

MINIMUM WAGE LAW EXEMPTIONS

DEFINITIONS OF EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, COMPUTER PROFESSIONALS AND OUTSIDE SALESMAN POSITIONS;

and

PROCEDURES FOR COMPUTING REGULAR RATE OF PAY AND DETERMINING COMPENSATING TIME OFF IN LIEU OF OVERTIME PAY

WAC 296-128-500 Purpose. This regulation is adopted in accordance with chapter 49.46 RCW to define the terms "bona fide executive, administrative, or professional capacity or in the capacity of outside salesman," to define salary basis and to establish a procedure for computing overtime pay.

An employee who meets the definitions of executive, administrative, or professional and who is paid on a salary basis (except as provided for in WAC 296-128-530(5)) is considered exempt from the requirements of chapter 49.46 RCW. Payment of a salary does not in and of itself exempt a worker from the minimum wage and overtime requirements.

[Statutory Authority: RCW 49.46.005, 49.46.010, 49.46.120, and chapter 49.46 RCW. 03-03-109, § 296-128-500, filed 1/21/03, effective 2/21/03; Order 76-5, § 296-128-500, filed 2/24/76.]

WAC 296-128-510 Executive. The term "individual employed in a bona fide executive . . . capacity" in RCW 49.46.010 (5)(c) shall mean any employee:

(1) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and

(2) Who customarily and regularly directs the work of two or more other employees therein; and

(3) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(4) Who customarily and regularly exercises discretionary powers; and

(5) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours worked in the work week to activities which are not directly and closely related to the performance of the work described in paragraphs (1) through (4) of this section: Provided, That this paragraph (5) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns

at least a 20 percent interest in the enterprise in which he is employed; and

(6) Who is compensated for his services on a salary basis at a rate of not less than \$155 per week exclusive of board, lodging, and other facilities: Provided, That an employee who is compensated on a salary rate of not less \$250 per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all of the requirements of this section.

[Order 76-5, § 296-128-510, filed 2/24/76.]

WAC 296-128-520 Administrative. The term "individual employed in a bona fide . . . administrative . . . capacity" in RCW 49.46.010 (5)(c) shall mean any employee:

(1) Whose primary duty consists of the performance of office or non-manual field work directly related to management policies or general business operations of his employer or his employer's customers; or

(2) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(3) Who customarily and regularly exercises discretion and independent judgment; and

(a) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in this regulation), or

(b) Who performs under only general supervision work along specialized or technical lines requiring special training, experience or knowledge, or

(c) Who executes under only general supervision special assignments and tasks; and

(4) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent of his hours worked in the work week to

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activities which are not directly and closely related to the performance of the work described in paragraphs (1) through (3) of this section; and

(a) Who is compensated for his services on a salary or fee basis at a rate of not less than \$155 per week exclusive of board, lodging, or other facilities; or

(b) Who, in the case of academic administrative personnel is compensated for his services as required by paragraph (4)(a) of this section, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which he is employed: Provided, That an employee who is compensated on a salary or fee basis at a rate of not less than \$250 per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers; which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all of the requirements of this section.

[Order 76-5, § 296-128-520, filed 2/24/76.]

WAC 296-128-530 Professional. The term "individual employed in a bona fide . . . professional capacity" in RCW 49.46.010 (5)(c) shall mean any employee:

(1) Whose primary duty consists of the performance of work:

(a) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or

(b) Original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the intention, imagination, or talent of the employee; or

(c) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the school system or educational establishment or institution by which he is employed; and

(2) Whose work requires the consistent exercise of discretion and judgment in its performance; and

(3) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work) and is of such a character that the output produced or the result accomplished cannot be standardized in relation to a

given period of time; and

(4) Who does not devote more than 20 percent of his hours worked in the work week to activities which are not an essential part of and necessarily incident to the work described in paragraphs (1) through (3) of this section; and

(5) Who is compensated for his services on a salary or fee basis at a rate of not less than \$170 per week exclusive of board, lodging, or facilities: Provided, That this paragraph (5) shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law, medicine, or dentistry and who is actually engaged in the practice thereof: Provided, That an employee who is compensated on a salary or fee basis at a rate of not less than \$250 per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the performance of work either requiring knowledge of an advanced type in a field of science or learning, which includes work requiring the consistent exercise of discretion and judgment, or requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section.

[Order 76-5, § 296-128-530, filed 2/24/76.]

WAC 296-128-532 Deductions for salaried, exempt employees. (1) **When does this section apply?** This section applies to any employee who is paid on a salary basis and who meets the definitions of executive, administrative, or professional.

