

Navigating Wage & Hour Regulations



TUESDAY, NOVEMBER 3, 2015 10:00 – 11:00 AM CST

WEDNESDAY, NOVEMBER 4, 2015 1:30 – 2:30 PM CST

**OFFICE FOR HUMAN RESOURCES
DIOCESE OF SPRINGFIELD IN ILLINOIS**

Information in this presentation can be found in the “Illinois Employer’s Guide to WAGE and HOUR Issues”, 2nd edition prepared by the Law Firm of Wessels Sherman Joerg Liszka Laverty Seneczko P.C. for publication by the Illinois Chamber of Commerce.

Federal and State Laws



(FLSA)

- **Federal – Fair Labor Standards Act**

(IMWL)

- **Illinois Minimum Wage Law**

(IWPCA)

- **Illinois Wage Payment and Collection Act**

Employee or Independent Contractor?



1. What establishes a person as an independent contractor rather than an employee?

Independent Contractor Under the FLSA & IMWL



The Economic Reality test.

- 1. Who has the right to control the methods and means of the individual's performance?**
- 2. The duration and permanency of the relationship.**
- 3. The skill required for the task.**
- 4. The investment of the individual.**
- 5. The individual's opportunity for profit and loss.**
- 6. The amount of initiative, judgment or foresight required for the enterprise to succeed in competition with others.**

Independent Contractor Under the IWPCA



- Have been and will continue to be free from control or direction over the performance of the work both under the contract of service with the company.
- Performs work which is either outside the usual course of business or is performed outside all of the places of business of the company unless the company is in the business of contracting with third parties for the placement of employees
- Is an independently established trade, occupation, profession or business.

The Internal Revenue Service Independent Contractor Test



Behavioral

Financial

**Type of
Relationship**

IRS – Independent Contractor Service Test



Set hours of work

Full-time

Oral or written
reports

Payment by the hour,
week or month.

Employee or Volunteer?



2. Can an employee volunteer services to perform tasks otherwise performed by employees?

Nooooo.

Volunteer Workers



Volunteer: an individual who performs hours of service FOR A PUBLIC AGENCY FOR civic, charitable, religious or humanitarian reasons usually on a part-time basis.

Members of a
civic
organization

Church
groups

Parents

Exempt or Non-Exempt Employment Status



DETERMINING EMPLOYMENT STATUS

Definition of Exempt and Non-Exempt



3. *What is an Exempt employee?*

FLSA and the IMWL create obligations for employers to pay certain employees a minimum wage and overtime wages for all hours worked over 40 hours in a work week.

Employees that meet the statutory exemptions to overtime and minimum wage requirements are **“EXEMPT”** from minimum wage and overtime pay.

White Collar Exemptions



Executive

Administrative

Professional (includes teachers & creative professionals)

Outside Sales

Computer Related Occupations

Highly Compensated

Exemption Requirements



The salary or fee basis requirement.

- As of this date the employee must receive a weekly salary of at least **\$455.00** (2/2016 may be increased to \$970.00)

The “Primary Duty” requirement

- The job duties must meet the exemptions “Primary Duty” requirement.

Primary Duty Requirement



1. The amount of time spent performing the exempt work.
2. The relative importance of the exempt duties compared to other types of duties.
3. The employee's relative freedom from direct supervision.
4. The relationship between the employee's salary and the wages paid to other employees for non-exempt work performed by the employee.

Executive Exemption Test



1. The employee's "primary duty" must consist of the management of the enterprise, (*not the space ship*), or a customarily recognized department or subdivision of the employer.
2. The employee must "**customarily and regularly**" direct the work of two or more full-time employees or their equivalent; and
3. The employee must have authority to hire or fire other employees or the employee's suggestions and recommendations as to hiring, firing, advancement, promotion, or the change of status of other employees must be given "**particular weight**".

