Bureau of Labor
and Industries

Employee Classification & Wage and Hour Exemptions

A Handbook for Oregon Employers

2012 Edition

Oregon Bureau of Labor and Industries
Technical Assistance for Employers Program

Technical Assistance for Employers Program

EMPLOYEE CLASSIFICATION & WAGE AND HOUR EXEMPTIONS

A Handbook for Oregon Employers

2013 Edition

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Oregon Bureau of Labor and Industries
Technical Assistance for Employers Program

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Bureau of Labor and Industries

Dear Friend of Technical Assistance (TA):

Welcome to the Bureau of Labor and Industries (BOLI)'s 2013 edition of *Employee Classification & Wage and Hour Exemptions*. Thank you for investing in this handy manual for human resources professionals, attorneys and managers and employers at all levels. This is an all-in-one-place, concise summary of laws that Oregon employers need to know and comply with.

BOLI is committed to helping Oregon's businesses and employers stay strong and successful. Our primary goal through TA is to help employers and businesses stay in compliance with the law and prevent costly litigation. When the law is known and followed in the first place, it's a win for all Oregonians.

Throughout the year, TA provides a variety of services to support Oregon employers. These services are funded almost entirely through the sales of publications like this one and attendance at public seminars on various employment law topics. Customized, on-site seminars for employers are also an important part of TA's work. Through your support, TA continues to answer 15,000 to 20,000 employer questions via phone and e-mail, conduct more than 130 public and private seminars, and produce a high-quality, two-day law conference each year.

I hope you find this book to be a helpful tool for understanding and complying with state and federal employment laws. Any feedback you may have should be directed to TA, and be sure to visit www.oregon.gov/boli/ta to learn more about the resources and services that TA has to offer.

Please do not hesitate to contact our offices if you have questions or thoughts to share.

Sincerely,

Brad Avakian, Commissioner
Oregon Bureau of Labor and Industries

A WORD FROM BOLI TECHNICAL ASSISTANCE …

Thank you for purchasing this book! Proceeds from the sale of this handbook support the Technical Assistance for Employers Program (TA), a self-supporting program that receives little taxpayer funding.

As an independent unit within BOLI, TA is dedicated to providing the resources, information and training employers need to comply with state and federal labor and employment laws.

TA offers a number of free and low-cost resources for Oregon employers, including fact sheets, employer advice columns, required workplace posters, and personal assistance by telephone and email. Our informative and practical handbook series is currently available for purchase and includes topics like:

- Civil Rights Laws;
- Family and Medical Leave Laws in Oregon;
- Wage and Hour Laws;
- Child Labor Laws;
- Legal Hiring Practices;
- Documentation Disciple and Discharge; and
- Policy Writing Guidelines.

You can also access seminar descriptions, schedules and registration information for all of our public training sessions online, as well as get information about arranging an on-site, customized seminar for your staff.

To contact us, feel free to visit our website at www.oregon.gov/boli/ta or call our Employer Assistance line at 971-673-0824.

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The mission of the Bureau of Labor and Industries is to protect employment rights, advance employment opportunities, and protect access to housing and public accommodations free from discrimination.

The four principal duties of the Bureau of Labor and Industries (BOLI) are to:

(1) Protect the rights of workers and citizens to equal, non-discriminatory treatment through the enforcement of anti-discrimination laws that apply to workplaces, housing and public accommodations;
(2) Encourage and enforce compliance with state laws relating to wages, hours, terms and conditions of employment;
(3) Educate and train employers to understand and comply with both wage and hour and civil rights law; and
(4) Promote the development of a highly skilled, competitive workforce in Oregon through the apprenticeship program and through partnerships with government, labor, business, and educational institutions.

If you have questions or concerns regarding any of these areas, please feel free to contact us!

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ABOUT THIS HANDBOOK

Misclassification of employees – both as “non-employees” and as “exempt” employees – has given rise to one of the most prolific bases for employment law disputes and litigation in recent years.

State and federal agencies have stepped up their enforcement activity around the issue of worker classification as well as concerted efforts at sharing tips, leads and audit results across agency lines.

With all of this in view, now more than ever employers need to have a firm grasp of (1) which workers are subject to the employment laws enforced by BOLI and (2) which employees qualify for exemption from the minimum wage and overtime requirements of wage and hour law.

