Overtime Pursuant to *The Saskatchewan Employment Act*

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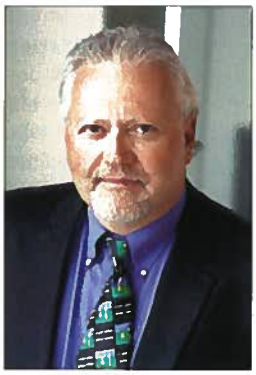

One of the more significant changes ushered in by *The Saskatchewan Employment Act* (the "*SEA*") relates to the new overtime provisions. Although some have questioned whether or not the new overtime regime can effectively safeguard workers against unscrupulous employment practices, the government has maintained that the changes benefit both employee and employer by promoting greater flexibility within the workplace.

Under the former legislation, an employer was required to pay overtime at a rate of time and one-half for each hour an employee worked in excess of 8 hours per day or 40 hours in any week (whichever was more favourable to the employee). Although the employer could modify this work schedule to four, ten hour days, or, in some cases, average the number of hours worked over several weeks, it required the Director's permission to do so. An employer did not have any other options to structure a work schedule that managed overtime.

Disputes between employer and employee about overtime under the former legislation generally centered around whether the employee actually **worked** overtime and whether the overtime was **authorized** by the employer.

The *SEA* significantly modifies the concept of overtime by giving both employers and employees the ability to modify the rules relating to the scheduling of work and when overtime should be paid. With this added flexibility comes an increasingly complex set of rules, exemptions, exceptions, and record keeping requirements.

Although weekly hours of work in Saskatchewan remain set at 40 hours, with daily hour limits of either 8 or 10, the employer, with the written agreement of the employee, can modify this standard work schedule, both in terms of the average work week and the daily number of hours. This agreement does not need to be submitted to the Director.

An employee can now agree to have weekly overtime pay calculated on the basis of a 160 hour, four week period (with a maximum of 44 hours per week). An employee can also agree not to be paid overtime until he or she works more than 12 hours in a single day. These changes, although not "wide open", are significant.

Critically, the above types of arrangements must be **voluntarily** agreed to by the employee in **writing**. In the case of existing employees, employers can modify the overtime policy with the consent of at least 50% of the employees who are affected by the change. Further, on a going forward basis, employers should ensure that any modification they intend to make to an overtime policy is set out as a term in the employment contract.

Further, unlike other provisions an employee may agree to, any agreement to modify overtime **cannot exceed two years in length** and employers are required to keep a copy of any overtime agreement for **at least five years** following the expiry of the agreement.

Accordingly, employers who take advantage of a modified overtime schedule will need to be diligent and ensure that they are renewed by the employee every two years. Employers must keep diligent records, both of upcoming expiry dates for their agreements, and of any agreements which have been in force over the last five years. Employers who do not do so risk complaints to labour standards by employees, who can seek retroactive overtime pay for time worked after the overtime agreement expires.

Although the above changes in the *SEA* are intended to promote flexibility between employer and employee, an employer, subject to emergency circumstances, is still prohibited from scheduling an employee in such a manner that the employee (except for residential-service facility operators) does not have a period of 8 consecutive hours of rest in any day. Employers are also, subject to a number of exceptions, required to grant one day off every week to an employee who ordinarily works at least 20 hours in a week.

However, not all categories of employees are required to be given days off, including employees who suppress forest or prairie fires or employees who are live-in care providers or domestic workers. In the case of the latter employment category, the employee is entitled to two consecutive days off. Retail workers whose workplace employs more than 10 people are also entitled to two consecutive days of rest in a week, provided they have not agreed to otherwise modify their working hours.

As was formerly the case, overtime is required to be paid at a rate of one and half times an employee's pay. Employees who are not paid by the hour must have their pay converted to an hourly rate to make the required overtime calculations. In the case of employees who are paid on a monthly basis, this calculation requires the employer to multiply the employee's monthly wages by 12, divide that total by 52 and then divide the regular weekly hours worked (note this amount cannot exceed 40 for the purpose of the calculation).

In addition to the above overtime arrangements, individual employees and their employer can also agree, in writing, to create an overtime bank. Any time banked in this type of arrangement must be banked at 1.5 times the number of overtime hours worked. As the name suggests, an overtime bank allows an employee to build up overtime hours worked and apply them to their regular shifts as paid time off at the preferred rate.

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All banked time must be paid out at the employee's regular wage within 12 months of the time it was banked. Also, if an employer wants to terminate an overtime bank agreement, they must give the employee notice of their intention to do so at least one pay period in advance.

As under the former legislation, an employer's obligation to pay overtime to an employee arises only where the excess hours are authorized by the employer. The *SEA* provides that overtime pay is required where the employer "requires or permits" the employee to work hours which exceed the statutory amounts or the modified arrangement. Employers should be sure to have clear protocols in place for the approval of overtime, particularly in work environments where employees are expected to manage their time. In workplaces where it is feasible to do so, employers may wish to implement a policy requiring prior approval for all overtime hours, to avoid unexpected claims of overtime at a later date.

If the employer decides to lay-off or terminate an employee, it cannot use the banked time as a substitute for the statutorily required notice period. Rather, the employer must pay-out the banked time in addition to any notice or pay in lieu. However, if an employee resigns and gives notice (which employees are now required to do under the *SEA*), an employer can apply any hours banked against the weeks remaining in that employee's work period.

Although the majority of employers and employees will be subject to this new overtime regime, the *SEA* also creates a number of exceptions: some of which existed in prior legislation. For example, professional practitioners, including students in training, are not entitled to overtime. Commissioned salespersons, who travel regularly and who earn all their remuneration as commissions are also not entitled to overtime.

From an employer's perspective, the *SEA*'s new regime on overtime should be seen as a positive step forward in labour relations. The legislation gives the employer significantly more control over the time and manner in which overtime is paid. It also gives employers, who are subject to fluctuating work flows, the ability to negotiate overtime banks which can then be applied to work days where less staff is required. From the employee perspective, the flexibility allows for greater work life balance. Provided that employees and employers respect the trade of working hard in exchange for work life balance this new flexibility can benefit both sides.

A modified version of this article was presented on October 29, 2014 at a convention for Saskatchewan employers.

** with context and editorial contributions from Candice Grant.*