Administrative Exemption Test



The primary duty:

1. The performance of office or non-manual work.
2. Must be **directly related** to the employer's management policies or general business operations of the employer, and
3. Must include the **exercise of discretion** and **independent judgment** with respect **to matters of significance.**

Administrative Exemption



- Carries out major assignments in conducting the operations of the business.
- Has authority to formulate, affect, interpret or implement management policies or operating practices.
- Performs work that affects business operations to a substantial degree.
- Has authority to commit the employer in matters that have significant financial impact.
- Has authority to waive or deviate from established policies or procedures without prior approval.
- Has authority to negotiate and bind the company on significant matters.
- Provides consultation or expert advice to management and is involved in planning long or short-term business objectives.
- Investigates and resolves matters of significance on behalf of management.
- Represents the company in handling complaints, arbitrating disputes or resolving grievances.
- Has authority to make independent choices free from immediate direction or supervision.

Administrative Exemption



An employee who is simply applying well established techniques, procedures and specific standards from manuals, past practices, or other sources, is not exercising discretion and independent judgment.

Professional Exemption



Learned Professionals

Creative Professionals

Teachers

Professional Exemption



The Learned Professional

- 1) Work requiring knowledge of an advanced type...
- 2) ...in a field of science or learning...
- 3) ...customarily acquired by a prolonged course of specialized intellectual instruction.

Professional Exemption Jobs that do not apply



- **Jobs where most employees acquire skills by experience.**
- **Jobs which only require completion of an apprenticeship program.**
- **Jobs not requiring a four-year degree in any field or a two year degree as a standard prerequisite for entrance into the field.**

The Professional Exemption - Teachers

Illinois

- Any employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee employed is a professional.

Professional Exemption The Creative Professional



Primary duty requires:

- Invention, imagination, originality or talent in a recognized field of artistic or creative endeavor
- Music and writing, acting, etc.

Other Exemptions from OT Pay



A full listing of all of the White Collar Exemption tests can be found at:

<http://www.illinois.gov>

Click on: Laws and Rules/Minimum Wage Law/ Fair Labor Standards Act (FLSA) Exempt vs. Non-Exempt Status in Illinois

Compensable Working Time



- **Employers must compensate non-exempt employees for all work they perform.**
- **Record the hours worked each day in each work week by each non-exempt employee.**
- **A record of time worked must be retained for a minimum of three years.**
- **Time worked can be recorded manually on a time sheet, punch time clock or electronically.**

Compensable Working Time



Work performed would also include the following:

- A secretary who is responding to emails on her cell phone outside of scheduled work hours.
- A employee who reports to work five minutes before the start of the shift to prepare for work.
- An employee who picks up the phone during the lunch break to answer a work related inquiry.
- An employee travels a mile across town for work related reasons to a different location during the work shift.

Suffer or Permit to Work



4. Does an employee get paid for performing work during their lunch or performing work before their regular clock in time?

If management knows or reasonably should have known that an employee is performing the work the employer must compensate the employee.

Rest Periods & Meal Periods



5. Are rest periods (breaks) mandatory?

No. Neither Federal FLSA or Illinois Minimum Wage law require break time be given to employees.

6. Are rest periods paid?

Yes. If rest breaks are given, the rest period should be under 20 minutes and the employee is paid for the rest period.

Meal Periods



7. How long of a meal period is required?

Illinois Law requires a meal period of at least 20 minutes beginning no later than five (5) hours after the start of the employee's scheduled work shift for employees scheduled to work at least seven and one-half (7 ½) hours in the day.

Best practices recommend the meal period be 30 minutes to avoid the risk that the employee will take less than a full meal period.

Meal Periods



8. Is the meal period paid?

Compensation for the meal period is left up to the employer, the meal break can be paid or does not have to be paid.

9. Can the employee eat at their desk and perform work during the meal period?

No. If the meal period is unpaid an employee must be completely relieved from duty and free to leave the work station.

Meal Periods



10. What if the employee works during their lunch break even though the employer's policy forbids such action?

The employer must compensate the employee.

11. Does an employee have to clock out for lunch and back in when returning to work?

Yes. This is true if the lunch break is paid or unpaid.

Meal Period



12. Can an employee have more than one meal period in a day?

Yes. Employers may award non-exempt employees working longer shifts beyond 7.5 hours in a day an additional meal period.



13. If an employee works less than 7.5 hours in a work day does the employee have to take a meal period?

No. Employees working less than 7.5 hours in a work day do not have to take a meal period.

