CHAPTER 46-02-07
NORTH DAKOTA MINIMUM WAGE AND WORK CONDITIONS ORDER

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46-02-07-01. Definitions.

As used in this title:

1. "Administrative" means an employee paid on a salary or fee basis and employed in a bona fide administrative capacity, but is not exclusive to any employee whose primary duty consists of:

   a. The performance of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customer; and

   b. Who customarily and regularly exercises discretion and independent judgment.

2. "Agricultural employment" means employment on a farm, for a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to carriers for transportation to market.

3. "Casual employment" means employment that is irregular or intermittent.

4. "Domestic service employment" means services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom the employee is employed.

5. "Engaged to wait" means when employees are required to remain on call on the employer's premises or so close thereto that they cannot use the time effectively for their own purposes and thus are considered to be working.

6. "Executive" means an employee paid on a salary or fee basis and employed in a bona fide executive capacity, but is not exclusive to any employee whose primary duty consists of:

   a. The management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

   b. Directing the work of two or more other employees therein; and

   c. The authority to hire or fire other employees or whose suggestions as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight.

7. "Highly compensated employee" means an employee who is paid total annualized compensation of one hundred thousand dollars or more, which includes at least four hundred fifty-five dollars per week paid on a salary or fee basis. The employee's primary duty includes performing office or nonmanual work.

8. "Nonprofit" means a nonprofit corporation organized under the laws of this or another state.

9. "Occasional and sporadic" means infrequent, irregular, or occurring in scattered instances.

10. "Professional" means an employee paid on a salary or fee basis and employed in a bona fide professional capacity, but is not exclusive to any employee whose primary duty consists of:

    a. 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 as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes.

    b. Work requiring the consistent exercise of discretion and judgment in its performance; and

    c. Work that is predominately intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

11. "Residential care establishment" means an institution primarily engaged in the care of the sick, the aged, or the mentally ill residing on the premises requiring general treatment or observation of a less critical nature than provided by a hospital. Such institutions may include nursing homes, rest homes, convalescent homes, homes for the elderly and infirm, and the like.

12. "Retail establishment" means an establishment in which seventy-five percent or more of the annual gross sales are sold to the final consumer and are not sold for resale, and is recognized as retail sales or services in the industry.

13. "Salary or fee basis" will be interpreted according to the Federal Fair Labor Standards Act.

14. "Service employee" means any employee who is providing direct service to the customer and to whom that customer shows appreciation for that service by tipping that employee for the direct service. The employee must regularly and customarily provide personal face-to-face service to individual customers, which the customer would recognize as being performed for his or her benefit. Services such as cooking and dishwashing are not included.

15. "Service industry" means an industry in which the principal activity is to provide goods and services directly to the consuming public.

16. "Taxicab driver" means an individual employed as a driver by a taxicab company; where the service is a computer or radio dispatched door-to-door service but not a motorcoach or a routed system.

17. "Tip credit" means the amount or percentage by which an employer is allowed to reduce the minimum wage for a tipped employee.

18. "Tip pooling" means when two or more tipped employees agree to pool their tips and split them as agreed upon.

19. "Tipped employee" means any service employee in an occupation in which the employee customarily and regularly receives more than thirty dollars a month in tips.

20. "Total annualized compensation" means commissions, nondiscretionary bonuses, and other nondiscretionary compensation earned on a basis of a fifty-two-week period, but does not include board, lodging, or other employer-provided facilities, payments for medical insurance or life insurance, or contributions to a retirement plan or other fringe benefits.

21. "Waiting to be engaged" means when employees are on call and not required to remain on the employer's premises, but are required to respond to a beeper or leave word at home or the

employer's business where they may be reached. Employees are not considered to be working while in this status.

22. "Week" means any consecutive seven-day period established by the employer.

History: Effective May 1, 1994; amended effective March 1, 1998; October 1, 2012.
General Authority: NDCC 28-32-02(1), 34-06-04
Law Implemented: NDCC 34-06-03, 34-06-09, 34-06-11, 34-06-12

46-02-07-02. Standards that apply.

