

## **WAGE AND HOUR ISSUES**

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### **FAIR LABOR STANDARDS ACT COVERAGE**

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Employers must pay minimum wages and overtime pay to all employees who are not specifically exempt from the law for all hours they work. The federal Fair Labor Standards Act (“FLSA”) covers employees of enterprises whose workers are engaged in interstate commerce, or handle, sell or otherwise work on goods or materials that have been moved in or produced for interstate commerce.<sup>94</sup> Minnesota also has a statute regulating minimum wages and overtime.<sup>95</sup> Although most employers and their employees in Minnesota are governed by the federal FLSA, Minnesota’s provisions apply if they are more favorable to the employee.

### **MINIMUM WAGE**

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The minimum wage for non-exempt employees of federally-covered employers is currently \$7.25 per hour.<sup>96</sup> The minimum wage for non-exempt employees of state-covered large employers is currently \$6.15 per hour.<sup>97</sup> The minimum wage for non-exempt employees of state-covered small employers (those with gross annual sales less than \$625,000) and certain employees (i.e., sheltered workers, trainees) is \$5.25 per hour.<sup>98</sup> State and federal minimum wage requirements may increase. In some cases, even local governments may set wage requirements in excess of state or federal wages. Minimum wage provisions apply to part-time employees.<sup>99</sup> The minimum wage law for both federal-covered and state-covered employers also provides that during the first 90 consecutive days of employment, an employer may pay an employee under the age of 20 years an “opportunity” wage. The minimum wage for these federal-covered employees is currently \$4.25 per hour and \$4.90 per hour for state-covered employees. Employers may not take any action to displace an employee in order to hire an employee at this lower rate.<sup>100</sup>

### **TIP CREDITS**

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There are no “tip credits” in Minnesota.<sup>101</sup> Employers must pay minimum wage even to employees who earn tips. Further, employers may not require employees to contribute or share gratuities received with the employer or other employees or to contribute any or all of their gratuities to a fund or pool operated for the benefit of the employer or employees. Employees may voluntarily share their gratuities with other employees, if the agreement to do so is made

without employer participation, except that employers, at their employees' request, may safeguard and disburse tips according to a sharing agreement and to report the amounts received for tax purposes. Employees may not coerce employees to share gratuities and must post a copy of this law for the employees' information.<sup>102</sup> If the employer interferes with or diverts gratuities, the employer may have to pay restitution to the employee.

## **DEDUCTIONS FROM WAGES**

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Only if the employee makes the proper written authorization, may the employer may make the following deductions:

- Union dues
- Premiums for:
  - Life insurance
  - Hospitalization and surgical insurance
  - Group accident and health insurance
  - Group term life insurance
  - Group annuities
- Contributions to:
  - Credit unions or a community chest fund
  - A local arts and science council or a local science council
  - Minnesota benefit association
  - A federally or state registered political action committee
- Participation in an employee stock purchase plan or savings plan for periods longer than 60 days.<sup>103</sup>

No deductions may be made for the following items if the deduction would reduce an employee's wages below minimum wage, or if the deduction exceeds \$50.00:

- Purchased or rented uniforms or specially designed clothing required by the employer, by the nature of the employment, or by law, which is not generally appropriate for use except in that employment;

- Purchased or rented equipment used in employment, except tools of a trade, a motor vehicle, or any other equipment which may be used outside the employment;
- Consumable supplies required in the course of that employment; and
- Travel expenses incurred in the course of employment except those incurred in traveling to and from the employee's residence and place of employment.<sup>104</sup>

When the employee's employment is terminated, the employer must reimburse the full amount deducted for any of the items listed above and the employer may require the employee to return the items for which the employer provided reimbursement. The employer may not, however, hold the employee's final check if the employee fails to return such items.