(2) **What does salary basis mean?** Salary is where an employee regularly receives for each pay period of one week or longer (but not to exceed one month) a predetermined monetary amount (the salary) consisting of all or part of his or her compensation, which amount will not be less than required to be paid pursuant to WAC 296-128-510 through 296-128-530. The salary shall not be subject to deduction because of variations in the quantity or quality of the work performed, except as provided in this section. Under RCW 49.46.130 (2)(a), salaried employees may receive additional compensation or paid time off and still be considered exempt.

(3) **When are deductions from salary allowed?**

(a) If the employee performs no work in a particular week, regardless of the circumstances, the employer may deduct for the entire week.

(b) When the employee takes at least a whole day off for personal reasons other than sickness or accident, the employer may deduct in full day increments.

(c) Deductions for absences due to sickness or disability may be made in full day increments if the deduction is made according to the employer's bona fide plan, policy or practice of providing paid sick and

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disability leave (other than industrial accidents or disability).

(i) Deductions are permitted when either leave is exhausted or the employee has not yet qualified under the plan.

(ii) Deductions are permitted even if an employee receives compensation under that plan or under workers' compensation laws.

(d) When an employee is eligible for the federal Family and Medical Leave Act 29 U.S.C. Sec. 2611 et seq., deductions may be made for partial day absences due to leave taken according to that law and the applicable provisions in chapter 49.78 RCW.

(e) In the first and final week of employment, an employee's salary may be prorated for the actual days worked.

(f) Deductions are allowed for disciplinary absences that are imposed for violations of safety rules of major significance. This includes only those relating to the prevention of serious danger to the plant, the public, or other employees, such as rules prohibiting smoking in explosive plants or around hazardous or other flammable materials.

(g) Deductions are allowed when authorized under RCW 49.48.010, 49.52.060, or WAC 296-126-025.

(4) What are improper deductions from salary?

(a) Deductions are not permitted for partial days of work, except as permitted by subsection (3)(d) of this section or by WAC 296-128-533.

(b) Deductions are not permitted for lack of work for any amount of time less than a full week.

(c) Deductions are not permitted when the employee participates in jury duty, attendance as a witness, or temporary military leave if the employee performs any work during that week. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay.

(d) Deductions are not permitted for absences due to sickness or disability if the employer does not have a bona fide plan, policy or practice in place for sick or disability leave.

(e) Any other deductions not allowed under subsection (3) of this section.

(5) Is a "window of correction" permitted? A limited window of correction will be permitted when an improper deduction is shown to be infrequent and inadvertent and the employer immediately begins taking corrective steps to promptly resolve the improper deduction when brought to the attention of the supervisor or other appropriate representative of the employer. Such corrections will be allowed only to the extent that the deduction is not due to lack of work or part of a pattern of the same or substantially similar deductions.

(6) What deductions may be made from leave banks?

(a) Deductions may be made from compensatory time in any increment.

(b) Deductions may be made from bona fide leave banks in partial or full day increments. However, partial day deductions may be made only on the express or implied request of the employee for time off from work. Leave bank deductions may not be made for less than one hour.

A "bona fide leave bank" is a benefit provided to employees in the case of absence from work due to sickness or personal time off, including vacation. It must be in writing and contained in contract or agreement, or in a written policy that is distributed to employees. A leave bank policy, or a leave bank provision in a contract or agreement, is not "bona fide" if it is used as a subterfuge to circumvent or evade the requirements of this regulation.

(c) When leave banks are exhausted, deductions from salary may not be made, except as permitted in subsection (3) of this section.

[Statutory Authority: RCW 49.46.005, 49.46.010, 49.46.120, and chapter 49.46 RCW. 03-03-109, § 296-128-532, filed 1/21/03, effective 2/21/03.]

WAC 296-128-533 Public employees. (1) How do the provisions specified in WAC 296-128-532 affect public employees? WAC 296-128-532 (1) through (5) is applicable to public employees, except that deductions from salary or leave banks are permitted in the following additional circumstances.

(a) Deductions from salary for partial day absences: A public employee who otherwise meets the requirements of WAC 296-128-532 will not be disqualified from the executive, administrative, or professional exemptions on the basis that such public employee is paid according to a pay system that:

(i) Is established by statute, ordinance, or regulation, or by a policy or practice established according to principles of public accountability, under which the public employee accrues sick or personal leave (annual, vacation, etc.); and

(ii) Permits the public employee's pay to be reduced or the public employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work day when accrued leave is not used by a public employee.

(b) Deductions from leave banks: Deductions may be made from a public employee's accrued leave banks in any increment in accordance with any statute, ordinance, or regulation, or by a policy or practice established according to principles of public accountability.

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(c) **Deductions for furlough:** Deductions from the salary of a public employee for absences where authorized by law due to a budget-required leave of absence will not disqualify the public employee from being paid on a "salary basis" except in the workweek in that the absence occurs and for which the public employee's pay is accordingly reduced.

