



NEWSLETTER – APRIL 2007

POTENTIAL FOR CLASS ACTION EMPLOYMENT LITIGATION

One of the biggest issues facing U.S. employers today is the potential for “wage and hour” claims brought by current or former employees of the company. Such claims are brought pursuant to federal and state laws that require minimum wages, overtime and breaks for certain employees. It is not so much the threat of an individual claim that worries employers, but the possibility of a class action. Class action litigation is fertile ground for plaintiffs’ lawyers in the U.S. to enforce minimum standards legislation. The question is whether this could occur in British Columbia.

Take, for example, the current “misclassification” lawsuits pending against FedEx across the United States. Motions have now been filed to certify two nationwide classes and ten statewide classes seeking damages on behalf of all ground delivery drivers who have allegedly been misclassified by FedEx as independent contractors instead of employees. The claim on behalf of all current and former drivers seeks damages for failure to provide leave under the *Family Medical Leave Act* and pension and other medical benefits available to employees of the company. The claim also seeks to recover all of the wage and other employment-related taxes the drivers have

paid as a result of allegedly being misclassified.

The 14,000 or so potential plaintiffs allege that they are not independent contractors at all, but rather employees who are told what hours they must work, what deliveries to make, what package scanner to use, what uniform to wear and what their trucks should look like. In short, they allege that they are under the complete control of FedEx, the same as any other employee. FedEx relies on the agreement that all drivers sign at the outset of the relationship making it clear that they are independent contractors.

In California alone, where a class has been certified for 200 current and former drivers, the claim amounts to approximately \$4.5 million. Some estimate that the claims nationwide could approach \$1.4 billion.

This is clearly “bet the company” litigation with stakes higher than anything we are likely to see in Canada. But could employers in B.C. face similar claims?

The *Employment Standards Act*, R.S.B.C. 1996, c. 113, would be the source of such a claim. For example, a company not paying overtime to supervisors who are allegedly “misclassified” as managers could face a claim. So too could a company that does not provide minimum breaks to employees.

The problem becomes potentially worse as a result of the B.C. Supreme Court’s decision in *Macaraeg v. E Care Contact Centers Ltd.*, [2006] B.C.J. No. 3211 (S.C.). As discussed in our February/March 2007 newsletter, the court ruled that the overtime provisions of the *Employment Standards Act* formed an implied term of the plaintiff’s employment contract. The court held that it had jurisdiction to enforce the claim as a breach of contract. The court also concluded that while the statutory overtime provisions were implied into the employment contract, the other provisions of the legislation permitting averaging (and arguably limiting the period of recovery to six months) were not. The court held that the claims mechanism under the *Employment Standards Act* was not

mandatory, and that the legislation expressly preserved an employee’s common law right to bring an action for breach of contract.

Adding to the significance of *Macaraeg v. E Care Contact Centers Ltd.* is the fact that the plaintiff also filed a claim pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, with the intention of applying to court to certify a class of employees who were advancing the same overtime claim.

Given the potential for class action employment litigation in British Columbia, and the ability to frame an employment standards case as a breach of contract, employers should be wary of the liability that could attach to “misclassification”. Whether supervisors are truly managers for “wage and hour” purposes under the *Employment Standards Act* is a question that an employer may wish to consider and address before a potential claim becomes reality.

If you have questions regarding the issues raised in this newsletter and how they may affect your company, please do not hesitate to contact any lawyer at our firm.

Lawyer contact information can be obtained by telephoning us at (604) 806-0922 or visiting our website at www.ropergreyell.com.

* Every effort has been made to ensure accuracy in respect of this newsletter. The comments, however, are necessarily of a general nature. Clients and other interested parties are urged to seek specific advice on matters of concern and not to rely solely on the text of this newsletter. *