

# Wisconsin Human Resources Handbook

## Chapter 520

### Administration Of The Federal Fair Labor Standards Act and Wisconsin Statutes Pertaining to Hours Worked and Overtime Provisions For State Classified Employees and Certain Unclassified Employees

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#### Sec. 520.010 Introduction

The federal Fair Labor Standards Act (FLSA) covers all represented and non-represented classified employees and certain unclassified employees in state service.

**Note:** Unclassified employees not identified in Section B. of the Compensation Plan may be covered by the FLSA, but the Office of State Employment Relations does not have the responsibility or authority to oversee the administration of their overtime compensation and therefore they are not included in this chapter.

The FLSA provides for a minimum wage and generally requires employers to pay covered employees time and a half whenever they work more than 40 hours in a workweek. There are exceptions to this, most commonly referred to as the executive, administrative, and professional exemptions.

Chapter 103, Wis. Stats. (Employment Regulations) and Chapter 104, Wis. Stats. (Minimum Wage Law) apply to employees of the various agencies, boards, commissions and other divisions of the State of Wisconsin and are administered by the Department of Workforce Development (DWD).

Effective August 23, 2004, the United States Department of Labor (USDOL) revised the “white-collar” exemption tests for the executive, administrative, and professional employees. Up until August 23, 2004, Wisconsin’s salary overtime exemptions very closely paralleled the similar federal exemptions. With the adoption of the federal changes, that is no longer the case. In order for a Wisconsin employer to comply with both federal and state overtime regulations, it is necessary for the employer to ensure that it meets both sets of criteria for the exemption. Usually an employer may accomplish that by meeting the more stringent requirement of each law. The chart in Attachment #1 was developed by DWD and outlines the criteria to qualify for the federal and state exemption in each category and identifies the more stringent requirement. This policy chapter (WHRH Chapter 520) refers primarily to the more stringent law and will cite whether that law is federal or state.

Collective bargaining agreements and the Compensation Plan covering state employees also contain provisions governing hours of work and overtime. These documents also must be consulted for application to represented and non-represented employees in Wisconsin State government.

State and federal employment laws also contain strict provisions covering child labor (i.e., employment of people under the age of 18). An attachment to this policy summarizes the hours during which minors may be employed. Agencies should consult the child labor provisions of both state and federal law with regard to certain functions that may be prohibited for specific age groups if minors are employed.

**Note: The provision that provides the most generous benefit to the employee must be applied.**

#### **Sec. 520.020 Authority**

Sections 230.04, 230.10, and 230.12, Wis. Stats. charge the Director of the Office of State Employment Relations (OSER) with the effective administration of the compensation system for state employees in the classified service and certain unclassified employees. The Director may issue enforceable orders relating to the administration, enforcement and effect of this chapter.

As a result of the U.S. Supreme Court decision in the case of Garcia v. San Antonio Metropolitan Transit Authority, the Maximum Hour (Overtime) provision of the federal Fair Labor Standards Act (FLSA), as amended, covers all represented and nonrepresented classified employees and certain unclassified employees in state service.

#### **Sec. 520.030 State Policy Regarding Overtime**

Overtime work is to be held to a minimum consistent with the needs of the service. It is the responsibility of each agency to explore all possible alternatives before a decision is made to require employees to work on an overtime basis. It is further the responsibility of each agency to ensure that the provisions of overtime pay are administered in the best interest of state service. Each agency should develop internal controls that provide a means of reviewing and evaluating the use of overtime.

#### **Sec. 520.040 Definitions**

The Glossary of Terms, Attachment #2, is a list of terms used throughout this chapter. The terms have been given specific meaning in either state or federal regulations, or through court decisions, and must be consulted when interpreting provisions of this policy.

## Sec. 520.050 Applicability of the Wage and Hour Laws

This chapter is intended to describe how the FLSA overtime provisions should be applied to classified and certain unclassified employees.

1. Employees covered by the FLSA may be categorized as “exempt” or “nonexempt” from the overtime compensation requirements. In addition, employers must consider the impact of state law.

The FLSA was enacted by the U.S. Congress in 1938, and has been amended numerous times. Effective August 23, 2004, the USDOL implemented a comprehensive revision of the FLSA “white-collar” exemption tests that define the terms executive, administrative and professional. The basic purposes of the FLSA are to:

- a. Create a minimum wage standard to prevent wage exploitation.
- b. Promote fair competition in interstate commerce to avoid driving down labor costs in order to have a price advantage over other employers.
- c. Generate more jobs by encouraging employers to spread the existing work among more people. Congress believed that requiring overtime premium pay would encourage employers to hire more workers rather than pay the premium rate, thus creating more jobs and reducing unemployment.

The FLSA, administered by the USDOL, Wage and Hour Division, contains provisions specific to public employers. For example, only public employers are authorized to substitute compensatory time for premium overtime pay.

Wisconsin employment laws are administered by the Wisconsin DWD. State employees may file complaints under and allege violations of either the federal or state employment laws.

2. OSER coordinates administration of both laws for state employees. All unclassified employees identified in Section B. of the Compensation Plan are covered by the FLSA except:
  - a. Elected officials.
  - b. Personal staff of elected officials.

**Note:** The exemption for personal staff applies only to those staff members who directly report to, are responsible to, are regularly supervised by, and serve solely at the discretion of the appointing elected official. The exclusion does not include individuals who are directly supervised by someone other than the elected official.

- c. Appointees of elected officials who serve on a policy-making level and who serve solely at the discretion of the elected officials.
    - d. Advisors to elected officials with respect to the constitutional or legal powers of the office.
3. Any state agency that does not comply with these provisions may be liable to affected employees in the amount of:
  - a. Unpaid overtime compensation.
  - b. An additional equal amount as liquidated damages.
  - c. The employee’s attorney fees.
  - d. Court costs.

Willful and repeated violations may also result in civil money penalties being imposed on the employer by the USDOL.

4. All collective bargaining agreement and Compensation Plan provisions relating to overtime eligibility, scheduling of overtime, forced overtime, etc., continue to apply to employees covered by them. If the applicable document does not contain overtime provisions, computation of the premium rate will be calculated in accordance with the provisions of the federal and state laws and the interpretations provided in this policy.

## Sec. 520.060 Categorizing Covered Employees as Exempt or Nonexempt

### 1. General

Employees covered by the federal FLSA and Wisconsin employment laws may be categorized as exempt from the overtime provisions of the laws if certain requirements are met. Exemptions are narrowly interpreted by the USDOL and should be granted only when an employee clearly meets the requirement of the exemption. Nonexempt employees who work overtime are eligible for premium pay or, in the case of public employees only, compensatory time accumulated at a premium rate for overtime hours worked.

Effective August 23, 2004, the USDOL adopted changes to the FLSA regulations defining the “white-collar” exemption tests for executive, administrative, and professional employees. Up until August 23, 2004, the Wisconsin salary overtime exemptions very closely paralleled the similar federal exemptions. With the adoption of the federal changes, that is no longer the case. In order for the State of Wisconsin government, as an employer, to comply with both the federal and state overtime regulations on the salary overtime exemptions, it is necessary for the employer to ensure that both sets of criteria for exemption are met. Usually this can be accomplished by meeting the more stringent requirement of each law, meaning whichever law is more beneficial to the employee (enabling the employee to receive overtime pay for hours worked more than 40 hours per week). The chart contained in Attachment #1, that was developed by DWD, outlines the criteria to qualify for the federal and state exemption in each category and points out the more stringent requirement.

The federal salary test is the more stringent test: it requires executive, administrative, and professional employees to earn a weekly salary of at least \$455 per week. Computer employees must earn a weekly salary of at least \$455 per week or be paid \$27.63 or higher per hour. Some computer employees may be exempt under the administrative test.

For most aspects of the duties and discretion exemption tests, the state law is either the same as the federal law or is more beneficial and must be applied. The exception to this is the primary duty test for computer employees, where the federal rule is more beneficial.

- a. The overtime provisions in this chapter apply to all nonexempt employees in the classified service and nonexempt employees in the unclassified service listed in Section B. of the Compensation Plan.

<p><b>Note:</b> Refer to the Compensation Plan or relevant labor agreement for overtime provisions for <u>exempt</u> employees and additional overtime provisions for nonexempt represented employees.</p>
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- b. All limited term employees are considered nonexempt except physicians, dentists, attorneys, teachers, certain computer professionals (i.e., information systems professionals) and special types of exempt employees such as those employed by amusement or recreational establishments, in agriculture (i.e., farming) and in fishing. Section ER-MRS 10.05, Wis. Adm. Code, does not permit limited term employees to be paid on a salary basis and payment on a salary basis is generally one of the requirements for exempt status.

- c. Agencies may refer to the most current “Alphabetical Listing of Classifications” (a.k.a. Alpha List) for the typical categorization of employees as exempt or nonexempt by classification title. This designation is only a guide and is not intended to serve as the actual determination of exempt or nonexempt status of individual employees. Appointing authorities must assess, on a case-by-case basis, the proper designation of an employee as exempt or nonexempt based on a review of the duties performed. Unless an exception to the typical categorization is requested by the employing agency and approved by OSER, employees in titles designated as exempt (E) will be treated as exempt and employees in titles designated as nonexempt (N) or mixed (M) will be treated as nonexempt.
- d. **It is the responsibility of each appointing authority to determine whether an exemption applies to a particular employee by evaluating the duties assigned to the employee.**

Agencies must perform reviews of individual employees to determine whether or not the typical categorization contained in the Alpha List actually applies in specific situations.

**Note:** If it is determined that the typical categorization for an entire classification should be changed, OSER will publish notification of the change in the Survey/Classification (SC) bulletin to inform agencies of the change. Agencies should be aware that the individual employee’s status designation on the automated Central Payroll system within the Department of Administration does not change automatically as a result of OSER changing the classification’s designation. As a result, employing agencies need to take specific action to change the designation of the individual employees when appropriate to do so.

- e. Exceptions to the typical categorization of employees can and should be made based on the duties and responsibilities of individual employees. All exceptions must be approved in writing with documentation maintained in the employee’s personnel file.
  - 1) Exceptions for classified employees may be recommended by the appropriate appointing authority to the Administrator, Division of Merit Recruitment and Selection (DMRS). The DMRS Administrator may approve or reject such recommendations based on the provisions contained in this chapter or may delegate authority in writing to agency heads to grant exceptions.
  - 2) Unclassified employees in classification titles designated as mixed may be treated as exempt upon approval of the appointing authority.
- f. Agency requests for delegated authority to make exceptions to the typical categorization of employees must be submitted in writing to the DMRS Administrator. Such requests should contain the specific classification title(s), the criteria that will be applied in making these exceptions, and the categorization that would apply if the unclassified employees were classified employees.

2. **Exemptions from the FLSA Overtime Provisions for Executive, Administrative, or Professional Employees** [Reference 29 C.F.R. Part 541]

Exempt employees are any employees functioning in an executive, administrative, or professional capacity or a combination of those capacities, as defined in the federal regulations concerned with administering the FLSA. Section DWD 274.08 (2), Wis. Adm. Code, designates the provisions of the FLSA as the authority regarding overtime pay, exemptions, and records requirements for employees of the State of Wisconsin. Employees must meet all of the following tests: the minimum salary test, salary basis test, and duty and discretion test as summarized below.

