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EMPLOYERS' ADVISOR
A Newsletter from Mathews Dinsdale & Clark LLP September 2012

"Unapproved" Overtime:
A Cautionary Tale

Traditionally, core business hours have been set as 9 to 5, Monday to Friday. Although this is no longer a universal truth, if it ever truly was, a large number of employees are still typically told at the time of hire that they are expected to put in a 40-hour work week.

Even so, it is not unusual for employees to be informally "expected" to work outside of a business's set operating hours in order to, for example:

- complete assigned tasks before stated deadlines;
- respond to customer inquiries received late in the day;
- clean up the shop or count cash after the doors are closed to customers; or
- respond to calls or emails from the employer after hours.

The expectation that these tasks are to be performed outside of normal working hours sometimes arises by express direction from a manager or supervisor, but more commonly, these workers are exposed to a culture that strongly values employees who are willing to "go the extra mile" and do what is necessary to "get the job done." While in most cases there is nothing wrong with asking employees to perform work in this way, issues can arise when extra work takes an employee beyond statutory or contractual overtime thresholds.

Even when employees "willingly" perform these tasks outside of their normal working hours, these tasks are being done for the benefit of the employer, and may still constitute "work" for which an employee should be paid. Indeed, many employers accept that employees are doing this extra work, but put blinders on in an attempt to avoid claims for overtime wages. When left unchecked, such business practices can have profound, or even crippling effects on a business.

The ongoing litigation in *Fresco v. Canadian Imperial Bank of Commerce* provides a dramatic example. In this case, a number of Bank employees have alleged that the Bank engages in a systemic practice of refusing to pay employees for additional hours of work by:

- directing employees to prepare time records that describe no more than their regular daily hours of work; and
- discouraging employees from submitting claims for overtime. >

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The employees further claim that although overtime is a routine aspect of working at the Bank, the Bank's policy that all overtime must be pre-approved does not reflect day-to-day realities. These employees were recently successful in certifying their claims in a class action on behalf of 31,000 employees of the Bank, for a total claim of $600 million in unpaid overtime.

It is still unknown whether this claim will ultimately be successful; however, the massive damage award being sought in this case should serve as a stern warning to other employers who engage, intentionally or otherwise, in similar behaviour.

It is important for employers to remember that while employees may work overtime without permission, they are still entitled to compensation for performing that work.

To avoid exposure to claims for unpaid overtime, employers should be certain to:

- develop clearly written policies that define expectations;
- develop corporate culture that matches expectations;
- consistently enforce these policies; and
- follow normal steps of progressive discipline when employees refuse to comply with the policies.

While adhering to these steps will not prevent overtime claims or unapproved overtime, it will go a long way to helping a company limit the liability associated with such claims.

Drunk Driving:
Just Cause for Termination

Workplace intoxication is a real problem that gives rise to the issue of loss of workplace productivity and it can threaten the health and safety of the workforce. And when employees drive while intoxicated, they put not only their own safety at risk, but also the safety of all those with whom they share the road. Furthermore, when drunk driving is done on company time, such actions can expose employers to liability.

How should an employer respond when it learns that an employee has been charged with drinking and driving? While each case must be assessed individually, the recent Ontario Court decision in *Dziecielski v. Lighting Dimensions Inc.* provides a helpful case study.

In *Dziecielski*, the vice president of quality control, who had been with the company for 23 years, was returning to Toronto from a client visit when he took a detour up Highway 400, intending to visit Webers Restaurant, a hamburger place that is popular with cottage-goers. He stopped somewhere short of that destination, where he consumed four beers over the course of an hour before turning around and heading back to Toronto.

On the way back he lost control of the company-owned truck he was driving. The truck rolled several times, causing the employee to sustain life-threatening injuries. He was airlifted to a Toronto hospital where a blood sample was taken. The employee was charged with a number of drunk-driving-related offences and ultimately pled guilty to one of those charges.

One month after the accident and before the guilty plea had been entered, the employee was terminated for cause. >

The employee brought a claim for wrongful dismissal, arguing that he had never been provided with an opportunity to explain his conduct. In light of his years of service, clean disciplinary history, and generally positive work performance, the employee argued that termination was excessive.

