

Wage and Hour Guide for Employers

Prepared by the Wage and Hour Sub-Practice Group of EBG
Collective Action Litigation – Advice and Counsel – Employer Audits

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 at least \$455 per week on a salary basis (under federal law), and in New York, the employee must be paid at least \$543.75 per week on a salary basis.

- » 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 at least \$455 per week on a salary basis (under federal law), and in New York, the employee must be paid at least \$543.75 per week on a salary basis.

- » “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 at least \$455 per week on a salary basis.

- » 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 need 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, or if applicable, in New York, \$543.75, 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:

» July 24, 2009: \$7.25 per hour

29 U.S.C. § 206

Overtime

1. Non-exempt employees must be paid overtime for all hours worked over 40 hours in a workweek

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

organizations, payments for U.S. bonds, payments for dues or assessments to a labor organization and similar payments for the benefit of the employee). Authorizations must be kept on file on the employer's premises **N.Y. Lab. Law § 193** (McKinney 2009 & Supp. 2011)

- » Wage deductions for overpayments, advances of accrued, unused vacation, or advances on wages are no longer permissible as the NYSDOL has significantly narrowed its view as to which types of deductions are permissible
D.O.L. Op. Ltr. RO-09-0006 (Aug. 3, 2009)

Timing

- » Manual workers: Weekly, with a holdover of 7 days permitted. (The Commissioner of Labor may authorize certain employers to pay wages less often than weekly, but not less often than semimonthly.)
N.Y. Lab. Law § 191
- » Commissioned salespersons: In accordance with the terms of employment, but not less frequently than once each month and not later than the last day of the month following the month in which the monies were earned. (Agreements with commissioned salespersons must be in writing and signed by employer and employee and describe, among other things, how salary, commission, draw, etc. are calculated, and provide details regarding payments in case of termination by either party.)
N.Y. Lab. Law §§ 190 and 191
- » Clerical and other employees: In accordance with the employment contract, but at least semimonthly, on regular paydays designated in advance by the employer. (This is not applicable to any person employed in a bona fide executive, administrative or professional capacity whose earnings are in excess of \$900 a week.)
N.Y. Lab. Law §§ 190 and 191

Notice

N.Y. Lab. Law § 195

Every employer must:

- » Provide newly-hired employees, at the time of hiring, with written notice of: their pay rate(s) and the basis thereof (i.e., whether paid by the hour, shift, day, week, salary, piece, commission, etc.); hourly rate and overtime pay rate (if applicable); allowances, if any, claimed as part of the minimum wage; regular pay day; the name (including any "doing business as" names), address and

PART 3: NEW YORK WAGE & HOUR LAWS

Payment On Separation

Termination

- » General Rule: If employment is terminated, the employer must pay the wages not later than the regular payday for the pay period during which termination occurred. If requested by the employee, the wages must be paid by mail
N.Y. Lab. Law § 191 (McKinney 2009 & Supp. 2011)

Payment of Wages

Deductions

- Deductions are only permitted if they are:
- » Made in accordance with any law, or any rule or regulation issued by any governmental agency (e.g., taxes and Social Security withholding); or
 - » Expressly authorized in writing by the employee and for the benefit of the employee (limited to payments for insurance premiums, pensions, health and welfare benefits, contributions to charitable

telephone number of the employer; and other information the Department of Labor deems material and necessary. The employer must keep the original notice for at least six years, and the employee must be provided with a copy

N.Y. Lab. Law § 195.1

- » Beginning in 2012, provide all employees between January 1 and February 1 of each year with written notice of: their pay rate(s) and the basis thereof (i.e., whether paid by the hour, shift, day, week, salary, piece, commission, etc.); hourly rate and overtime pay rate (if applicable); allowances, if any, claimed as part of the minimum wage; regular pay day; the name (including any “doing business as” names), address and telephone number of the employer; and other information the Department of Labor deems material and necessary
N.Y. Lab. Law § 195.1
- » Provide these written notices in English and the primary language identified by the employee, if English is not the primary language (unless the employee’s primary language is other than one for which a template is available from the Commissioner of Labor) **N.Y. Lab. Law § 195.1**
- » Obtain an acknowledgment of each written notice provided to newly-hired employees and annual notices to all employees, each of which should confirm that the employer asked the employee to identify his/her primary language, and that the employer provided the notice in both English and that primary language (unless the employee’s primary language is other than one for which a template is available from the Commissioner of Labor) **N.Y. Lab. Law § 195.1**
- » Provide each employee with a wage statement every time wages are paid, which includes the following information: dates of work covered by the applicable payment of wages; name of the employee; name, address and phone number of the employer; rate or rates of pay and basis thereof (whether paid by the hour, shift, day, week, salary, piece, commission, etc.); gross wages; deductions; allowances, if any, claimed as part of the minimum wage; and net wages. If applicable, the overtime rate(s) of pay, number of regular hours worked, and number of overtime hours worked must be included on the wage statement **N.Y. Labor Law § 195.3**
- » Notify employees of any changes in paydays prior to the time of changes in writing and at least seven calendar days in advance unless such changes are indicated on the wage statement that must

accompany every payment of wages.