**Note:** There are some exceptions to the minimum salary, salary basis, and duty and discretion tests. For example, physicians, dentists, attorneys, teachers need not meet either the minimum salary test or the salary basis test in order to be exempt professionals.

Certain computer professionals (i.e., information systems professionals) may be exempted from the minimum salary test and the salary basis test as a computer employee if the employee is compensated at the rate of at least \$455 per week on a salary basis or \$27.63 on an hourly basis. Other computer professionals may be exempt as administrative employees if they meet the requirements of the administrative exemption, which does include the minimum salary and the salary basis tests.

The USDOL and DWD evaluate the status of individual employees under the FLSA. The FLSA exemptions address the actual job duties of the employee and are not concerned with job titles or civil service classifications.

a. **Minimum Salary Test**

The minimum salary test requires payment of a salary that, at minimum, meets the requirements of the federal minimum wage in effect at any given time. Based upon the pay schedules in effect at the time this chapter was published, all full-time state employees meet the minimum salary test. To determine whether a part-time employee meets the test one must look at how much the employee is regularly paid in a week.

b. **Salary Basis Test**

All employees functioning in an exempt capacity, except exempt limited term employees (LTEs), are paid on a “salary basis” and therefore will meet this test, unless an exception is granted by the DMRS Administrator. The employee must receive his or her full salary for any week in which work is performed without regard to the actual number of days or hours worked, as long as the employee is ready, willing and able to perform work.

Confusion over this provision often arises when public employees claim they are not paid on a salary basis because vacation, sick leave, etc., must be used to account for the absence, including partial day absences. The FLSA provides public employers the ability to substitute accrued personal leave (sick leave, annual leave, personal holiday, etc.) for absences. This ability to substitute paid leave is granted under the principles of public accountability which require the public employee’s pay to be reduced or the employee placed on leave without pay for absences for personal reasons or because of illness or injury. [Reference 29 C.F.R. Part 541.710, Bulletin OS-66 CC/POL-18 CBB-7, and Bulletin CC/POL-27 CBB-15]

**Note:** The employer’s ability to substitute leave may be superseded when the absence is a covered leave under federal or state family and medical leave laws.

The employer may also choose not to allow time to be charged to paid leave and require the exempt employee to work additional time as necessary to meet the work requirements of the position whether or not such additional time is on an hour-for-hour basis.

1) **Exceptions to Payment on a Salary Basis**

The DMRS Administrator must authorize exceptions to payment on a salary basis unless an agency is delegated authority to make such exceptions. Agencies may request delegation to make such exceptions by submitting the request in writing to the DMRS Administrator. Such requests must contain the criteria that will be applied in making exceptions.

For example, an exception may be appropriate where, due to employee illness, an employee cannot work any kind of regular schedule, even a reduced regular schedule of partial days, and cannot work full days.

As soon as the affected employee can return to any kind of regular schedule the employee should again be paid on a salary basis.

a) **Effect of Exceptions**

If the exception to payment on a salary basis occurs for a single workweek, the employee is nonexempt for the workweek. If the exception occurs repeatedly the employee may be considered nonexempt for an extended period (possibly years) depending on the specific circumstances.

**Note:** Exceptions for physicians, dentists, attorneys, and teachers will not affect the exempt status of these employees because these professions are exempted from the salary basis test.

c. **Duty and Discretion Test**

To meet the duty and discretion test as an exempt employee the following conditions within each distinct category must be met:

- 1) **Executive Employee** means: [Reference 29 C.F.R. 541.100 and DWD 274.04(1)(a), Wis. Adm. Code]
  - a) The primary duty consists of directing the functions and employees of an agency or recognized subdivision of an agency, including customarily and regularly supervising at least two FTE employees.
  - b) Employees must also:
    - (1) Customarily and regularly exercise discretionary powers in the day-to-day performance of duties, and
    - (2) Devote no more than 20% of the hours worked in the workweek to work that is not directly and closely related to the performance of exempt work described in (1) (a). [Reference DWD 274.04(1)(a)(5)]
- 2) **Administrative Employee** means: [Reference 29 C.F.R. 541.200 and DWD 274.04(1)(b), Wis. Adm. Code]
  - a) As a primary duty either performs office or non-manual work of substantial importance which is directly related to management policies or general “business” operations of the employer or the employer’s “customers.” OR
  - b) Customarily and regularly exercises discretion and independent judgment; and regularly and directly assists an exempt executive or exempt administrative employee. OR
  - c) Performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge. OR
  - d) Executes special assignments and tasks under only general supervision.

- e) Employees must also:
  - (1) Customarily and regularly exercise discretionary powers in the day-to-day performance of duties, and
  - (2) Devote no more than 20% of the hours worked in the workweek to work that is not directly and closely related to the performance of exempt work described in a through c above. [Reference DWD 274.04(1)(b)(4)]

Employees must customarily and regularly exercise discretion and independent judgement in significant matters and be free from close supervision. This should not be confused with non-discretionary activities that require the use of skill in applying techniques, procedures or specific standards. Decisions need not have a finality that goes with unlimited authority and a complete absence of review. They may consist of effective recommendations for action or be subject to general review.

- 3) **Professional employee** means: [Reference DWD 274.04(1)(c), Wis. Adm. Code]
  - a) As a primary duty, performs work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a long course of specialized intellectual instruction and study and which requires consistent exercise of discretion and judgement. The knowledge must be of a type that cannot be attained at the high school level. Generally speaking the professions which meet the requirement include law, medicine, nursing, accounting, engineering, teaching and various types of physical, chemical, and biological sciences. The exemption does not apply to entire occupational group and must be based on the specific duties of the particular employee. OR
  - b) Performs work that is original and creative in character in a recognized artistic field and the result of which must depend primarily on invention, imagination or talent of the employee. The exemption in the recognized artistic fields include music, writing, the theater, and the plastic and graphic arts, but the requirements must be tested against each individual employee's duties.

The work must:

- c) Consistently involve the exercise of discretion and judgement;
  - d) Be mainly varied and intellectual and of such character that the output cannot be standardized in relation to time; and
  - e) Be no more than 20% of the hours worked in the workweek may be spent in activities, which are not an essential part of and necessarily incidental to the exempt work described above.
- 4) **Computer employee** means: [Reference 29 CFR 541.400 and DWD 274.04(1)(c), Wis. Adm. Code]
    - a) Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption as professionals. Because job titles vary widely and change quickly in the computer industry, job titles are not determinative of the applicability of this exemption.

- b) As a primary duty, applies systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications.
- c) Performs the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications.
- d) Performs the design, documentation, testing, creation or modification of computer programs related to machine operating systems. OR
- e) Performs a combination of the aforementioned duties that requires the same level of skills.

**Note:** It is also possible for employees to be exempt from the overtime provisions if they perform a combination of work meeting more than one exempt category (i.e., executive, administrative or professional). In combination exemptions, however, the employee must meet the stricter of the requirements on salary and nonexempt work. [Reference 29 C.F.R. Part 541.708]

3. **Special Types of Exempt Employees** [Reference 29 C.F.R. Part 553.32]

Employees in the types of employment noted below are also considered exempt. The minimum salary, salary basis, and duty and discretion tests described above do not apply to employees identified below.

- a. Employees of an amusement or recreational establishment if:
  - 1) The establishment does not operate more than seven months in any calendar year; or
  - 2) During the preceding calendar year, the average receipts for any six months of the year were not more than 1/3 of its average receipts for the other six months of such year. (If operating funds of an establishment are wholly or primarily provided by tax funds, this provision cannot be met.)
- b. Employees employed in agriculture. When an employee is engaged in direct farming operations the purpose of the agency in performing the operations is immaterial.
  - 1) Includes farming in all its branches.
  - 2) When employees employed in agriculture, during a workweek, also engage in some nonexempt work during the same workweek, the employees are nonexempt for that workweek.
- c. Employees employed in the catching, taking, propagating, cultivating or farming of fish. When such employees, during any workweek, also perform nonexempt work more than 20% of the time, the employees are nonexempt for the workweek.

4. **Administration of Time Off for Exempt Employees**

Time off for exempt employees, except LTEs, must be administered as follows, unless an exception has been granted by the DMRS Administrator or by an appointing authority with delegated authority from the DMRS Administrator to grant such an exception.

- a. **Time Off at the Employee's Request** [Reference C.F.R. Part 541.710]

Deductions may be made from an exempt employee's salary for time off for full or partial workdays for personal reasons at the employee's request if the supervisor has approved the time off.

- 1) The employer may charge time off to the appropriate paid leave as designated by the employee if the employee has unused annual or holiday leave. Leave time that qualifies may be charged to sick leave in accordance with s. ER 18.03, Wis. Adm. Code, or relevant labor agreement.
- 2) If all appropriate paid leave has been used and the employer allows the employee time off of less than one full workday for personal reasons or because of illness or injury, the appropriate deduction may be made from the employee's salary without negatively impacting the employee's exempt status.
- 3) Salary deductions may also be made for absences for personal reasons or because of illness or injury if the employee chooses to use leave without pay. However, the employer may later require the employee to work such additional time as is necessary to meet the work requirements of the position in the work unit.
- 4) If the absences are regular and continuing the employer and employee may agree to change the employee's percent of appointment (hours per pay period).

**Note:** Agencies should also refer to the provisions of the federal and state family and medical leave laws when considering leave time. Reference Chapter 724—Family and Medical Leave of the *Wisconsin Human Resources Handbook*.

b. **Time Off for Jury Duty, Attendance as a Witness or Temporary Military Leave of Less than One Workweek** [Reference 29 C.F.R. Part 541.602(b)(3)]

Deductions may not be made from an employee's salary for time off caused by jury duty, attendance as a witness, or temporary military leave. Attendance as a witness is limited to situations where the employee is legally required to attend a proceeding under subpoena. The employer must offset any amounts received by an employee as fees or military pay against the salary due for that particular week unless prohibited by statute, rule, or labor agreement. If the employee performs no work in a given workweek, the requirements of this paragraph do not apply.

**Note:** Time off caused by attendance as a witness in matters unrelated to his or her employment may be charged to paid leave as provided in ch. ER 18, Wis. Adm. Code, or relevant labor agreement.

c. **Budget Related Furloughs** [Reference 29 C.F.R. Part 541.710(b)]

Deductions from the salary of an employee for absences due to a budget-required furlough will not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is reduced.

d. **Shift Substitutions** [Reference 29 C.F.R. Part 553.31]

Employees who, with approval of the agency, freely substitute for one another during scheduled work hours in the same capacity, may be exempt from the overtime requirements.

e. **Time Off Without Approval** [Reference 29 C.F.R. 541.710]

When an employee takes time off without the employer's approval, the employee may be considered to be absent without leave. Any such absence may be grounds for disciplinary action. Charging such an absence to paid leave may affect the employer's ability to defend disciplinary action.

f. **Time Off Caused By the Employer** [Reference 29 C.F.R. Part 541.118]

- 1) In the case of time off caused by the employer, deductions may not be made from an exempt employee's salary if the time off is less than one week and the exempt employee has performed some work in that workweek. (The FLSA regulations refer to this as time off "occasioned" by the employer.) This includes situations when some or all of the offices and other work locations are closed due to weather condition, energy shortages or emergency situations. Time off may be charged to paid leave time as appropriate.
- 2) Exempt employees who are subject to disciplinary suspensions without pay for periods of less than a full workweek are considered nonexempt employees under the FLSA and must be paid premium pay for overtime hours worked. If an employee is potentially subject to receiving a disciplinary suspension of less than a full workweek for work rules violations (other than violations of work rules concerning major safety regulations), the employee must be treated as nonexempt under the overtime provisions of the FLSA.