An employer may not deduct from an employee's wages any amount for lost, stolen or damaged property, or recover any claimed amount owed by the employee to the employer, unless the employee voluntarily authorizes the employer in writing to make the deduction *after the loss has occurred*, or unless the employee is found liable by a court for the loss or indebtedness.<sup>105</sup>

Any written authorization must specify the amount to be deducted from the employee's wages during each pay period. There are statutory limits on the amount which may be deducted in each pay period.

The prohibitions on wage deductions do not apply to:

- Independent contractors;
- Cases where there is a contrary provision in a collective bargaining agreement;
- Commissioned sales people, where the deductions are established for purposes of discipline, or where the employee has committed errors or omissions in performing his or her duties; or
- Cases where an employee, before making a purchase or taking a loan from the employer, gives written authorization that the cost of the purchase or loan shall be deducted from the employee's wages at certain intervals, or upon termination of employment.<sup>106</sup>

Wage assignments for married employees require spousal written consent.<sup>107</sup>

## **HOURS WORKED**

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Minimum wage must be paid to non-exempt employees for all hours worked. Hours worked include training time, on-call time, cleaning time, waiting time, or any other time when the employee must be either on the premises of the employer or involved in the performance of duties in connection with his or her employment or must remain on the premises until work is prepared or available.<sup>108</sup> Hours worked do not include days on which the employee does not perform any work, such as paid holidays, vacation, sick leave, or other paid time off. Employees and employers may not agree to work “off the clock.”

Periods when the employee is completely relieved of duty and free to leave the premises for a definite period of time, and the period is long enough for the employee to use for the employee’s own purposes, are not hours worked.<sup>109</sup> An employee is not completely relieved of duty unless he or she is definitely told ahead of time that he or she will not have to commence work until a specified time and that he or she may leave the job until that time.

Special rules apply for certain occupations, such as bus and truck drivers, emergency personnel, personal care attendants or live-in companions. Employers should be aware of exceptions specific to their industry.

### **ON-CALL TIME**

Employees who are required to remain on call on the employer’s premises or so close that they cannot use the time effectively for their own purposes are working while “on call.” Employees who are not required to remain on the employer’s premises but are merely required to carry a pager or leave word where they may be reached probably are not working while “on call.”<sup>110</sup> The mere fact of being “on call” under these circumstances does not require pay. If an employee is working while “on call,” he or she must be paid for that time. If an employer requires a non-exempt employee to monitor email or voice mail and respond to messages during his or her non-scheduled work time, such time may be considered to be “hours worked.” Employers should review on-call duties with legal counsel to determine whether the restrictions on the employee’s time are significant enough to be considered working time.

### **SLEEPING TIME AS HOURS WORKED**

If an employee is required to be on duty for 24 hours or more, bona fide meal periods and a bona fide regularly scheduled sleeping schedule of not more than eight hours may be excluded from hours worked. The employer and employee must have a written agreement, the employer must provide adequate sleeping facilities, and the employee must usually have an uninterrupted sleeping period. If the employee sleeps more than eight hours, only eight hours will be excluded from hours worked. If a sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the employee cannot get a minimum of five hours of sleep as the result of interruptions, the entire period must be counted as hours worked.

If the employer does not have an agreement with the employee regarding exclusion of meal periods and sleeping periods, meal periods and up to eight hours of sleeping time will constitute hours worked.<sup>111</sup> Minnesota law is more restrictive than federal law in this area, and special rules apply for various occupations. Employers are required to maintain accurate records of the employee's working and sleeping times.

## **MEALS**

Employers must permit employees who work for eight or more consecutive hours sufficient time to eat a meal, but they are not required to pay employees for this time.<sup>112</sup> Meal periods of less than 20 minutes may not be deducted from hours worked, and meal periods may not be deducted where an employee is not entirely free from work responsibility, e.g., where an office employee is required to eat at his desk or a factory worker is required to be at her machine.<sup>113</sup> If an employee prefers to skip the designated meal period and continue working instead, it is the employer's decision whether to permit the employee to do so. An employer is not required to permit employees to accumulate break or meal time to alter their work schedule. However, the employee must be compensated for all hours worked.

