

# Five Employment Issues Facing Retailers



By Daniel Pugen on July 29th, 2013

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I am fortunate in my practice to work with clients in different industries, ranging from healthcare and social services to traditional manufacturing. Although employment laws generally apply to all industries in much the same way, there are usually certain issues that some industries face more than others. This is true of many clients I assist in the retail industry.

**Here are five common employment law/HR issues that I come across when advising retailers:**

## *(1) Only "True Supervisors/Managers" Exempt from Overtime*

In Ontario, most employees are entitled to overtime pay (at "time-and-a-half") after 44 hours worked per week. While many retailers understand this general rule, there is sometimes confusion as to the types of employees who may properly be excluded from overtime pay (i.e., "exempt employees"). For example, just because an individual has the title of "Assistant Manager" and is paid a salary does not mean that the individual will be an exempt employee.

To be exempt from overtime under the Ontario *Employment Standards Act, 2000* (ESA), that individual must be a "true" manager in the sense that he/she: (i) has the authority over staff to direct, supervise, hire, fire, performance manage, grant time off, etc.; or (ii) can make or participate in substantial decisions that impact the employer's operations and budgeting. In addition, the employee must only perform non-managerial/non-supervisory tasks on an "irregular or exceptional basis". If Assistant Managers are "on the floor" with little authority/control over the staff and with little say in operational decisions, there is a risk that they may be entitled to overtime pay for excess hours worked.

Retailers should carefully scrutinize the duties performed by staff to ensure that only those "true" members of the management team are treated as exempt employees and properly denied overtime. For staff who are non-exempt, averaging agreements (in which hours of work are averaged over successive weeks for overtime eligibility purposes) should be considered to avoid overtime premiums.

## *(2) Careful in Reassigning Employees Coming Back From Maternity Leave*

An employee is on maternity leave from her job as manager of Store "A". The employee replacing her is performing at a higher level and, accordingly, the retailer is reluctant to return the employee on leave to Store "A". Instead, the employer sees that there is a vacant manager position at Store "B" and returns the employee to Store "B" with the same pay. While the employee has suffered no monetary loss, the situation described can be contrary to the ESA.

In Ontario, employees returning from maternity leave must generally be reinstated (with the same pay) to their position, if it exists, or to a comparable position if it no longer exists. The fact that another employee is in the role does *not* mean that the position no longer exists. As such, absent a clear contractual provision or company practice permitting the employer to move an employee between stores, the employee must usually be returned to her original store (with the same pay).

### *(3) Laying Off Seasonal Workers Can Result in Termination Pay*

Retailers are often faced with hiring seasonal or part-time staff for busy seasons. Some retailers make a habit of hiring staff for the busy season, then laying off those staff and calling them back to work if they are needed. Unfortunately, the ESA provides that after 13 weeks of lay-off in a 20-week period, the lay-off is deemed a "termination", requiring the laid off employee to receive termination pay.

Instead of laying off employees after a busy season, retailers are advised to have fixed term contracts for seasonal labour with a fixed end date. The fixed end date acts as appropriate notice of termination such that termination pay will not be owed. Alternatively, instead of fixed term contracts, retailers can try to ensure that seasonal labour is employed for less than three months to minimize the risk of termination pay.

### *(4) Dress Codes – "One Size Does Not Fit All"*

Understandably, many retailers have dress codes to reflect their brand and image. These dress codes can range from a company uniform to a certain style of dress. While most employees understand the business rationale for the dress code, certain staff may object to a dress code based on, for example, their religion or on another prohibited ground of discrimination under human rights law. One example is a dress code requiring that employees wear a hat (or no headwear), which could adversely impact Jews who wear a *kippah* or Sikhs who wear a *turban*.

Retailers are required to accommodate employees up to the point such accommodation causes undue hardship (a difficult standard for employers to meet). This can require making exceptions for certain employees strictly complying with the dress code. As such, retailers should not be quick to dismiss requests for accommodation from employees. Instead, advice should be sought from HR and Legal (see below).

### *(5) Reach out to HR or Legal Before It Is Too Late!*

Many retailers have stores spread out through a large territory (or, indeed, throughout Canada and the United States). Local store management usually reports to a district manager who, in turn, reports to more senior management at head office. As HR is usually not "on the ground", but rather at the head office, local employment issues may not be quickly referred to HR. Such issues (like those mentioned above) can escalate if proper professional advice is not obtained in a timely manner.

Retailers should seriously consider putting policies in place so that staffing issues are first communicated to HR (and Legal in some circumstances) for proper guidance prior to taking action. Unfortunately, I have seen many examples of branch managers

or district sales managers making unilateral decisions without the benefit of professional advice. Often this has resulted in legal action. Invest in policies that promote early advice – this will avoid extra legal costs and potential liability.