**Note:** The Federal Courts have ruled that even though an employee may meet all of the other criteria to be an exempt employee under the FLSA, the employee must also meet all of the requirements under the salary basis test. [Reference: Auer v. Robbins, 519 U.S. 452 (1997)] Since 1995, state agencies have been directed to develop discipline policies that preclude disciplinary suspensions of less than one full workweek for FLSA exempt employees. [Reference Bulletin OS-66, CC/POL-18, CBB-7 (07.1100 & 13.0400)].

- 3) Deductions may be made from an employee's salary due to time off occasioned by the employer if no work is performed by the employee for that workweek.

g. **First and Last Weeks of Employment** [Reference 29 C.F.R. Part 541.602(b)(6)]

During the first and last weeks of employment only, payment of a proportionate part of the employee's salary for the time actually worked will meet the salary basis test.

## Sec. 520.070 Overtime Compensation for Nonexempt Employees

1. **Amount and Nature of Payment Due – General** [Reference 29 C.F.R. Part 778]

Nonexempt employees must be paid at a premium rate or receive compensatory time credits at a rate of 1.5 hours per hour worked, for each hour worked in excess of 40 hours in a workweek. Exceptions to this requirement exist for public safety employees (i.e., fire protection and law enforcement employees) and certain hospital and residential care employees. The FLSA excludes paid leave time from hours worked.

a. **Nonexempt Public Safety Employees** [Reference 29 C.F.R. Part 553, Subpart C]

- 1) Nonexempt public safety employees must be paid at a premium rate or receive compensatory time credits at a rate of 1.5 hours per hour worked, for all hours worked in excess of 212 hours (fire protection) or 171 hours (law enforcement) in a work period of 28 consecutive days.

For employees who perform both fire protection and law enforcement activities, the applicable standard is the one that applies to the activity in which the employee spends the majority of work time during the work period. If a work period of less than 28 days is established, the premium rate or the crediting of compensatory time off is required when the hours worked during the work period exceeds the ratio between 28 days and 212 hours (fire protection) or 28 days and 171 hours (law enforcement). Any additional hours worked within the work period must be paid for at the premium rate or credited with compensatory time off at a rate of 1.5 hours per hour worked.

To qualify as a fire protection or law enforcement employee for any given work period, an employee must spend at least 80 percent of the total hours worked in the performance of the described public safety activities or work incidental to or in conjunction with the described work. Employees who perform related support activities such as dispatching, radio or alarm operation, apparatus and equipment repair and maintenance, and/or bulldozing do not qualify as law enforcement or fire protection personnel.

a) **Fire Protection**

- (1) Employees of an organized fire protection district (exempt volunteers) who are trained and have legal authority and responsibility to perform activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires. This includes such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards.
- (2) Employees who work for public agencies charged with forest firefighting responsibilities, who spend 80% of their time in the work period in the direction or performance of the following functions: fire spotting or lookout activities; or fighting fires on the fire line or from aircraft; or operating tank trucks, bulldozers and tractors for the purpose of clearing fire breaks. Employees engaged in these activities may also simultaneously perform such related functions as housekeeping, equipment maintenance, tower repairs and/or the construction of fire roads.
- (3) Employees of a fire district who are engaged in rescue and ambulance services that are an integral part of the organization's fire protection activities.

b) **Law Enforcement**

- (1) Employees of an organized enforcement unit (except volunteers) who have state authorized arrest powers and are trained and sworn to enforce various laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes.
- (2) Employees of a correctional institution or any other facility maintained as part of the state penal system who are responsible for controlling and maintaining custody of inmates and of safeguarding them from other inmates or for supervising such functions.
- (3) Employees of a law enforcement unit or correctional institution who are engaged in rescue and ambulance services that are an integral part of the organization's enforcement activities.

**Note:** Employees attending a bona fide fire or police academy or other training facility when required by the employing agency are engaged in public safety activities only when the employee meets the definitions provided in a) or b) above, except for the power of arrest for law enforcement personnel. If the cadets fail to meet these requirements, they are not eligible for the special exemption applied to public safety employees.

b. **Hospital and Residential Care Employees** [Reference 29 C.F.R. Part 778.601]

Hospital and residential care establishments may adopt a 14-day work period in lieu of the usual 7-day workweek by agreement with the employee (or employee's representative in the case of a represented employee). If adopted, nonexempt employees would receive the premium rate or be credited with compensatory time off at a rate of 1.5 hours per hour worked for hours worked over 8 in a day or 80 in a 14-day work period, whichever results in the greater number of overtime hours. As of the publication of this policy, no such agreement exists between the State of Wisconsin and any of the collective bargaining units representing state employees.

2. **Compensatory Time-Off as Payment for FLSA Overtime** [Reference 29 C.F.R. Part 553]

a. **Agreement Prior to Performance of Work**

The FLSA requires that an agreement or understanding be reached prior to the performance of the work as a condition for providing compensatory time credits as payment for overtime. This is accomplished through labor agreements for represented state employees. For nonrepresented employees hired before April 15, 1986, an agreement or understanding is deemed to have been reached if the agency has had a regular practice of awarding compensatory time credits in lieu of pay for overtime. For nonrepresented employees hired after April 14, 1986, a record of an agreement or understanding must exist and may take one of the following forms:

- 1) As a condition of employment, provided:
  - a) The employee knowingly and voluntarily agrees to it as a condition of employment.
  - b) The employee is informed that the compensatory time credits received may be preserved, used or cashed out consistent with the provisions of this chapter.
- 2) A notice to the employee that compensatory time credits will be given in lieu of pay. An agreement or understanding would be presumed to exist if the employee fails to express an unwillingness to accept compensatory time credits to the agency. The employee's decision to accept compensatory time off in lieu of cash overtime payments must be made freely and without coercion or pressure.

**Note:** It is recommended that agencies provide notice of this condition of employment to new employees within the appointment letter in order to avoid the potential for confusion over whether the employee was properly notified in advance of the work being performed.

b. **Limits on the Accrual of Compensatory Time Credits**

Accrual of compensatory time credits is limited by the amount of compensatory time off that an employer can realistically and in good faith expect to be able to grant to the requesting employee within a reasonable period of time. Accrual of compensatory time credits is subject to the following restrictions:

- 1) A nonexempt employee engaged in a public safety, emergency response or seasonal activity is allowed to accumulate a maximum balance of 480 hours of compensatory time off credits (320

hours of FLSA overtime worked) only if the employee regularly engages in a public safety, emergency response or seasonal activity.

- 2) All other nonexempt employees may accumulate a maximum balance of 240 hours of compensatory time credits (160 hours of FLSA overtime worked).
- 3) An employee who has accumulated the maximum amount of compensatory time credits must be paid at the premium rate for any additional overtime hours worked.

An employee who has previously accumulated between 240 and 480 hours of compensatory time credits and then moves from a position with the 480 hour limit to a position with the 240 hour limit within an agency may carry over to the new position any accumulated compensatory time credits. However the employee must be paid at the premium rate for any subsequent overtime hours until the accumulated compensatory time credits fall below the 240-hour limit.

c. **Compensatory Time Credits for Contractual Overtime That is Not FLSA Overtime**

Accumulation of compensatory time credits for contractual overtime that is not FLSA overtime is subject only to pertinent provisions in labor agreements and is not subject to the FLSA limits. FLSA overtime is based strictly on hours worked. In some cases, contractual overtime provisions may exceed the FLSA overtime hours due to (1) lower maximum hour standards (e.g., fire and law employees) and/or (2) more liberal methods of counting hours that provide for the overtime pay (e.g. hours in pay status).

**Note:** Any compensatory time credits granted for non-FLSA overtime under the labor agreement need not be counted when determining whether a person has accumulated the maximum balance of compensatory time off credits under the FLSA.

d. **Use or Liquidation of Compensatory Time Credits**

- 1) An employee who has accumulated FLSA-related compensatory time credits and requested use of this compensatory time, must be permitted to use such credits within a “reasonable period” after making the request, if such use does not “unduly disrupt” the operations of the agency. An agency may not refuse an employee’s request to use FLSA-related compensatory time credits unless the agency anticipates that it will not be able to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee’s services.
- 2) Cash payment for compensatory time credits must be granted at the regular rate for the workweek or work period during which the employee uses the compensatory time credits.
- 3) Compensatory time off credits may be liquidated at any time by multiplying the total hours to be liquidated by the regular rate in effect at the time of the lump sum payment.
- 4) Upon termination of employment with an agency, or agencies in a joint employment situation, unused compensatory time credits must be liquidated. The lump sum payment is calculated by multiplying the total unused compensatory time credits by the higher of the following rates:
  - a) Final regular rate received by such employee prior to termination with the agency, or
  - b) Average regular rate received by the employee during the last three years of continuous employment with the agency. (This alternative would typically apply to employees whose average hourly wages have been decreasing rather than increasing.)

**Sec. 520.080 Hours Worked by Nonexempt Employees** [Reference 29 C.F.R. Part 785 and Ch. DWD 272, Wis. Adm. Code]

The Guide to Determining Hours Worked, Attachment #3, contains examples of time normally considered work time and non-work time under the FLSA.

All of the following general principles must be met for an activity not to be counted as working time:

- attendance must occur outside the employee's regular working hours; and
- attendance must be voluntary; and
- the employee must do no productive work while attending; and
- the program, lecture or meeting is not directly related to the employee's job.

Specific situations must be evaluated on a case-by-case basis to determine whether the activities performed are considered hours worked and whether or not the hours worked may be exempted from the overtime provisions. Employer-directed training is always considered hours worked.

Additional detail is provided below in order to provide additional guidance to agencies in determining actual hours worked under federal and state law.

**1. Training Time Directly Related to an Employee's Job**

Training is directly related to an employee's job if it is designed to make the employee perform his or her present job more effectively as distinguished from training for another job or new or additional skills. Training directly related to an employee's job is considered hours worked. Lectures, meetings, training programs and similar activities are considered training.

**2. Training Excluded From Hours Worked**

Attendance at training is not counted as hours worked in any of the following situations:

- a. The employee on his or her own initiative attends an independent school, college, or independent trade school after hours even if the courses are related to the employee's job.
- b. Attendance is voluntary, outside of working hours, in a program of instruction established by the employer that corresponds to courses offered by independent bona fide institutions of learning even if the courses are directly related to the employee's job, or paid for by the employer.
- c. The employee is employed under a written apprenticeship agreement or program that meets the standards of the USDOL and attends related supplemental instruction that does not involve productive work or performance of the apprentice's regular duties unless a written agreement specifically provides that attendance is hours worked.
- d. Attendance, outside of regular working hours, is specialized or follow-up training required by law for certification of public and private sector employees within the particular governmental jurisdiction.
- e. Public safety employees attending a police or fire academy or other training facility, are not considered to be on duty during those times when they are not in class or at a training session, if they are free to use such time for personal pursuits.