This handbook has been produced by the Technical Assistance for Employers Program in order to help both employers and businesses to understand Oregon employment laws regarding the proper classification of workers and to stay in compliance with those laws.

The Employment Relationship

Both the wage and hour laws and the civil rights laws enforced by BOLI apply (almost) exclusively to employment relationships. Some workers, however, are not considered "employees" and as a result, the obligations and protections of these laws do not apply to a business' working relationship with these individuals.

There are three specific types of workers which are ***not considered employees***:

1. Independent contractors,
2. Volunteers, and
3. Student interns and trainees.

Independent Contractors

Employment taxes, fringe benefit contributions, recordkeeping requirements . . . couldn't I just hire a contractor instead?

Many of the legal obligations placed on employers do not apply to their business relationships with independent contractors. By the same token, independent contractors typically enjoy a level of autonomy that is simply unavailable to employees.

Unfortunately, businesses and workers alike too often fail to recognize that under Oregon law, specific legal criteria distinguish an "independent contractor" from an "employee." Confusing these two working relationships can result in the misclassification of workers – and some very expensive consequences:

Employees misclassified as independent contractors risk the loss of the legal benefits and protections of employee status under many laws (like unemployment insurance, minimum wage and overtime protections, workers' compensation insurance, and employer contributions to Social Security). Such individuals also risk the loss of benefits typically extended to regularly classified employees (like sick leave, vacation pay, group health insurance and retirement benefits).

Beyond claims for unpaid wages, overtime, penalties and interest, businesses that engage workers as independent contractors (who do not meet the specific requirements of the law) also risk liability for unpaid back taxes and unpaid insurance premiums. In addition, businesses may be responsible for workers' compensation claims and liability for employee benefits or negligent acts of the worker.

Employee or Independent Contractor?

A worker who provides services for remuneration is generally considered an employee by the courts and state regulatory agencies - unless that worker also meets the criteria required of an independent contractor.

In making classification determinations, both the courts and regulatory agencies (including BOLI) apply certain criteria to the facts of each case to determine:

1. Whether the worker in question is free from direction and control; and usually
2. Whether the worker is, as a matter of economic reality, independent of the business to which services are being provided, i.e., whether the worker is in business for himself or herself.

If these requirements are not met, the worker in question is generally classified as an employee, regardless of how the relationship is characterized on paper or by the parties involved.

In fact, there are a number of considerations which are **not** determinative in deciding whether a worker is an independent contractor:

- The creation or use of a business entity, such as a corporation or a limited liability company, by an individual for the purpose of providing services does not, by itself, establish that the individual provides services as an independent contractor.
- A contract in which the worker is assigned the label of “independent contractor.”
- Payment to the worker is reported by way of a Form 1099 rather than a Form W2.
- The worker submits an invoice to the business for payment.

What are the Criteria for an Independent Contractor?

To a certain extent that will depend on who you ask.

Although there are broad similarities, not all agencies use the same criteria to gauge a worker's degree of freedom from direction or control or economic independence. For example, Oregon Revised Statute ("ORS") 670.600 provides a legal definition for the term "independent contractor" that is used by several state agencies, including:

- Department of Revenue,
- Employment Department,
- Construction Contractors Board, and
- Landscape Contractors Board.

In determining whether the specific laws enforced by any one of these agencies apply, employers will need to ensure that he or she meets the criteria of ORS 670.600. Keep in mind that these agencies require that the worker meet ALL of the criteria of ORS 670.600 in order to be considered an independent contractor.

Both the Bureau of Labor and Industries (BOLI) and the Department of Consumer and Business Services Workers' Compensation Division are required by court decisions to use different criteria to determine independent contractor status. These criteria are described below under the respective headings for "Bureau of Labor and Industries" and "Workers' Compensation Division."

Keep in mind that a classification of independent contractor made under say Workers' Compensation Division criteria is not binding on other agencies like BOLI or the Oregon Department of Revenue. A summary of each agency's criteria has been included as an appendix entitled: "State Agency Criteria Table."

