

Directors and officers of a corporation: Beware of personal liability under section 96 of the Employment Standards Act

The *Employment Standards Act* (“the *Act*”) delineates the minimum standards that apply in most workplaces in British Columbia. It governs the employment of all employees - casual, probationary or temporary- within provincial jurisdiction, whether employed in a full time or part time capacity.

The *Act* will not apply where the employee is a person excluded from the provisions of the *Act* under *Employment Standards Regulation* (“the *Regulation*”) such as doctors, lawyers, architects and others whose professions are specifically regulated by provincial legislation. Also other non-professionals, under specific circumstances, are excluded from the application of the *Act*. These include, but are not limited to, persons engaged in government sponsored work programs, sitters, and newspaper carriers.

The *Act* also does not apply to employees whose work falls within federal jurisdiction such as banking, defence, interprovincial or international transportation, interprovincial and international shipping, air transport as well as employment with the federal government and crown corporations.

If you are or have been a *director or officer of a corporation within provincial jurisdiction*, it is important that you understand your potential exposure under section 96 of the *Act*. Section 96(1) states:

Corporate officer's liability for unpaid wages

- 96** (1) A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee.

Under section 96(1) *each* director or officer of the corporate employer is liable personally to pay up to a *maximum of two months' wages* for each employee, even where more than two months' wages is owed.

This section only comes into play where the employee successfully lodges a complaint under the *Act* against her corporate employer for the latter's failure to pay her wages and the Director of Employment Standards issues a determination against the employer which determination is not satisfied by the employer. In such case, the Director of Employment Standards will employ section 96(1) to issue a determination against one or more directors or officers of the corporate employer to obtain payment of wages owed to the employee by the corporate employer.

The director or officer, to be liable under section 96(1), must have been a director or officer of the corporate employer, at the time the wages were earned or should have been paid by the corporate employer.

It is also important to note that where there is more than one director or officer, nothing in section 96(1) or in any other section of the *Act* requires the Director of Employment

Standards to apportion, pro-rate or divide the liability for wages owed to the employee between the directors or officers¹.

Where the employee is owed more than two months' wages, the Director of Employment Standards may issue a determination against each director and officer of the corporate employer for two months wages. Just because one of the Director's or officer's pays the employee two months' wages under a section 96 determination does not extinguish or discharge the liability of other directors and officers under their section 96 determinations, since the employee is still owed wages. In such case, since the Director of Employment Standards is not required to collect equally from all directors and officers, he may collect from the other directors or officers only that which is necessary to pay the balance of wages outstanding and no more. For example, if the employee is owed 3 months' wages, once the director has collected from the first director 2 months' wages, he may only collect one additional month's wages from the second director.

What constitutes wages for the purpose of section 96? Wages, under section 96, refers to normal wages including applicable vacation pay. It does not include length of service, termination pay or money payable in relation to individual or group terminations, if the corporation is in receivership.²

Directors and officers are also not personally liable for (i) wages of an employee if the corporate employer is subject to action under section 427 of the *Bank Act* (Canada) or to a proceeding under an insolvency Act³, (ii) vacation pay that becomes payable to an employee after they cease to hold office⁴, or (iii) money that remains in an employee's time bank after they cease to hold office⁵.

Pursuant to section 45 of the *Regulation*, directors and officers of charities are exempt from the liability created in section 96 of the *Act*, if they only receive reasonable out-of-pocket expenses and no other remuneration for services performed for the charity. If you are not such a director or officer and section 96 of the *Act* applies to you, you may want to ask the corporate employer whose Board you are serving on if they have a directors and officers "error and omissions" insurance that sufficiently protects you from such liability. Such enquiry is advisable in advance of getting on the Board of any corporate employer.



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² Section 96(2)(a) of the *Act*

³ Section 96(2)(b) of the *Act*. Section 1 of the *Act* defines "insolvency Act" to mean "*Bankruptcy and Insolvency Act (Canada), the Companies' Creditors Arrangement Act (Canada) or the Winding-up and Restructuring Act (Canada)*"

⁴ Section 96(2)(c) of the *Act*

⁵ Section 96(2)(d) of the *Act*