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## TAKE CARE WHEN EMPLOYING RESIDENT CARETAKERS

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Describing employer - employee relationships as complex is an understatement. Realistically, the matrix of statutory minimum obligations, human rights laws, and express and implied terms creates challenges for HR departments and lawyers. This complex legal framework can be further complicated by special laws that apply only to specific types of employees or industries, and sometimes to organizations not accustomed to seeing themselves as "employers".

The resident caretaker, for example, works under a series of very specific legal provisions yet, often, their employers are strata corporations or residential landlords who are unfamiliar with being an "employer". This article highlights some of the issues that can arise in this unique employment relationship, and identifies a few tips and traps for those employing resident caretakers. Even if you do not employ or work as a resident caretaker the tips below may serve as a helpful reminder of the types of issues employers and employees always need to recognize.

### Statutory Requirements

The definition of a resident caretaker in the BC *Employment Standards Act*, which establishes the minimum requirements governing employer - employee relationships in this province, applies once there are more than 8 residential units in a building. The provisions of the Act governing these workers apply whether the caretaker works in a rental apartment building or a strata complex where the units are individually owned. To clarify, different provisions apply to non-resident "caretakers" and "resident caretakers". The provisions mentioned in this article are specific to "resident caretakers".

Special minimum wage provisions apply to resident caretakers and currently require minimum pay of \$615 per month plus \$24.65 per suite for buildings with 9 to 60 units or \$2,094.84 per month for buildings with 61 or more units. If the resident caretaker has signed a written authorization, then part of these wages can be assigned for rental of the unit. Overtime laws do not apply to resident caretakers, however, there is a requirement that they receive 32 consecutive hours free from work each week and, if this is not complied



with, the resident caretaker is owed wages at the rate of time and a half for any work completed during the 32 hour period which should have been free from work.

Vacation and statutory holiday provisions in the Act also apply to resident caretakers so arrangements to comply with these provisions need to be made by the employer.

The obligation on an employer to keep a record of an employee's hours of work applies to resident caretakers so a system needs to be arranged to ensure such records are kept. In the event of any dispute, the Employment Standards Branch will expect an employer to produce the records that are required to be kept under the Act. A failure to keep such records may amount to a violation of the Act that is pursued by the Employment Standards Branch.

One tool that can assist residents and the manager (as well as help ensure compliance with the Act) is a schedule that is posted in the building specifying the manager's hours. While this helps minimize demands on the resident caretaker's time it is also a requirement of the Act to post a schedule and to provide a copy of that schedule to the resident caretaker. If the employer and caretaker choose to address statutory holidays by providing a day off with an average day's pay then indicating on the schedule that the hours do not apply on statutory holidays can help reduce demands on the resident caretaker's time on those days. This will help limit the employer's obligation to pay an average day's pay plus time and a half for any hours worked and will also help reduce demands during the consecutive hours that should be free from work.

### **Employees or Independent Contractors?**

Resident caretakers are sometimes classified as independent contractors instead of employees. Numerous factors apply to determine whether a person is a true independent contractor as opposed to an employee but some key factors include: the amount of control exercised over the duties and how they are performed; the chance of profit or risk of loss and ownership of the tools or equipment for the job. The fact the employer and the employee have chosen to call the resident caretaker an "independent contractor" is not a relevant factor. Whether an individual is properly characterized as an "independent contractor" or not, the employer's option of entering into a written contract with the resident caretaker should not be overlooked. Employment contracts often help clarify issues like the employee's duties, statutory payment obligations, rights upon termination and other key elements of the employment relationship.

### **Employment and Tenancy Issues on Termination**

Finally it is key to highlight that termination of a resident caretaker can be a complex matter. Provisions in the *Employment Standards Act* will apply to the termination of employment, however, the terms of the



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*Residential Tenancy Act* will also need to be considered to terminate any tenancy. As a result, in the event termination is necessary, the interplay of these two statutory schemes will need to be juggled to ensure the termination complies with all required laws. Where a unit is rented to a caretaker for the term of their employment, and that employment ends, the landlord can terminate the tenancy if it plans in good faith to rent the unit to another caretaker. The end date of the tenancy must: not be earlier than the last day of employment; not be earlier than one month after the notice to end the tenancy; and, be the day before the day on which rent is payable.

Although every employer - employee relationship will have unique characteristics based on the nature of the work, many of the issues that arise will be common to all employment relationships. Anticipating issues in advance, whether general or specific to a job or industry, will assist employers and employees in minimizing the risk of disputes arising both during the relationship, and at the relationship's end.

