

Top Trends in Directors & Officers Liability

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MEARIE Annual Conference
June 21, 2018



Directors and Officers Liability

- **Duty to exercise due diligence in overseeing the management of the organization**
 - Act in good faith
 - Act in the best interest of the organization
- **Personal Liability**

Overview

- 1. Sexual harassment claims and risk management in the age of #MeToo**
- 2. Gender pay gap and discrimination issues**
- 3. Overtime class actions**

#MeToo

- **International movement against sexual harassment and assault**
- **Viral in October 2017**

#MeToo Effect

- **Increased frequency and severity of sexual misconduct claims**
- **Peripheral increase in wrongful termination and retaliation suits**

Sexual Misconduct Claims

- **Potential for high exposure**
 - Amount
 - Adverse Publicity
- **Personal liability**

Risk Management

- **Hiring**
- **Anti-harassment and anti-retaliation policy and procedure**
- **Policy Awareness**
- **Policy Implementation**

Risk Management: Hiring Practices

- **Communicating conduct expectations at an early stage**
- **Due diligence**
 - Background checks
 - Red flags

Risk Management: Anti-Harassment Policy & Procedure

- **Define key terms**
- **Expected conduct and standards**
- **Clear guidance on multiple channels for reporting misconduct**
- **Investigative processes**
 - Reported incidents
 - Observed or suspected misconduct
- **Sanctions**

Risk Management: Policy Awareness

- **Incorporate into training**
- **Signed acknowledgement**
- **Employee handbook**
- **Revision notifications**

Risk Management: Policy Implementation

- **Follow policy**
- **Fair and unbiased investigation**
 - Protect the rights of both complainants and respondents
- **Proper training for investigators**
 - Third party investigators
- **Document actions taken (and keep all records)**

Gender Pay Gap Issues

- **Gender pay gap**
 - Difference between the remuneration for working men and women
 - Women are generally paid less than men
- **Gender Discrimination**
 - Work/ life balance
 - Pregnancy/ parental leave discrimination

Risk Management

- **Procedures and protocols**
 - Parental leave policies (non-gender specific)
- **Support and reasonable accommodations**
 - Reasonable time off requests
 - Flexible hours

Overtime Class Actions

- **Current and former employees seeking payment for unpaid overtime**
- **Recent increase in claims**
- **High value**

Overtime Issues

- **Potential sources of liability:**
 - **Misapplication of statutory overtime provisions**
 - **Misapplication of overtime policies**
 - **Systemic underpaying or withholding overtime pay**

Baroch v Canada Cartage

- **\$100 million class action for unpaid overtime certified**
- **7,800 current and former employees alleging entitlement to overtime compensation**

Baroch v Canada Cartage

- **Court persuaded by the following evidence:**
 - **No written overtime policy**
 - **No document for employees to consult in order to learn how overtime entitlement would be established**
 - **No written directives issued by employer to managers, supervisors, or payroll department regarding application of overtime rules**

Recent Overtime Class Action Settlements in Canada

- ***Eklund v Goodlife Fitness***
 - April 2018, settlement for \$7.5 million (pending court approval)
- ***Fulawka v Bank of Nova Scotia***
 - March 2016, settlement for \$39.3 million + \$2.3 million in legal fees approved by the court
- ***Rosen v BMO Nesbitt Burns Inc.***
 - August 2016, settlement for \$12 million approved by the court

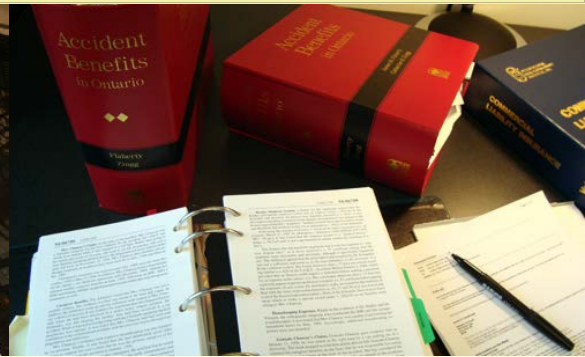
Risk Management

- **Control overtime costs**
 - Establish overtime policies, overtime agreements, or averaging agreements (if permitted by applicable legislation)
- **Maintain accurate records of hours worked**
- **Provide supervisors and managers with adequate training on overtime obligations**

Summary

- **Risk Identification & Risk Mapping**
 - Trend Awareness
- **Risk Management**
 - Policy and procedures - include relevant stakeholders and audit to ensure implementation
 - Training
 - Fairness

Questions?



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