

# Wage and Hour Guide for Employers

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## PART 1: FAIR LABOR STANDARDS ACT (FLSA) OVERTIME EXEMPTIONS

### Executive

1. Primary duty is management of enterprise department or subdivision
2. Customarily and regularly directs the work of two or more employees
3. Must have power to hire and fire, or recommendations must be given “particular weight”

*The employee must also be paid on a salary basis of at least \$455 per week.*

- » Can manage a mix of full time and part time employees, if equals 2 full time employees
- » To determine primary duty, look at amount of time spent, job description, hiring criteria, how paid
- » To analyze “particular weight,” determine whether recommendation is part of job duties, frequently made, or frequently relied upon

29 C.F.R. §§ 541.100 – 541.106

### Administrative

1. Primary duty is performance of office or non-manual work directly related to management or general business operations of employer
2. Must exercise discretion and independent judgment with respect to matters of significance

*The employee must also be paid on a salary basis of at least \$455 per week.*

- » “Production workers” (those producing core product or service) may not be eligible

- » Specific exempt job titles: team project leader (lead major projects); administrative assistant (if delegated authority re: matters of significance); human resource managers (must make or interpret employment policies); purchasing agents (w/ authority to bind company on significant purchases)
- » Internet, database and computer network administrators now meet administrative exemption

29 C.F.R. §§ 541.200 – 541.203

### Professional

#### Performance of work:

1. Requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, or
2. Requiring invention, imagination, originality or talent in recognized field of artistic or creative endeavor

*The employee must also be paid on a salary basis of at least \$455 per week.*

- » Examples: doctors, lawyers, nurses, engineers, scientists
- » College or advanced degrees are standard, but a combination of work experience and training will suffice in some cases
- » Accountants usually meet this exemption, but accounting clerks and bookkeepers do not
- » Graphic artists may qualify, but must exercise a high level of invention, imagination, originality and talent

29 C.F.R. §§ 541.300 – 541.304

### Outside Sales

- 1 Primary duty is making sales
2. Must customarily and regularly be engaged away

from the employer's place of business in performing this duty

- » Work done in furtherance of sales is considered part of making sales
- » Inside duties such as writing sales reports, updating catalogues, planning itineraries and attending sales conferences are considered part of making sales
- » Inside salespeople not eligible: no telephone, mail or internet sales
- » Former rule – no more than 20% non-exempt duties; new rule – outside sales must only be “primary duty”

29 C.F.R. §§ 541.500 – 541.504

### Computer Professional

- 1 Application of systems analysis techniques and procedures to determine hardware, software or system functional specifications
2. The design, development, documentation, analysis, creation, testing or modification of:
  - a) computer systems or programs; or
  - b) computer programs related to machine operating systems; or
3. A combination of these duties

- » Does not apply to computer operation, manufacture or repair
- » Does not apply to employees whose work is highly dependent upon the use of computers and computer software programs (i.e., auto cad)
- » Must be paid on a salary basis of at least \$455 per week, or can pay on hourly basis if at least \$27.63/hr

29 C.F.R. §§ 541.400 – 541.401

### Highly Compensated Employee Exemption

1. An employee with a total annual compensation of at least \$100,000 is deemed exempt if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee
2. “Total annual compensation” must include at least \$455 per week paid on a salary or fee basis. Total annual compensation may also include commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period
3. If the employee's total annual compensation does not meet the required amount, the employer may, during the last pay period or a one month period after the end of the year, make a payment sufficient to achieve the required level

4. For employees who work less than one year, the employer may calculate exemption on a pro rata basis
5. The exemption only applies to employees performing office or non-manual work

29 C.F.R. § 541.601

### Permissible Deductions From Exempt Employee Salary

The following is a list of permissible deductions from an exempt employee's salary, which will not violate the “salary basis” requirement:

- 1 When an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability
2. For absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability. Deductions for such full-day absences also may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted the leave allowance thereunder
3. For unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules, or for infractions of safety rules of major significance
4. An employer is not required to pay the full salary in the initial or terminal week of employment
5. An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act

29 C.F.R. § 541.602

## PART 2: FAIR LABOR STANDARDS ACT (FLSA) NON-EXEMPT EMPLOYEES

### Minimum Wage

1. Non-exempt employees must be paid at least the federal minimum wage for all hours worked

Federal Minimum Wage:  
» \$7.25 per hour

29 U.S.C. § 206

## Overtime

1. Non-exempt employees must be paid at least the federal minimum wage for all hours worked

### a) Overtime:

- » 1 ½ times an employee's regular rate of pay
- » Regular rate of pay must be determined for non-exempt employees paid on a piece-rate, salary, or commission basis by dividing their earnings by the number of hours actually worked

29 C.F.R. §§ 778.100 – 778.115

- » Non-discretionary bonuses (i.e., performance incentives) are to be included in an employee's regular rate of pay to determine overtime payment obligations

Bonuses are considered to be discretionary if:

1. The fact that the payment is to be made and the amount are determined at the sole discretion of the employer; and
2. The bonuses are not paid under a prior contract, agreement, announcement, or promise that would cause the payments to be considered "regular"

29 C.F.R. § 778.211

### b) Workweek

- » Regularly recurring period of 168 hours (7 consecutive 24-hour periods)
- » May begin on any predetermined day and hour of day

29 C.F.R. § 778.105

## Tipped Employees

1. "Tipped Employee": Employee who typically receives over \$30 of tips per month

2. Employees must receive at least the federal minimum wage

- » Tips actually received by tipped employees may be counted as wages; but
- » Employers must pay tipped employees at least \$2.13 per hour in direct wages
- » If an employee's tips combined with the employer's direct wages of at least \$2.13 an hour do not equal the federal minimum wage, the employer must make up the difference.

29 C.F.R. § 531.50

3. The employer must inform tipped employees about the tip credit allowance (including amount to be credited) before the credit is utilized

4. Tipped employees must retain all tips when the

employer elects to take a tip credit for tips received, except to the extent the employee participates in a valid tip pooling arrangement

5. Tip Pooling: Employees who customarily and regularly receive tips, such as waiters, waitresses, bellhops, counter personnel (who serve customers), busboys/girls and service bartenders may be required to share tips through a tip pool. Tipped employees may not be required to share their tips with employees who have not customarily and regularly participated in tip pooling arrangements, such as dishwashers, cooks, chefs, and janitors. Only those tips that are in excess of tips used for the tip credit may be taken for a pool

## Hours Worked

### 1. On-call Time:

- » On Employer's Property: Generally, on-call time is compensable (unless living on property)
- » Off Employer's Property: Generally, on-call time is not compensable (unless activities are restricted)

#### Example:

A paramedic is scheduled to work a 12-hour "on-call" shift, which requires her to remain at the dispatching center to respond to emergencies. All time spent at the dispatching center is compensable time.

#### Compare:

Maintenance employees at a large manufacturing facility are scheduled to be "on-call" one weekend each month. During such time, the employees may do as they please, including staying at home, but must "check-in" with their supervisor by telephone at the beginning and end of each day. The maintenance employee's "on-call" time is not compensable.

29 C.F.R. § 785.17

### 2. Sleeping Time:

If employee is required to be on duty:

- » 24 Hours or Less: All time is compensable, even if permitted to sleep
- » 24 Hours or More: Employer and employee may agree to exclude sleep time from hours worked, however, sleeping facilities must be provided

29 C.F.R. §§ 785.21 – 785.22

### 3. Lectures, Meetings, & Training Programs:

Compensable unless all the following elements are met: time spent is (1) outside normal working hours; (2) voluntary; (3) not job related; and (4) no other work is concurrently performed

29 C.F.R. § 785.27

#### 4. Travel Time:

- a) Home to Work:
  - » Not compensable
- b) One-Day Special Assignment in Another City:
  - » If employee ordinarily works at a fixed location, all time spent traveling to and returning from another city on the same day is compensable. However, time the employee normally spends traveling to/from work can be deducted from the otherwise compensable time
- c) Overnight Travel:
  - » Time spent away from home on overnight travel that coincides with the employee's normal work hours is compensable. In addition, time spent on non-work days that coincides with the employee's normal work hours is also compensable

29 C.F.R. §§ 785.34 – 785.40

#### 5. Break Time for Nursing Mothers:

Employers are required to provide “reasonable break time for a non-exempt employee to express breast milk for her nursing child for 1 year after the child’s birth each time such employee has need to express the milk.” Employers are also required to provide “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.”

29 U.S.C. § 207(r)(1)

## PART 3: NEW JERSEY WAGE & HOUR LAWS

### Minimum Wage

#### Hourly Amount

- » On July 24, 2009, the new federal minimum wage of \$7.25 per hour replaced New Jersey’s minimum wage. [N.J.S.A. § 34:11-56a4](#).

#### Wages for Tipped Employees

- » Employers that operate in the “food service occupations” or “hotel and motel occupations” and are not subject to the Fair Labor Standards Act must demonstrate that the total wage, including cash and gratuities, equals the minimum wage. [N.J.A.C. §§ 12:56-13.4, 12:56-14.4](#); [29 C.F.R. §531.50](#).

#### Posting

- » Employers are required to post, in a conspicuous place, the “New Jersey State Wage and Hour Law Abstract,” setting forth the minimum wage and overtime requirements, and the “Employer Obligation to Maintain and Report Records” poster. [N.J.S.A. §34:11-56a21](#).

