

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 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 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

29 C.F.R. § 531.50

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

PART 3: ILLINOIS WAGE & HOUR LAWS

Payment On Separation

Termination

- » Final compensation must be paid to separated employees no later than the next regularly scheduled pay date. The employee also must be paid for any earned but unused vacation pay (820 ILCS 115/5)
- » An employer may not withhold all or part of an employee's final compensation while awaiting the return of company property (56 IAC §300.830)

Payment of Wages

Timing

- » General Rule: Employees must be paid

semi-monthly.

(820 ILCS 115/3)

- » However, wages paid to executive, administrative and professional employees, as defined in the FLSA, may be paid monthly as may commissions (820 ILCS 115/3)
- » Wages earned during a semi-monthly or bi-weekly pay period must be paid no later than 13 days after the end of the pay period, and wages earned during a weekly pay period must be paid no later than 7 days after the end of the pay period (820 ILCS 115/4)

Bonuses

- » A former employee is entitled to a proportionate share of a bonus earned by length of service, regardless of any provision conditioning payment on employment on a particular date, when the employment relationship was terminated by mutual consent or an act of the employer without fault by the employee (56 IAC §300.500 (b))

Commissions

- » Absent express agreement to the contrary, the employee who is the procuring cause of a sale is entitled to the commission, even if the sale was consummated by someone else (56 IAC §300.510(a))

Vacation

- » When paid vacation is earned by length of service, vacation time is earned pro rata as the employee performs services (56 IAC §300.520)
- » An employer may require employees to use vacation by a certain date or lose it, as long as the employee had notice of the policy and an opportunity to use the vacation (56 IAC §520 (e))
- » If an employer has a paid days off policy that allows employees to use the time as both sick leave and vacation, all of the paid days off are treated as vacation, and earned but unused time must be paid upon termination (820 ILCS 115/5; 56 IAC §300.520 (f)(3))

Direct Deposit

- » An employer may not pay wages via direct deposit unless the employee designates a bank or financial institution
(56 IAC §300.600)

Deductions

- » Deductions from wages or final compensation are prohibited unless required by law, to the benefit of the employee, in response to a valid wage assignment or wage deduction order, made with the express written consent of the employee, given freely at the time the deduction is made, or made by certain local governments and governmental entities. (820 ILCS 115/9, 56 IAC §300.720)
- » Cash and/or inventory shortages, shortages due to failure to follow proper credit card or check cashing procedures, financial losses due to damage to the employer's property or that of a customer, and the cost of equipment required by the employer may not be deducted from an employee's pay without the employee's express written consent at the time of the deduction. (56 IAC §§ 300.730 – 300.740, 300.820, 300.850) Employers may require a deposit be paid on a particular piece of property but may not deduct the deposit from wages or final compensation without the employee's express written consent given freely at the time the deduction is made. (56 IAC §300.870)
- » If a cash advance is to be repaid by payroll deductions, both the employer and employee must sign an agreement specifying the amount of the advance, the repayment schedule and the method of repayment. (56 IAC §300.750) However, the cash advance repayment agreement cannot provide for a repayment schedule of more than 15% of an employee's gross wages per paycheck. (56 IAC §300.800) On termination, if an employee owes an amount greater than 15% of his gross wages, that amount may be withheld from his final compensation only if such arrangement was included in the cash advance repayment agreement. (56 IAC §300.810) If an employee is advanced vacation pay before it is earned, the unearned vacation pay may not be deducted from the final paycheck unless the employer complies with the rules for cash advances. (56 IAC §300.760)

Notice

- » Employer must notify employees of the rate of pay and time and place of payment at the time of hire and of any changes, prior to the time of the change, and post this information in an accessible location
(820 ILCS 115/10)

Medical Examinations

- » Applicants and employees cannot be required to pay the cost of medical examinations required by the employer as a condition of employment
(56 IAC §300.860)

Minimum Wage

Hourly Amount

- » Employees who are at least 18 years old must be paid a minimum of \$8.00 per hour. The state minimum wage increased to \$8.25 per hour on July 1, 2010. (820 ILCS 105/4(a)(1)) Workers under 18 may be paid fifty cents per hour less.
(820 ILCS 105/4 (a)(3))

Wages for Tipped Employees

- » For employees in an occupation where gratuities are customary and recognized as part of the remuneration, employers can take credit for up to 40% of the minimum wage
(820 ILCS 105/4(c))

Overtime Pay

With some exceptions, employees must be paid time and one-half of the regular rate for all hours worked over 40 in a workweek. (820 ILCS 105/4a(1))

Exemptions

1. Executive

The executive exemption applies to employees whose primary duty is to manage the business or a recognized subdivision. The employee must customarily direct the work of two or more full-time employees, have authority to hire or fire or recommend same, and customarily exercise discretionary powers. A maximum of 20%

(50% in retail or service establishments) of his time can be devoted to activities that are not related to the exempt work. *The employee must also be paid on a salary basis of at least \$455 per week* (820 ILCS 105/4a(2)(E))

2. Administrative

The administrative exemption applies to employees whose primary duty is to perform office or non-manual work related to management or general business operations of the employer or its customers. The employee must customarily and regularly exercise discretion and independent judgment. The salary requirement and limit on non-exempt work for the executive exemption applies. (820 ILCS 105/4a(2)(E))

