

# **The Calculation of Overtime Under The Employment Standards Act of Ontario**

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## **Introduction**

One of the most vexing areas of the Employment Standards Act is the actual calculation of overtime. Most of the debate has centered on whether or not a certain position is entitled to overtime, not how to actually calculate the overtime owing. Although this paper will focus on the methodology of calculating overtime, by necessity I must first focus on destroying some myths about who is and is not entitled to overtime.

### **Myth # 1: Overtime does not apply to salaried employees, only hourly rated ones**

Eligibility to overtime has nothing to do with whether an employee is paid a regular salary or is paid by the hour. All employees are entitled to overtime unless they fall within a specific exemption in the Employment Standards Act. However, as will be explained later in this paper, the method by which overtime is calculated varies greatly depending on whether one is on a fixed salary with regular hours, a fixed salary with no regular hours or hourly rated.

### **Myth # 2: Managers are not entitled to overtime**

There is a provision in Regulation 325, Section 6 (b), which exempts persons “whose only work is supervisory or managerial in character”. There is considerable law on this issue, most of which is neatly summarized in a recent decision called **Schachter et al v Ontario Nurses Association**, appended to this paper. In essence this exemption only applies to those employees whose work is primarily, not exclusively, supervisory or managerial. Thus a “working foreman “ or “lead hand” is not covered by this exemption. The exemption applies to the character or the job, thus the job title is of little relevance. Thus a Vice President who is really just a salesperson is not covered by the exemption. The cases also make a distinction between *supervisory* and *managerial* in that supervisory involves the supervision of other employees while that is not necessarily essential to a managerial characterization. One can be found to have a managerial job without necessarily directly supervising other employees if the job involves aspects such as the ability to set ones own hours, setting budgets and goals, determining the way in which the work is to be performed, setting policy and standards, attendance at meetings with other managers, and the ability to hire, fire or discipline employees.

In other words the job title does not determine whether or not the exemption applies, rather one must conduct a rather thorough analysis of the actual job being performed to see if it attracts overtime.

### **Myth # 3 An Employer can unilaterally exempt certain positions from overtime entitlement.**

No one can opt out of the Employment Standards Act, even if the employee were to agree to the idea because of section 3 of the Employment Standards Act. In fact, even trying to designate the relationship as one of an independent contractor does not avoid the

overtime provisions if in fact the relationship is found to actually an employment relationship pursuant to the various tests in the Employment Standards Act.

#### **Myth # 4 Commissioned employees are not entitled to overtime.**

There is a exemption which applies to certain classes of salespersons, however the fact that they receive commissions is only one requirement of this exemption found in Section 3(1)(h) of Regulation 325 of the Employment Standards Act. The other requirements are as follows;

- It does not apply to route salesman, that is salespeople that have regular customers on a regular route.
- The salesperson has to make the sales normally at a place other than the employers' premises. In other words a car salesman who works on the employers lot is not covered by this exemption while a salesman who is on the road calling on clients and potential clients is covered by the exemption.

#### **Calculation of Overtime**

Now let us assume that the employee is entitled to overtime. How do we calculate it?

There are a number of important principles to remember when calculating overtime. Some of these are as follows:

- Unless there is an agreement with a lower threshold, overtime applies after 44 hours.
- The parties can agree to have overtime applied at a lower level than 44 hours per week, however merely agreeing that the regular work week is 40 hours does not mean that overtime applies after 40 hours. There must be an agreement or a practice in which the parties have shown that they intended the overtime rate to apply at the lower threshold, otherwise the employee will receive straight time for the hours from 40 to 44 and time and a half over 44.
- Overtime only applies after 44 hours actually worked, not simply paid. Thus vacation time, statutory holidays, sick time, meal breaks and coffee breaks do not count towards overtime entitlement. Thus where an employee works from 9:00 a.m. to 5:00 p.m. with an hour paid lunch, they are paid for 8 hours but have only accumulated 7 hours towards their overtime threshold. As the Employment Standards Act requires a 30 minute unpaid meal break every 5 hours, you can usually deduct 30 minutes from each days hours for the purpose of calculating hours eligible for overtime.

- Travel time, if it is part of the job and does not involve simply commuting from home to work, is considered work and thus counts towards overtime eligibility and accumulation
- The actual hours worked in a single day is irrelevant, as overtime is based on the hours actually worked in a week. Although it may infringe Part IV Hours of Work of the Employment Standards Act, if someone works 10 hours in a single day, it has no effect on overtime entitlement
- The overtime rate is 1.5 times the regular rate. However the calculation of the regular rate can vary depending on the situation. Where the parties have agreed either through agreement or past practice that the regular workweek is a set number of hours, for instance 40, then the regular rate of a salaried employee is determined by dividing the weekly salary by the regular hours. Thus where the weekly salary was \$400 and the regular hours of work were from 9:00 a.m. to 5:30 p.m. with a 30 minute unpaid lunch, the regular work week is 40 hours. Thus the regular rate is :