If an employer serves the employee a meal and the employee accepts it, the employer receives credit toward the minimum wage for 60 percent of one hour's wage per meal at the adult minimum wage rate.<sup>114</sup> The employer, however, may not require the employee to accept meals as a condition of employment.

## **REST BREAKS**

Generally, employers are not required by law to give breaks of a specific duration. However, employers must allow employees adequate time within each four consecutive hours of work to use the restroom.<sup>115</sup> Such breaks are considered working time for which the employee must be paid. An employee is not entitled to extra compensation if breaks are not given, nor is an employee allowed to accumulate unused break time for purposes of altering his or her work schedule.

## **NURSING MOTHERS**

An employer must provide reasonable unpaid break time for nursing mothers to express breast milk for their infant children. Employers must provide a lockable private facility, other than a toilet stall, for such purposes.<sup>116</sup>

## **TRAVEL**

Travel time from home to work is not considered hours worked for which an employee must be compensated.

Time spent traveling by an employee during his or her normal work day must be counted as hours worked, as must travel time on non-working days that falls within the hours the

employee usually works. If an employee finishes his or her job at an off-site location and, instead of returning to the regular job site, returns home, that travel time would not be counted as hours worked. Travel time spent during a time of day other than the employee's regular working hours as a passenger on an airplane, train, boat, bus or automobile to a place away from the employee's home community will not be considered work time unless the employee is required to work while traveling.<sup>117</sup> Time spent in ride sharing arrangements also do not constitute work time.<sup>118</sup>

## **OVERTIME PAY**

Federally-covered employers must pay non-exempt employees overtime at one and one half times their "regular rate of pay" for work performed in excess of 40 hours per week.<sup>119</sup> State-covered employers must pay non-exempt employees overtime at one and one half times their regular rate for work performed in excess of 48 hours in a week.<sup>120</sup> Note that the "regular rate" includes all remuneration for employment except certain payments specifically excluded by law. Therefore, an employee may need to include non-discretionary bonuses, shift differential, or other compensation when calculating the proper overtime rate.

"Non-exempt" employees are those employees covered by state or federal wage and hour laws. "Exempt" employees, as defined in the following section, are not subject to these laws. Special exceptions may apply for health care employees and certain other limited occupations.<sup>121</sup> There is no statutory requirement in Minnesota for overtime pay on weekends, holidays or after 8 hours. However, laws of other states, collective bargaining agreements, or employer policies may require such payment.

The overtime requirement may not be waived by agreement between the employer and employee. An agreement that only 8 hours a day or only 40 hours a week will be counted as working time also fails the test of FLSA compliance. An announcement by the employer that no overtime work will be permitted, or that overtime work will not be paid for unless authorized in advance, also will not impair the employee's right to compensation for compensable overtime hours already worked.

## **COMPENSATORY TIME OFF**

"Comp time" (compensatory time off) generally means time off in lieu of time and a half pay for hours over 40 worked in a *workweek*, not a "pay period," by a non-exempt employee. "Comp time" is not permitted for private employees, only public employees. There are limitations on the number of hours of "comp time" which a public employee may accumulate.

## EMPLOYEES EXEMPT FROM MINIMUM WAGE AND OVERTIME PROVISIONS

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Individuals employed in bona fide executive, administrative, professional, computer professional, or outside sales positions and who are paid on a salary basis, (often referred to as “white collar” employees) are exempt from the minimum wage and overtime provisions of the federal FLSA. In Minnesota, executives, administrators, professionals and outside salespersons also are not subject to minimum wage and overtime provisions because they are excluded from the definition of “employees” in Minnesota’s FLSA. Each type of position—executive, administrative, professional, computer professional and outside sales—is subject to tests which are used to determine whether an individual worker fits a particular exemption, typically known as “salary basis” and “duties” tests. Because the regulations governing this area are extensive and have been recently changed, employers should consult with their legal counsel before treating an individual employee as exempt.<sup>122</sup> Should the employer incorrectly classify an employee as exempt, the penalty may include unpaid overtime for that employee and other similarly classified employees for at least the past two years.