(2) **What does "public employee" mean?** Public employee means an employee directly employed by a county, incorporated city or town, municipal corporation, state agency, institution of higher education, political subdivision or other public agency and includes any department, bureau, office, board, commission or institution of such public entities.

[Statutory Authority: RCW 49.46.005, 49.46.010, 49.46.120, and chapter 49.46 RCW. 03-03-109, § 296-128-533, filed 1/21/03, effective 2/21/03.]

WAC 296-128-535 Are professional computer employees exempt from the Washington Minimum Wage Act? (1) Any employee who is a computer system analyst, computer programmer, software engineer, software developer or other similarly skilled worker will be considered a "professional employee" and will be exempt from the minimum wage and overtime provisions of the Washington Minimum Wage Act if:

- (a) Their primary duty is of one of the following:
 - (i) Applying systems analysis techniques and procedures to determine hardware, software, or system functional specifications for any user of such services; or
 - (ii) Following user or system design specifications to design, develop, document, analyze, create, test or modify any computer system, application or program, including prototypes; or
 - (iii) Designing, documenting, testing, creating or modifying computer systems, applications or programs for machine operation systems; or
 - (iv) Any combination of the above primary duties whose performance requires the same skill level; and
- (b) Their rate of pay is at least \$27.63 per hour.

(2) **This professional exemption only applies to** highly skilled employees who:

- (a) Possess a high degree of theoretical knowledge and understanding of computer system analysis, programming and software engineering; and
- (b) Have the ability to practically apply that theoretical knowledge and understanding to highly specialized computer fields; and
- (c) Generally attain the necessary level of expertise and skill to qualify for an exemption through a combination of education and experience in the field; and
- (d) Consistently exercise discretion and judgment in the application of their special knowledge as opposed to

performing purely mechanical or routine tasks; and

(e) Engage in work that is predominantly intellectual and inherently varied in character as opposed to work that is routinely mental, manual, mechanical, or physical.

(3) While many employees who qualify for this exemption hold a bachelor's or higher degree, **no degree is required for this exemption.**

(4) This professional exemption **does not apply to:**

(a) Trainees or employees in entry level positions learning to become proficient in computer systems analysis, programming and software engineering; or

(b) Employees in computer systems analysis, programming and software engineering positions who have not attained a level of skill and expertise which allows them to generally work independently and without close supervision; or

(c) Employees engaged in the operation of computers; or

(d) Employees engaged in the manufacture, repair or maintenance of computer hardware and related equipment; or

(e) Employees covered by a collective bargaining agreement.

[Statutory Authority: RCW 49.46.010 (5)(c). 98-02-027, § 296-128-535, filed 12/31/97, effective 2/1/98.]

WAC 296-128-540 Outside salesman. The term "individual employed in the capacity of outside salesman" in RCW 49.46.010 (5)(c) shall mean any employee:

(1) Who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business, as well as on the premises (where the employee regulates his own hours and the employer has no control over the total number of hours worked) in the following alternative activities:

(a) In making sales; including any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition; or

(b) In obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; or

(c) In demonstrating products or equipment for sale; or

(d) In the sale of services and performance of the service sold when the compensation to the employee is computed on a commission basis; and

(2) Whose hours of work of a nature other than that described in (1)(a), (b), (c) and (d) of this section do not exceed 20 percent of the hours worked in the work week by nonexempt employees of the employer: Provided, That work performed incidental to and in conjunction with the employee's own outside sales or solicitations,

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including incidental deliveries and collections, shall not be regarded as nonexempt work; and

(3) Who is compensated by the employer on a guaranteed salary, commission or fee basis and who is advised of his status as "outside salesman."

[Order 76-5, § 296-128-540, filed 2/24/76.]

WAC 296-128-550 Regular rate of pay. The regular rate of pay shall be the hourly rate at which the employee is being paid, but may not be less than the established minimum wage rate. Employees who are compensated on a salary, commission, piece rate or percentage basis, rather than an hourly wage rate, unless specifically exempt, are entitled to one and one-half times the regular rate of pay for all hours worked in excess of 40 per week. The overtime may be paid at one and one-half times the piecework rate during the overtime period, or the regular rate of pay may be determined by dividing the amount of compensation received per week by the total number of hours worked during that week. The employee is entitled to one and one-half times the regular rate arrived at for all hours worked in excess of 40 per week.

[Order 76-5, § 296-128-550, filed 2/24/76.]

WAC 296-128-560 Compensating time off in lieu of overtime pay. The provisions of chapter 49.46 RCW requiring one and one-half times the regular rate of pay for hours worked in excess of 40 per week does not apply to any person who requests compensating time off in lieu of overtime pay. Therefore, compensating time may be as agreed upon by the employer and the individual employee at the request of the employee, but may not be imposed by the employer in lieu of overtime pay upon any employee who has not so requested such compensating time off.

[Order 76-5, § 296-128-560, filed 2/24/76.]