One Day Rest in Seven



14. Can an employee be scheduled to work 7 consecutive days?

No. In most cases the employer must provide every non-exempt employee with at least 24 consecutive hours of rest in every calendar week.

Minimum Wage



15. What is the current minimum wage in Illinois?

Adult - \$8.25 per hour

Deductions from Wages



16. Can I deduct wages from an employee to pay for equipment or property loss or damage, tuition owed, etc.?

No. Not without the express written consent given freely by the employee at the time of the deduction.

Deductions for Overpayment of Wages



17. Can an employee's wages be deducted to compensate for overpayment of wages?

Yes. If the employee agrees that the employer has overpaid wages, the employer may deduct the “entire sum of the overpayment” from the employee’s first regular payday after the overpayment.

Rounding a Non-Exempt Employee's Time



18. Can an employee's time worked be rounded off?

Yes.

- a. Interval** – Round up or down to the nearest defined increment.
- b. Start-stop** – Round in favor of the employee at punch in and the employer's favor at punch out (using the same increments in both cases)
- c. Employee's favor** – Round in the employee's favor which will result in a longer share of "worked" time for the employee

Vacation, Sick, Personal & Holiday Pay - PTO



19. Are employers required to provide paid-time-off (PTO)?

No. However most employers do provide some PTO in the interest of attracting and retaining employees.

20. What PTO is owed to an employee when they terminate?

Accrued vacation pay.

Payout of Accrued Vacation Pay



21. When paying out accrued vacation is it paid at the employee's current rate of pay or at the rate of pay when the employee earned the vacation pay?

Vacation payout at termination is always paid at the employee's current rate of pay at termination.

22. When is the vacation pay out due?

The accrued vacation payout is due to the employee at the pay date following the termination date.

Payout of Accrued Vacation



23. Our PTO plans are combined into one plan where employees do not designate the reason for the time off (vacation, sick, personal, etc.). What is owed to the employee at termination?

When the employer has a combined PTO plan with no designation of vacation, sick or personal, etc. then all of the unused PTO accrual is paid to the employee at termination.

The Work Week



24. Is there a limit on the number of hours a non-exempt employee can work in the workweek?

No. However if the non-exempt employee works more than 40 hours in the work week, the employer must compensate the employee with overtime pay for hours worked in excess of 40 hours in a workweek.

Work Week



25. How many days are in a work week?

The work week is comprised of a 7 day period. Normally the work week begins on Sunday and ends on Saturday but it can be any 7 consecutive days.

Overtime Hours and Pay



26. Do I have to pay overtime to an employee working more than 8 hours in a day?

No. The law is over 40 hours in a work week.

Overtime Hours and Pay



27. How is overtime calculated?

Overtime is paid at a rate of not less than one and one half times the employee's regular rate of pay for each hour worked over 40 in a workweek.

Overtime Calculation



1. Employee worked 45 hours in the work week and earns \$8.25 per hour.
2. $\$8.25 \times 1.5 = \12.37
3. The overtime rate is: \$12.37.
4. The employee would be paid \$12.37 for the 5 hours of overtime = \$61.85.
5. The employee would earn straight time pay of 8.25×40 work hours = \$330 + 61.85 OT pay for a total pay of \$391.85.

Overtime Calculation



28. Are there any other amounts that should be included as regular rates of pay when figuring the overtime rate?

Yes. All remuneration for employment paid to or on behalf of the employee, (i.e., bonuses, commissions, shift differentials, hazardous duty premiums, cost of living allowances, on-call pay and tip credits, etc.), are considered remuneration for work performed and must be included in the regular rate computation.

Calculating Overtime for Non-Exempt Employees with Two Different Hourly Pay Rates



29. How do I calculate the overtime rate for an employee earning 2 different pay rates for performing 2 different jobs?

First Method - Weighted Average: take the total earnings for both jobs add together and divide the total earnings by the total number of hours worked at all jobs. This results in a weighted hourly rate of pay. The result is the “time” and when divided = the “one half”. Add the time and one half together to determine the OT rate. Apply this rate to all hours worked over 40 in a work week.

