



CAMBRIDGE
PROPERTY & CASUALTY

**ARE YOU IN COMPLIANCE WITH
WAGE AND HOUR REGULATIONS?**

INTRODUCTION

Both state and federal law require employers to comply with strict and complex minimum wage and overtime regulations. These regulations are aggressively enforced by the U.S. Department of Labor and the Michigan Department of Labor and Economic Growth.

Failure to comply with these regulations can result in substantial penalties as well as substantial back pay awards to employees who were not adequately compensated. Ignorance of these laws or an improper interpretation is not considered a viable excuse to avoid penalties or back pay.

The Special Report addresses some commonly asked wage and hour questions and provides narratives on a variety of related employment issues. While this publication addresses numerous substantive issues, it should not be used as a sole source of guidance.

MINIMUM WAGE

What is the current minimum wage rate?

The Federal Fair Labor Standards Act (FLSA) requires employers to pay at least minimum wage for all hours worked by an employee. The federal minimum wage was increased to \$5.85 per hour on July 24, 2007, and will increase to \$6.55 per hour on July 24, 2008 and \$7.25 per hour on July 24, 2009.

Under Michigan law, Michigan employers employing 2 or more employees who are at least 16 years old are required to pay the Michigan minimum wage of \$7.15 per hour and \$7.40 beginning July 1, 2008. Where an employee is subject to both the state and federal minimum wage laws, the employee is entitled to the higher of the two minimum wage rates.

Some limited exceptions may apply to workers with disabilities, students, youth workers during the first 90 days of employment, and tipped employees. Care must be used that deductions from an employee's wages do not reduce the employee's earnings below the required minimum wage or overtime compensation. Bona fide executive, professional and administrative employees are exempt from minimum wage and overtime laws.

An overview of the exemption eligibility criteria is provided later in this publication.

Can employees waive their right to minimum wage?

Employees may not agree to work for less than the current minimum wage rate.

OVERTIME

When is an employee entitled to overtime compensation?

Employers covered by the Fair Labor Standards Act must pay one and one-half times an employee's regular hourly wage for hours worked (each hour or part thereof) in excess of 40 hours in one work week. A comprehensive understanding of this aspect of the wage and hour laws cannot be achieved without a clear definition of the term "employee's regular hourly wage," "hours worked" and "work period." The definitions are provided in subsequent paragraphs.

The FLSA provides an exemption from overtime pay for individuals employed as bona fide executive, administrative, professional, outside sales employees and certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than \$455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations. More specific information may be obtained from the U.S. Department of Labor website, <http://www.wagehour.dol.gov>, or from the Department's toll-free information and helpline, 1-866-4USWAGE.

When calculating overtime pay, employees must generally be paid for all hours worked. When calculating "hours worked," certain rules must be followed regarding meal and break periods, travel time, training, staff meetings, etc.

Can employees waive their right to overtime pay?

Employees may not agree to accept "straight time" for those hours that constitute overtime.

How do you calculate an employee's regular rate of pay?

An employee's "regular rate of pay" is the rate per hour. While the FLSA does not require employers to compensate employees at an hourly rate basis, an hourly rate is determined for purposes of calculating overtime. Thus, the employee's pay can be determined on a piece-rate, salary, commission, or other basis, but in all cases overtime pay must be calculated based on an average hourly rate derived from the total pay. The regular hourly rate of pay of an employee is determined by dividing his total compensation for employment in any work period by the total number of hours actually worked by him in that work week.

Additionally, the regular rate of pay is not limited to the employee's standard wage or salary. It may also include supplemental payments such as shift pay, bonuses, and commissions. It may also include the fair market value of goods the employees receives as remuneration or the value of facilities the employee is entitled to use, such as housing.

How do you determine an employee's regular rate of pay when the employee works two or more different types of work at two different rates during a single work period?

Where an employee, in a single work period, works at two or more different types of work for which different non-overtime rates of pay are applicable, the employee's regular rate of pay is determined by using a weighted average of the rate. Specifically, the total earnings are computed to include the compensation during the work week from all such rates and then are divided by the total number of hours worked at all jobs.