The Court noted that although a single, isolated incident of workplace intoxication would not normally constitute cause for termination, in this particular case, the employee had done more than exercise mere "bad judgment" or "inadvertence." Rather, he was guilty of "serious misconduct" that had attracted criminal sanctions for drunk driving.

In upholding the termination, the Court accepted that the employer had failed to provide the employee with an opportunity to explain his actions. Even so, the employer appeared to have a full appreciation for all of the relevant facts before making its decision: the employee was intoxicated while operating a company vehicle that, the evidence revealed, he had taken without proper authorization. Furthermore, the misconduct had put the employer at risk of vicarious liability to third parties, as well as WSIB claims and premium increases.

Interestingly, the Court appeared influenced by the fact that the incident might adversely affect the employer's reputation and goodwill, although there was no evidence to suggest that this might be the case.

Although in this particular case the employer's failure to obtain the employee's version of events before making its decision to terminate the employment relationship was not fatal, prudent employers would do well to ensure that they have conducted a thorough investigation before imposing discipline. Employers might also want to:

- implement or update comprehensive policies on workplace intoxication;
- clearly outline expectations involving the consumption of alcohol on company time;
- implement or update comprehensive policies on the use of company vehicles;
- conduct thorough investigations when incidents occur; and
- be aware of potential human rights issues, because this type of situation may give rise to an obligation to accommodate.

Terminating employees for workplace intoxication is not out of the question, even where employees claim to have drug or alcohol dependencies, but doing so usually requires exercising a degree of caution as well as following good business practices. In order to minimize exposure to wrongful dismissal claims and allegations of human rights violations in these cases, it is advisable to seek legal advice before proceeding.

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Post-Retirement Benefits:

Courts Unclear Whether Employers Can Make Unilateral Changes

Whether an employer can unilaterally make changes to post-retirement benefit plans has been unclear. Two recent decisions from British Columbia, which might otherwise have provided some guidance as to whether employers can amend or terminate post-retirement benefit plans, may only have served to further muddy the water.

In *Lacey v. Weyerhaeuser Company Limited,* the BC Supreme Court focused on the precise wording of the benefits package and rejected the employer's attempt to make unilateral changes. Notwithstanding that the plan was gratuitously implemented, or that it expressly permitted the employer to make changes "from time to time," the Court ruled that the employer could not unilaterally reduce its contributions, because the plan promised a "lifetime" of benefits to which employees were "entitled."

Five days later, the BC Court of Appeal took a contradictory position in *Bennett v. British Columbia*. Focusing on the timing of when information had been provided to employees — an approach that was specifically rejected in *Weyerhaeuser* — the Court of Appeal held that the employer was entitled to make the desired changes because the employees had only been informed about the plans after they were hired.

Together, these cases should serve as a cautionary note to employers who are considering making unilateral changes to post-retirement benefit plans. It is hoped that a similar case currently pending in Quebec will provide further guidance to employers with respect to the scope of their ability to make such changes. Nevertheless, it is clear that these issues will need to be assessed on a case-by-case basis.

If you are considering making changes to your post-retirement benefits or have any other questions relating to workplace law, please do not hesitate to contact a Mathews Dinsdale lawyer.

Seminars and Presentations

May
Steven C. Bernardo was quoted in the May 7, 2012 edition of the *Canadian Labour Reporter* on the recent claims by the United Steelworkers relating to worker attrition resulting from retirement, resignation, and the contracting out of work and how companies have been responding to those claims.

June
Steven C. Bernardo was extensively interviewed for a leading article in the June 28, 2012 edition of the *Daily Commercial News*. Steven provided commentary on the reasons for, and the practical effects of, the formation of the Canadian Construction Unions Council (CCUC) by the Communications, Energy and Paper Workers Union of Canada (CEP) and FTQ-Construction, an association of 18 unions representing more than 70,000 Quebec construction workers.

August
August 21, 2012: **Joe Morrison** gave a presentation on compliance with the *Accessibility for Ontarians with Disabilities Act* (AODA) at the IncentiveWorks 2012 Annual Conference.

September
September 20, 2012: **Chris Fiore** will be speaking at the Ontario Bar Association's conference called Labour Relations: Important Updates in the Law Governing Unionized Workplaces on the topic of *Ontario Labour Relations Board Practice and Procedure.*