N.Y. Lab. Law § 195.2

- » Notify employees in writing or by publicly posting the employer’s policy on sick leave, vacation, personal leave, holidays and hours
N.Y. Lab. Law § 195.5
- » Notify any employee terminated from employment, in writing, of the exact date of termination as well as the exact date of cancellation of employee benefits connected with termination. In no case may notice of termination be provided more than five working days after the date of termination. Failure to notify an employee of cancellation of accident or health insurance subjects an employer to an additional penalty
N.Y. Lab. Law § 195.6

Posting

- » Every employer must keep posted in a conspicuous place in its establishment a digest and summary of New York’s minimum wage law or applicable wage order
N.Y. Lab. Law § 661 (McKinney 2002 & Supp. 2008)

Minimum Wage

Hourly Amount

- » For private employers the minimum wage rate is \$7.25 per hour as of July 24, 2009. When the state minimum wage rate increases, existing wage order rates increase in the same proportion. If a higher federal minimum wage rate is established, then the federal rate would apply
N.Y. Lab. Law § 652 (McKinney 2002 & Supp. 2008) and N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.1

Spread of Hours

- » Employees are entitled to one additional hour of pay for each day (i) worked more than 10 hours and/or (ii) there is a split shift so that the number of hours between the start of the first shift and the end of the last shift exceeds ten
N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.4
- » Total gross pay must be equal to or greater than minimum wage for all hours of work, including one additional hour for each workday of more than 10 hours
D.O.L. Op. Ltr. R0-06-0027 (Apr. 12, 2006)

Wage for Tipped Employees

» **Miscellaneous Industries and Occupations:**

N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.5.

Tips or gratuities may be considered a part of the minimum wage, subject to the following conditions:

- (1) the occupation in which employees are engaged is one in which tips have customarily and usually constituted a part of their remuneration;
- (2) substantial evidence is provided that employees received in tips at least the amount of the allowance claimed; and
- (3) the allowance claimed by the employer is recorded on a weekly basis as a separate item in the wage record.

» **Hospitality Industry (Restaurant and Hotel Industries):** **N.Y. Lab. Law § 652 and N.Y. Comp. Codes R. & Regs. tit. 12, § 146**

Effective January 1, 2011, NYS Department of Labor issued a new minimum wage order covering the hospitality industry. An employer may take a credit towards the basic minimum hourly rate if a service employee or food service worker receives enough tips and if the employee has been notified of the tip credit as required. **§§ 146-1.3, 146-2.2** The tip credit that employers may take toward the state and federal minimum wage has been reduced to \$2.25 per hour.

Service Employees: Employers must pay a wage of at least \$5.65 per hour to service employees in all establishments and credit for tips shall not exceed \$1.60 per hour, provided that tips plus wages equal or exceed the minimum wage (\$7.25) per hour.

Food Service Employees: Employers must pay a cash wage of at least \$5.00 per hour, provided that tips and cash wages are equal to or exceed the minimum wage (\$7.25) per hour. The maximum tip credit is now \$2.25 per hour.

Service Employees in resort hotel (if tips are at least \$4.10 per hour): Employers must pay a wage of at least \$4.90 per hour and credit for tips shall not exceed \$2.35 per hour, provided that tips plus wages equal or exceed the minimum wage (\$7.25) per hour.

Chambermaids in resort hotels: As of January 1, 2011, chambermaids in resort hotels' minimum

hourly rates merge into service employees in resort hotels. (See above)

» **Tipping Pool:**

NY. Comp. Codes R. & Regs. tit. 12, § 146-2.16(b)

An employer may require food service workers to participate in a tip pool and may set the percentage to be distributed to each occupation from the tip pool. Only food service workers may receive distribution from the tip pool (e.g. wait staff, bus persons, bartenders, barbacks, food runners, captains, hosts). Management and kitchen staff may not participate in a tip pool.

» **Service Charge:**

- No employer may demand or accept any part of the gratuities received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee. This provision does not apply to the checking of hats, coats or other apparel.

N.Y. Lab. Law § 196-d (McKinney 2009)

- In *Samiento v. World Yacht, Inc.* 2008 WL 382346 (Feb. 14, 2008), the New York Court of Appeals found that mandatory service charges, previously excluded from gratuity treatment pursuant to section 196-d of the New York Labor Law, may now be considered under the statute a gratuity that should not be retained by the employer, unless the employer provides clear, written notice to customers that the charge is not a gratuity.

» **Building Services Industry:**

N.Y. Comp. Codes R. & Regs. Tit. 12 § 141-1.7

Tips or gratuities from tenants and others must not be counted as part of the minimum wage.

Breaks & Meal Periods

Most employees are entitled to one day rest in seven.
N.Y. Lab. Law § 161

Breaks

- » None required. If a break of less than 20 minutes is permitted, it must be considered paid working time.