Independent Contractors under ORS 670.600

Under ORS 670.600, workers may be properly classified as independent contractors by the Department of Revenue, the Employment Department, the Construction Contractors Board, and the Landscape Contractors Board so long as such workers:

1. Are free from direction and control, beyond the right of the service recipient to specify the desired result, **AND**
2. Are licensed under ORS 671 or 701 (State Landscape Architect Board or Landscape Contractors Board and State Board of Architect Examiners or Construction Contractors Board) if licensure is required for the service, **AND**

3. Are responsible for other licenses or certificates necessary to provide the service **AND**
4. Are customarily engaged in an "independently established business."

To qualify under the law, an "independently established business" must meet three out of the following five criteria):

1. Maintain a business location that is:
    a. Separate from the business or work location of the service recipient; or
    b. that is in a portion of the business owner's residence that is used primarily for business.
2. Bear the risk of loss, shown by factors such as:
    a. Entering into fixed price contracts;
    b. Being required to correct defective work;
    c. Warranting the services provided; or
    d. Negotiating indemnification agreements or purchasing liability insurance, performance bonds, or errors and omissions insurance.
3. Provide contracted services for two or more different persons within a 12-month period, or routinely engage in business advertising, solicitation or other marketing efforts reasonably calculated to obtain new contracts to provide similar services.
4. Make a significant investment in the business through means such as:
    a. Purchasing tools or equipment necessary to provide the services;
    b. Paying for the premises or facilities where the services are provided; or
    c. Paying for licenses, certificates or specialized training required to provide the services.
5. Have the authority to hire and fire other persons to provide assistance in performing the services.

Additional provisions:

1. A person who files tax returns with a Schedule F and also performs agricultural services reportable on a Schedule C is not required to meet the independently established business requirements
2. Establishing a business entity such as a corporation or limited liability company, does not, by itself, establish that the individual providing services will be considered an independent contractor.

For the full text of ORS 670.600 and its implementing regulations, please refer to the appendices at the end of this volume.

BOLI's Criteria for an Independent Contractor

Unlike many state agencies, BOLI, together with the U.S. Department of Labor, the Equal Employment Opportunity Commission, and the courts, uses criteria that have been

established in previous court cases to take a close look at the actual realities of a working relationship.

The provisions of state and federal wage and hour law do not apply to independent contractors. For this reason, BOLI uses the "economic reality" test to verify whether a given claim or complaint arises out of an employment relationship.

In the absence of an employment relationship, workers are not subject to wage and hour law and they must bring claims for non-payment to the courts instead of filing wage claims with BOLI or the U.S. Department of Labor. Such workers are also not subject to the laws regulating working conditions, rest and meal periods, the payment of minimum wage and overtime or the parameters for the employment of minors.

BOLI uses a different test, the "right-to-control" test, to determine whether a given worker is an employee or an independent contractor for purposes of civil rights law. Some civil rights statutes protect not only workers, but also job applicants and customers. In those situations, civil rights law applies whether an individual is an independent contractor or employee.

Economic Reality Test:
The "economic reality" test consists of the following five factors which gauge the degree of a worker's economic dependency on the business to which he or she is providing services. Generally speaking, the more dependent a worker is on a particular business to perform the service in question, the more likely he or she is to be an employee.

In weighing these factors, it is important to remember that no single factor is determinative for an investigator, administrative law judge or a trial court judge to find that a worker is an independent contractor or an employee. The elements are:

(1) The degree of control exercised by the alleged employer

(2) The extent of the relative investments of the worker and alleged employer

(3) The degree to which the worker's opportunity for profit and loss is determined by the alleged employer

(4) The skill and initiative required in performing the job

(5) The permanency of the relationship

Although not part of the official test, the following questions may help to illustrate whether a worker is performing work as an employee or an independent contractor:

(1) The degree of control exercised by the alleged employer

- Who sets the hours of work?
- Who is responsible for quality control?

- Does the worker have other customers?
- Who determined the rate of pay? Was it negotiated?
- Who determines how the work gets performed?

(2) The extent of the relative investments of the worker and alleged employer

- Does the worker supply his or her own tools and equipment?
- Does the worker purchase materials necessary to do the job?
- Has the worker invested in bonds / insurance / advertising?

(3) The degree to which the worker's opportunity for profit and loss is determined by the alleged employer

- Is the worker free to bring on additional workers to speed up the job? At whose expense?
- Does working or managing the project more efficiently increase profit for the worker?
- Does the worker risk a loss if the job goes awry?