For example, if an employee works 30 hours as a secretary at the rate of \$6.00 per hour and works 10 hours as a lawn maintenance staff at the rate of \$5.15 per hour, the following calculations must be performed:

30 hours times \$6.00 per hour equals	\$ 180.00
10 hours times \$5.15 per hour equals	<u>\$ 51.50</u>
Total:	\$ 231.50

\$231.50 divided by 40 hours equals \$5.79 per hour, the weighted average.

What is a work period?

A work period should not be confused with a pay period. A work period is a regularly reoccurring period of 168 hours in the form of 7 consecutive 24-hour periods and is used to calculate the payment of overtime. The employer's work period should be defined in the employer's personnel policy manual. For example, the policy manual could state that the work period begins at 12:00 a.m. on Sunday and ends at 11:59 p.m. on Saturday.

Can the employer use an average number of hours worked over two or more weeks?

The FLSA does not permit averaging a nonexempt employee's hours over two or more weeks. Some employers mistakenly assume that if an employee works 30 hours in one week and 50 hours the next, the employee need not be paid overtime because the average number of hours worked in the two-week period is 40.

Can an employer offer "comp-time" in lieu of paying overtime wages?

The Fair Labor Standards Act generally does not permit compensatory time for private sector employers. Under the FLSA, employees must be paid for all time worked, and employers are not permitted to give time off in place of pay.

EMPLOYEE BONUSES

If I pay my employees a bonus, how should it be treated to comply with the FLSA?

The U.S. Department of Labor has strict guidelines as to the treatment of gifts and bonuses of all types. The regulations specifically distinguish bonuses which are discretionary in nature and bonuses which are nondiscretionary in nature. The purpose of the distinction is to identify when an employer must recalculate the employee's regular hourly rate of pay and the corresponding hourly overtime rate for overtime pay during the bonus period.

If an employee bonus is non-discretionary, the employer must take the amount of the total number of hours the employee worked during the bonus period. This calculation provides the employer with the employee's adjusted regular hourly rate including the amount of the bonus. The employer must then recalculate the employee's overtime compensation earned during the bonus period using the adjusted/increased regular hourly rate. The following example illustrates the proper method.

Example:

- Employee worked 600 straight time hours at regular hourly rate of \$6.00.
- Employee worked 62 hours of overtime during the bonus period at the rate of \$9.00 per hour (which equaled \$558.00).
- The employee receives a \$300 bonus.
- The employee's regular rate is then increased by \$.45. ($\$300 - 662 \text{ hours} = \$.45 \text{ per hour}$)
- The employee's increased overtime amount is \$.68 per hour. ($\$.45 \times 1.5 = \$.675$)
- The employer must then calculate only the "half-time" due for overtime hours worked ($.50 \times \$.45 = \$.225$) since the straight-time portion was already paid in the original bonus amount.
- The additional overtime compensation due to the employee is \$13.95. ($\$.225 \times 62 \text{ hours} = \13.95)

This complicated calculation must be done whenever an employer issues a bonus that is non-discretionary.

The bonus is deemed to be non-discretionary if the bonus is announced to employees to induce them to work more steadily, more rapidly, more efficiently or to remain with the company. Attendance bonuses, individual or group production bonuses, bonuses for quality and accuracy of work, bonuses contingent upon the employee's continuing in employment until the time the payment is to be made and other similar bonuses are considered nondiscretionary. These bonuses must be included in the employee's regular rate of pay and the overtime compensation must be adjusted accordingly.

Discretionary bonuses do not require this complicated calculation. Discretionary bonuses include gifts and payments in the nature of gifts on special occasions.

The bonus is discretionary when the sum of the bonus is determined at the sole discretion of the employer without any prior promise of agreement with the employee. The employee has no contract right, express or implied, to any amount. (A bonus is generally not deemed to be discretionary if it is based on performance and promised to an employee.)

Thus, sums paid as gifts, payments in the nature of gifts made at Christmas time or on other special occasions as a reward for service, are deemed discretionary. However, if the gift or bonus is measured by or dependent on hours worked, production, performance efficiency or other similar factors, the bonus is considered non-discretionary and subjects the employer to the recalculation of overtime compensation.

