

Watch Your (Employment Contract) Language



The dangers of including the phrase “inclusive of all hours worked” in employee contracts.

A piece of boilerplate found in some standard employment contracts purports to make the contractual rate of compensation “inclusive of all hours worked.” While that may seem like a self-evident and harmless phase, particularly for an intended salary arrangement, it may constitute a violation of employment standards laws overtime pay requirements. Consider the following scenario.

SITUATION

A fashion design firm hires a retail merchandise supervisor to oversee stores in Manitoba. The supervisor signs an employment contract that lists the duties she’s expected to perform. The contract says that the supervisor will be paid \$42,000 per year “inclusive of all hours required to be worked” to fulfill those duties. The firm terminates her just over a year later. The supervisor claims the firm owes her unpaid overtime and files a wage complaint. The Manitoba Labour Board sides with the supervisor and orders the firm to pay her \$10,240 in overtime wages owed.

THE PROBLEM

Under employment standards laws, employees who work beyond a stated number of hours per day or week are entitled to overtime pay at time-and-a-half. In Manitoba, the overtime entitlement kicks in after 40 hours in a week and 8 hours in a day. The employee’s right to receive overtime for work beyond these thresholds is mandatory. In other words, it’s against the law for an employer and an employee to make a contract that says an employer doesn’t have to pay overtime to the employee. The same rule applies in all other jurisdictions.

The contract in this case purported to pay the supervisor a set wage for performing certain duties, “inclusive of all hours” she had to work to fulfill her duties. The Labour Board interpreted this as “an attempt to ‘contract out’ of the minimum wage law and impose an illegal salary arrangement instead. So, it ruled that the contract was illegal [*Nygard International Partnership Associates (Re)*, [2005] M.J. No. 309].

THE LESSON

DON’T stipulate a salary and say that it covers all hours worked (unless you’re

contracting with a management employee not subject to minimum wage protections). Phrases to avoid:

- “Any and all hours worked”;
- “Inclusive of all hours worked”; and
- “Regardless of the number of hours worked.”

DO: Specify the number of hours you expect employees to work and the rate of pay for that work. If the employee is expected to work more than 40 hours per week, make sure that the rate of pay includes overtime for those hours.