(4) The skill and initiative required in performing the job

- Does the level of skill and initiative required for the job rise to the level demonstrated by an independent business competing in an open market?
- Is a license required to perform the work?

(5) The permanency of the relationship

- How long has the job lasted? Is an ending date contemplated (upon completion of the work)?
- Is the contract (if any) subject to periodic review or automatic renewal?

The legal precedent….

The current test applied by BOLI was adopted in *In the Matter of Geoffrey Enterprises, Inc.*, 15 BOLI 148 (1996). In that case, the Commissioner adopted the "economic reality" test articulated in *Circle C Investments, Inc.* 998 F.2d 324 (5th Cir 1993), a similar case brought by US DOL involving the question of whether certain dancers were employees under the federal Fair Labor Standards Act (FLSA). In adopting the test, the Commissioner noted that the relevant definitions of "employer" and "employ" in state law were taken from the FLSA and that federal courts have adopted an expansive interpretation of the definition of "employer" under the FLSA in order to effectuate "its broad remedial purposes." As noted by the *Circle C* court in its analysis, the focal point of the test is "whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which she renders her services."

COMMONLY ASKED QUESTIONS – Homeowner or Employer?

Q. I want to hire someone to remodel my house. That person would be an independent contractor, right?

A. It really depends on the facts and circumstances. Look at the economic reality to make the correct determination. While home repair and remodeling are thought of as classic independent contractor situations, in the right circumstances an employment relationship may very well exist. A recent BOLI case illustrates the point. *In the Matter of Laura M. Jaap and Nettice Honn*, 30 BOLI 110 (2009) stands for the proposition that an employment relationship is created if (1) the alleged employer exercises sufficient control (Respondent directed the work of the Claimants), (2) the employer makes all or most of the investments in the work (materials and supplies), (3) the employer retains all of the opportunity for profit or loss (Claimants were paid a fixed hourly rate with no capital investment and no opportunity to make more money), (4) the alleged employee has relatively little skill or initiative (Claimants had no licenses and the Respondent failed to prove that they were particularly skilled in their work) and (5) the relationship has an indefinite term (there was no fixed date for the employment to cease, but the Forum held that the scope of work was of limited duration). In this case, four out of the five factors of the economic reality test indicated an employment relationship. *Jaap, Supra at pp. 123-125.*

Right-to-Control Test:
Under the "right-to-control test," four factors are weighed to determine whether an employer has the "right to control" the work of an individual. Where an employer clearly has the "right to control" the work of an individual under this test, that individual is deemed an employee rather than an independent contractor for purposes of civil rights law. To put the use of this test into context, courts would consider whether an employment relationship exists either to determine if the alleged employer is liable for the discrimination by the worker against a third party or if the alleged employer is liable to the worker under the civil rights laws for discrimination by the employer against the worker.

The factors of the "right-to-control" test are:

(1) Direct evidence of the right to, or the exercise of, control

(2) The method of payment

(3) The furnishing of equipment

(4) The right to fire

It is not necessary that all factors coincide to determine whether a given worker is an employee. In such cases, the weight or strength of the factors which are in evidence will be considered.

Although not part of the official test, the following questions may help to illustrate whether a worker is performing work as an employee or an independent contractor:

(1) Direct evidence of the right to, or the exercise of, control

- Who sets the hours of work?
- Who is responsible for quality control?
- Does the worker have other customers?
- Who determined the rate of pay? Was it negotiated?
- Who determines how the work gets performed?

(2) The method of payment

- Do clients pay the individual worker directly or do they pay the business employing that worker?
- Does the worker set the rate of payment or does the business employing that worker set the rate?

(3) The furnishing of equipment

- Does the worker supply his or her own tools?
- Does the worker purchase materials necessary to do the job?
- Has the worker invested in bonds / insurance / advertising?

(4) The right to fire

- How long has the job lasted? Is an ending date contemplated (upon completion of the work)?
- Is the contract (if any) subject to periodic review or automatic renewal?
- Does the contract (if any) provide consequences for termination of the relationship?

The legal precedent….