The U.S. Department of Labor strictly enforces these provisions of the wage and hour regulations as well as all other wage and hour compliance requirements.

CALCULATING HOURS WORKED

Must an employee be paid for work not authorized by the employer?

Throughout the FLSA and corresponding regulations, the employer is responsible for complying with minimum wage and overtime laws for all hours worked. The term "hours worked" generally includes all the time an employee is required to be on duty or on the employer's premises or at a prescribed work place, and all times when the employee is "suffered or permitted to work" for the employer.

An employee is considered "suffered or permitted to work" for the employer where the employee performs work for the employer but is not requested to do so. For example, an employee may voluntarily continue to work at the end of the shift. The FLSA requires the employer to pay minimum wage and any applicable overtime for this additional work.

Thus, time spent doing work not requested by the employer, but still allowed, is generally hours worked, since the employer knows or has reason to believe that the employees are continuing to work and the employer is benefiting from the work being done. This time is commonly referred to as "working off the clock." The U.S. Department of Labor considers it the duty of management to exercise its control and monitor the work that is performed and to discipline as appropriate any employee who performs unauthorized work.

Are there any restrictions on schedule patterns?

The FLSA does not set any limits on the number of hours that employees may be required to work in a day or workweek as long as they are paid in accordance with the minimum wage and overtime regulations. The scheduling of an employee's regular and overtime hours of work is a matter of agreement between the employer and the employee.

Do wage and hour laws require the employer to provide breaks and meal periods?

The FLSA also does not define or require employers to provide rest periods or meal periods. However, where rest periods, meal periods and breaks are available to employees, specific wage and hour regulations are applicable. While wage and hour laws do not specifically require breaks or meal periods, an employer should consider the value of allowing an employee the opportunity to have an occasional break or meal period which can enhance the employee's ability to be alert and comfortable while performing challenging tasks.

Michigan law mandates a 30 minute meal and rest period for minors employed for more than 5 continuous hours of work.

If the employer offers breaks or meal periods, must they be compensated?

Rest periods of short duration, running from 5 minutes to approximately 20 minutes, must be counted as hours worked for purposes of calculating the employee's compensation. Such rest periods and breaks are also to be included as hours worked for purposes of calculating overtime compensation.

Bona fide meal periods during the scheduled workday are not considered as work time under the FLSA provided that the employee is completely relieved of duty. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. If the employee is completely free from duty during the meal period, then it is not necessary that the employee be permitted to leave the premises in order to exclude the time from the hours worked calculation.

Does an employer have to pay the employee for hours spent in training or other meetings?

As a general rule, an employee must be compensated for those hours spent at lectures meetings, training programs and similar activities. These hours are counted for purposes of calculating overtime.

Attendance at lectures, meetings and training programs and similar activities need not be counted as working time if all of the following four criteria are met:

1. Attendance is outside of the employee's regular working hours;
2. Attendance is, in fact, voluntary;
3. The course, lecture, or meeting is not directly related to the employee's job; and
4. An employee does not perform any productive work during such

Of course, attendance is not voluntary if it is required by the employer. In fact, it is not voluntary if the employee understands or is led to believe that the employee's present working condition or the continuation of the employment relationship would be adversely affected by not attending the training program.

In general, training is considered to be directly related to the employee's job if it is designed to make the employee handle the job more efficiently as distinguished from training for another job or to acquire a new or additional skill.

When must an employee be compensated for travel time?

Whether travel time is considered hours worked depends upon the kind of travel involved. The Portal To Portal Act excludes from working time any time spent in walking, riding or traveling to and from the actual place where the employee performs his or her principal activity or activities both prior to the time the employee commences and subsequent to the time the employee ceases such principal activity or activities.

An employee who travels from home before her regular workday and returns to her home at the end of the workday is engaged in ordinary home-to-work travel which is a normal incident of employment. This normal commute time is not considered work time. This is true whether she works at a fixed location or at different job sites.