1. The North Dakota minimum wage is set forth in North Dakota Century Code section 34-06-22.

   The following are exempt from minimum wage and working conditions provided in this chapter:

   a. Employees of nonprofit camps that are directly youth-related and intended for educational purposes.

   b. A guide, cook, or camp-tender for a hunting or fishing guide service.

   c. Golf course caddies.

   d. Any person in a program for youthful or first-time offenders designed as an alternative to incarceration if the person:

      (1) Voluntarily enters into the program for personal benefit;

      (2) Does not displace regular employees or infringe on the employment opportunities of others;

      (3) Is under the supervision or control of a court; and

      (4) Performs the work without contemplation of pay.

   e. Prison or jail inmates who do work for the prison, jail, institution, or other areas directly associated with the incarceration program. The work must be performed for the prison, jail, institution, state, or a political subdivision.

   f. Actors or extras for a motion picture.

   g. Any person working on a casual basis for less than twenty hours per week for less than three consecutive weeks in domestic service employment providing babysitting services.

   h. Volunteers as described in this subdivision:

      (1) Individuals who donate their time and services, usually on a part-time basis, including public service, humanitarian objectives, religious, fraternal, nonprofit, and charitable organizations, not as employees and without contemplation of pay.

      (2) Individuals who provide services to hospitals or nursing homes to provide support and assistance to families and patients.

      (3) Regular employees of religious, nonprofit, or charitable organizations may volunteer their services for activities outside of their normal work duties.

      (4) Residents or patients of shelters, foster care, or other such related establishments may volunteer their services as long as regular employees are not displaced.

i. Student trainees meeting the following six criteria:

(1) The training is similar to that in a vocational school.

(2) The training is clearly for the benefit of the trainee.

(3) The trainee does not displace regular employees.

(4) The employer derives no immediate benefit.

(5) The trainee is not entitled to a job.

(6) The trainee is not entitled to wages.

2. The commissioner may issue subminimum wages for students enrolled in vocational education or related programs as long as the wage is not below eighty-five percent of the current state minimum wage.

   The process for granting subminimum wages for students includes:

   a. The student must complete the application for subminimum wage certificate for vocational education students (SFN 51370). The application (SFN 51370) includes: the employee's name, address, and signature; the employer's name, type of business, address, and signature; a description of the job; the pay rate; the vocational education instructor's signature.

   b. Upon receipt of the application the commissioner may issue a license to pay a subminimum wage to the employee for not more than one year.

3. The process for granting subminimum wages to individuals with disabilities in accordance with North Dakota Century Code section 34-06-15 includes:

   a. The disabled worker must complete the application for subminimum wage certificate for individuals with disabilities (SFN 51371). The application (SFN 51371) includes: the employee's name, address, and signature; the employer's name, type of business, address, and signature; a description of the job; the prevailing wage; the proposed pay rate; and an analysis of the employee's productive capacity. A physician's signed verification of the disability in relationship to the job duties or existing supporting evidence of the disability must be provided.

   b. In order to be paid less than the minimum wage, documentation of the employee's commensurate wage rate must be provided to the commissioner and maintained by the employer. Commensurate wages are determined by assessing nondisabled worker productivity, the prevailing wage rate for the same or similar work, and an evaluation of the worker's own efficiency.

   c. Upon receipt of the application and documentation the commissioner may issue a license to pay a subminimum wage to the employee for not more than one year.

   d. The worker's commensurate wage rate must be reevaluated by the employer every six months and adjusted accordingly; the employer must maintain all documentation.

   The commissioner may issue a special license to pay less than the minimum wage to nonprofit community rehabilitation programs for the handicapped under North Dakota Century Code section 34-06-15. Those programs must conduct a recognized program for rehabilitation for handicapped workers or provide paid employment for such workers or other occupational rehabilitative activity of an educational or learning nature. Special licenses to these programs

may be issued after the commissioner receives a copy of the application and license from the commensurate federal program for employment of disabled workers under special certificates.

4. Overtime pay must be paid at one and one-half times the regular rate of pay to any employee for hours worked in excess of forty hours in any one week. Paid holidays, paid time off, or sick leave are not counted in computing overtime hours. Overtime is computed on a weekly basis regardless of the length of the pay period. Hours worked may not be averaged over the pay period or used to offset shorter weeks. Employees working more than one job under the control of the same employer must have all hours worked counted toward overtime. Individuals employed as drivers by taxicab companies must be compensated at one and one-half times the regular rate of pay for all hours worked in excess of fifty hours in any one week. Hospitals and residential care establishments may adopt, by agreement with their employees, a fourteen-day overtime period in lieu of the usual seven-day workweek, if the employees are paid at least time and one-half their regular rate for hours worked over eight in a day or eighty in a fourteen-day work period. The following types of employment are exempt from the overtime provisions of this subsection:

   a. Any employee employed in a bona fide executive, administrative, or professional capacity.

   b. Any employee engaged in an agricultural occupation.

   c. Any employee spending at least fifty-one percent of the employee's work time providing direct care to clients of a shelter, foster care, or other such related establishment whose primary responsibilities are to provide temporary shelter, crisis intervention, prevention, education, and fellowship.