In *Cantua v. Creager*, 169 Or.App. 82, 7 P.3d 693 (2000), the Oregon Court of Appeals examined the definitions of an employee and an employer at ORS 659A.001(3) and (4) (*formerly* ORS 659.010(5) and (6)) and determined that the right-to-control test incorporated in *former* ORS 659.010 is the common law test for employee status in civil rights cases. The court quantified this test by identifying "[f]our factors that are material in determining whether an employer has the right to control an individual: (1) direct evidence of the right to, or the exercise of, control; (2) the method of payment; (3) the furnishing of equipment; and (4) the right to fire."

Independent Contractors and Workers' Compensation Division

As noted above, another agency departs from the statutory test for an independent contractor at ORS 670.600. For workers' compensation purposes, an independent contractor is an individual or entity that provides a service under a contract without direction and control, or without others having the right to direct and control the provision of those services.

WCD will apply the following tests to determine if a person or entity is an independent contractor:

Right-to-Control Test:

- Direct evidence of the right to, or the exercise of, control
- The method of payment (a contractor's pay will relate more to completion of a job)
- The furnishing of equipment
- The right to dismiss (whether either party can terminate the contract, or the worker can be dismissed at will, or whether the worker has the authority to hire someone to work alongside him or her)
- Can the "contractor" accept or refuse a job?
- Was a bid made for the job? Were multiple bids taken by the person seeking to retain a service?
- Can the worker set his or her own hours within the time frame of the general contractor?
- Can the worker use his or her own methods to accomplish the intended result?
- Was the contractor subject to monitoring beyond checking progress?

The Nature of the Work Test:

- How much is the work a regular part of the hiring entity's business?
- How skilled is it?
- Is the work continuous or intermittent?
- Is the duration sufficient to amount to the hiring of continuous services as distinguished from contracting for completion of a particular job?
- To what extent may it be expected to carry its own accident burden?

Where it remains unclear whether a given worker meets the definition of an independent contractor under workers' compensation law, businesses are encouraged to contact WCD's Employer Compliance Unit toll free at 1-888-877-5670 and ask for a Coverage Investigator.

Best Practices for Businesses that Engage Independent Contractors

Engaging an independent contractor can be a smart option for businesses with limited resources in a specific area of expertise. Given the potential consequences of misclassification, however, it is always wise to **document** the criteria you used to determine that a worker meets the legal requirements to be treated as an independent contractor.

The best time to make this evaluation is before you draw up and execute a contract. You may even wish to make it part of the hiring process for bidders to provide you with specific documentation of their independent contractor status. The Bureau of Labor and Industries and the U.S. Department of Labor consider the permanency of the relationship as part of their classification determinations, so you may wish to make sure your contract is subject to periodic review and is not automatically renewed; that way you can use your contract renewal period as an opportunity to re-verify the status of your contractor.

Most importantly, verify and document that the terms of the relationship set out in your contract are borne out by the actual reality between the contractor and yourself. State agencies and the courts have made it clear that it is the reality of a business's relationship with a worker (not its characterization on paper) that controls whether he or she will be considered an independent contractor. While not exhaustive, the following checklist highlights three areas in which you may want to document how a given worker qualifies as an independent contractor.

Direction and Control

To be considered an independent contractor, a worker must be free from your right to direct and control how he or she provides services. Consider the following:

1. Schedule. The independent contractor should be free to establish his or her own hours of work as well as the schedule according to which a project is carried out. As an example, you may wish to provide the contractor with independent access to the worksite.

2. Tools and Materials. It is critical that the independent contractor is not dependent upon your business to provide the tools and materials necessary to complete the work. (Note that there are some exceptions to this rule which allow for greater control over construction and landscape contract specifications.)

3. Personnel. Make it clear (again, by way of the contract) that the independent contractor remains free to bring in other workers as deemed necessary at his or her own expense. Make sure that this is your practice as well as a contractual acknowledgement. Do not direct the contactor as to whether or when additional workers need to be brought aboard.

4. Employee policy manual acknowledgement / Performance evaluation. Both of these processes communicate and reinforce your expectations for workplace behavior and are a critically important part of your relationship with your

employees. However, an independent contractor is not your employee and as such must remain free from your direction and control when it comes to how work is to be performed. Signing off on your workplace behavior policies may establish an inappropriate measure of direction and control over an independent contractor.

