

# Can You Offset Previous Overpayment Against Overtime?



## **SITUATION**

ABC Manufacturing's business hours are from 8 am to 4:30 pm. Myra Gretts, a salaried employee, has to drop off her kids at daycare and can't make it in on time. But Myra is a valued member of the team and management cuts her some slack. Myra is allowed to show up for work at 9 am and still get paid for a full 40-hour week. Later, when her relationship with the company turns sour, Myra sues ABC for unpaid overtime. The company admits that in December, Myra put in 19 hours of overtime by working more than 40 hours in a week. But the company claims that she's not entitled to overtime. Its argument: The extra pay that Myra did receive for work she didn't actually do during the rest of the year, (that is, full pay for a 40-hour week even though she worked only 35 hours) was much greater than the 19 hours worth of overtime she did.

## **QUESTION**

**Is Myra entitled to overtime?**

- A. No because she's a salaried employee.
- B. No because the pay for work she didn't perform cancels out the obligation to pay for the overtime hours she did perform.
- C. Yes because full pay for working less than a full week in one week doesn't cancel out the obligation to pay overtime for working more than 40 hours in another.
- D. Yes because an employee's agreement, directly or indirectly, to give up the right to receive overtime for working more than 40 hours per week is unenforceable.

## **ANSWER**

**C. Yes, ABC must pay Myra overtime for all 19 hours of work she put in past 40 per week.**

## **EXPLANATION**

Employment standards laws require employers to pay overtime when an employee works more than a standard number of hours per week, typically 40. This example, which is loosely based on a ruling by the Ontario Labour Relations Board, (*730372 Ontario Ltd.*

(*c.o.b. Blow Mould Engineering*), [2008] O.E.S.A.D. No. 462, May 12, 2008), illustrates an important principle about this obligation: The determination of whether overtime is due is based on hours worked in the week when the employee put in more than 40 hours; how much the employee got paid for hours worked in previous weeks is irrelevant (assuming there's no averaging agreement in place.)

Thus, the 19 hours of overtime Myra wracked up in December for weeks worked over 40 hours were all payable even though there were certain weeks during the year when ABC paid Myra the equivalent of a 40-hour salary for working 35 hours.

#### **WHY WRONG ANSWERS ARE WRONG**

**A is wrong** because salaried employees can be entitled to overtime as well. Confusion on this point sometimes results from the fact that some provinces permit an exemption from overtime for managers and supervisors—who often are paid on a salary basis. But the key factor in the exemption for managers and supervisors is not how they are paid but what their duties are.

**B is wrong** because paying an employee more than the value of the hours she actually worked in one week doesn't give the employer the right to deny the employee overtime she earns in another week.

**D is wrong** because, at least in most provinces, employees can agree to waive their right to receive overtime for long hours under the employment standards laws. For example, at least nine jurisdictions—BC, Fed, MB, NS, NT, NU, ON, SK and YT—allow employees to enter into averaging agreements in which hours worked over a period of weeks are averaged for purposes of determining if overtime is due.