3. Professional

The professional exemption applies to employees whose primary duty involves work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a specialized course of instruction. The employee must consistently exercise discretion and judgment and perform work that is predominantly intellectual and varied in character. The salary requirement and limit on non-exempt work for the executive exemption applies. (820 ILCS 105/4a(2)(E), 29 U.S.C. §541.600)

4. Vehicle, boat and aircraft salesmen

Salesmen and mechanics primarily engaged in selling or servicing cars, trucks or farm equipment, if employed by a nonmanufacturing establishment primarily engaged in the business of selling these vehicles, are exempt. (820 ILCS 105/4a(2)(A))
Salesmen primarily engaged in selling trailers, boats or aircraft, who are employed by a nonmanufacturing establishment primarily engaged in the business of selling these items, are exempt. (820 ILCS 105/4a(2)(B))

5. Agricultural employees

Employees of agricultural employers are exempt. (820 ILCS 105/4a(2)(C))

6. Commissioned employees

In a retail or service establishment, employees whose commissions represent more than half their compensation and whose regular rate of pay exceeds one and one-half the federal minimum wage are exempt from the overtime

pay requirement.

(820 ILCS 105/4a(2)(F), 29 U.S.C. §207(i))

7. Miscellaneous

There are additional overtime pay exemptions for an employee who works in the stead of another under an agreement between the two employees, certain government employees, certain residential employees of not-for-profit educational or residential child care institutions, crew members on uninspected towing vessels and certain radio and television announcers, news editors and chief engineers.

(820 ILCS 105/4a(2)(D),(E),(G), (H), (I))

Posting and Recordkeeping

A summary of the Act and the regulations must be posted in a conspicuous and accessible location. (820 ILCS 105/10) Employers must keep records of the amounts paid each pay period, the hours worked each day, employee names, addresses, occupations and rates of pay for three years. (820 ILCS 105/8)

Breaks and Meal Periods

- » Employees must be allowed 24 consecutive hours of rest every calendar week with the exception of part-time employees, laborers required in an emergency, agriculture and coal mining workers, cannery, watchmen, exempt administrative, executive and professional employees and outside salesmen, supervisors and crew members on uninspected towing vessels. (820 ILCS 140/2)
- » Employers may obtain a permit to authorize employment for 7 days a week for up to 8 weeks in one year. (820 ILCS 140/8) Employees may voluntarily work seven days per week. (56 IAC 220.125)
- » Employees who work for 7½ continuous hours or longer must be allowed a 20 minute meal period beginning no later than 5 hours after the start of the work period. (820 ILCS 140/3)
- » Hotel room attendants in a county with a population over 3 million must be allowed at least 2 fifteen minutes paid rest breaks and one 30 minute meal period each work day in which they work at least 7 hours. (820 ILCS 140/3.1)

Child Labor

Prohibited Employment

» Minors under the age of 16 are not permitted to work in any of 26 listed hazardous occupations:

- (1) delivery service, bowling alley, pool room, skating rink, place of amusement (with exceptions)
- (2) cleaning or wiping machinery
- (3) mine or quarry
- (4) stone cutting/polishing
- (5) hazardous factory work
- (6) manufacturing or transporting explosives
- (7) manufacturing or heat treating of metals
- (8) cold rolling heavy metal stock or operating punching machines
- (9) sawmills
- (10) power driven woodworking machines
- (11) freight elevators
- (12) spray painting
- (13) where alcohol is served or sold (with exceptions),

- (14) oil refineries
- (15) laundry and dry cleaning
- (16) exposure to radioactive substances
- (17) filling stations
- (18) construction
- (19) roofing
- (20) excavating
- (21) logging
- (22) utilities
- (23) meat, poultry, seafood slaughtering or packaging
- (24) involving elevated surfaces
- (25) security positions
- (26) handling or storing blood or bodily fluids

(820 ILCS 205/7)

» Non family members under 12 may not perform agricultural work, but minors 10 or older can work in agriculture during school vacations and outside of school hours

(820 ILCS 205/1)

Prohibited Employment

Age	School	Hours Permitted/Requirements
14 & 15	In Session	<ul style="list-style-type: none"> ▪ May work up to 3 hours per day ▪ May work up to 24 hours per week ▪ Combined school and work hours may not exceed 8 per day
Under 16 (820 ILCS 205/3) (820 ILCS 205/4)	Not in Session	<ul style="list-style-type: none"> ▪ May not work over 8 hours per day ▪ May not work more than 6 days per week ▪ May not work over 48 hours per week ▪ May not work before 7 AM or after 7 PM, except between June 1 and Labor Day when work till 9 PM is permissible ▪ May work 8 hours on both Sat. and Sun. under certain conditions. ▪ Meal period of 30 minutes must be provided no later than the fifth consecutive hour of work

Work Permits

- » For most occupations, minors under the age of 16 can only be employed after the issuance of an employment certificate by the school superintendent, which the employer must keep on file.
(820 ILCS 205/9, 10)

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.

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

Exceptions

- » Law does not apply to the sale and distribution of magazines and newspapers when school is not in session, to the employment of a minor outside of school hours in a home when the work is not business related, to a minor 13 or older cad-dying at a golf course, to 14 and 15 year olds working in a JTPA summer program. (820 ILCS 205/2)