Weighted Average Method - Example



Hours worked in the Maintenance Position	43
Hours mowing	<u>2</u>
Total hours in the work week	45

1. 43 hours x \$20.00 per hour = \$860 – regular straight time earnings.
2. Plus \$20.00 for 2 hours of mowing = \$880 total straight time compensation.
3. \$880 divided by 45 hours equals a weighted average hourly rate of \$19.56.

Weighted Average Method



4. The \$880 covers all the straight time hours so the employee is entitled to one-half of the weighted average hourly rate (\$19.56) for each of the five overtime hours worked:

$$\$19.56 / 2 = \$9.78$$

$$\$9.78 \times 5 \text{ hours OT} = \$48.90$$

\$880.00 straight time earnings

\$ 48.90 OT earnings

Total \$928.00 Compensation for Straight time and OT worked

Calculating Overtime for Non-Exempt Employees with Two Different Hourly Pay Rates



- **Second Method - Rate in Effect When Work is Performed**: The employee would earn the regular rate of pay for the hours worked in the job where overtime did not occur and pay the employee the OT rate based on the hourly rate for the job performed where the OT occurred.
- **Important**: This method requires an Agreement be signed by the employer and employee.

Rate in Effect When Work is Performed



1. \$20.00 per hour x 43 hours spent in maintenance = \$860.00 regular straight time earnings.
2. Plus 3 hours of overtime: $\$20.00 \times .05 \times 3 = \30
3. **Total compensation for the Primary job = \$890**
4. \$20 for two hours mowing
5. Plus overtime on that mowing pay $\$10 \times 0.5 \times 2 = \10
6. **Total compensation for the secondary job = \$30**
7. **Total weekly compensation \$920**

Unexpected Overtime



30. What if the employee has worked 40 hours and is ready to leave work but is interrupted by a phone call or visitor or question or unexpected duty?

The employee is owed overtime pay for the time worked over 40 in a work week.

Overtime without Permission



31. If the employee works overtime without permission do I have to pay the employee at the overtime rate?

Yes. Although the employer may discipline an employee who works unauthorized overtime hours, an employer may not refuse to pay overtime for those hours worked.

Overtime is Always Paid



32. May an employer agree with the employee to not pay overtime, or refuse to pay overtime to an employee who works unauthorized overtime? NO.

- The overtime requirement may not be waived by agreement between the employer and employee.
- An agreement that only 40 hours in a work week will be counted as work time or 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 does not impair the employee's right to be compensated for overtime hours that the employer suffers or permits to be worked.
- While it is good to have an established policy in place that has been communicated to all employees (existing and new) regarding authorized overtime, the employer cannot use the policy to withhold overtime pay.
- The employer may discipline the employee for not following established policy.

Overtime Required



33. May an Employer Require an Employee to Work Overtime?

Yes. Employers generally have discretion to determine an employee's work schedule and hours and can schedule an employee for overtime.

Reducing the Schedule or Employee's Rate of Pay



34. Can an employee's work schedule or hourly rate of pay be reduced?

Yes. The FLSA does not prevent an employer from lowering an employee's hourly rate, provided the rate is at least the applicable minimum wage, or from reducing the number of hours the employee is scheduled to work.

Adjusting the Work Schedule to Compensate for the Expectation of Overtime Worked



35. When the employee's work schedule for the week seems to be heading toward more than 40 hours is there anything that can be done to avoid overtime pay?

Yes. The employer may “adjust schedules” within a work week to avoid the overtime. If the employee works extra time early in the work week the employer is permitted to “send the employee home” later in the work week (unpaid), so that the total hours actually worked in the work week will not exceed 40.

Adjusting the Work Schedule to Compensate for Overtime Paid



36. If the overtime worked is in the last week of the pay period and there isn't enough time to send the employee home to adjust the schedule to avoid the overtime, is there anything that can be done to adjust the payroll budget for the overtime payout?

Yes. The employer is free to adjust the work schedule of the employee in the next week or at any time to adjust the payroll budget to compensate for the overtime paid to the employee.

Comp Time



37. Can I avoid paying overtime to the employee by giving them paid time off at another time?

No. Contrary to popular belief PRIVATE sector employers may not provide employees with compensatory time off in lieu of paying overtime.