Employers are encouraged to review the new tests under the FLSA at [www.dol.gov](http://www.dol.gov) for specific salary and duties requirements relating to exempt employees. The area of employee classification is an area of heightened scrutiny by regulatory agencies and a target of collective action lawsuits.

An employee can be paid a salary and still not be an exempt employee because he or she does not fit one of the above exemptions. An employee who is paid on an hourly basis rather than a salary basis generally cannot be an exempt employee. An exception to this rule exists for computer professionals whose hourly rate of pay is at least \$27.63 per hour and who meet the strict definition of duties.<sup>123</sup>

The primary duties of the employee (not just the job title) determine his or her status as an exempt or non-exempt employee.<sup>124</sup> Only where the employee’s primary duties meet all the criteria under a particular test may the employee be exempt from the minimum wage and overtime provisions of the federal and state FLSAs.<sup>125</sup> Regardless of duties, employees earning less than \$23,660 or generally classified as “blue collar” employees must receive overtime pay.<sup>126</sup>

Both professionals and administrative employees, in order to be exempt, must exercise discretion. The exercise of discretion is not meant to include those day-to-day decisions which, although they are necessary to the daily operations of the business, are routine, or involve prescribed procedures or a determination of whether specific standards are met, or are lacking in substantial importance to the employer’s business as a whole. Administrative employee duties must include the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers.

Certain “highly compensated” employees who receive total annual compensation of at least \$100,000 may be exempt if they customarily perform exempt duties.<sup>127</sup>

Exempt employees are generally required to be paid a guaranteed salary for a workweek in which any hours are worked<sup>128</sup> and deductions from that salary may only be made under very limited circumstances.<sup>129</sup> Deductions from pay may not be made for partial day absences, except as permitted under the Family and Medical Leave Act.<sup>130</sup> However, employers may require employees to deduct time from established PTO, vacation or sick leave accruals as long as there is not a deduction from the employee's pay. Additional pay, usually on a regular basis and according to a formula or system, may appear to constitute overtime pay, inconsistent with the concept of "salary basis," in the view of some courts. Compensation systems for exempt employees that involve either deductions from or additions to salary should be carefully reviewed by legal counsel. Impermissible payment programs may destroy the FLSA exemption for any employee potentially subject to such a payment program.

## **WORK HOURS FOR MINORS**

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Minors, under the wage and hour laws, are those individuals who have not yet attained age 18. There are significant differences between federal and state laws about working hours and permitted work. Employers are encouraged to consult legal counsel. Minors under 14 are not permitted to work in Minnesota except in limited occupations (babysitting, newspaper delivery, agricultural operations, youth athletic referees, etc.).<sup>131</sup> Minors under 16 may not work before 7 a.m. or after 9 p.m. on any day. They may not work more than 8 hours per day or 40 hours in a week. High school students under age 18 are restricted from working after 11 p.m. the night before a school day and before 5 a.m. on a school day subject to limited exceptions. If the minor age 16 or 17 obtains a note of permission from a parent or a guardian, the student may be permitted to work until 11:30 p.m. before a school day and begin at 4:30 a.m. on a school day.<sup>132</sup> Both federal and state law have unique restrictions that should be carefully reviewed if minors are employed. Employment certificates may be obtained to permit limited exceptions.

Certain types of employment may be prohibited completely for minors under 16, or severely restricted for minors under 18.<sup>133</sup> When an employer seeks to hire a minor, legal counsel should be consulted concerning whether the minor can legally perform the job in question.