There are, however, some instances where travel from home to work is considered work time. For example, if an employee who has been home after completing a day's work is subsequently called out at night to travel a substantial distance to perform an emergency job for the employer, all time spent in travel is considered working time. However, if an employee is, for example, told on Friday

to do a special job for the employer on Saturday, it will not be considered as an emergency call outside the regular working hours. Thus, the travel time is not considered hours worked.

A problem arises when an employee who regularly works at a specific location in one city is given a special one-day assignment in another city. For example, an employee who works in Lansing with regular working hours from 9 a.m. to 5 p.m. may be given a special assignment in Mt. Pleasant which requires the employee to commence traveling at 7:15 a.m. instead of 8:45 a.m. All of the travel time cannot be regarded as ordinary home to work travel. The travel is performed for the employer's benefit at the employer's special request. However, all of the time involved need not be counted as hours worked. The employee's normal home to work site travel time may be deducted from the hours worked.

BONA FIDE EXEMPT EMPLOYEES

When is an employee exempt from minimum wage and overtime?

The FLSA provides an exemption from minimum wage and overtime pay for individuals employed as bona fide executive, administrative, professional, outside sales employees and certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than \$455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations. More specific information may be obtained from the U.S. Department of Labor website, <http://www.wagehour.dol.gov>, or from the Department's toll-free information and helpline, 1-866-4USWAGE.

This means that an employer may not arbitrarily pay an employee a salary instead of an hourly rate. The decision must be based on the employee's duties and responsibilities. For example, a receptionist cannot be paid a salary and instead must be paid hourly. The reason for this is to prevent employers from circumventing the overtime provisions of the wage and hour regulations.

THE MICHIGAN PAYMENT OF WAGES AND FRINGE BENEFITS ACT

The Michigan Payment of Wages and Fringe Benefits Act governs the payment of wages earned by employees. It includes a broad number of provisions regarding employee wages and fringe benefits.

While this statute governs numerous wage-related issues, the three most notable provisions relate to 1) the timing of the issuance of the employee's final paycheck; 2) the procedures for adjusting an employee's compensation due to an employer payroll error resulting in overpayment; and 3) the limited circumstances in which an employer may make payroll deductions for items not required or expressly permitted by law or a collective bargaining agreement.

Termination of Employment - Voluntary and Involuntary

An employee's final pay check can be issued at the next regularly scheduled pay day. This is applicable to voluntary and involuntary terminations.

Payroll Overpayment Errors

The Michigan Payment of Wages and Fringe Benefits Act allows an employer to make payroll deductions to offset an employer payroll error which resulted in an overpayment. In order to make such a deduction, certain conditions must be met:

- (a) The overpayment resulted from a mathematical miscalculation, typographical error, clerical error, or misprint in the processing of the employee's regularly scheduled wages or fringe benefits.
- (b) The miscalculation, error, or misprint described in subdivision (a) was made by the employer, the employee, or a representative of the employer or employee.
- (c) The employer provides the employee with a written explanation of the deduction at least 1 pay period before the wage payment affected by the deduction is made.
- (d) The deduction is not greater than 15% of the gross wages earned in the pay period in which the deduction is made.
- (e) The deduction is made after the employer has made all deductions expressly permitted or required by law or a collective bargaining agreement, and after any employee-authorized deduction.
- (f) The deduction does not reduce the regularly scheduled gross wages otherwise due the employee to a rate that is less than the rate specified in Michigan's Minimum Wage Law or the Fair Labor Standards Act.

Deduction from Wages

An employer may not deduct from wages, except those deductions required or expressly permitted by law or a collective bargaining agreement, directly or indirectly, any amount without the full, free and written consent of the employee, obtained without intimidation or fear of discharge for refusal to permit the deduction. Essentially, this standard makes it unlawful to make payroll deductions to offset the value of lost employer property such as keys cell phones, petty cash etc.

Penalties for Violation of the Law

The Act makes a violation of payment of wages and fringe benefits a misdemeanor. If there is an intent to defraud, the employer can be charged with a misdemeanor, punishable by a fine of not more than \$1,000 or imprisonment for not more than one year, or both.