Fixed Salary for Non-Exempt Employees



38. Can I pay a non-exempt employee a fixed salary?

Yes. Two Methods:

- 1. Fixed Salary for Fixed Hours**
- 2. Fixed Salary for Fluctuating Hours**

1. Fixed Salary for Fixed Hours



1. Intended to pay an employee for a fixed number of hours worked.
2. The rate of pay is the fixed salary for the established workweek divided by the fixed weekly hours.
3. If the employee works over 40 hours in a work week, the employee must be paid overtime compensation at time and one-half the employee's regular rate of pay for hours worked above 40 hours in a workweek.

NOTE: The employee must continue to track their time worked and meal periods.

Example - Fixed Salary for Fixed Hours



1. Sam works a regular workweek of 35 hours for a fixed salary of \$525 per work week.
2. Sam works 44 hours in a single workweek.
3. Sam receives a regular rate of \$15 ($\$525/35$ hours) for each of the first 40 hours in the work week. (40 hours x \$15.00) for a straight pay of \$600
4. Sam receives \$22.50 for each hour worked over 40 (1.5 x the \$15 regular rate) $\$22.50 \times 4$ hours OT = \$90.
5. Sam's straight pay is \$600 and the overtime pay is \$90 for a total of \$690 for the work week.

Fixed Salary for Fluctuating Hours



This arrangement is expressly authorized by regulations of the Department of Labor. To use it the following 4 criteria must be met.

1. The employee's hours must fluctuate from week to week;
2. The employee is paid a fixed salary that does not vary with the number of hours worked in a workweek;
3. The employee's fixed salary must be large enough to assure the employee's average hourly compensation will not fall below the applicable minimum wage in any given work week;
4. The employee must have a clear mutual "understanding with the employer that he/she will receive such fixed amount as straight time pay for whatever hours he/she is called upon to work in a workweek, whether few or many.

2. Fixed Salary for Fluctuating Hours



1. Fixed salary compensates for a fluctuating hours.
2. No fixed regular rate of pay since the regular rate of pay will vary with each workweek depending on the number of hours worked.
3. The fixed salary constitutes straight time compensation for all hours worked and overtime is only required at one-half the regular hourly rate of pay for hours worked over 40.

NOTE: The employee must continue to track their hours worked and meal periods.

Fixed Salary for Fluctuating Hours



It is essential that a written policy or understanding be established if the “fixed salary for fluctuating hours” overtime plan is to be used.

There is a large downside to this plan:

1. Because the employee’s compensation for all hours worked (however many or however few), the employee must receive the full fixed salary even if the employee works less than expected or is absent for any reason. The limitation on deductions from salary make the fixed salary for fluctuating hours plan inappropriate to employees prone to absenteeism.
2. The other downside is that the regular hourly rate of pay would vary from week to week depending on the number of hours worked.

Non Exempt Employee Paid on Semi-Monthly Basis



Paid twice per month or 24 pays per year.

- 1. The semi-monthly salary must be converted to a weekly salary by multiplying the semi-monthly salary by 24 and dividing by 52.**
- 2. OT is calculated based on hours worked over 40 in each established workweek. (a 7 day period consisting of 168 hours).**
- 3. It is not permissible to calculate overtime by the “half month”, or any other period longer than one established work week.**

Non Exempt Employee Paid on Semi-Monthly Basis



4. OT earned during the pay period would be on the next regular semi-monthly pay day, unless the calculation cannot reasonably be completed at that time.

5. OT is calculated by the week and on any given pay day, an employee may receive OT for the two or three weeks which ended during the semi-monthly pay period.

Non Exempt Employee Paid on Semi-Monthly Basis



- 6. If the semi-monthly salary covers the employee's entire straight time compensation for all hours worked in the pay period, then the calculation of OT is essentially the same as in the fixed salary for fluctuating hours method described above.**

- 7. Convert the semi-monthly salary to a weekly salary and OT is calculated on a half time basis for hours worked over 40 in an established work week.**

Additional OT Questions



39. Can an employer average hours over two or more weeks to avoid paying overtime?

No. If the employee works 20 hours in one week and 60 in the next the employee must receive OT compensation for the OT hours worked beyond 40 in the second week.