## **AGE CERTIFICATES**

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Employers must require minors to provide proof of age through a copy of the minor's age certificate, birth certificate, copy of the minor's driver's license, or a Form I-9.<sup>134</sup> Employers also may rely upon state or federal age certificates for their minor employees, usually completed by the minor's school. The age certificate ensures that the minor is in fact the age he or she represents himself or herself to be, and the employer is entitled to rely upon this certification. Age certificates protect employers from unwitting violation of child labor laws.<sup>135</sup> Employers

are subject to minimum wage and overtime laws and penalties for the employment of minors and to specific additional penalties for violations of the child labor laws.<sup>136</sup>

## **PAYMENT OF WAGES TO CURRENT EMPLOYEES**

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Employers must pay transitory employees and employees whose work requires the employee to change his or her place of residence, at intervals of not more than 15 days.<sup>137</sup> All other employees must be paid at least once every 31 days on a regular pay day designated in advance by the employer.<sup>138</sup> If wages due are not paid, the Commissioner of Labor and Industry may demand payment on behalf of the employee.<sup>139</sup> If wages are not paid within 10 days of the Commissioner's demand, the Commissioner may charge and collect the wages due and assess a penalty of up to 15 days' wages. Employers should consult legal counsel if any difficulties with respect to payment of employee wages arise. Employees may not be paid in non-negotiable instruments (scrip, options, etc.). Direct deposit of payroll checks cannot be mandatory, except for employees of municipalities.<sup>140</sup>

## **COMMISSIONER OF LABOR AND INDUSTRY**

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The Department of Labor and Industry is under the supervision and control of the Commissioner of Labor and Industry. The Commissioner may inspect all employer records that pertain to wages, hours and other conditions of employment. The Commissioner is empowered to investigate wage complaints against employers. If the records maintained by the employer do not provide sufficient information to determine the exact amount of back wages due to an employee, the Commissioner may make a determination of wages due based upon the available evidence. Failure to submit records may subject the employer to fines and penalties.<sup>141</sup>

With respect to violations of certain statutes or rules, the Commissioner shall issue cease and desist orders, shall take whatever steps the Commissioner determines necessary to effectuate the purposes of the rule or statute violated, shall order the employer to pay the employee back pay, gratuities, compensatory damages and liquidated damages, and, in cases of repeated or willful violations, assess civil penalties.<sup>142</sup>

## EMPLOYER RECORDS

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Employers, under state and federal law, must maintain comprehensive records including hours worked, rate of pay, amount of overtime worked, deductions or additions to wages, and employee names, addresses, occupations, sex and social security numbers.<sup>143</sup> When wages are paid, Minnesota requires the employer to give the employee an earnings statement each pay period which includes:

- The name of the employee;
- The hourly rate of pay (if applicable);
- The total number of hours worked by the employee (unless exempt);
- The total amount of gross pay earned by the employee during that period;
- A list of deductions made from the employee's pay;
- The net amount of pay after all deductions are made;
- The date on which the pay period ends; and
- The legal name of the employer and the operating name of the employer if different from the legal name.<sup>144</sup>

The earnings statement may be provided electronically, or in writing. If provided electronically, the employee must be permitted to access it at their workplace.