3. **Travel Time** [Reference 29 C.F.R. Part 785, Ch. DWD 272, Wis. Adm. Code]

Determining whether or not time spent in travel counts as hours worked depends upon the kind of travel involved. The federal and state laws differ somewhat with regard to travel away from the home community and should be carefully considered when determining hours worked with regard to travel time.

Chapter DWD 272.12 (2)(g) 6 defines travel time as hours worked “that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus or automobile” providing a greater benefit to the employee than required by the federal regulations.

Any work that an employee is required to perform while traveling must be counted as hours worked even though it may not be during normally scheduled work hours.

An employee who drives a car, bus, boat, or plane, or an employee who is required to ride therein as a helper, is working while riding, except during bona fide meal periods or sleep time, and the time must be counted as hours worked.

4. **Special Detail Work for Fire Protection and Law Enforcement Employees**

The hours worked by a fire protection or a law enforcement employee on a special detail for a separate and independent employer are not required to be counted as hours worked even if:

- a. The employee chooses to be employed on the special detail.
- b. The special detail work is in fire protection, law enforcement or related activity.
- c. The employee’s regular employer:
  - 1) Requires the employee to be hired by the separate and independent employer to perform the special detail;
  - 2) Facilitates the employment of the employee by the separate and independent employer; or,
  - 3) Otherwise affects the condition of employment of such employee by the separate and independent employer.

5. **Occasional or Sporadic Employment**

Occasional or sporadic work performed by an employee for his/her regular employer need not be counted as hours worked for overtime purposes if the following conditions are met.

- a. The work is undertaken solely at the employee’s option (i.e., not required by the employer).
- b. The work meets the definition of occasional or sporadic.
- c. The work is in a different occupational category from any capacity in which the employee is regularly employed.

Occupational categories will normally be considered “different” if the first three digits of the occupational codes used within the Dictionary of Occupational Titles are different. For example:

- a. Typists (code 203) are considered to be performing work in a “different general occupational category” from file clerks (code 206).

- b. Terminal system operators, typographic composing machine operators, and clerk typists are considered to be performing work in the same general occupational category, i.e. they are all typewriting machine operators (code 203).
- c. If an employee performs a combination of duties that cross into different general occupational categories. For example, if an employee's regular job consists of a combination of typist (code 203) and file clerk (code 206) duties, then occasional or sporadic employment as a file clerk would be in the same general occupational category as the regular job. In this case, the occasional and sporadic work hours must be added to the hours worked on the regular job to determine FLSA overtime liability.

**Note:** Public safety employees taking on any kind of security or safety functions are never considered employed in a different capacity. This conclusion is based on legislative history and not on the definition of "different capacity" provided above.

#### 6. **Shift Substitutions**

The hours worked by employees who, with approval of the agency, freely trade shifts for one another during scheduled work hours in the same capacity, may be exempt from the overtime requirements. The traded hours are excluded from the calculation of the hours for which the substituting employee would otherwise be entitled to overtime compensation. Where one employee trades with another, each employee will be credited as if he or she had worked his or her normal work schedule for that shift. This applies only if the decision to trade shifts is made freely by the employee and approved by the agency. If the employer requires the employees to trade shifts, overtime may be incurred.

#### 7. **Unauthorized Work**

The employer may not unjustly benefit from work performed without the employer's knowledge. Hours worked by an employee without the employer's permission or contrary to the employer's instructions may be considered hours worked, depending on the specific situation. Once an employer allows the employee to work, or knows that the employee is working, then the employee must be compensated, even if the work was performed at home. If the employer has reason to believe that an employee is submitting inaccurate time reports, the employer may be liable to pay for additional overtime hours. Agencies must make certain that regular time and overtime work it does not want performed is not performed.

#### 8. **Work Performed as a Volunteer**

A person is a volunteer only if the following criteria are met:

- a. The person receives no compensation; or the person is paid expenses, reasonable benefits, or a nominal fee, in any combination, to perform the services.
  - 1) Payment of expenses includes reimbursement for out-of-pocket expenses incidental to providing volunteer services; e.g., payment for the cost of meals and transportation.
  - 2) Benefits would be considered reasonable, for example, when they involve inclusion of individual volunteers in group insurance or retirement funds commonly or traditionally provided to volunteers of the agency.
  - 3) The total amount of payments made (expenses, benefits, fees) must be examined in the context of the economic realities of the particular situation in order to determine the person's status as a volunteer.
- b. If an employee is performing volunteer work for his or her agency, both of the following conditions must be met.

- 1) The services are in a different general occupational category than that of the employee's regular employment.
- 2) The services are not closely related to the actual duties performed by or responsibilities assigned to the employee.

9. **Residing on Employer's Premises**

The fact that employees live on the employer's premises and are on call for 24 hours a day does not mean that the employees are entitled to pay for all those hours. Such employees have regular duties to perform and are subject to work at any time in the event of an emergency. Ordinarily, such employees have a normal night's sleep, ample eating time and may, during certain periods, come and go as they please. A reasonable agreement should be reached with employees (or for represented employees, the employees' representative) to make clear the time that should not be considered hours worked.

10. **Daylight Savings Time Effect on Hours**

Nonexempt employees are paid for hours actually worked. When daylight savings time goes into effect, third shift employees work one hour less than normal. Such employees do not get paid for the hour not worked.

When daylight savings time ends, third shift employees work one hour more than normal. This additional hour must be counted in determining the total hours worked in that workweek for overtime purposes.

Exempt employees are paid on a salary basis and the additional hour worked should not increase the salary when daylight savings time ends. Exempt employees should also receive their regular salary during the workweek when daylight savings time goes into effect.

11. **Employment of Minors (i.e., Child Labor)** [Reference 29 C.F.R. Part 570; Ch. DWD 270, Wis. Adm. Code]

Numerous restrictions apply to the employment of individuals under the age of 18 (i.e., minors). Restrictions include the type of work a minor may perform as well as the hours the minors may work. The chart in Attachment #6 of this Chapter summarizes the hours and time of day minors may work under state and federal law. Federal and state restrictions must be considered when employing minors. In instances where state and federal law differ, the more restrictive requirement must be applied.

**Note:** Wisconsin regulates wage and hour matters relating to child labor through a child labor permit system, minimum ages for specific types of work, limited hours of employment and notice posting requirements. Agencies employing minors must ensure compliance with the requirements of the Ch. DWD 270, Wis. Adm. Code.

**Sec. 520.090 Establishing and Changing Workweeks and Work Periods for Nonexempt Employees** [Reference C.F.R. Part 778]

1. **Approval Process**

The appointing authority must approve beginning and ending times for workweeks and work periods for all nonexempt employees.

2. **Limitations**

- a. Workweeks or work periods must be established for all nonexempt employees.
- b. All workweeks and work periods must meet the definitions provided in Attachment #1.
- c. When a workweek or work period is established for an employee or group of employees it remains fixed regardless of hours worked by the employee or employees.
- d. The workweek or work period may be changed, but only if the change is intended to be permanent and is not made to evade the intent of the FLSA.
- e. Agencies are encouraged to establish workweeks and work periods that coincide with the calendar week. If workweeks and work periods do not coincide with the calendar week, necessary calculations and record keeping at the agency level will be significantly greater. Uniformity should be established and maintained whenever practical. Examples of situations where uniformity may not be practical are provided below:
  - 1) Nonexempt employees assigned non-standard workweeks or work periods. It may be possible to permit certain employees to work non-standard work weeks or work periods of greater than 40 hours one calendar week and less than 40 the next calendar week without incurring overtime liability. Whether or not this is possible depends on the specific work hours of the affected employees, the job-related requirements of the nonstandard schedule and the beginning and ending times for the workweek. In order to preserve this option for employees, it may be necessary to carefully establish beginning and ending times for workweeks. As noted above, such a workweek may not be established if the intent is to evade the overtime requirements of the FLSA. Agencies must be prepared to demonstrate bona-fide job requirements that lead to establishment of the non-standard workweek or work period.
  - 2) Fire protection and law enforcement employees. Management and employees will have greater flexibility to use compensatory time off if a work period of greater than 7 days is established.

**Note:** Beginning and ending times of workweeks and work periods will not affect payroll periods. Changing the beginning and ending times of workweeks and work periods may result in overtime during the week in which the change is made, and will require additional tracking of hours worked to coincide with the newly established workweek or work period.

**Sec. 520.100 Employees Occupying Multiple Positions** [Reference C.F.R. Part 791]

1. **Categorizing Employees as Exempt or Nonexempt**

- a. Employee categorization must be based on the total employment situation with a single agency unless a joint employment situation exists. In a joint employment situation, employee categorization must be based on the total employment situation with the jointly employing agencies.
- b. Appointing authorities should evaluate all work performed by an employee (for the agency or in a joint employment situation) during the workweek or work period. The position occupied at the time each duty was performed is not relevant.

An employee may be exempt even if one job is as an LTE if the employee's salary from the permanent job meets both the minimum salary and the salary basis tests. Exempt status may be appropriate if the percentage of exempt work performed by the employee in both jobs meets the duty and discretion test.

2. **Determining Overtime Compensation for Nonexempt Employees**

- a. All hours worked for a single agency or in a joint employment situation must be totaled in each workweek or work period to determine if any overtime is worked. Hours worked in each agency are totaled separately for employees who occupy positions in more than one agency, unless a joint employment situation exists.
- b. The employee and the agency (or agencies in a joint employment situation) may agree prior to performance of the work that he or she will be paid during overtime hours at the premium rate for the position in which the overtime hours are worked. Unless such an agreement is reached premium pay must be calculated based on the total employment situation with an agency (or agencies in a joint employment situation.)

3. **Joint Employment and Responsibility for Premium Pay**

A determination of whether the employment situation is considered joint employment or separate and distinct employment depends upon all facts in the particular case. Agencies should answer the following questions to determine if a joint employment relationship exists:

- a. When employed by one state agency, is the employment by another state agency completely voluntary on the part of the employee, or is the employee led to believe in any way that he or she should accept additional work from another state agency?
- b. When employed by one state agency, is the employee assured, promised or led to believe that he or she will receive additional work from another state agency?
- c. Are employees of one state agency given a special preference for additional work at another state agency?
- d. What are the percentages of time in all workweeks in which the employee works for one state agency as compared to the employee's work for another state agency or agencies?
- e. Does the work for one state agency represent only part-time or irregular work?
- f. What effect does the employee's work in one job have on his or her other job or jobs?

When an employee works for two or more agencies in a joint employment situation, the hiring agencies must coordinate with each other regarding the total number of hours worked by the employee in any workweek. If any premium pay is required, all jointly employing agencies are responsible under the FLSA, both individually and jointly, for the additional pay required which exceeds the regular rate for the overtime hours. The costs of such additional pay is prorated on the basis of extra hours worked for each agency or on some other basis agreeable to the agencies involved.

