

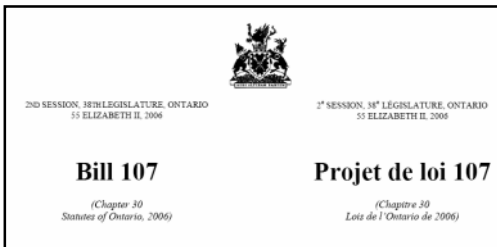
## EMPLOYERS' ALERT

June 2007

### Is Your Overtime Policy A Claim Waiting to Happen?

### A New Class Action Lawsuit Relating To Overtime Brings this Issue to the Forefront

#### WHAT'S NEW AT RUBIN THOMLINSON LLP



At our RT breakfast on June 28, 2007, Janice Rubin facilitated a very interesting discussion about the impact of Bill 107, which amends the Human Rights Code in Ontario. The discussion focussed on how changes to the Code will impact on employers' human rights practices. More than 70 people attended this very successful standing room only event.

Did you know that...

Kevin Robinson, newest lawyer at RT, sits as a Councillor on the Council of the Ontario Association of Architects? Kevin was appointed by the Attorney General for Ontario for a three year term ending in 2009. The Council is the governing body for the Association that prescribes and regulates the standards of the profession, in accordance with the Architects Act .

We work with employer clients to provide optimal legal solutions to their challenging workplace issues. If you would like to know more about our practice, please do not hesitate to contact us at (416) 847-1814 or via e-mail at [contact@rt-law.ca](mailto:contact@rt-law.ca).

On June 5, 2007, a class action lawsuit was commenced by a CIBC employee claiming that tellers are required to work overtime for which they are not paid. The class action seeks \$600 million in damages for all employees affected.

While the CIBC is federally regulated, the claim has led many employers, regardless of the jurisdiction in which they operate, to question whether their overtime policies are creating a risk of liability.

Employment Standards Act, 2000 ("ESA")

The ESA, which is applicable to provincially regulated employees working in Ontario, states that an employer "shall pay an employee overtime pay of at least one and one-half times his or her regular rate for each hour of work in excess of 44 hours in each week or, if another threshold is prescribed, that prescribed threshold."

Overtime pay is required to be at least 1.5 times the employee's regular rate of pay (i.e., time and a half).

An employee can agree in writing to have paid time off instead of overtime pay but he or she must be given 1.5 hours of paid time off work for each hour of overtime worked. The ESA requires that paid time off be taken within three months of the week in which it was earned or, if the employee agrees in writing, within 12 months.

Regardless of what the contract of employment or workplace policy states, an employer and an employee cannot agree to give up his or her right to overtime pay under the ESA. However, the parties can agree to overtime rules which are more beneficial to the employee than those outlined above.

There are a number of exceptions to the requirement to pay overtime, including, but not limited 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"; professionals (i.e., lawyers, doctors etc.) and information technology professionals.

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### Upcoming Events

On July 6<sup>th</sup> David Whitten will be speaking at the Canadian Payroll Association's Annual Conference in St. John's, Newfoundland and Labrador. In addition to 40 other experts, David will be speaking to payroll, HR and IT professionals about what distinguishes an employee from an independent contractor and where to draw the line. For more information please call (416) 487-3380 x111 or visit [www.payroll.ca](http://www.payroll.ca).

-and-

On October 2<sup>nd</sup>, Chris Thomlinson will host our next RT breakfast on what's new in employment contracts. Please watch your email for details. If you are not subscribed to receive our Employers' Alerts please contact us at [contact@rt-law.ca](mailto:contact@rt-law.ca) to subscribe.

*This alert is prepared as a service for our clients and other persons dealing with employment issues. It is not intended to be a complete statement of the law or an opinion on any subject. Although we endeavour to ensure its accuracy, no one should act upon it without a thorough examination of the law after the facts of a specific situation are considered, and without seeking the advice of legal counsel. No part of this publication may be reproduced without prior written permission of Rubin Thomlinson LLP. This has been sent to you courtesy of Rubin Thomlinson LLP.*

### Canada Labour Code (the "Code")

The Code applies to federally regulated employees working in Ontario in industries such as banking, trucking, and telecommunications, to name a few.

Under the Code, overtime means any hours "required or permitted to be worked" in excess of the standard hours specified which in most cases is 8 hours in a day or 40 hours in a week. If the total of daily overtime hours differs from the total of weekly overtime hours, the greater of the two amounts is used in calculating overtime payments.

Overtime pay must be at least 1.5 times the regular rate of pay. Time off in lieu of overtime pay is not permitted under the Code and overtime pay must be made within 30 days.

Similar to the ESA, the overtime provisions in the Code do not apply to all employees. Exceptions include employees who "are managers or superintendents or exercise management functions" as well as certain professionals such as legal and medical professions.

It should be noted that the above is a summary of the key overtime rules under the Code and ESA, and a number of exceptions apply. Legal advice should be sought for full details of the overtime rules.

### Important Issue Relating To Overtime

- Payments for Unauthorized Overtime

Simply stated, employers are responsible for paying overtime on work done by employees even if the overtime is done without consent or prior approval. The Code expressly addresses this issue by requiring overtime pay for work "required or permitted to be worked". Under the ESA, overtime pay is required for "each hour of work". Lack of consent or prior approval is not a defence.

As stated in one ESA decision, "the responsibility rests fully with the employer. If he does not wish employees to work overtime, he must not only order them to stop but see that they do". If employees are disregarding your instructions regarding overtime, discipline may be warranted, but an employer cannot avoid paying overtime by stating it was not approved or consented to.