



Employee Wages, Overtime, and Severance

Balancing Legal Compliance
with Good Business Practice



When you own or manage a business, your focus is always shifting between the big picture and the day-to-day details. In this constant back and forth, invariably, some things get missed. Unfortunately, some of those missing pieces don't get noticed until it's too late.

In our experience, compliance with employment laws is one of the pieces that can sometimes fall through the cracks. That's where we come in: We advise employers on the big and the small of employment law, identifying and solving problems so you don't have to. We also like to empower our clients, sharing our knowledge so that you can deal proactively with potential employee-related problems.

In the paper that follows, we cover a few of the foundational, "need to know" employment law concepts on wages, overtime, and severance. While it's far from an exhaustive review of the law in this area, we hope it will be of some assistance to you in structuring your employment contracts and compensation practices.

Sincerely,

Simon Kent
Senior Partner
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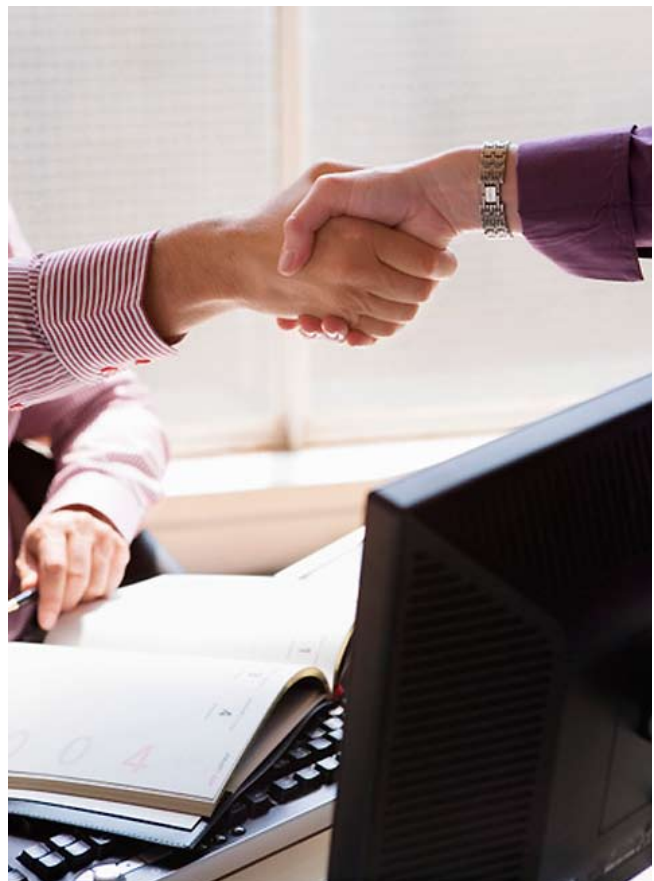
The issues on which employers seek our advice are diverse and wide-ranging, and our help is sought at every stage of the employment relationship – hiring, retention, and dismissal. Despite the varied nature of employers’ concerns, however, the one theme that runs through many of our clients’ questions is, put bluntly...money. Whether they are dealing with a new, longstanding, or former employee, employers are often uncertain about their financial obligations under the law and how to meet them.

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Questions about an employee’s compensation entitlements under the law arise both during the employment period (such as with respect to minimum wage, overtime pay, and vacation pay) and after the employment relationship ends (such as regarding severance). Most employers are aware that employment standards legislation sets out mandatory minimums in these areas, but many are not sure how to interpret that legislation or how it fits together with the common law (what the courts have said about employee compensation). With that in mind, we have identified below some of the key things that all business owners need to know to ensure that their employee compensation arrangements strike the right balance between legal compliance and good business practice.

Hours of Work and Overtime Pay

The British Columbia Employment Standards Act (the ESA) and related regulations set out certain minimum standards regarding wages and hours of work. BC employees (with some specific, limited exceptions) are entitled to a minimum hourly wage of \$10.25 and may work a maximum of 8 hours a day or 40 hours a week before being entitled to overtime pay. So what about employees who work beyond those 8 or 40 hour minimums? When exactly does an employer have to pay its employees overtime pay? And how does that overtime pay get calculated?



Generally speaking, if an employee works more than 8 hours a day, the employer must pay her “time and a half” for the next four hours she works in that day, and double time for all hours she works in excess of 12 hours in a day. These overtime entitlements apply even if the employee works less than 40 hours in that week. Similarly, if an employee works more than 40 hours in a week, he must receive “time and a half” after 40 hours worked, even if he never works more than 8 hours in a day that week.