**Sec. 520.110 Record Keeping for Employees Covered by the FLSA** [Reference 29 C.F.R. Part 516]

1. **General**

- a. Accurate record keeping is vital as it forms the basis of the employer's ability to comply, and to prove compliance, with the FLSA. When the USDOL conducts an investigation, it examines the employer's records and interviews employees to gather information. If the employer's records are incomplete because the employer has not kept separate records of the amounts paid employees at the straight rate and at the premium rate, the USDOL could require the employer to generate records of the different amounts paid each week in order to complete their investigation. This has proven to be a costly experience for some employers.

If the employer does not have the records, the employee's personal records and testimony will be accepted as evidence to prove the claims of hours worked by the employee. The employer must then disprove the employee's testimony and that would be extremely difficult without records. Agencies may, therefore, want to consider instituting a positive time reporting system for all nonexempt employees.

- b. Records may be maintained in a centralized location or at the place or places of employment and must be available for review by the OSER and the USDOL.
- c. Records that are retained by DOA Central Payroll are accurate only if agencies submit the information to DOA necessary to create the records. For example, while DOA calculates the regular rate, it may be inaccurate if the agency does not submit information regarding how many hours in a week were worked and how many were charged to paid leave or compensatory time off status. DOA needs timely reporting of the total amount of supplemental pay owed an employee for a week so the amount can be included in the pay calculations for the week in which it is earned.
- d. There are fewer record keeping requirements for exempt executive, administrative and professional employees than for nonexempt employees. For example, a daily record of hours worked is not required to be kept for exempt employees as it is for nonexempt employees.

If an employee who is categorized as exempt is later found to have been a nonexempt employee the agency must attempt to reconstruct the hours worked by that employee for a two year or possibly a three year period. If the employee maintained a record of what hours he or she worked, those can be accepted as proof of any overtime pay that may be required. Agencies may want to consider instituting a positive time reporting system for all employees.

## 2. **Records for Nonexempt Employees and Agricultural Employees**

According to the USDOL, the records listed in this section and in the Record Keeping Requirements, Attachment #4, must be kept for each nonexempt or agricultural employee for a minimum of three years from the last date of entry. Records retained by the DOA for employees of agencies on Central Payroll are reflected on Attachment #4. Each agency head or supervisor is responsible for keeping the required records noted in this section for each employee.

- a. Day and time of day the workweek or work period begins.
- b. Regular rate of pay for any workweek or work period in which either or both of the following appears:
  - 1) Overtime is worked and cash overtime compensation is received, or
  - 2) Compensatory time is taken off.

**Note:** For employees who occupy multiple positions on Central Payroll, the regular rate will be computed for each position separately based on the assumption that the employee has agreed in advance of this computation method. The regular rate must be computed and recorded manually if such agreement is not reached.

- c. Amount, nature and date of each payment made by the employer that is excluded from the regular rate such as:
  - 1) Lump sum discretionary compensation payments.
  - 2) Purchasing or laundering of uniforms.

- d. Hours worked on each workday and total hours actually worked each workweek or work period. For employees who work a fixed schedule, the employer may maintain records showing a schedule of daily and weekly hours the employee normally works and indicate in some manner whether the employee actually worked the hours indicated on the schedule. In weeks where the employee does not strictly adhere to the schedule the employer must record the exact number of hours worked each day and each week.
- e. Number of hours of compensatory time off credits which are liquidated in cash, the total amount paid, and the date of such payment.
- f. Total additions to or deductions from wages paid each pay period, plus the dates, amount and nature of the items that make up the total additions and deductions such as adjustments to wages.

**3. Records for Nonexempt Employees Who Occupy More Than One Position**

The USDOL also requires that the following items be kept for three years from the last date of entry for these employees who are paid for overtime hours worked at the premium rate for the position in which the overtime is worked.

- a. The information required under sections 2.b. and 2.c. above and items # 7, 8 and 13 on Attachment #3, for each position occupied by the employee.
- b. The number of overtime hours worked in each position occupied by the employee in the workweek or work period.
- c. The date of the agreement or understanding to use a specific method of compensation and the period covered thereby.

**4. Records for Nonexempt Employees of a Hospital Who Have Agreed to be Paid for Overtime Work on the Basis of a 14-day Work Period.**

The USDOL requires employers to maintain all records required in section 2. above, and Attachment #4, for three years from the last date of entry. Employers must also keep a copy of the agreement or understanding with respect to using the 14-day period for overtime pay computations showing its terms and the date it was entered into and how long it remains in effect.

**5. Records for Exempt Executive, Administrative and Professional Employees.**

According to the USDOL records listed in Attachment #4, Items #1 through 6, 15 and 16 and under section 2.a. above, must be maintained for 3 years from the last date of entry. Employers must also maintain the basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment including fringe benefits and any lump sum payments.

**6. Records for Exempt Employees of an Amusement or Recreational Establishment and Exempt Employees Employed in the Catching, Taking, Propagating, Cultivating, or Farming of Fish.**

Maintain the records listed in Attachment #4, Items # 1-6 for three years from the last date of entry, including information indicating the place or places of employment.

**7. Records for All Employees.**

The USDOL requires employers who have the following records to maintain the records for at least two years from the last date of entry.

- a. All time cards or sheets reflecting the daily starting and stopping time of individual employees, or the individual employee's daily, weekly, or pay period amounts of work accomplished, when those amounts determine in whole or in part the pay period earnings or wages of those employees.
- b. All schedules or tables which establish the hours and days of employment of individual employees or of separate work forces.
- c. Statements furnished employees, purchase orders and other records involved in the additions to or deductions from wages paid.

## **Sec. 520.120 Internal Complaint Resolution Procedure**

### **1. Guidelines**

- a. Complaints alleging violation of this chapter may be filed by any current employee of any state agency.
- b. This procedure is designed to encourage resolution of complaints internally, prior to an employee seeking alternative avenues of relief. If an employee decides to use one of the formal complaint routes available, then the internal complaint resolution process ceases.
- c. All actions taken both at the agency level and by OSER on a complaint filed under this internal procedure shall be completed in 60 calendar days, whenever possible.

### **2. Agency Procedure**

- a. An employee may raise a concern or file a complaint about the application of this chapter by contacting the appointing authority in writing.
- b. Upon receipt of a complaint from an employee, the appointing authority or designee shall review the complaint and attempt to resolve the complaint at the agency level, if possible, within 30 calendar days.

### **3. Review of Unresolved Complaints by OSER**

- a. If no resolution can be achieved at the agency level, an employee may then file a written complaint with the DMRS Administrator within seven calendar days from the date the employee received the decision of the appointing authority.
- b. Upon receipt of a written complaint from an employee, the DMRS Administrator or designee will review the complaint and render a decision in the matter within 30 calendar days. The Bureau of Collective Bargaining Director may be consulted regarding complaints of represented employees depending on the issues involved.
- c. The DMRS Administrator may request a written opinion from the USDOL depending on the nature of the complaint. If the USDOL is consulted it may take longer than 30 calendar days for a decision to be rendered. In this case, the DMRS Administrator will render a decision as soon as it is feasible.
- d. The DMRS Administrator or designee will notify the employee and appointing authority of the decision and, if necessary, the Director of OSER will issue an enforceable order to implement the decision.

### Sec. 520.130 External Complaint Resolution Procedure

1. If the USDOL receives a complaint, the investigator will contact OSER to assist in coordinating the review of the issue in an effort to facilitate resolution. OSER will contact the affected agency or agencies to gather information regarding the complaint filed and will serve as the ongoing point of contact for the DOL investigator.

If the complaint alleges minor violations affecting a small number of employees, an investigator will usually be assigned to pursue the possibility of conciliation rather than conduct an investigation. Conciliation is a technique designed to facilitate a resolution by focusing on a single employee or minor violation and can often be handled over the telephone. Conciliation may be converted to full investigation when additional violations are discovered or where the facts of the case are unclear.

**Note:** If the USDOL makes initial contact with the employing agency rather than OSER, the employing agency should immediately notify OSER to facilitate the review. OSER will then notify the USDOL investigator that OSER will serve as the central point of contact, in an effort to ensure statewide consistency.

2. Complaints filed under state law are investigated by the DWD. Agencies should contact OSER immediately upon notification by DWD that such a complaint has been filed. OSER will assist agencies in facilitating the investigations conducted under state law, as the need arises.
3. Agencies are responsible for providing information requested, conducting a review of the issue(s) raised, coordinating the interview process and performing the calculations of any amounts that may be due to a complainant.

### Sec. 520.140 Posters [Reference 29 C.F.R. Part 516.4]

Every agency must display in each distinct physical place of business a poster that briefly outlines an employee's rights under the FLSA. The poster must be displayed in a place where employees will readily see it. The posters are printed by and may be obtained from the Wage and Hour Division of the USDOL.

### Sec. 520.150 Administrative Information

This chapter was originally published as Chapter 516—Administration of the FLSA Overtime Provisions for State Class Employees of the *Wisconsin Personnel Manual*. It was revised and renumbered to Chapter 520 of the *Wisconsin Human Resources Handbook* in April 2002.

In March 2003, changes were made to reflect current formatting and an administrative section was added.

In December 2004, Chapter 520 was revised to reflect the new United States Department of Labor FLSA regulations on the "white-collar" exemptions that became effective August 23, 2004.

In March 2005, Chapter 520, specifically Attachment #7, was revised to include the DOL's Overtime Security Advisor tool found at <http://www.dol.gov/elaws/esa/flsa/overtime/menu.htm>. The Advisor is an interactive tool to assist in the determination of an employee's FLSA status and provides additional guidance on the general application of the new regulations.

**Attachment #1**

**Comparison Chart of Federal and State Overtime Laws Developed by the State of Wisconsin Department of Workforce Development**

On August 23, 2004, the U. S. Department of Labor (USDOL) adopted changes to the FLSA that affect whether some employees are eligible to receive overtime premium pay for hours worked in excess of 40 hours per week and minimum wage under federal law. Wisconsin employers need to be aware that Wisconsin also has state minimum wage and overtime pay requirements affecting persons employed in Wisconsin. Wisconsin employers, with rare exceptions, are covered by both the federal FLSA and Wisconsin laws and must comply with both.

While the FLSA contains a minimum wage exemption for outside salespersons, certain computer employees and salaried administrative, executive and professional employees who meet certain criteria, Wisconsin's minimum wage law contains no similar exemption. A Wisconsin employer must pay all of its employees at least the state minimum wage for all hours worked.

The most significant change in the USDOL regulations concerns the overtime exemptions that apply to some salaried administrative, executive and professional employees. Wisconsin's overtime regulations also contain exemptions for these types of employees. Up until August 23, 2004, Wisconsin's salary overtime exemptions very closely paralleled the similar federal exemptions. With the adoption of the federal changes that is no longer the case. In order for a Wisconsin employer to comply with both federal and state overtime regulations on the salary overtime exemptions, it is necessary for the employer to ensure that they meet both sets of criteria for the exemption. Usually an employer may accomplish that by meeting the more stringent requirement of each law. The following chart outlines the criteria to qualify for the federal and state exemption in each category and points out the more stringent requirement.