   d. Any employee employed in domestic service who resides in the household in which employed.

   e. A straight commission salesperson in retail automobile, trailer, boat, aircraft, truck, or farm implement dealerships unless that salesperson is required to be on the premises for more than forty hours per week.

   f. Computer professionals exercising discretion and independent judgment when designing, developing, creating, analyzing, testing, or modifying computer programs or who are paid hourly at a rate of at least twenty-seven dollars and sixty-three cents.

   g. Any employee who is customarily and regularly engaged away from the employer's premises for the purpose of making sales or taking orders. Work unrelated to outside sales may not exceed twenty percent of the hours worked in the week for the exemption to apply.

   h. Mechanics paid on a commission basis off a flat rate schedule.

   i. An employee of a retail establishment if the employee's regular rate of pay exceeds 1.5 times the minimum hourly rate applicable if more than half of the employee's compensation for a period of not less than one month is derived from commission on goods or services sold.

   j. Any employee employed as an announcer, news editor, or chief engineer by a radio or television station.

   k. Artistic professions which are original and creative in nature or where the work is dependent upon the invention, imagination, or talent of the employee, such as: editors, columnists, critics, publishers, cartoonists, graphic artists, musicians, composers, conductors, soloists, novelists, writers, and actors.

l. Motor carrier: Any employee exempted by section 13(b)(1), (2), and (3) of the Fair Labor Standards Act [29 U.S.C. 213(b)(1), (2), and (3)] from section 7 of the Fair Labor Standards Act [29 U.S.C. 207], as applied to covered employees of motor common, contract, and private carriers specified by the Motor Carriers Act [49 U.S.C. 3102].

m. Teachers, instructors, tutors, and lecturers engaged in teaching in a school or educational system.

n. A highly compensated employee.

5. A minimum thirty-minute meal period must be provided in each shift exceeding five hours when there are two or more employees on duty. Employees may waive their right to a meal period upon agreement with the employer. Employees do not have to be paid for meal periods if they are completely relieved of their duties and the meal period is ordinarily thirty minutes in length. The employee is not completely relieved if required to perform any duties during the meal period. Collectively bargained agreements will prevail over this provision.

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

   a. Attendance is outside of the employee's regular working hours.

   b. Attendance is in fact voluntary.

   c. The course, lecture, or meeting is not directly related to the employee's job.

   d. The employee does not perform any productive work during such attendance.

   Training or education mandated by the state, federal government, or any political subdivision for a specific occupation need not be counted as work time.

7. Ordinary travel from home to work need not be counted as work time. Special and unusual one-day assignments performed for the employer's benefit and at the employer's request is work time for the employee regardless of driver or passenger status. Travel away from home is work time when performed during the employee's regular working hours. Time spent traveling on nonworking days during regular working hours is work time. The time spent as a passenger on an airplane, train, bus, or automobile after normal working hours is not work time. The driver of a vehicle is working at anytime when required to travel by the employer. Travel time from jobsite to jobsite, or from office to jobsite, is work time to be compensated. Activities which are merely incidental use of an employer-provided vehicle for commuting home to work are not considered part of the employee's principal activity and therefore need not be counted as work time.

8. Standby time on the employer's premises, or "on call" as in an engaged to wait manner is work time to be compensated. Waiting to be engaged is not required to be compensated as work time.

9. If an employee is required to be on duty for twenty-four hours or more, the employer and the employee may agree to exclude bona fide meal periods and bona fide regularly scheduled sleeping periods of not more than eight hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted sleep. If the sleeping period is more than eight hours, only eight hours will be deducted from hours worked. If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted as work time.

10. Recordkeeping: Every employer must furnish to an employee each pay period a check stub or pay voucher that indicates hours worked, the rate of pay, required state and federal deductions, and authorized deductions.

    Time clocks: Time clocks are not required. If used, the employer may round the time to the nearest five minutes or quarter hour using the total minutes for the day as long as the employee over a period of time is paid for all the time the employee has actually worked.

    Employees who voluntarily clock in before their regular starting time or remain after closing time do not have to be compensated provided that no work is performed.

11. An employer may require an employee to purchase uniforms if the cost of such uniforms does not bring that employee's wage below the hourly minimum wage for all hours worked during that pay period.

12. Paid time off includes annual leave, earned time, personal days, or any other provisions of the employment relationship intended to provide compensation as vacation. Provisions where employees earn time off and the employees can use the days for any purpose, are paid time off unless separate arrangements are made for sick leave.

    Paid time off, once earned or awarded, is considered wages upon separation from employment. If the paid time off is available for use at the time of separation from employment, the employer must pay the employee for that time at the regular rate of pay earned by the employee prior to separation.