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Sounds fairly straightforward, right? But what if you never officially approved of an employee’s overtime hours? Or if an employee has agreed in advance to receive “straight” pay (or no pay at all) for overtime hours worked? What about where both you and the employee would prefer that she take time off as compensation for her extra hours worked, what then? The ESA is clear that an employee has a right to overtime pay even where the employer “allows” the employee to work beyond the 8 and / or 40 hour minimums. In other words, you become liable to pay overtime wages even where you did not actively request or “require” an employee to work additional hours.

As for the extent of that liability, employers cannot avoid the time-and-a-half and double time rules in the ESA. Any attempt by an employer to reach a side agreement with an employee regarding reduced overtime wages will violate the Act and is therefore unenforceable. No matter how well-meaning, such efforts are doomed to fail.

Finally, one area where employers and employees have some flexibility is in terms of how overtime is paid out. For example, the ESA permits employees and employers to agree that an employee may take time off in lieu of payment for extra hours worked. To ensure that they do not run afoul of employment standards legislation, savvy business owners should seek the assistance of legal counsel before finalizing such agreements. There are also rules regarding “banking” overtime that our lawyers can advise you on, as well as educating you about the ESA’s timing requirements for overtime pay.

Dismissal and Severance

The other key area of employee compensation that often causes employers significant confusion and grief is severance. In the simplest of terms, the question facing business owners is: I’ve decided to fire an employee...now what?

There are many aspects of a dismissal to be managed – administrative, emotional and financial. When employers consider the issue of severance in advance, this can ease the transition for all parties involved, by creating certainty and reducing potential conflict. The tricky part, of course, is figuring out how much severance to pay your employees and making sure that their employment contracts are drafted accordingly.

As with hourly wages, provincial legislation imposes minimum compensation standards which employers must meet when dismissing an employee, unless the employee is dismissed for “just cause” (more on this later). The ESA provides that, after three months of consecutive employment, an employee may be eligible for compensation, written working notice, or a combination of the two. The amount of compensation you owe under the ESA will depend on the length of the employee’s employment, but an employee’s maximum statutory severance entitlement is 8 weeks wages.

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However, many employees are entitled to much higher awards of severance under the common law doctrine of wrongful dismissal developed by Canadian courts. Even where an employee receives his maximum ESA severance, he may claim additional notice or severance based on the factors set down in the 1960 Ontario High Court decision in *Bardal v. The Globe and Mail Ltd.* In cases where the parties have not reached a clear, prior agreement regarding an employee’s severance entitlement, a court will consider a number of factors to determine the amount owed by an employer, including the nature of the employee’s job, the length of employment, the employee’s age, and the availability of similar employment, having regard to the employee’s experience, training and qualifications. Unfortunately for employers, there is no strict mathematical formula for judges to follow

in these circumstances and, not surprisingly, two different judges faced with the same fact scenario might award different amounts of severance. Because of this, many employers and employees often reach a settlement without ever going to court.

Of course, the even better option for employers is to include a clear, unambiguous severance clause in all employee contracts. When properly worded, such clauses will ensure compliance with the ESA, limit your financial exposure and, ideally, reduce the likelihood of a legal challenge by the employee. Because of the potential pitfalls involved in drafting termination provisions – for example, if a clause is inconsistent with provincial legislation, this can lead to unanticipated employer liability – it is wise to involve an employment lawyer in this process.

While severance calculations are a first step in cutting your losses on dismissal, there are a number of related considerations that also need to be addressed: When and how will you pay out your employee (note that there are certain timelines to be followed for payment of ESA severance)? How will you deal with any potential bonus or benefit entitlements of the employee? What vacation pay is owed? Can you include a “clawback” provision in the event the employee



finds new employment quickly? These and other termination-related questions raise legal issues that are familiar to employment lawyers and that can be addressed in your company's employment contracts.

Just Cause

In closing, a few words about "just cause": Some employers attempt to limit their severance liability by alleging that an employee was dismissed for cause. However, what may amount to sound business reasons for dismissal do not always rise to the level of "just cause" as this term is understood by the courts. Keep in mind that proving to a judge that you had cause for termination can be an uphill battle. In fact, if a court rejects your cause argument, the employee may receive an even higher severance award than if you hadn't advanced that argument at all. Because this area of the law is another inexact science, employers should consult with their employment lawyer before making any cause allegations.

About Kent Employment Law

Kent Employment Law is a Vancouver-based full-service employment law firm advising on all employment-related legal matters, including discrimination and human rights issues. The firm's exclusive employment law focus and proven track record of results has enabled it to develop a sterling reputation and to forge influential relationships throughout the legal community. We serve a variety of British Columbia businesses and regional branches of national companies, and are ideally suited to advise small and medium-sized business clients who benefit from the flexible, personalized approach we take to each particular client situation. We invite you to learn more about us by visiting our website at www.kentemploymentlaw.com or by calling us today at **(604) 266-7006**.



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