**Executive Exemption**

<b>State Rule</b>	<b>Federal Rule</b>	<b>Most Stringent</b>
Monthly Salary of \$700	Weekly Salary of \$455	Federal rule
Primary duty of the management of the enterprise or a recognized department or subdivision.	Primary duty of the management of the enterprise or a recognized department or subdivision. In some instances the federal rule would allow someone whose principal duty was the management of the enterprise, even though the person might not be primarily engaged as a manager or supervisor.	State rule
Customarily and regularly directs the work of two or more other employees.	Customarily and regularly directs the work of two or more other employees.	Same.
Has authority to hire or fire other employees (or recommendations as to fire, hire, promotion or other change of status of other employees are given particular weight).	Customarily and regularly directs the work of two or more other employees.	Same
Customarily and regularly exercises discretionary powers.	Customarily and regularly exercises discretionary powers.	Same
Does not devote more than 20 percent (40 percent in retail or service establishments) of work time to activities that are not directly and closely related to exempt work.	Usually the position spends more than 50 percent of work time on exempt work but in some positions the exempt work may be their principal or most important duties but not account for 50 percent of their work time.	State

**Administrative Employees**

<b>State Rule</b>	<b>Federal Rule</b>	<b>Most Stringent</b>
Monthly Salary of \$700	Weekly Salary of \$455	Federal rule
Primary duty of performing office or non-manual work directly related to management policies or general business operations of the employer or of the employer's customers.	Primary duty of performing office or non-manual work directly related to management policies or general business operations of the employer or of the employer's customers.	Same
Customarily and regularly exercises discretion and independent judgment.	Customarily and regularly exercises discretion and independent judgment.	Same
Regularly and directly assists a proprietor, or exempt executive or exempt administrative employee  OR  Performs work along specialized or technical lines requiring special knowledge under only general supervision  OR  Executes special assignments under only general supervision		Same
Does not devote more than 20 percent (40 percent in retail or service establishments) of time to activities that are not directly and closely related exempt work.	With most positions will devote no more than 50 percent of time to activities not directly and closely related to the above duties. In some positions, however, the individual may spend more than 50 percent of their work time on other duties but their principal or most important duties will be those listed above.	State rule

**Learned Professional Employee**

<b>State Rule</b>	<b>Federal Rule</b>	<b>Most Stringent</b>
Monthly Salary of \$750	Weekly Salary of \$455	Federal rule
Primary duty of performing work 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.	Primary duty of performing work 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 but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience.	State rule
Consistently exercises discretion and judgment.	Includes work that requires the exercise of discretion and independent judgment.	State rule

Performs work that is predominantly intellectual and varied in character that the output produced or result accomplished cannot be standardized in relation to a given period of time.		State rule.
Does not devote more than 20 percent of time to activities that are not an essential part of and necessarily incident to exempt work.		State rule

**Creative Professional Employee**

State Rule	Federal Rule	Most Stringent
Monthly salary of \$750	Weekly salary of \$455	Federal rule
Primary duty of performing work that is original and creative in character in a recognized field of artistic endeavor, and the result of which depends primarily on the invention, imagination, or talent of the employee.	Primary duty of performing work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.	Same
Consistently exercises discretion and judgment.		State rule
Performs work that is predominantly intellectual and varied in character and is of such character that the output produced or result accomplished cannot be standardized in relation to a given period of time.		State rule
Does not devote more than 20 percent of time to activities that are not directly and closely related to exempt work.		State rule

**Computer Employees**

State Rule	Federal Rule	Most Stringent
Monthly salary of \$750 or hourly rate of \$27.63 or higher	Weekly salary of \$455 or paid \$27.63 or higher per hour	Federal rule
Primary duty of performing work requiring theoretical and practical application of highly specialized knowledge in computer systems analysis, programming, and software engineering.	Primary duty of <ul style="list-style-type: none"> <li>A. application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional applications; or</li> <li>B. design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or</li> </ul>	Federal rule

	<p>system design specifications; or</p> <p>C. design, documentation, testing, creation or modification of computer programs related to machine operating systems; or</p> <p>D. a combination of the duties described in (A), (B) and (C), the performance of which requires the same level of skills.</p>	
Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field.	Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.	Same
Consistently exercises discretion and judgment		State rule
Performs work that is predominantly intellectual and varied in character and is of such character that the output produced or result accomplished cannot be standardized in relation to a given period of time.		State rule
Does not devote more than 20 percent of time to activities that are not directly and closely related to exempt work.		State rule

**Outside Salesperson**

State Rule	Federal Rule	Most Stringent
<p>Employed for the purpose of and customarily and regularly engaged away from the employer's place of business.</p> <p>In making sales; or</p> <p>In obtaining orders or contracts for services for the use of facilities for which a consideration will be paid by the client or customer.</p>	<p>Primary duty of making sales; or of obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer.</p>	State rule
Spends at least 80 percent of time away from the employer's place of business.	Customarily and regularly engaged away from the employer's place or places of business.	State rule

**For specific questions about the application of state overtime pay exemptions, contact the DWD Labor Standards Bureau Madison office at (608) 266-6861.**

**Attachment #2**

**Glossary of Terms Related to Administration of the Fair Labor Standards Act**

**Administrative Employee:** An employee who meets the requirements of the administrative exemption.

**Agency:** Any state board, commission, committee, council, department or unit thereof created by the constitution or statutes if such board, commission, committee, council, department, unit or the head thereof, is authorized by constitution or statute to hire and fire subordinate staff, fix their compensation, assign their duties, and oversee and control their work schedules or conditions of employment (all subject to pertinent rules, regulations, labor agreements and laws). See ss. 20.922(1) and 230.06, Wis. Stats.

**Agriculture:** Includes the cultivation and tillage of soil; dairying; production, cultivation, growing and harvesting of agricultural or horticultural commodities; raising livestock, bees, fur-bearing animals, or poultry, and any practices (including forestry or lumbering operations) performed by a farmer or on a farm in conjunction with the farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. Employees not employed in farming, such as a bookkeeper, or by a farmer or on a farm are not employed in agriculture.

**Appointing Authority:** The chief administrative officer of an agency unless another person is authorized to appoint subordinate staff in the agency by the constitution or statutes.

**Base Pay Rate:** The official hourly rate excluding any supplemental pay, as prescribed in the Compensation Plan or relevant labor agreement, and excluding overtime or holiday premium pay.

**C.F.R.:** Code of Federal Regulations

**Compensatory Time Credits:** Paid time off the job which is earned and accrued by an employee in lieu of immediate cash payment for employment in excess of the statutory hours for which overtime compensation is required by Section 7 of the FLSA.

**Dictionary of Occupational Titles:** A comprehensive body of standardized occupational information that groups jobs into “occupations” based on their similarities. The DOT defines the structure and content of all listed occupations utilizing uniform occupational language to compare and match the specifications of employer job openings and the qualifications of applicants who are seeking jobs.

**Different Capacity:** A different general occupational category than the regular employment. The duties and other factors contained in the definitions of the 3-digit categories of occupations in the Dictionary of Occupational Titles are used as a guide in determining whether the occasional or sporadic employment is in a “different general occupational category” than the regular employment.

**Directly Related to Management Policies or General Business Operations:** Describes those administrative operations of significant importance to a business, as distinguished from production, including the work performed by employees engaged in, for example, advising the management, planning, negotiating, representing the organization, purchasing, promoting sales and business research and control.

**Discretion and Independent Judgment (i.e., Duty and Discretion Test):** Involves the comparison and evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance. This should not be confused with the use of skill in applying techniques, procedures, or specific standards and does not apply decisions relating to matters of little consequence.

**Dual Employment:** Employment by two or more agencies when the employment by one agency is completely disassociated from employment by the other agency or agencies and is not considered joint employment. (See also Joint Employment)

**Emergency Response Activity:** Rescue work and ambulance services, and the dispatching of emergency vehicles and personnel.

**Establishment:** A distinct physical place of business. Activities conducted at different and separate locations, even though similar or related, generally are not parts of a single establishment.

**Exempt:** Not subject to the overtime provisions of the state or federal wage laws.

**Executive Employee:** An employee who meets the requirements of the executive exemption.

**FLSA Overtime-Fire Protection:** All time worked in excess of 212 hours in a work period of 28 consecutive days for an agency, or agencies in a joint employment situation.

**FLSA Overtime-General:** All time that a nonexempt employee works in excess of 40 hours per workweek for an agency, or agencies in a joint employment situation. This excludes paid leave time and compensatory time off. (Note: Collective bargaining agreements may contain language that provides for premium pay [i.e., “overtime”] for all time in pay status, including vacation, sick leave, etc., and must be consulted when calculating the “overtime” that may be due to represented employees.)

**FLSA Overtime – Hospital & Residential Care Establishments:** Upon prior agreement of the employer and employee (or employer and the employee’s representative for represented employees), all hours worked in excess of 8 in a day or 80 in a 14 day work period whichever is the greater number of overtime hours. If no agreement has been reached, then “FLSA Overtime-General” applies.

**FLSA Overtime-Law Enforcement:** All time worked in excess of 171 hours in a work period of 28 consecutive days.

**Hours Worked:** All time during which an employee is required or permitted to work or to wait for work when the employee is unable to use the working or waiting time effectively for his or her own purpose.

**Joint Employment:** Employment by two or more agencies when the employment by one agency is not completely disassociated from employment by the other agency or agencies. A joint employment relationship will be considered to exist:

1. Where there is an arrangement between the agencies to share the employee’s services, as, for example, to interchange employees;
2. Where one agency is acting directly or indirectly in the interest of the other agency or agencies in relation to the employee; or
3. Where the agencies may be deemed to share control of the employee, either directly or indirectly.

**Minimum Salary Test:** Exempt Executive, Administrative and Professional employees must be paid a weekly salary at least equivalent to the federal minimum wage in effect regardless of the number of hours worked in the workweek.

**Mixed:** Subject to the overtime provisions of the law unless an exception has been granted.

**Nonexempt:** Subject to the overtime provisions of the state and federal laws.

**Occupational Category:** The first three digits of the occupational codes found in the Dictionary of Occupational Titles are used as a guide to determine the occupational category.

**Occasional or Sporadic:** Work that is infrequent, irregular, or occurring in scattered instances, even when it recurs seasonally. However, work that recurs every other week is not occasional or sporadic.

**One-Day Assignment:** Assignment and travel are completed within a 24 hour period, midnight to midnight.

**Premium Rate:** The straight rate plus .5 times the regular rate paid the employee.

**Primary Duty:** A duty that encompasses over 50% of the employee's time. The 50% standard is a guide and determination of whether a duty is primary is not based on the percent time performing a duty in any single workweek.

**Professional Employee:** An employee who meets the requirements of the professional exemption.

**Public Agency:** The government of the United States; the government of a State or political subdivision thereof; any agency of the United States, a State, or a political subdivision of a State, or any interstate governmental agency. The public agency definition does not extend to private companies that are engaged in work activities normally performed by public employees.