$$\$400 / 40 \text{ hours per week} = \$10 \text{ regular or straight rate}$$

The overtime rate is therefore:

$$\$10 \times 1.5 = \$15$$

- However where there are no regular hours and the arrangement is that you will be paid a fixed salary no matter how few or many the hours are, the calculation of the regular rate is trickier. The Employment Standards Branch Interpretation Manual says that to determine the regular rate you divide the number of hours actually worked in the week by the regular salary on a week by week basis. Thus if in week one, the employee on a fixed salary of \$400 worked 45 hours, his or her regular rate would be :

$$\$400 / 45 \text{ hours} = \$8.89 / \text{hour}$$

If in week two the employee worked 50 hours the regular rate would be as follows:

$$\$400 / 50 \text{ hours} = \$8.00 / \text{hour.}$$

Thus as the hours go up the regular rate drops. If it drops below the minimum wage, the minimum wage becomes the regular rate.

Now here is the clincher. The Ministry of Labour takes the position that where a salaried employee has no regular hours, the agreement is that he will work whatever hours are requested in exchange for the set salary, thus the employee has already received their regular rate or straight time for all hours

worked. **Thus overtime hours, that is hours worked in excess of 44 per week, need only be paid at the rate of ½ of the regular rate as the employee has already received the regular rate for that hour in their fixed salary.**

This means that in the second example quoted above, where the regular rate is \$8 per hour, the overtime hours are paid only at the rate of only \$4 extra per hour not \$12 per hour. Therefore, where an employee worked a 50-hour week they would receive the following:

$$50 \text{ hours less } 44 \text{ hours} = 6 \text{ overtime hours} \times \$4 \text{ ( } \frac{1}{2} \text{ of regular rate)} = \$24 \text{ overtime pay}$$

### **Tying it All Together: Some Examples**

#### **Hypothetical # 1**

Employee is paid at an hourly rate of \$8.00.  
Employee works 46 hours in a week, excluding meal times

**Result:** Employee is entitled to 44 hours at \$8.00/hour ( \$352) plus 4 hours OT at \$12.00 / hour ( \$48.00) for a total wage of **\$400.00**

#### **Hypothetical # 2**

Employee is paid a salary of \$352 a week with no regular hours.  
Employee is at work 46 hours in the week, including meal breaks

**Result:** First we deduct 30 minutes a day for lunch, as this is not considered as work. The weekly hours are thus reduced by 2.5 to a total of 43.5. As overtime only kicks in after 44 hours, no overtime is payable. Employee is paid her regular wage of **\$352**

#### **Hypothetical # 3**

Employee is paid a salary of \$352 a week for a regular 40-hour workweek with no specific agreement on overtime.  
Employee works 46 hours, excluding meal breaks

**Result:** Employee receives \$352 for the first 40 hours, \$8.00 for the 4 hours between 40 and 44 and \$12.00 OT rate for the two hours over 44. Total pay that week is  $\$352 + (4 \times \$8) + (2 \times \$12) = \mathbf{\$408}$

**Hypothetical # 4**

Employee is paid a salary of \$352 a week for a regular 40-hour workweek with a specific agreement that overtime accrues after 40 hours.

Employee works 46 hours, excluding meal breaks

**Result:** Employee receives \$352 for the first 40 hours and \$12 for the next 6 hours for a total wage of **\$424**

**Hypothetical # 5**

Employee is paid a salary of \$352 a week with no regular hours.

Employee works 46 hours, excluding meal breaks

**Result:** The regular rate is determined by dividing the salary (\$352) by the hours actually worked (46) to arrive at a regular rate of \$7.65 per hour. The employee worked 2 overtime hours but has been already paid the straight time for those hours, thus is only entitled to the .5 OT premium for the overtime hours. Thus the formula is as follows:

$$2 \text{ hours} \times (.5 \times \$7.65) = \$7.65$$

The employees wage for that week is thus **\$359.65**

**Conclusion:**

Knowledge of this area of law can be of great help both for lawyers who act for employees and employers.

If you act for employees, be aware that most employers and most employees are quite unaware of the extent to which the overtime provisions of the Employment Standards Act apply to the workplace. This is a topic that should be raised by the lawyer even if the client does not raise it herself. Companies are often unaware that they even have this problem until some disgruntled employee, who has usually been terminated, raises it. When they come to realize the true extent of the problem, they often panic and cut a deal quickly.

If you act for employers, remember that you can fight the case not only on the grounds of eligibility but more importantly on quantum. You can save your client lots of money by understanding how the Ministry of Labour calculates overtime under the Employment Standards Act. With a clear understanding of the rules and an willingness to perform tedious calculations (which can be done quite easily on a spreadsheet program like Microsoft Excel), you can perform a great service for your employer client.

Appendices

1. Schachter et al v Ontario Nurses Association ( EPB # 31-003006)
2. Extract from Employment Standards Branch Interpretation Manual
3. Example of spreadsheet calculation for overtime claim