Independently Established Business

State law makes it clear that *bona fide* independent contractors are in business for themselves. Be sure to document how a given contractor meets at least three of the five requirements of an "independently established business:"

1. Verify that the contractor maintains a separate business location.

2. Structure payment arrangements so as to ensure the contractor bears an appropriate risk of loss as an independent business. Evidence of this risk could include:
    a. Entering into fixed price contracts;
    b. Being required to correct defective work;
    c. Warranting the services provided; or
    d. Negotiating indemnification agreements or purchasing liability insurance, performance bonds, or errors and omissions insurance.

3. Obtain documentation from the independent contractor such as references from the contractor's other clients, business cards, advertisements to demonstrate that (1) the contractor provides contracted services for multiple clients and (2) routinely engages in business advertising, solicitation or other marketing efforts to obtain new contracts to provide similar services.

4. Verify and document how the contractor has made a significant investment in the business through means such as:
    a. Purchasing the tools or equipment necessary to provide services;
    b. Paying for the premises or facilities where the services are provided; or
    c. Paying for licenses, certificates or specialized training

5. Make sure your contract includes recitals / acknowledgements which make clear the understanding of the contractual relationship and set out responsibility for items such as taxes and workers' compensation coverage, and the authority and responsibility of the contractor to hire / fire additional workers.

Licensure

If independent contractors are required to maintain licenses or certificates necessary to provide the services, it is a good idea to verify that any license and bond numbers provided are valid. (The Construction Contractors Board and the Landscape Contractors Board provide instant verification of licensee information online.)

Additional Information on Independent Contractors

Oregon maintains a website to provide information and resources relating to the issue of independent contractor classification at:

www.**O**regon**I**ndependent**C**ontractors.com

You may also contact any one of the following agencies directly for additional information:

Employment Department taxinfo@emp.state.or.us	Department of Revenue ic.info.dor@state.or.us
Workers' Compensation Division wcd.employerinfo@state.or.us	Bureau of Labor and Industries boli.mail@state.or.us
Construction Contractors Board ccb.info@state.or.us	Landscape Contractors Board lcb.info@state.or.us

Volunteers

Under Oregon's minimum wage and overtime law, the definition of "employ" at ORS 653.010(2) excludes voluntary or donated services performed for no compensation or without expectation or contemplation of compensation as the adequate consideration for the services performed for a public employer, or a religious, charitable, educational, public service or similar nonprofit corporation, organization or institution for community service, religious or humanitarian reasons.

Therefore, a bona fide volunteer need not be paid minimum wage or overtime wages so long as the work performed is:

1. For no compensation or without expectation of compensation as the adequate consideration for the services performed;
2. For community service, religious, or humanitarian reasons; and
3. For a public employer or a religious, charitable, educational, public service or similar nonprofit corporation or organization for community service.

Generally, private or for-profit businesses may not accept the services of volunteers as they do not meet the third criterion listed above. Under OAR 839-020-0046(3), time spent in work for public or charitable purposes at the employer's request, or under its direction and control, or while the employee is required to be on the premises, is compensable work time. Time spent voluntarily in such activities is not compensable work time when it takes place outside of the employee's normal working hours and the duties performed are not the same as those performed in the course of the employee's regular employment. ORS 653.010(2); OAR 839-020-0046(3).

Public agencies may use volunteers when the work is being performed voluntarily and is humanitarian or civic in nature, and the volunteer does not expect to be paid. Employees of a public agency may not volunteer to do the same work that they normally do in their paid positions. 29 U.S.C. § 203(e)(4)(B).

COMMONLY ASKED QUESTIONS - Stipends

Q. Our school district relies heavily on the work of dedicated volunteers. The district would like to offer reimbursement of expenses and a nominal stipend (say $200 per month) to show our appreciation, would that be creating an employment relationship?

A. Not necessarily. Compensation paid to volunteers of a public agency in an amount which does not vary, i.e., is not tied to production, and which cannot be considered adequate compensation for the service performed need not create an employment relationship. Under federal law, individuals do not lose their volunteer status when they receive payment for expenses or a nominal fee for services performed.
29 U.S.C. § 203(e)(4)(A); 29 C.F.R. § 553.106(a).

Be aware, however, that other state and federal agencies are not bound by wage and hour law. Compensation of any sort paid to a volunteer may need to be reported to taxing authorities like the Department of Revenue and may also create the potential for an unemployment claim or liability for workers' compensation claims.

