisions of the *Employment Standards Act, 2000* and Regulations



# Paid Time off in Lieu of Overtime

- Employees may be compensated for overtime hours by receiving 1.5 hours of paid time off for each hour of overtime worked
- Two requirements:
  - 1) Employer and employee must agree to this arrangement
  - 2) The paid time off work must be taken within three (3) months of the work week in which the overtime was earned
- Exception: With the employee's agreement, the time off can be taken within 12 months of the work week in which the overtime was earned

# Overview of Overtime Exemptions

- Certain professionals (lawyers, accountants, professional engineers, etc.)
- Fishing or hunting guides
- Landscape gardeners
- Persons who install and maintain swimming pools
- Students employed as camp counsellors for children
- Superintendents, janitors and caretakers of residential buildings
- Persons whose employment is directly related to:
  - Growing mushrooms
  - Growing flowers
  - Growing or transporting sod
  - Growing trees and shrubs
  - Breeding and boarding horses
- ... and many more!

# Exemption #1: Information Technology Professional

- Information Technology (“IT”) Professional
  - Person who exercises professional judgment and applies specialized knowledge in accordance with technical standards
- Examples of Key Characteristics:
  - Engagement in the investigation, analysis, design, development, implementation, operation, or management of information systems
  - Responsible for assessing the information system needs of clients
  - Evaluating the risks and benefits associated with information systems
- Formal education and employment in the information technology business are not determinative
- Note: Exemption does not include IT help desk

# Example of IT Professional Exemption

*Mandana Fararia v The Hospital for Sick Children, 2018*  
CanLII 1004 (ON LRB)

- Applicant was employed with the Hospital as a Senior Systems Analyst
- Board stated employers must demonstrate that:
  - Person under review was primarily engaged in one or more of specified activities set out in the definition
  - Person under review was primarily engaged through the objective application of specialized knowledge and professional judgment
- Board determined that the IT professional exemption did not apply
  - Evidence was inconclusive as to whether the applicant was primarily engaged in the activities outlined in the definition
  - Focus is not on what the Employee is capable of doing but what she is primarily doing on the job

# Example of IT Professional Exemption

*Seyed Iman Homayooni v Applied Precision Inc.*, 2019 CanLII 79633 (ON LRB)

- Applicant was employed as Project Manager of 3D services
  - Applicant was responsible for: evaluating and testing 3D software, software and workflow testing, providing observations on new software
- Board determined that the applicant was not entitled to overtime
  - Applicant possessed a high level of education, experience and proficiency that the employer relied upon
  - Applicant's responsibilities reflected the definition of IT Professional
  - Applicant utilized his professional and specialized knowledge and experience in engineering while undertaking his work – evaluating and testing 3D software
  - No evidence that the applicant engaged in work of an administrative, routine or peripheral nature



# Exemption #2: Managerial Exemption

- Overtime provisions do not apply to:
  - 1) Persons whose work is supervisory or managerial in nature, and
  - 2) Who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis
- Key Terms
  - “Supervisory or managerial in nature” refers to the supervision of employees
    - Key feature: regular exercise of discretion and independent judgment in management affairs
    - Must assess the actual functions of the supervisor or manager under assessment
  - “Irregular” is defined as instances where the performance of non-supervisory or non-managerial duties is unscheduled or sporadic
  - “Exceptional” is defined as non-supervisory or non-managerial duties that are performed outside of the ordinary course of the employee’s duties

# Exemption #2: Managerial Exemption

- Examples where exemption would apply
  - Manager covering staff duties for non-supervisory staff as a result of a rush of customers
  - Manager assists a staff member with clearing the snow from the entrance of the business
  - Manager performs bargaining unit work during a short strike or lockout
- Examples where exemption would not apply
  - Manager operates the business one day and is helped for the remainder of the week
  - Manager is required to regularly perform day-to-day duties of a non-supervisory employee
  - Manager spends a significant period of time on each shift performing non-supervisory duties

# Example of the Managerial Exemption

*Andrew Stevens v 2414407 Ontario Inc*, 2019 CanLII 75740 (ON LRB)

- Applicant was employed as an executive chef
  - Alleged that he completed non-managerial tasks regularly
  - Examples of non-managerial tasks performed: preparation and cooking of meals
- Board determined that the fundamental character of the applicant's position was managerial
  - Although the applicant performed non-managerial tasks, they did not rise to the level of regular, non-exceptional duties
  - Board reviewed the evidence regarding the types of tasks performed by the applicant

# Exemption #3: Commissioned Salesperson

- Overtime provisions do not apply to:
  - Salespersons who are entitled to receive any of their remuneration as commissioned in respect of offers to purchase or sales that:
    - Relate to goods or services, and
    - Are normally made away from the employer's place of business
- Key Factor: Degree of control exercised by the employee
- Exemption is directed at salespersons who normally carry out their duties off-site and spend most of their time away from the employer's place of business
- Exemption does not include "route salespersons"
  - "Route salespersons" is defined as persons who conduct their sales on the basis of a "route" determined or established by the employer

# Example of Commissioned Salesperson Exemption

## *Schiller v P & L Corporation Ltd*, 2012 CanLII 12611 (ON LRB)

- Applicant sold newspaper subscriptions door-to-door
  - Assigned to neighbourhood where subscriptions were delivered
  - Provided with list of non-subscribers of particular street within neighbourhood where the applicant was to solicit
  - Provided with instructions regarding how to perform sales as well as a script of what to say to potential customers
- Board determined the employee was a route salesperson
  - Applicant was not engaged in business on her own account
  - Employer exercised substantial control over the applicant's activities
  - Sales were conducted on the basis of "routes" which were established and determined by the employer

# Common Employer Errors

- Relying on title rather than duties
- Treating salaried employees as exempt
- Misclassifying employee as IT professional, “managerial” or “supervisory”
- Failure to properly document hours of work
- “Off the clock” work
- Failure to renew averaging agreement

# Tips to reduce Overtime Liability

- Conduct an internal overtime audit
- Review hours of work language in your employment contracts
- Review and update your overtime policy
  - Ensure that the overtime policy is clearly communicated in writing to employees
- Review your practices on payment for non-overtime “extra hours”
- Set clear guidelines for overtime approval
- Review your company’s categorization of jobs as “exempt” and “non-exempt”
- Maintain proper records of hours worked
- Review “regular hours” section of pay stubs issued

# Tips to reduce Overtime Liability

- Check the exemptions carefully and know the rules
- Train your managers and supervisors
- Use Paid Time off in Lieu
- Consider Averaging Agreements



# Your Toronto Employment and Labour Group



Anneli Legault,  
Partner



Mary Picard,  
Partner



Blair McCreadie,  
Managing Partner



Adrian Miedema,  
Partner



Andy Pushalik,  
Partner



Meaghen Russell,  
Partner



Matthew Curtis,  
Partner



Craig Lawrence,  
Partner



Pamela Chan  
Ebejer, Sr. Associate



Chelsea  
Rasmussen, Sr.  
Associate



Stefanie Chimienti,  
Associate



Karina Pylypczuk,  
Associate



Kyle Isherwood,  
Associate



Larysa Workewych,  
Associate

# Thank you

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Dentons Canada LLP  
77 King Street West  
Suite 400  
Toronto, Ontario M5K 0A1  
Canada

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