Meal Periods

» N.Y. Lab. Law § 162 (McKinney 2009)

Time Allowed	Industry/Occupations
1 hour noon-day period.*	Factories
30 minute noon-day period.* Employees who work shifts of more than 6 hours that extend over the noon-day meal period are entitled to at least 30 minutes off within that period for the meal period.	All other establishments and occupations covered by the Labor Law.
An additional 20 minutes between 5 p.m. and 7 p.m. for all those employed on a shift starting before 11 a.m. and continuing after 7 p.m. in all industries and occupations.	All
1 hour in factories, 45 minutes in other establishments (midway in shift) for all those working more than a 6-hour period starting between 1 p.m. and 6 a.m.	All

* Noon-day meal period: 11 a.m. – 2 p.m. Labor Commissioner may give written permission for shorter meal period under each standard. NY has separate provisions requiring meal periods for minors.

Payment

» Not required, unless there is an agreement to the contrary

Payment for Vacation & Sick Pay

Payment on Termination

» Depends on the terms of the vacation and/or resignation policy. New York courts have held in *Glenville Gage Company, Inc. v. Industrial Board of Appeals of the State of New York*, 70 A.D.2d 283 (3d Dept. 1979), aff'd, 52 N.Y.2d 777 (1980) that an agreement to furnish benefits or wage supplements such as vacation can specify that employees forfeit accrued benefits under certain conditions. To be valid, the employer must have notified employees, in writing, of the conditions that nullify the benefit.

If an employee has earned vacation time and there is no written forfeit policy, the employer must pay the employee for the accrued vacation. (NYSDOL)

Posting

» Every employer must notify its employees in writing or by publicly posting the employer's policy on vacation leave and holidays. N.Y. Lab. Law § 195.

Child Labor

Minimum Age

- » Under 14 Years of Age: Employment is prohibited. Exceptions: newspaper delivery by minors at least 11 years old, and certain farm work and bridge caddying at a bridge tournament by minors 12 or 13 years of age. N.Y. Lab. Law § 130 (McKinney 2009 & Supp. 2011)
- » 14 or 15 Years of Age: Employment of minors 14 or 15 years of age is prohibited during the hours when school is in session. When school is not in session, they may be employed in certain farm work, caddying, babysitting, casual yard and household work. They may also be employed in other occupations if they obtain an employment certificate. Factory work is prohibited at all times. N.Y. Lab. Law § 131 (McKinney 2009 & Supp. 2011)
- » 16 or 17 Years of Age: In general, same conditions and circumstances as 14 and 15-year old minors, but factory work is permitted. N.Y. Lab. Law § 132 (McKinney 2009)
- » There is no minimum age for child performers involved in theatrical, radio, or television performances or for child models.

Prohibited Employment

- » Under the age of 16: painting or cleaning the exterior of a building or structure, employment

in a factory or operation of washing, grinding, cutting, slicing, pressing or mixing machinery. All occupations qualified as “high-risk occupations” until the age of 18. *N.Y. Lab. Law § 133* (McKinney 2009 & Supp. 2011)

» Employers must maintain an employment certificate on file at the place of employment. At the termination of the minor's employment, the certificate should be returned to the minor. *N.Y. Lab. Law § 135* (McKinney 2009 & Supp. 2011)

Hours of Employment

Age	School	Hours Permitted/Requirements*
14 or 15 (<i>N.Y. Lab. Law § 142</i> (McKinney 2009 & Supp. 2011))	In Session	<ul style="list-style-type: none"> ▪ 3h on school days ▪ 18h / week ▪ 6 days / week ▪ 7 a.m. to 7 p.m.
Special rules apply to minors enrolled in supervised work study programs approved by the Commissioner of Education.	Not in Session	<ul style="list-style-type: none"> ▪ 8h / day ▪ 6 days / week ▪ 40h / week ▪ 7 a.m. to 7 p.m. ▪ Exceptions: From June 21 to Labor Day (7 a.m. to 9 p.m.) / Minors employed as junior counselors or counselors-in-training at a camp for children (June, July and August).
16 or 17 (<i>N.Y. Lab. Law § 143</i> (McKinney 2009 & Supp. 2011))	In session	<ul style="list-style-type: none"> ▪ In general, 4h / day on any day preceding a school day other than Sunday or holiday. ▪ 8h on a Friday, Saturday, Sunday or holiday. ▪ 28h / week ▪ 6 days / week ▪ In general, 6 a.m. to 10 p.m. (to 12 a.m. in certain cases).
	Not in Session	<ul style="list-style-type: none"> ▪ 8h / day** ▪ 48h / week ▪ 6 days / week - 6 a.m. to 12 a.m.
12 or over (<i>N.Y. Lab. Law § 130</i>)	When attendance upon instruction is not required by the education law	<ul style="list-style-type: none"> ▪ Presentation of a farm work permit. ▪ 4h in assisting in the hand harvesting of berries, fruits and vegetables. ▪ 9 a.m. to 4 p.m.: 1st day after Labor Day to June 20. - 7 a.m. to 7 p.m.: June 21 to Labor Day.

* Some exceptions apply to certain industries, i.e., street trades and newspaper carriers.

** Except that for the purpose of making one or more shorter work days or a holiday in a week, such persons may be employed up to 10 hours on any one day of the week, and 9 hours on any of the 4 other days, but not in excess of 48 hours in any such week.

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.