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'Managerial Exemption' Enforcement Blitz - Is your retail operation prepared?

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The Ontario Ministry of Labour (MOL) is currently conducting a proactive enforcement blitz under the *Employment Standards Act* (*ESA*) targeting "Retail Services" including retail chains, franchises, gas stations, convenience stores and grocery stores. The blitz is scheduled to last from October to December 2013.

Of particular emphasis is compliance with the overtime provisions of the *ESA*. **Specifically, the MOL is seeking to ensure retail managers and supervisors not currently receiving overtime pay, are not in fact "working managers" which status would entitle them to overtime pay**. For large retail operations with hundreds, if not thousands, of managers and supervisors, the potential liability is considerable.

The purpose of this briefing note is to alert retailers to the enforcement blitz, identify the potential issues, and offer proactive strategies to reduce risk in a cost-effective and efficient manner.

Overtime Pay for "Working Managers" – What's the Issue?

In Ontario, an employee is entitled to overtime pay for each hour of work in excess of 44 hours per week. There are exceptions to this general rule, one of which is the *Managerial and Supervisory Overtime Exemption.* Under this exemption an employee whose work is *managerial or supervisory* in character is exempt from the overtime provisions of the *ESA.* These employees may perform *some* non-managerial work and remain within the exemption but only if work is performed on an *irregular* or *exceptional* basis.

The *Managerial and Supervisory Overtime Exemption* – When Does It Apply?

The *Managerial and Supervisory Overtime Exemption* applies in the following circumstances:

1. *Where work performed is managerial or supervisory in character.*

   Determining whether work is managerial or supervisory, requires an evaluation of the actual functions performed. The fact that an employee's job title, job description or employment contract may include the word "Manager" or "Supervisor", is not determinative. A 'manager' exercises discretion and independent judgment in the management of the affairs of the organization and in most cases has the ability to impact the employment of others (*e.g.*, hiring, shift scheduling, performance reviewing, counseling, disciplining and firing, *etc*.).

2. *Where some – but not all - of the work performed is <u>not</u> managerial or supervisory in character, but this work is performed on an <u>irregular</u> or <u>exceptional</u> basis.*

   The phrase "irregular or exceptional" has been interpreted to mean that non-managerial duties may be performed so long as this occurs outside the ordinary course of the manager's duties, or on an unscheduled or sporadic basis. For example, if the *routine* in a particular workplace is that a manager will take on non-managerial work during 'the busy season/time', the performance of that work cannot be said to be either unscheduled or sporadic. To the contrary, it is expected.

<u>Risks Unique to the Retail Industry</u>

In retail, it is not uncommon, and often necessary, for a manager or supervisor to perform some non-managerial duties whether sporadically or more consistently. Particularly in smaller communities or stores and even in larger operations where the workplace culture encourages managers to 'chip in' whenever possible, it may be common for managers and supervisors to take on non-managerial functions. Unfortunately this willingness to 'chip in' – a characteristic encouraged and lauded among the best workplace leaders – is the very characteristic that can expose an organization to liability because it blurs the line between 'manager' and 'employee'.

The type of non-managerial work will vary depending on the specific workplace and may include:

- Unloading merchandise after a delivery
- Tagging merchandise
- Stocking shelves
- Restocking returned merchandise
- Assisting on cash registers

<u>Steps To Protect the Organization</u>

To minimize the risk a manager may be determined by the MOL to be a "working manager" and therefore entitled to overtime pay, consider the following strategies:

1. **<u>Conduct a *Proactive* Workplace Audit</u>**. The best and most cost-effective way to minimize exposure to liability is to: i) conduct a comprehensive, <u>internal</u> workplace audit; ii) identify areas of risk; and iii) take corrective steps, *before* the MOL is at the door.

   The audit should include a detailed, critical review of all workplace policies, protocols, handbooks, manuals, directives, employment agreements and, of course, practices. For large organizations with several stores operating across a wide geographic area, it will be important to select a range of locations representing differing geography, sales volumes, scheduling expectations, and workplace norms.

The objective is to identify potentially troublesome language, protocols, and routines, and proactively correct them. For example, if the same manager assists co-workers unpack merchandise after each delivery, this is the kind of *pattern* that can expose the organization to liability.

2. **Educate Your Leaders.** Even the best drafted policies and procedures will be of little value if what happens on the ground is a different story. Once approved, workplace policies and practices should be transparent and consistently enforced at all levels of the organization. To enable this to happen it may be necessary to educate corporate leaders, managers and supervisors on the do's and don'ts of the *Managerial and Supervisory Overtime Exemption*, and then hold them accountable so that, subject only to emergencies and unforeseen employee absences, managers and supervisors are not removed from the *Exemption*.

For more information, and/or assistance designing and implementing an internal *ESA* compliance audit and education program tailored to your workplace, contact a member of Sherrard Kuzz LLP.

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