### Child Labor

#### Minimum Age

- » Minors who are 11 years of age or older may be employed in newspaper delivery over residential routes. [N.J.S.A. §34:2-21.15](#).
- » In addition to the foregoing, minors who are 12 years of age or older may be employed in farming, gardening, nursery work, forestry, or the raising of animals. [N.J.S.A. §34:2-21.15](#).
- » In addition to the foregoing, minors who are 14 or 15 years of age or older may be employed in most positions, but not those in factories, bars, gambling houses, or construction; jobs requiring the use of power-driven machinery or conveyor belts; or certain jobs that could expose the minor to hazardous materials. [N.J.A.C. §§ 12:58-3 et seq.](#); [N.J.A.C. §§ 12:58-4 et seq.](#)
- » In addition to the foregoing, minors who are 16 years of age or older may be employed in most positions, but they are prohibited from working in the field of construction and in bars or gambling places, from jobs requiring the use of various types of heavy machinery, and from jobs that potentially involve exposure to certain hazardous materials. [N.J.A.C. §§ 12:58-4 et seq.](#)

#### Limitations on Hours

- » When school is in session, minors aged 14 or 15 may not be employed for more than 18 hours per week, and may not be employed for more than three hours per day on school days or eight hours per day on Saturdays or Sundays. [N.J.S.A. §34:2-21.3](#).
- » When school is not in session, minors aged 14 or 15 may not be employed for more than eight hours per day or 40 hours per week. [N.J.S.A. §34:2-21.3](#).
- » Minors aged 16 or 17 may not be employed for more than eight hours per day or 40 hours per week. [N.J.S.A. §34:2-21.3](#).
- » Minors may not be employed for more than six consecutive days in a pay week. [N.J.S.A. §34:2-21.3](#).
- » Special restrictions apply to minors working as newspaper carriers, in agriculture, or in theatrical employment. [N.J.S.A. §34:2-21.3](#).

## Work Schedules

*When school is in session:*

- » Minors aged 14 or 15 may not be employed before 7 a.m. or after 7 p.m.
- » Minors aged 16 or 17 generally may not be employed before 6 a.m. or after 11 p.m. However, on Fridays and Saturdays or days not followed by a school day, minors aged 16 or 17 may be employed between 6 a.m. and midnight.

*When school is not in session:*

- » Minors aged 14 or 15 may not be employed before 7 a.m. or after 7 p.m. However, with written permission from a parent or legal guardian, minors aged 14 or 15 may work until 9 p.m.
- » Minors aged 16 or 17 may not be employed before 6 a.m. or after 11 p.m. However, in restaurant and seasonal amusements, minors aged 16 or 17 may be employed beginning at 6 a.m. and as late as 3 a.m. and with written permission from a parent.
- » Furthermore, minors under 18 years of age may not be employed after 10 p.m. in or for a factory. [N.J.S.A. §34:2-21.3.](#)

## Breaks

- » No minor under the age of 18 may work more than five hours continuously without a lunch period of at least 30 minutes. [N.J.S.A. §34:2-21.4.](#)

## Posting

- » Employers are required to post, in a conspicuous place, the “New Jersey Child Labor Law Abstract,” setting forth the requirements and limitations on the employment of minors, and the “Schedule of Minors’ Hours” poster. [N.J.S.A. §34:2-21.5.](#)

## Documentation Requirements

- » Employers may not employ a minor under 18 years of age without an employment certificate or special permit for that minor (unless that minor is employed in an agricultural pursuit or fair). [N.J.S.A. § 34:2-21.7.](#)
- » For every minor under the age of 19, employers are required to keep a record of the number of hours worked on each day of the week, the times at which that minor began and finished work, the times at which that minor began and finished a meal period, and the amount of wages paid. [N.J.S.A. §34:2-21.6.](#)

## Overtime

### Requirements

- » The New Jersey State Wage and Hour Law requires that a non-exempt employee be paid 1.5 times the employee’s regular hourly wage for each hour of worked in excess of 40 hours in any workweek. [N.J.S.A. § 34:11-56a4.](#)

### Exemptions

- » Employees are exempt from the overtime requirements if they are employed in a bona fide executive, administrative, professional, or outside sales capacity. In defining those terms, New Jersey law expressly relies on the regulations promulgated pursuant to the Fair Labor Standards Act. [N.J.S.A. § 12:56-7.1–7.2.](#)
- » Inside salespersons are also exempt if they receive half of their total compensation from commissions and a total compensation of not less than \$400.00 per week. [N.J.S.A. § 12:56-7.2.](#)

### Remedies & Penalties

- » Employees who do not receive the required overtime pay or minimum wage may recover their unpaid wages as well as the costs and attorneys’ fees incurred in recovering those unpaid wages. [N.J.S.A. § 34:11-56a25–25.1.](#)
- » The Commissioner of Labor is authorized to assess and collect administrative penalties, up to a maximum of \$250 for a first violation and up to a maximum of \$500 for each subsequent violation, for violations of New Jersey’s overtime and minimum wage laws. [N.J.S.A. § 34:11-56a22.](#)

### Statute of Limitations

- » The statute of limitations for claims under the New Jersey State Wage and Hour Law is two years. [N.J.S.A. § 34:11-56a25.1.](#)

For more information about wage and hour, please visit the Wage and Hour Defense Blog <http://www.wagehourblog.com>

This Guide reflects the law only as of the date of publication. You should consult with an attorney before relying on any information contained herein, as the law may have changed, and outcomes may vary depending on individual circumstances.

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