Teachers working non-exempt positions



40. Some teachers work before or after school care programs how is the teacher paid for the two different positions – One exempt and one non-exempt?

- According to section 29 of the Code of Federal Regulations (29 CFR subsection 541.303,), “The requirements of § 541.300 and Subpart G (salary requirements) of this part do not apply to the teaching professionals described in this section.”
- The Federal Department of Labor advises teachers are not subject to meeting the requirements of the Professional Exemption and therefore can be paid both a salary for the full-time teaching position and an hourly rate for the part-time child care programs in the school.

The Full-Time Work Week



41. Is full-time always a 40 hour work week?

No. The number of hours per week designated as Full-time is established by the employer. But...

- a. If the employer currently has a 40 hour full-time work week, it may be helpful to change the full-time hours to 35 hours per week.
- b. Designating 35 hours per week as full-time allows some wiggle room for employees to take care of last minute details without going over the 40 hour limit and into the overtime situation.

Switching to a 35 Hour Work Week



- A 35 hour, 5 day work week calculates to a 7 hour day.
- Employees working less than 35 hours in the work week would be part-time employees.
- PTO plans for part-time employees working less than full-time would be pro-rated using the 35 hours per week and 7 hours per day as the base for the calculation of the pro-rated portion of PTO earned by the part-time employee.

Ministerial Exception



- The FLSA contains only a few exceptions: the so-called “ministerial” exception for ministers and clergy.
- The “ministerial” exception is not in the FLSA itself.
- The exception has been ruled by federal and state court judges and thus created a tradition of judge-made law under our common law system.

Ministerial Exception



- **Judges have interpreted the First Amendment to allow certain religious entities to ignore federal and state wage and hour and anti-discrimination language for “ministers and clergy”.**

Ministerial Exception



- Prior to 2012, the “ministerial” exception was applied to persons such as nuns, monks, priests, lay brothers, ministers, deacons and other members OF A RELIGIOUS ORDER, who serve pursuant to their religious obligations in schools, hospitals, and other institutions operated by their church or religious order.

Ministerial Exception



- In 2012 the Supreme Court decided for the Evangelical Lutheran Church that a teacher did fit the “ministerial” exception to Title VII in the case of: *EEOC v. Hosanna-Tabor Evangelical Lutheran Church*.

Ministerial Exception



The four factors considered by the Supreme Court were:

1. The formal title given by the employer,
2. The substance reflected in that title,
3. The employee's use of the title, and
4. The employee's religious functions performed for the employer.

Ministerial Exception



- **Positions that have withstood case law thus far to be deemed “ministerial” in nature:**
 - A seminarian who assisted with Catholic Mass
 - Church music/choir directors
 - Ordained and non-ordained Baptist seminary faculty
 - A Catholic diocese’ Director of Religious Formation
 - A Mashginach, who supervises the kashrut status of a facility at a Jewish nursing home.
 - A religious hospital’s chaplain
 - Salvation Army administrators who led worship and had separate duties at the Salvation Army thrift shops.
 - A Catholic nun denied tenure for a canon law professorship at a Catholic University.

Ministerial Exception



- Determining which positions are “ministerial” depends on the specific facts and the particular court interpreting those facts.
- However there is some guidance and some recommendations to assist in deeming a position applicable to the “ministerial” exception.

Ministerial Exception



- Ensure that the governing/founding documents, policies, handbooks, job descriptions, evaluations and other key documents demonstrate a clear religious purpose and that the organization adheres to them.
- Look to the Supreme Court's four factors to analyze whether a particular position might qualify for a “ministerial” exception to the FLSA.

Ministerial Exception



- Some positions are obvious such as a Catholic priest which would fall squarely within the “ministerial” exception.
- Others such as lay administrators, maintenance workers, office staff, or secular instructors are a much closer call.
- Where there is uncertainty religious entities should tread carefully before treating employees as exempt from FLSA or state wage and hour laws.



- **The ministerial exemption of the FLSA is narrowly limited in its application. Clear and definite standards and guidelines have not been established by the Courts and each case is being determined on its own merits.**
- **Caution should be used and counsel sought before establishing a position as a “ministerial exception” to the Fair Labor Standards Act and the non-payment of overtime to an employee.**