**Public Safety Employees:** Law enforcement or fire protection employees as defined in this chapter.

**Regular Rate:** The average hourly rate actually paid the employee as the straight time pay for all hours worked in the workweek, including all remuneration for employment paid to, or on behalf of, the employee except payments specifically excluded by the FLSA or federal regulations. The regular rate must be calculated on a week-by-week basis. Because the regular rate calculation includes differentials, stand-by pay, etc., it will often differ from the base hourly rate. It will also differ from the base rate during those weeks when an employee works fewer or more than 40 hours in the workweek.

**Repeated violation:** Where the employer has previously violated the minimum wage or overtime requirements of the FLSA, provided the employer has previously received authoritative notice that the employer allegedly was in violation of the provisions of the FLSA.

**Salary Basis Test:** An employee must regularly receive each pay period a predetermined amount constituting all or part of the employee's compensation. Such amount may not be subject to reduction due to variations in the quality or quantity of the work, or because of the actual number of days or hours worked, as long as the employee is ready, willing and able to perform work.

**Seasonal Activity:** Work during periods of significantly increased demand, which are of a regular and recurring nature. In order for the activity to be considered seasonal, the projected compensatory time due to overtime hours worked by the affected employee during the period of significantly increased demand must be likely to result in the accumulation of more than 240 hours of compensatory time off credits.

**Supervise:** To act as a supervisor as defined under s. 111.81 (19), Wis. Stats., supervision must be exercised over at least 2 full-time-equivalent (FTE) employees in order for the Executive exemption to apply.

**Supplemental Pay:** An hourly amount paid in addition to the base pay in recognition of factors or conditions not reflected in the basic pay range or pay rate of a position (e.g., add-on pay, differential pay, on call pay).

**Subdivision:** A recognized work unit that has a continuing function. A fixed location and continuity of personnel are both helpful but not absolutely essential in establishing the existence of a subdivision.

**Total Pay:** Base Pay plus any supplemental pay provided pursuant to the Compensation Plan or any labor agreement plus lump sum payments in a workweek or work period.

**Training Directly Related to the Employee's Job:** Training designed to make an employee perform the present job more effectively, as distinguished from training designed to prepare an employee for another job, or to acquire a new or additional skill.

**Unauthorized Work:** Hours worked by an employee without the employer's permission or contrary to the employer's instructions.

**Volunteer:** The person receives no compensation; or the person is paid expenses, reasonable benefits, a nominal fee, or any combination thereof to perform the services and such services are not the same type of services which the individual is employed to perform for the agency.

**Willful violation:** Where the employer knew that its conduct was prohibited by the FLSA or showed reckless disregard for the requirements of the FLSA.

**Work period:** Applies only to public safety employees and means any established and regularly recurring period of no less than 7 consecutive days and no more than 28 consecutive days. A work period of more than seven consecutive days may only be established for fire protection and law enforcement employees of hospitals and residential care establishments. The work period need not coincide with the pay period or with a particular day of the week or hour of the day and it need not coincide with the time periods established for the purpose of determining overtime pay requirements pursuant to negotiated agreements or the compensation plan.

**Workweek:** A fixed and regularly recurring period of 168 hours in the form of consecutive 24-hour periods. The workweek need not coincide with the calendar week (it may begin any day of the calendar week and any hour of the day) and it need not coincide with time periods established for the purpose of determining overtime pay requirements pursuant to negotiated agreement or the Compensation Plan.

Attachment #3

Guide to Determining Hours Worked

Activities that are always considered hours worked or non-work time under the FLSA are designated with an “X” in the following table. [Agencies are reminded that certain collective bargaining agreements may contain provisions that exceed the requirements of the FLSA and should be consulted when determining whether time spent in an activity may be required to be included in calculation of overtime under the collective bargaining agreement.]

<i>ACTIVITY</i>	<i>WORK TIME</i>	<i>NON-WORK TIME</i>
<b>Changing Clothes</b>	If required by nature of work.	If for the employee’s convenience.
<b>Charitable Work</b>	If requested or controlled by employer.	If done voluntarily outside working hours.
<b>Compensatory Time Credits Used</b>		X
<b>Holiday Time</b>		X
<b>Home Work</b>	That which is <u>permitted</u> , but not requested by the employer.	Of which employer has <u>no</u> knowledge or no viable means of knowing the work is being performed.
<b>Meal Periods &amp; Rest Breaks</b>	Where the employee is not completely relieved from active or inactive duties <u>or</u> where the meal period is less than 30 minutes.	Periods of 30 minutes or more when the employee is completely relieved from duty for the purposes of eating regular meals. The employer does not have to permit the employee to leave the premises if the employee is otherwise freed from duties during the meal period. (Note: This applies to one meal period per eight-hour shift.)
<b>Medical Attention</b>	During normal work hours for matters that <u>are</u> job-related <u>and</u> at the employer’s discretion.	Medical attention for matters that are <u>not</u> job-related.
<b>Residing on Premises</b>		When not on duty.
<b>Sick Leave</b>		X
<b>Sleep Time</b>	When the employee is required to be on duty for less than a straight 24-hour period.	Not to exceed eight hours, where an employee is required to be on duty 24 hours or more, is furnished adequate sleeping facilities and can usually enjoy at least five hours of uninterrupted sleep. (Note: It is necessary that employer and employee agree that this is not work time.)
<b>Tools</b>	Caring for tools and machinery if part of the principal duties.	Putting away tools if reasonable time is already allowed for during regular hours.

<i>ACTIVITY</i>	<i>WORK TIME</i>	<i>NON-WORK TIME</i>
<b>Training—General</b>	Attendance outside of the regular work hours if the employee understands or is led to believe that his/her present working conditions or continuance of employment would be adversely affected by nonattendance.	If <u>all</u> of the following criteria met: <ul style="list-style-type: none"> <li>• Attendance is voluntary;</li> <li>• Attendance is outside the employee's regular working hours;</li> <li>• The training is not directly related to the employee's job; <u>and</u></li> <li>• No productive work is performed during attendance.</li> </ul>
<b>Training—Job Related</b>	X	
<b>Training—Career Related</b>	Refer to Training-General	Refer to Training-General
<b>Travel—Home to Work</b>	If required to report to a meeting place to receive instructions, perform other work, or to pick up and carry tools, travel time from the designated meeting place to the actual work sites is part of the day's work and must be counted as hours worked.	Travel from home to a work site before the employee's regular work day and to the employee's home from a work site at the end of the work day, whether the employee works at a fixed work site or at different work sites.
<b>Travel—Home to Work</b>	When an employee has gone home after completing a day's work and is called out to travel a substantial distance to perform an emergency job for one of the employer's customers, all time spent on such travel.	If an employee is called to work after his/her regular work day to perform emergency work at a regular work site, travel time from home to work site is not considered work time.
<b>Travel—Home to Work</b>	When an employee who regularly works at a fixed location in one city is required to travel to another city to perform work on a special and unusual one-day assignment.	Regular meal time and time normally spent in transit to and from the regular work site and the employee's home.
<b>Travel—Overnight (When it Cuts Across the Employee's Work Day)</b>	Only the time spent in travel during the hours of the regular work day, excluding meal time.	Time spent in overnight travel away from home outside of regular working hours.
<b>Travel—Overnight (Not on a Regularly Scheduled Work Day)</b>	Travel time during what would normally be the work hours on a regular work day.	Time spent in overnight travel away from home outside of regular working hours.
<b>Travel—Overnight (Public Transportation Offered)</b>	If offered public transportation but the employee requests permission to drive his or her car, only actual time spent in travel during the regular work hours <u>or</u> time which would have been spent if public transportation had been used, whichever is less.	Time spent in overnight travel away from home outside of regular working hours.

<i>ACTIVITY</i>	<i>WORK TIME</i>	<i>NON-WORK TIME</i>
<b>Travel—Work Site to Work Site</b>	Time spent by an employee in travel, as part of his/her normal activities during the workday, from work site to work site.	
<b>Unauthorized Work</b>	Hours worked by an employee <u>without</u> the employer's permission or <u>contrary to</u> the employer's instructions <u>may</u> be considered hours worked, depending on the specific situation.	
<b>Vacation</b>		X
<b>Waiting Time</b>	Unpredictable short periods of inactivity when the employee is unable to use the time effectively for his/her own purposes even though the employee may be allowed to leave the work site. (Examples: Standby time during lunch periods and work shutdowns.)	Standby time when told in advance the employee may leave the job and will not have to commence work until a definitely specified hour or must only leave word where he or she may be reached.  When the period of time is long enough for the employee to use the time effectively for his or her own purposes (usually at least an hour).  Waiting in paycheck lines.  Waiting to check in or out.  Waiting to start work at a designated time.
<b>Washing-Up</b>	If required by nature of work.	If for the employee's convenience.

**Attachment #4**

**General FLSA Record Keeping Requirements**

These records are required for all nonexempt employees and agricultural employees. DOA Central Payroll retains the records listed below for employees of agencies on the DOA Central Payroll System.

Within the University of Wisconsin System, some records are maintained at the employing department level, some in accounting, and some at the UW Processing Center.

	<b>Record Type</b>
<b>1</b>	Name used for social security purposes
<b>2</b>	Identifying symbol or number if one is used in place of the name on any time, work, or payroll records
<b>3</b>	Home address including zip code
<b>4</b>	Date of Birth, if under 19
<b>5</b>	Sex of employee
<b>6</b>	Position classification of employee
<b>7</b>	Basis on which wages are paid (such as \$8.000 per hour)
<b>8</b>	Amount, nature and date of each payment made by the employer that is excluded from the regular rate, such as: <ul style="list-style-type: none"> <li>a. state retirement payments, each type of contribution</li> <li>b. state health insurance payments</li> <li>c. state life insurance payments</li> <li>d. state income continuation insurance payments</li> <li>e. holiday premium pay</li> <li>f. meal reimbursement</li> <li>g. lodging reimbursement</li> <li>h. transportation reimbursement</li> <li>i. mileage payments</li> <li>j. payments for time not worked (e.g., vacation, compensatory time off taken, personal holidays, sick leave, holidays not worked, failure of the employer to provide sufficient work after employees have been asked to report and absences due to jury duty)</li> <li>k. premium pay for hours in excess of a daily or a weekly standard (hours worked in excess of 8 per day or 40 per week)</li> <li>l. "Clock Pattern" premium pay (premium for hours worked outside of established working hours) if it is 1.5x regular rate and is paid pursuant to an applicable employment contract or collective bargaining agreement.</li> </ul>
<b>9</b>	Number of hours worked in the workweek or work period that will be paid by crediting the employee with compensatory time off and the number of hours of compensatory time off that are credited to the employee.
<b>10</b>	Number of hours used as compensatory time off in the workweek or work period.
<b>11</b>	Number of compensatory time off credits an employee has accrued.
<b>12</b>	Total regular pay for the workweek or work period including any earnings or wages due during any overtime worked, excluding the overtime premium paid. Weekend and night differentials, flight, standby and motorcycle pay and any other supplemental pay earned for hours worked in the workweek or work period should be included and specifically recorded.
<b>13</b>	Total overtime premium paid in the workweek or work period which is the amount paid over and above the straight time wage (including differentials and supplemental compensation paid for overtime worked).

