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LABOUR AND EMPLOYMENT COMMUNIQUÉ

DIRECTORS' PERSONAL LIABILITY FOR UNPAID WAGES

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During the current economic crisis, many businesses are financially challenged. Given the demands on available resources, there may be a temptation to reduce costs by skipping a payroll. The directors of a corporation should monitor the affairs of the business to ensure that managers do not give into such temptations because each director can be held personally liable for wages owed to employees of the corporation. The *Employment Standards Act, 2000* ("ESA"), the Ontario *Business Corporations Act* ("OBCA") and the *Canada Business Corporations Act* ("CBCA") all contain provisions under which directors may be held liable for unpaid wages personally.

Under the ESA and the OBCA, directors may be liable for up to six months of unpaid wages and twelve months of unpaid vacation pay. Under the CBCA, directors may be held liable for up to six months of wages. In the normal course, "wages" do not include termination or severance pay for the purpose of any of these Acts. Liability in such cases is "joint and several". In other words, each director can be required to contribute to the payment of unpaid wages, or, if all other directors are unavailable or unable to pay, one single director can be required to pay the entire amount of outstanding wages.

Under all three Acts, the personal liability of directors only arises in certain circumstances, such as when the corporation has not satisfied a judgment or order against it to pay outstanding wages or when the corporation has a bankruptcy order against it.

Directors may also be subject to fines under the ESA. In October of this year, directors of a corporation formerly operating as Amato Pizza and directors of a related corporation were personally fined because the business failed to pay wages to the employees of the corporations. The companies owed approximately $42,000 to six employees. The companies and their directors had failed to comply with orders to pay wages issued by the Ministry of Labour in relation to the six employees. The companies were each convicted of six violations of failing to comply with orders to pay under the ESA and were each fined $120,000. The directors were each personally convicted of six counts of authorizing, permitting or acquiescing in the failure to comply with the orders to pay and were each personally fined $10,000. A 25% victim fine surcharge was levied on the fines, as required by the *Provincial Offences Act*.

Directors should be aware that under these pieces of legislation they may ultimately be held personally responsible for wages owed by a corporation. Each director should, therefore, ensure that the wages and vacation pay of employees are paid when due.

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Our Labour and Employment Practice Group is dedicated to providing comprehensive and integrated legal services, and advises management in all aspects of labour relations and employment law. For more information about our Group, visit our website at www.millerthomson.com.

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