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- <sup>94</sup> 29 U.S.C. §§ 203; 206; 207 (2011).  
<sup>95</sup> Minn. Stat. §§ 177.21 – 177.35 (2011)  
<sup>96</sup> 29 U.S.C. § 206 (2011).  
<sup>97</sup> Minn. Stat. § 177.24 (2011).  
<sup>98</sup> Id.  
<sup>99</sup> 29 U.S.C. § 206 (a) (2011); Minn. Stat. § 177.24, subd. 1(b)(2011).  
<sup>100</sup> Minn. Stat. § 177.24, subd. 1(c) (2011); 29 USC § 206(g) (2011).  
<sup>101</sup> Minn. Stat. § 177.24, subd. 2 (2011).  
<sup>102</sup> Minn. Stat. § 177.24, subd. 3 (2011).  
<sup>103</sup> Minn. Stat. § 181.06, subd. 2 (2011).  
<sup>104</sup> Minn. Stat. § 177.24, subd. 4 (2011).  
<sup>105</sup> Minn. Stat. § 181.79 (2011).  
<sup>106</sup> Minn. Stat. § 181.79, subd. 1(c).  
<sup>107</sup> Minn. Stat. § 181.07 (2011).  
<sup>108</sup> 29 C.F.R. § 785.14-785.17 (2011); Minn. Rules § 5200.0120, subp. 1 & 2 (2011).  
<sup>109</sup> 29 C.F.R. § 785.16(a) (2011); Minn. Rules § 5200.0120, subp. 3 (2011).  
<sup>110</sup> 29 C.F.R. § 785.17 (2011); Minn. Rules § 5200.0120, subp. 2 (2011).  
<sup>111</sup> 29 C.F.R. § 785.22 (2011); Minn. Rules § 5200.0121, subp. 2 (2011).  
<sup>112</sup> Minn. Stat. § 177.254 (2011).  
<sup>113</sup> 29 C.F.R. § 785.19(a) (2011); Minn. Rules § 5200.0120, subp. 4 (2011).  
<sup>114</sup> Minn. Rules § 5200.0060 (2011).  
<sup>115</sup> Minn. Stat. § 177.253, subd. 1 (2011).  
<sup>116</sup> 29 U.S.C. § 207(r); See also Minn. Stat. § 181.939.  
<sup>117</sup> 29 C.F.R. §§ 785.38, 785.39, 785.41 (2011).  
<sup>118</sup> Minn. Stat. § 177.251 (2011).  
<sup>119</sup> 29 U.S.C. § 207 (2011).  
<sup>120</sup> Minn. Stat. § 177.25, subd. 1 (2011).  
<sup>121</sup> Minn. Stat. § 177.25, subd. 2, 3, 4 (2011).  
<sup>122</sup> 29 C.F.R. Part 541 et seq. (2011); Minn. Stat. § 177.23, subd. 7 (6) (2011).  
<sup>123</sup> 29 C.F.R. § 541.600(d) (2011).  
<sup>124</sup> 29 C.F.R. § 541.2 (2011).  
<sup>125</sup> 29 C.F.R. §§ 541.100-300 (2011); Minn. Rules § 5200.0180, subd. 1 (2011).  
<sup>126</sup> 29 C.F.R. § 541.3 (2011).  
<sup>127</sup> 29 C.F.R. § 541.601 (2011).  
<sup>128</sup> 29 C.F.R. § 541.600 (a) (2011).  
<sup>129</sup> 29 C.F.R. § 541.602 (2011).  
<sup>130</sup> 29 C.F.R. § 541.602 (b) (7) (2011); 29 C.F.R. § 825.206 (2011).  
<sup>131</sup> Minn. Stat. § 181A.07 (2011).  
<sup>132</sup> Minn. Stat. § 181A.04 (2011).  
<sup>133</sup> Minn. Stat § 181A.04 (2011); 29 C.F.R. § 570.5 – 570.72 (2011).  
<sup>134</sup> Minn. Stat. § 181A.06, subd. 1 (2011).  
<sup>135</sup> 29 C.F.R. § 570.121 (2011).  
<sup>136</sup> Minn. Rules § 5200.0010 (2011).  
<sup>137</sup> Minn. Stat. § 181.10 (2011).  
<sup>138</sup> Minn. Stat. § 181.101 (2011).  
<sup>139</sup> Minn. Stat. § 181.101 (2011).  
<sup>140</sup> Minn. Stat. § 471.426 (2011).  
<sup>141</sup> Minn. Stat. § 177.27, subd. 2 (2011).  
<sup>142</sup> Minn. Stat. § 177.27, subd. 7 (2011).  
<sup>143</sup> Minn. Stat. § 177.30 (2011); 29 C.F.R. § 516.2 (2011).  
<sup>144</sup> Minn. Stat. § 181.032 (2011).