<b>14</b>	Total additions to or deductions from wages paid each pay period, plus the dates, amount and nature of the items that makeup the total additions and deductions, such as: <ul style="list-style-type: none"> <li>a. health insurance</li> <li>b. life insurance</li> <li>c. income continuation insurance</li> <li>d. catastrophic insurance</li> <li>e. deferred compensation</li> <li>f. tax sheltered annuities</li> <li>g. employee retirement contributions (mandatory and additional)</li> <li>h. union dues</li> <li>i. State Employees Combined Campaign (SECC)</li> <li>j. credit union deductions</li> <li>k. savings bond deduction</li> <li>l. federal tax</li> <li>m. state tax</li> <li>n. social security</li> <li>o. maintenance (e.g., lodging, uniforms, safety shoes, meals, parking, other)</li> </ul>
<b>15</b>	Total wages paid each pay period
<b>16</b>	Date of payment and pay period covered

**Attachment #5**

**Frequently Asked Questions**

**1. Can a person who is doing professional work, but does not have a degree, be considered exempt under the professional category?**

It depends on what the “professional work” is. An advanced degree in a specific field is ordinarily required for one to qualify as a “professional.” A general degree may not be sufficient to support an exemption under the professional category.

**2. Does the FLSA require employers to provide meal periods and rest breaks?**

There is no requirement under the FLSA for employers to provide meal periods and/or rest breaks. However, it is recommended, in the interest of health and safety, that employees be provided with rest breaks. Meal periods must be at least 30 minutes in length and the employee must be completely relieved of duty for the entire meal period in order for the meal period to be unpaid time.

Chapter 103, Wis. Stats., requires that an employee under the age of 18 receive a meal break if the employee works for six or more consecutive hours. State law also provides that employees engaged in certain types of employment (generally at factories or mercantile establishments) may not work or be permitted to work for periods that are dangerous to their health.

**3. What can a first-line supervisor do to help avoid violations of the FLSA?**

Supervisors play an important role in complying with FLSA by maintaining accurate position descriptions and assuring that the work described is the work actually performed. Supervisors monitor work time of subordinates to avoid overtime hours whenever practical. Supervisors assure that complete and accurate records are maintained for subordinates. Supervisors who understand the concept of hours worked under FLSA are in the best position to control the amount of actual hours worked by an individual employee, thus avoiding unnecessary or unrecorded hours worked.

**4. Must FLSA overtime be paid in cash payments?**

No. Only public sector employers are allowed to compensate employees in the form of compensatory time if the employee agrees, prior to the performance of the work, that compensatory time is allowable. For represented state employees, this agreement may be reached through the provisions contained in a collective bargaining agreement.

**5. What constitutes the “exercise of discretion” in tests of whether an employee is exempt from coverage or not?**

An employee who exercises discretion or independent judgment is able to make decisions freely, without needing to consult a superior. The work requires the employee to compare and evaluate possible courses of conduct and act or make a decision after various possibilities have been considered. The decision-making power must be real and substantial, free from immediate supervision, and exercised with regard to matters of consequence.

**6. Can the workweek start/stop times be changed in order to allow nonexempt employees to work a nonstandard schedule without incurring overtime liability?**

The employer establishes the beginning and ending times of the workweek or work period for individual employees. The FLSA requires payment of premium pay (in the form of cash or compensatory time) when certain hours worked limitations are exceeded. In the event the employer wishes to design or an employee requests a work schedule that deviates from the standard workweek (or work period for public safety employees), the employer must be careful to have clearly identifiable work-related reasons for doing so. (For example, the reception desk needs to be covered on Saturday and Sunday because the office is open for business.) Workweek and work period changes may not be

made in order to avoid payment of overtime.

This should not be confused with an employee's work schedule (e.g., 7:45 a.m. – 4:30 p.m., Monday through Friday).

**7. Are exempt employees eligible for overtime under the FLSA?**

No. The FLSA does not require overtime compensation for exempt employees. Exempt employees are generally intended to have their salary compensate them for the total responsibilities of the position regardless of the number of hours worked. In fact, the FLSA requires that exempt employees be compensated on a "salary basis." For some exempt employees, overtime compensation may be possible under the provisions of the compensation plan. The FLSA does not prohibit payment for overtime hours for exempt employees. However, if the overtime payments occur on a regular and recurring or hour-for-hour basis, the exempt status of the employee could be called into question.

**8. What are the consequences if the employer is found to be in violation the FLSA?**

In most instances, the employee is eligible to claim back pay for a period of two full years. If the employer is found to "repeatedly" or "willfully" violate the FLSA, the period of liability may be increased to three full years. In addition, civil money penalties may be assessed by the USDOL and court costs may be incurred if the complaint is appealed to a court of law. In any case, the employer must provide the necessary records, or in absence of those records, must attempt to reconstruct the hours worked by the employee during the entire period of liability. If the employer has no record of the hours worked and the employee has maintained recorded information, the USDOL may accept the employee's records as proof of hours worked.

**9. Is it possible for a permanent state employee to volunteer his/her services to the State?**

Yes, however the volunteer time must be spent in activities unrelated to the permanent position's responsibilities and the person must have willingly volunteered to perform the duties, with no coercion on the part of the employer.

**10. Is it possible for a nonexempt permanent state employee to be hired to work as an LTE in the same state agency when that LTE employment results in the employee working more than 40 hours in a given workweek?**

Yes. The FLSA places no limit on the maximum number of hours an employee may work in a workweek. However, all hours worked over 40 in a workweek by a nonexempt employee must be compensated at the premium rate in cash, compensatory time, or a combination thereof.

**11. Is it possible for a nonexempt permanent state employee to be hired to work as an LTE in a different state agency than the agency in which the employee is permanently employed?**

Yes, however agencies should exercise extreme caution in doing so. If a complaint is filed by the employee and the USDOL determines that the separate agencies constitute a single employer or the situation is considered joint employment, the employing agencies may be liable for any overtime liability that occurs as a result of the employee working more than 40 hours in a workweek.

**12. Is it possible for a nonexempt permanent state employee to be hired to work in a second permanent position in the same state agency if the combined employment results in the employee working more than 40 hours in a given workweek?**

Yes. The FLSA places no limit on the maximum number of hours an employee may work in a workweek. However, all hours worked over 40 in a workweek (i.e., overtime) by a nonexempt employee must be compensated at the premium rate in cash, compensatory time, or a combination thereof. Agencies should explore all possible alternatives before a decision is made to require employees to work overtime.

**13. Is it possible for a nonexempt permanent state employee to be hired to work in a second permanent position in a different state agency than the agency in which the employee is permanently employed?**

Yes, however agencies should exercise extreme caution in doing so. If a complaint is filed by the employee and the USDOL determines that the separate agencies constitute a single employer, the employing agencies may be liable for any overtime liability that may occur as a result of working more than 40 hours in a workweek.

**14. What should I do if I am contacted by the USDOL regarding a formal complaint filed by an employee in my agency?**

Indicate to the USDOL investigator that your agency's policy is to have all such complaints coordinated through the central human resources office and inform the investigator that you will provide whatever information he/she can give you regarding the complaint to that office for further review. Contact your agency's human resources office immediately to inform them that the complaint has been filed and provide as much detail about the complaint as you are able to. Agency human resources offices are responsible for coordinating the investigation of the complaint through the OSER and should contact OSER immediately upon learning that a formal complaint has been filed.

**15. What is the maximum number of hours an employee may work in a day before the employer is required to provide a meal break or rest period?**

There is no maximum number of hours. As noted in #2 above, there is no requirement that the employer provide meal periods or rest breaks to employees. However, it is common practice that employers provide some form of rest break in the interest of health and safety.

Attachment #6

Child Labor Law Comparisons

<b>HOURS EMPLOYEES UNDER THE AGE OF 18 MAY WORK</b>			
	<b>Ages 14, 15 Federal</b>	<b>Ages 14, 15 State</b>	<b>Ages 16, 17 State</b>
<b>Maximum Hours of Work</b>			
<b>Daily:</b>			
School days, except last school day of the week	3	4	5
Last school day of the week	3	8	8
Non-school day	8	8	8
Day during non-school week	8	8	Unlimited
<b>Weekly:</b>			
School week	18	18	26
School week less than five days	18	24	32
Non-School week	40	40	50
<b>Permitted Time of Day:</b>			
School day	7 a.m. – 7 p.m.	7 a.m. – 8 p.m.	7 a.m. – 11 p.m.
Last school day of the school week	7 a.m. – 7 p.m.	7 a.m. – 11 p.m.	7 a.m. – 12:30 a.m.
Non-school day preceding school day	7 a.m. – 7 p.m.	7 a.m. – 8 p.m.	5 a.m. – 11 p.m.
Non-school day preceding non-school day	7 a.m. – 7 p.m.	7 a.m. – 11 p.m.	5 a.m. – 12:30 a.m.
Day during non-school week	7 a.m. – 9 p.m.	7 a.m. – 11 p.m.	Unlimited

**Note:**

Federal law does not cover hours of 16- and 17-year-olds.  
Federal law allows 14- and 15-year-olds to work until 9 p.m. from June 1 through Labor Day.

**Attachment #7**

**Additional Resources**

Dictionary of Occupational Titles, U.S. Department of Labor (Currently unavailable in electronic format)

FLSA Fact Sheets: <http://www.dol.gov/dol/esa/public/regs/compliance/whd/whdcomp.htm>

DOL's Overtime Security Advisor: <http://www.dol.gov/elaws/esa/flsa/overtime/menu.htm>

**State Statutes & Administrative Code**

Chapter 103, Wis. Stats. – Employment Regulations

Chapter 104, Wis. Stats. – Minimum Wage Law

Chapter 109, Wis. Stats. – Wage Payments, Claims & Collections

Chapter DWD 270, Wis. Adm. Code – Child Labor

Chapter DWD 272, Wis. Adm. Code – Minimum Wages

Chapter DWD 274, Wis. Adm. Code – Hours of Work and Overtime

**Federal Law & Regulations**

Fair Labor Standards Act of 1938, as amended:

<http://www.dol.gov/dol/esa/public/regs/statutes/whd/whdstat.htm>

U.S. Dept of Labor Regulations: <http://www.dol.gov/dol/esa/public/regs/cfr/whdcfr.htm>

(This link will take you to a list of the USDOL regulations listed below.)

Title 29, C.F.R., Part 516 – Records to be Kept by Employers Under the FLSA

Title 29, C.F.R., Part 541 – Defining the Terms Executive, Administrative, Professional and Outside Sales

Title 29, C.F.R., Part 553 – Application of the FLSA to Employees of State and Local Governments

Title 29, C.F.R., Part 778 – Interpretative Bulletin on Overtime Compensation

Title 29, C.F.R., Part 785 – Hours Worked Under the FLSA

Title 29, C.F.R., Part 790 – Child Labor

Title 29, C.F.R., Part 791 – Joint Employment Relationship Under FLSA

**OSER Policy Bulletins**

OS-66 CC/POL-18 CBB-7 – Policies on Disciplinary Suspensions for Employees who are Exempt from the Overtime Provisions of the FLSA

CC/POL-22 CBB-9 – Application of Policy Related to Compensatory Time Off as Payment for FLSA Overtime

CC/POL-27, CBB-15 – Fair Labor Standards Act Allowances for Partial Day Absences as Leave Without Pay