



Common Misconceptions About... Overtime for Accountant Employees

By David J. Doyle

During February, March and April of each year many accountants work a lot of overtime. It is a part of the life of being a practising accountant. Employers and their accountant employees both expect overtime to be worked, but often do not make any specific arrangements for overtime pay. Accounting firms concede that they are required to pay overtime to staff members that do not hold licenses from either the Institute of Chartered Accountants of Ontario (the “Institute”) or the Certified General Accountants of Ontario (the “CGAO”). They are unaware that many of their CA and CGA employees may also be entitled to overtime under the *Employment Standards Act* (Ontario) (the “Act”).

ENTITLEMENT TO OVERTIME

The Act provides that an employee is entitled to be paid one and a half times his or her regular rate of pay for each hour of work above the 44 work hours per week threshold (or be given equivalent time off in lieu of pay). There are exceptions that exempt employers from paying overtime to many licensed professionals practising their profession. The overtime exemption for employed accountants is very narrow.

Section 2 of Ontario Regulation 285/01 provides that the overtime provisions of the Act do not apply to a person employed as:

(a) *as a duly qualified practitioner of,*

...

(iv) *public accounting,*

The common understanding among accounting firms appears to be that the “public accounting” exemption is intended to capture any licensed accountant dealing with the public, and therefore, all licensed accountants are exempt from the overtime entitlement. The ESA Policy and Interpretation Manual (the “ESA Manual”) indicates that this is not the meaning of the Regulation. The ESA Manual states that a duly qualified practitioner of public accounting will:

- (i) have a licence to practice public accounting under the *Public Accounting Act*; and
- (ii) be practising public accounting.

In addition to the requirement that a specific public accounting licence from the Institute or CGAO be held (as opposed to the CA or CGA designation), the ESA Manual also sets a narrow definition of what constitutes “practising public accounting”. The ESA Manual suggests practising public accounting is being in “*the business of expressing independent assurance and certain other services in respect of financial statements and other financial information of enterprises where it can reasonably be expected that the services will be relied upon or used by a third party*”. The Manual goes on to state:

For clarity, a person is not practising public accounting if he or she is engaging solely in bookkeeping, cost accounting, or the installation of bookkeeping or business systems. Likewise, the preparation of financial statements solely as part of tax returns without provision of an opinion independent of the taxpayer in respect of financial statements, is not considered “practising” public accounting.

There are many employed CAs and CGA that do not hold public accounting licences with the Institute or the CGAO and many others that hold the licence but do not “practise” public accounting. These employed accountants will not fit within the “public accounting” exemption so an employer must find another exemption if it wishes to avoid paying time and a half for each hour of overtime (or providing vacation time in lieu of payment) to these employees.

Some have suggested that the “supervisor/ manager” exception may apply to employed accountants. Many employed accountants are known as “Managers” and manage and review the work of their employer’s staff. This exception (from Section 8 of Ontario Regulation 285/01) provides that the following persons are not entitled to overtime:

...
 (b) *a person whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis;*

Although many accountant employees may be wedged into this exception, they might not fit comfortably because they perform too much direct, non-managerial work. The ESA Manual provides:

The intention here is that the exemption applies only to a true supervisor who does not regularly or ordinarily perform the same work as the people he or she supervises. The section therefore exempts employees who perform such managerial or supervisory work exclusively, and also those managers and supervisors who perform non-supervisory and non-managerial tasks either on an irregular or exceptional basis.

It goes on later:

"Exceptional" suggests that the non-supervisory or non-managerial duties may be performed so long as they are being performed outside of the ordinary course of the employee's duties.

...

"Irregular" implies that although the performance of non-supervisory or non-managerial duties is not unusual or unexpected, their performance is unscheduled and sporadic (i.e. does not occur at a regular or set time).

The ESA Manual provides as an example of an "exceptional" performance of a non-managerial duty a manager shoveling snow in a snowstorm and provides as an example of an "irregular" non-managerial duty a supervisor covering staff duties when there is an unexpected rush of customers. The ESA Manual also give some examples of managerial or supervisory duties:

...hiring and firing of employees, responsibility for making substantial purchases, financial control and budgeting, and productions planning. Other management functions would include the regular exercise of discretion and independent judgment in management affairs.

Tax or audit managers would not often have the discretion to make big-picture management decisions for their employer and would regularly, and in the ordinary course of their employment, perform accounting services directly to clients that were very similar to some of the services provided by accountants that they supervise. This exemption would have to be stretched significantly to include most employed CAs or CGAs.

In light of the above, the Act does not provide an exemption to the obligation to pay overtime to many employed CAs or CGAs.

ACCOUNTING FIRM CONSIDERATIONS

Accountants will continue to work overtime, particularly in February, March and April, regardless of the application of these provisions. The concern is that a failure by an employer to address overtime leaves the employer with the risk of paying an employee a salary that the employer feels includes a payment for overtime and then having to pay the employee more money for that same overtime if the employee complains or sues.

Assuming that an accounting lobbying group is taking steps to expand the overtime exemption for employed accountants, employers still must manage their risk while they wait for any change. Written employment contracts should be used to address in detail overtime compensation and the limitations on hours of overtime the employee can work without employer approval. Absent written employment agreements, employers should ensure that they assess their risk of being sued for unpaid overtime carefully before terminating or materially modifying the employment terms of an employee.

Although the overtime issues discussed in this paper may be an unpleasant surprise, proactive employers may now have an opportunity to ensure that this surprise does not have unpleasant consequences.

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