

# Certified Dental Assistants are Entitled to Overtime Pay

By Employment Lawyer Dean Crawford of Coutts Pulver LLP



Employees in British Columbia enjoy many protections under the *Employment Standards Act*. One of the most basic protections is the right to receive overtime wages for overtime work. However, in some cases, employees are not aware of their rights and how to enforce them.

Under section 35 of the Act, an employer must pay an employee overtime wages “if the employer requires, or directly or indirectly allows” the employee to work more than eight hours per day or 40 hours in a week. If the employee does work more than eight hours in a day, she is entitled to overtime wages of one and one-half times her normal hourly wage for each additional hour over eight. The same applies for each additional hour worked beyond 40 in a week. Further, if the employee works more than 12 hours in a day, she is entitled to double her normal hourly wage for each additional hour beyond 12.

Some employees, including certified dental assistants, may be asked to sign employment agreements which purportedly rule out overtime wages. Such agreements may state, for example, that a monthly salary covers “all hours worked” and no additional payment will be made for overtime. Alternatively, the agreement may say that overtime is only paid at the normal hourly wage, not at overtime rates. These types of agreements are illegal and unenforceable. The protections under the *Employment Standards Act* cannot be waived by employees and once overtime wages are worked, an employee has an absolute right to the wages at overtime rates.

As noted, section 35 states that employers that “directly or indirectly” allow an employee to work overtime wages are liable for overtime. In some cases, an employer may refuse to pay overtime wages by saying the employee did not obtain permission to work overtime. However, if the employer knows the certified dental assistant is working overtime or is willfully blind to the fact that she is, the employer likely will be liable for overtime wages.

## **Time in Lieu / Time Banks and Overtime**

Some employers and employees adopt a policy of “time in lieu” of paying overtime. For instance, if an employee works one hour of overtime, she is not paid any additional wages but instead receives an hour off with pay later on. These types of arrangements, known as “time banks”, are legally permissible, but only under certain conditions set out in the *Employment Standards Act*. Importantly, if the employee puts an overtime hour “in the bank”, she has the option to later “withdraw” the hour either through overtime pay or through time off. If the hour is withdrawn as pay, it must be at overtime wages. If it is withdrawn as time off, it must be at the overtime rate. For example, if an employee takes two hours out of the overtime bank as time off, she is actually entitled to three hours off with pay as opposed to only two.

Such overtime banks must also be established only with the written consent of the employee and the employer.

## **Averaging Agreements and Overtime**

Some employees and their employers agree to enter into averaging agreements under which the employee’s hours of work are averaged over a period of one to four weeks for the purpose of determining entitlement to overtime. For instance, it may be agreed that the employee will work 35 hours each second week and 45 others each other week for an overall average of 40 hours. Under such circumstances, the employee is not entitled to overtime if this schedule is followed under an averaging agreement.

Employees and their employers can also agree to a one-week averaging agreement provided the number of hours specified for the week does not exceed 40. For instance, the employee may agree to work Monday through

Thursday at 10 hours per day for a total of 40 hours, with no additional hours for the rest of the week. If this schedule is followed, no overtime wages are payable. Several conditions must be met before an averaging agreement is valid. Amongst the requirements is that the averaging agreement:

- is in writing
- is signed by the employee and employer before the start date of the agreement
- specifies the number of weeks over which the agreement applies
- specifies the work schedule for each day covered by the agreement
- specifies the number of times, if any, that the agreement may be repeated
- cannot provide for more than an average of 40 hours per week

If an employee works beyond the number of hours contemplated on any day in the averaging agreement, overtime wages may be payable.

### **Calculating the Amount Payable**

Calculating the amount payable as overtime wages can be difficult if the certified dental assistant is not paid an hourly wage. In those circumstances, the Act states that the employee's weekly or monthly salary, if that is how she is paid, must be converted into an hourly wage on the basis of normal or average hours of work. For instance, if the employee is paid on a weekly basis and normally works an average of 35 hours per week, then the weekly salary divided by 35 is the normal hourly wage. This forms the basis for calculating the overtime wage.

An employer can be liable for up to six months of unpaid overtime wages under the Act. If you do not file a complaint within six months of the date the overtime wages were earned, you may be barred under the Act for filing the complaint for overtime earned more than six months previously, so timeliness of making a complaint is important.

### **Seeking Advice**

The Employment Standards Branch of British Columbia is the organization responsible for assisting employees in knowing their rights under the Act and for administering complaints under the Act. It often is also a good idea to contact an employment lawyer to obtain some initial advice about your rights under the Act.

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