

# Personal Liability of Corporate Directors for Unpaid Wages



A new court case may heighten the liability risks of your company's directors and officers.

Generally, corporate directors and officers aren't personally liable for the debts of the corporations they direct. This insulation from personal liability is one of the reasons so many companies are set up as corporations. However, there are some important exceptions. In most parts of the country, corporate directors can be held personally liable to employees for unpaid wages. As an HR director, you need to understand and, if necessary, be able to brief your own directors on the scope and extent of their personal liability for unpaid wages. Here's the lowdown.

## **Employment Standards & Corporate Directors' Personal Liability**

The source of corporate director personal liability for unpaid wages are the employment/labour standards laws (which we'll refer to as "ESA" laws). In addition to setting minimum requirements for pay, vacation, termination notice and other key employment terms, the ESA laws also establish a system for enforcement, including some form of personal liability for corporate officers and directors. There are 2 basic ways enforcers can hold corporate directors liable for a corporation's ESA offence:

### **1. Liability as Principles**

First, corporate directors can be charged and prosecuted as principles, i.e., persons that directed, authorized, went along with or otherwise participated in the offence. The prosecutor has the burden of proving beyond a reasonable doubt that the director was involved in the violation. And, as with an OHS violation, even if the prosecutor meets that burden, the director can raise a due diligence defence by showing that he/she took all reasonable steps to prevent the violation and comply with the ESA law. But if directors are convicted, they can be fined as individuals under the ESA.

### **2. Residual Liability for Unpaid Wages**

In 10 jurisdictions (all but NL, NS, NWT and QC), directors are also personally liable for unpaid wages that occurred during their tenure regardless of whether the

corporation is prosecuted. “Wages” is defined broadly as including other amounts to which employees may be entitled under the ESA, such as vacation pay and holiday pay. Directors’ liability is typically what’s known as “joint and several.” **Translation:** The employee can collect some or all of the wages owed from any one or combination of the directors. That’s important because it enables employees to go after the directors with the deepest pockets. Although the rules differ ([click here](#) to see what your jurisdiction requires)

there are some common limits and ground rules:

- **Limited to time of tenure:** Generally, directors can be held liable only for the wages that were unpaid while they served as director. **Exceptions:** In Manitoba, the period of liability runs for another 6 months after a director leaves; in New Brunswick, the window is 2 years after the director’s term;
- **Wage cap:** FED, AB, NB, ON, PE and SK limit the extent of a director’s liability to 6 months of wages (New Brunswick and Ontario also impose a 12-month cap on unpaid vacation); the cap in BC, NL, NU and YK is 2 months’ wages;
- **Due diligence:** Unlike liability as a principle, directors’ liability for unpaid wages is absolute. **Exceptions:** In Alberta, New Brunswick, Prince Edward Island and Nunavut, directors can avoid liability by making out a due diligence defence.

## Directors Not Personally Liable for Wrongful Termination

Personal liability for unpaid wages isn’t the same thing as personal liability for termination notice for wrongful dismissal. Three provinces—BC, Manitoba and Ontario—expressly state that termination notice doesn’t count as wages for which a director is liable. Over the years, employees in other jurisdictions have tried repeatedly to drag a company’s directors into their wrongful dismissal lawsuits. These cases almost always fail to the extent that directors are considered far removed from termination decisions. Of course, in addition to being on the hook for wages and vacation pay, directors can be sued directly for wrongful dismissal, punitive damages, etc., to the extent they’re directly involved in the termination decision or process.

## Red Flag: The “Oppression” Theory & the *Abbasbayli* Case

A new case from Ontario seems to open the door to a new theory for suing a director for wrongful dismissal: “oppression.” **Explanation:** Individuals who work for or have a stake in a corporation can sue the company for engaging in conduct that’s “oppressive or unfairly prejudicial to them or that unfairly disregards their interests.”

The “oppression” rule comes not from ESA but corporations law and typically applies to shareholders, officers and directors who get forced out. But on February 16, the Ontario Court of Appeal ruled that a very non-corporate employee, namely a boxing operator, claiming to be fired as a result of an illegal reprisal could sue a corporate director for oppression [*Abbasbayli v. Fiera Foods Company*, 2021 ONCA 95 (CanLII)]. Even though the employee will still have to prove his claim, the fact that he could survive dismissal and actually go to trial could be a significant development affecting employers and directors in not just Ontario but all parts of the country.