



## Unpaid Overtime by Jodi L. Wyman

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A new case from the Manitoba Court of Appeal will have some employers nervous. Businesses with workers on salary may have to review their policies and practices to ensure they do not end up in Court.

The Nygard International case has already received a lot of attention. A former employee took the company to the Manitoba Labour Board for unpaid overtime. She had worked more than 40 hours each week but was not paid as required by the Employment Standards Code.

When the employee was hired she signed a contract. It stated she would receive a salary which included all working hours necessary to fulfill her duties. She worked for the company for about a year and claimed to have worked 284 hours of overtime during her final six months at the company.

The employee testified she was told she would receive time off to compensate her for overtime, but did not. The company denied that this promise was made.

The Manitoba Labour Board ruled in favour of the employee and said that the clause in the contract which kept her from being paid for overtime was void. The law about

paying an employee for overtime is meant to prevent employers from exploiting their staff, which is exactly what they found Nygard had done.

Nygard appealed the Labour Board decision to the Manitoba Court of Appeal. The Court upheld the decision that the employee was entitled to be paid for overtime in spite of the contract.

What message does this case send to employers? Although an employment contract can override many labour laws, businesses have to be careful when doing so. In all respects, the contract must be fair and reasonable or it could be set aside.

There is not likely a problem with the idea of salaried employees not being paid for overtime, but employers must be careful. If the overtime is likely to be excessive, other arrangements will have to be made. The agreed-upon salary can specifically include a certain amount paid overtime. For example, each week's salary would be the same but will automatically include a certain amount of overtime at a higher wage. Also ensure the hours are monitored and no employee is being overworked.

Meanwhile, a new Ontario class

action case has a similar issue. The law states that employees designated as salaried "managers" are exempt from extra pay for overtime. Although this law in itself may be fair, the claim in the case is that the company called ordinary retail clerks "managers" just to get out of paying them for overtime.

Although this case is only in the beginning stages, employers should be conscious of the concept. Managers should have actual supervision duties, input into hiring and firing etc, not just a fancy title. The job duties of a manager should be reviewed regularly as well, in case workplace changes require job title and contract changes. Employers should also review the recent changes to Manitoba's Employment Standards Code made just this week. The criteria for when managers or independent contractors can be excluded from hours of work and overtime provisions is more clearly addressed.