

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 and fifty five dollars per week paid on a salary or fee basis. The employee's primary duty includes performing office or nonmanual work.
- ~~7-8.~~ "Nonprofit" means a nonprofit corporation organized under the laws of this or another state.
- ~~8-9.~~ "Occasional and sporadic" means infrequent, irregular, or occurring in scattered instances.
- ~~9-10.~~ "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.

- ~~10.11.~~ "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.
- ~~11.12.~~ "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.
- ~~12.14.~~ "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.
- ~~13.15.~~ "Service industry" means an industry in which the principal activity is to provide goods and services directly to the consuming public.
- ~~14.16.~~ "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.
- ~~15.17.~~ "Tip credit" means the amount or percentage by which an employer is allowed to reduce the minimum wage for a tipped employee.
- ~~16.18.~~ "Tip pooling" means when two or more tipped employees agree to pool their tips and split them as agreed upon.
- ~~17.19.~~ "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, non discretionary bonuses and other non discretionary compensation earned on a basis of a fifty two-week period, but does not include board, lodging, or other employer provided facilities, payments for medial insurance or life insurance, or contributions to a retirement plan or other fringe benefits.
- ~~18.21.~~ "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.
- ~~19.22.~~ "Week" means any consecutive seven-day period established by the employer.

History: Effective May 1, 1994; amended effective March 1, 1998; _____, 2011

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.

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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.

Section

46-03-01-01

Formulas for Determining Regular Rate and Overtime

46-03-01-01. Formulas for determining regular rate and overtime.

1. Determining overtime from an hourly rate:

$$\begin{array}{l} \text{Hourly rate} \times 1.5 = \text{Overtime hourly rate of pay} \\ \text{Overtime hourly rate of pay} \times \text{Number of hours worked in excess of 40} = \text{Amount of overtime due} \end{array}$$

2. Determining hourly rate and overtime from monthly salary:

$$\frac{\text{Monthly salary} \times 12}{52} = \text{Weekly salary}$$

$$\frac{\text{Weekly salary}}{\text{Total hours worked during that week}} = \text{Rate per hour}$$

To calculate overtime from this:

$$\text{Rate per hour} \times \frac{1}{2} \times \text{Number of hours worked in excess of 40} = \text{Amount of overtime due}$$

3. Determining hourly rate and overtime for retail employees paid principally from commissions:

$$\frac{\text{Total compensation for one week}}{\text{Total hours worked for that same Week}} = \text{Regular rate of pay}$$

4. Weighted average method of overtime: When an employee performs two jobs for the same employer, with each job having a different rate of pay, the method of computing overtime is as follows:

$$\begin{array}{l} \text{Job 1: Rate of pay} \times \text{Number of hours} = \text{Compensation} \\ \text{Job 2: Rate of pay} \times \text{Number of hours} = \text{Compensation} \\ \hline \text{Total hours} \qquad \qquad \qquad \text{Total compensation} \end{array}$$

$$\frac{\text{Total compensation}}{\text{Total hours}} = \text{Average per hour}$$

$$\frac{\text{Average per hour}}{2} = \text{Rate of overtime}$$

The rate of overtime multiplied by the number of overtime hours (hours in excess of 40) is the total overtime due.

5. Determining overtime from regular rate and overtime from day rates and job rates:

If the employee is paid a flat sum for a day's work or for doing a particular job, without regard to the number of hours worked in the day or at the job, and if the employee receives no other form of compensation for services, the employee's regular rate is determined by totaling all the sums received at such day rates or job rates in the

workweek and dividing by the total hours actually worked. The employee is then entitled to extra half-time pay at this rate for all hours worked in excess of 40 in the workweek.

History: Effective December 1, 1992; amended effective March 1, 1998.

General Authority: NDCC 28-32-02(1), 34-06-04

Law Implemented: NDCC 34-06-11, 34-06-12