    No employment contract or policy may provide for forfeiture of earned paid time off upon separation. An employment contract or policy may require an employee to take vacation by a certain date or lose the vacation (use it or lose it), provided that the employee is given a reasonable opportunity to take the vacation. The employer must demonstrate that the employee had notice of such contract or policy provision.

13. The reasonable value not exceeding the employer's actual cost of board, lodging, and other facilities customarily furnished by the employer for the employee's benefit may be treated as part of the wages, up to a maximum of eighteen dollars per day, if agreed to by a written agreement and if the employee's acceptance of facilities is in fact voluntary.

14. The common law test provided in subdivisions a and b of subsection 5 of section 27-02-14-01 will be used to determine whether or not an individual may be considered an employee or an independent contractor.

15. Earned bonus: An earned bonus is an amount paid in addition to a salary, wage, or commission. An earned bonus is compensable when an employee performs the requirements set forth in a contract or an agreement between the parties.

    Earned commission: A commission is a fee or percentage given for compensation to an individual for completion of a sale, service, or transaction. Upon separation from employment, the past practices, policies, and entire employment relationship will be used to determine if the commission is earned and compensable.

16. The department will use the past practices, policies, and entire employment relationship in wage claim determinations.

History: Effective May 1, 1994; amended effective October 1, 1996; September 1, 1997; March 1, 1998; July 24, 2007; October 1, 2012.
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Law Implemented: NDCC 34-06-03, 34-06-09, 34-06-11, 34-06-12, 34-06-15

46-02-07-03. Additional standards that apply to service and nonprofit industries.

1. A tip credit of thirty-three percent of the minimum wage may be allowed for tipped employees. The employer may consider tips as part of wages, but such a tip credit must not exceed thirty-three percent of the minimum wage. The employer who elects to use the tip credit provision must inform the employee in advance and must maintain written records showing that the employee receives at least the minimum wage when direct wages and the tip credit allowance are combined.

2. Tip pooling is allowed only among the tipped employees. A vote of tipped employees to allow tip pooling must be taken, and fifty percent plus one of all tipped employees must approve it. The employer must maintain a written record of each vote on tip pooling, including names of employees voting and the vote totals. A vote on whether to pool tips is required if requested by fifty-one percent or more of the tipped employees. The tipped employees shall provide documentation verifying the request. Time spent in meetings called by the employees exclusively for tip issues is not work time.

3. Tipped employees employed in the nonprofit gaming industry means all employees who are employed as gaming attendants by a gaming organization licensed under North Dakota Century Code section 53-06.1-03.

    a. Gaming sites that regularly have four or fewer tipped employees on duty can require tip pooling among all tipped employees at the site.

    b. A gaming organization licensed under North Dakota Century Code section 53-06.1-03 may require tip pooling by blackjack (twenty-one) dealers at an authorized site as provided in North Dakota Century Code section 53-06.1-10. This tip pooling requirement only pertains to any employee, pit boss, or supervisor when actually dealing blackjack (twenty-one).

    c. Pit bosses or supervisors at gaming sites are not tipped employees and cannot be part of the tip pool when performing functions of those positions other than dealing blackjack (twenty-one).

History: Effective May 1, 1994; amended effective October 1, 1996; September 1, 1997; March 1, 1998.
General Authority: NDCC 28-32-02(1), 34-06-04
Law Implemented: NDCC 34-06-03, 34-06-09, 34-06-11, 34-06-12

46-02-07-04. Additional standards that apply to government entities.

1. Any two individuals employed by the state or any political subdivision in any occupation may agree to substitute for one another during scheduled work hours in performance of work in the same capacity. The hours worked shall be excluded by the employer in the calculation of the hours for which the substituting employee would otherwise be entitled to overtime. If one employee works for another, each employee will be credited as if that employee had worked that employee's normal schedule. In order to qualify an agreement between individuals employed by the agency the agreement must be approved by the agency. The agency approval must be prior to the work being done. Each employee must be free to refuse to participate. The employee's decision to participate is valid only if freely made without coercion from the employer. A public agency that employs individuals who substitute or "trade time" under this section is not required to keep a record of the hours of the substitute work. This subsection must be interpreted in accordance with 29 CFR 553.31, as amended.

2. A state or political subdivision employee, solely at the employee's own option, may work occasionally or sporadically on a part-time basis for the same agency in a different capacity

from the regular employment. The hours worked in the different jobs must not be combined for overtime purposes. This subsection must be interpreted in accordance with 29 CFR 553.30, as amended.

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