Student Interns and Trainees

Although both Oregon and federal law define "employ" as "to suffer or permit to work," not everyone who performs work is an employee. Apart from independent contractors and volunteers, the Supreme Court has held that individuals who work for their own advantage on the premises of another without any express or implied compensation agreement are not necessarily employees. The U.S. Department of Labor (DOL) has clarified that student interns and participants in pre-employment training programs need not be considered employees provided the following criteria are continuously met:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;

2. The training is for the benefit of the trainees or students;

3. The trainees or students do not displace regular employees, but work under close supervision;

4. The employer that provides the training receives no immediate advantage from the activities of the trainees or students and, on occasion, the employer's operations may even be impeded;

5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period; and

6. The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

BOLI applies these same criteria in determining whether someone is a "trainee" under Oregon's minimum wage, overtime and wage collection laws. It is important to note, however, that the determination as to whether a student intern or trainee is an employee will depend on all the circumstances surrounding their work activities, and while the courts have generally confirmed that DOL's criteria are relevant, they have not always applied the criteria consistently. In some cases, the courts have found that not all the criteria need be met (promise of employment) or that the focus of the test ought to be weighted toward determining who received the primary benefit of the training instead of whether the employer received ***any*** advantage at all. What is clear is that labeling the relationship an "unpaid internship" or "work based training program" has little bearing on whether the work performed is subject to wage and hour law. Rather, as with the determination of whether an independent contractor or employment relationship exists, all of the facts and circumstances need to be examined and evaluated on a case-by-case basis.

School-to-Work programs …

DOL has provided specific guidance on the elements of work based learning programs, including work experience and "school-to-work" programs under the School-to-Work Opportunities Act of 1994 (STW).

A learning experience at an employer's work site that includes all of the following elements is consistent with a learning experience under the STW:

1. A planned program of job training and work experience for the student, appropriate to the student's abilities, which includes training related to pre-employment and employment skills to be mastered at progressively higher levels that are coordinated with learning in the school-based learning component and lead to the awarding of a skill certificate;
2. The learning experience encompasses a sequence of activities that build upon one another, that increase in complexity and promote mastery of basic skills;
3. The learning experience has been structured to expose the student to all aspects of an industry and promotes the development of broad, transferable skills; and,
4. The learning experience provides for real or simulated tasks or assignments which push students to develop higher-order critical thinking and problem-solving skills.

A student enrolled in such programs would not be considered an employee under wage and hour laws provided he or she met the following criteria:

1. The student receives ongoing instruction at the employer's worksite and receives close on-site supervision throughout the learning experience, with the result that any productive work that the student would perform would be offset by the burden to the employer from the training and supervision provided; and
2. The placement of the student at a worksite during the learning experience does not result in the displacement of any regular employee -- i.e., the presence of the student at the worksite cannot result in an employee being laid off, may not result in the employer not hiring an employee it would otherwise hire, and may not result in an employee working fewer hours than he or she would otherwise work; and
3. The student is not entitled to a job at the completion of the learning experience -- but this does not mean that employers are to be discouraged from offering employment to students who might successfully complete the training; and
4. The employer, student, and parent or guardian understand that the student is not entitled to wages or other compensation for the time spent in the learning experience -- although the student may be paid a stipend for expenses such as books or tools.

COMMONLY ASKED QUESTIONS – Interns & Trainees

Q: What are some of the factors that would indicate a student is an employee and NOT an intern or trainee?

A. Students would be considered employees and their work would be subject to both state and federal wage and hour law if, among other things:

1. They provide essential services to the employer; or
2. They are working in a position where someone is normally paid; or
3. There is a history of paying someone to do the same or similar work; or
4. Other people are currently paid for the same or similar work.

Q: Our firm has traditionally offered a small stipend to student interns…. Would that create an employment relationship?

A: A stipend is generally considered a modest amount provided to students or volunteers to help defray the cost of expenses. Stipends are not compensation for services rendered and should be distinguishable from compensation in that they may not be tied to the quality or quantity of work performed.

Q: Apart from starting a full-fledged pre-employment training program, is there any way I can pay someone less than minimum wage? Say, while they are learning the ropes?

A: Generally, no. On-the-job training of employees is a cost of doing business, and employees in training must receive no less than the minimum wage for all hours worked.

Unlike federal law, Oregon law requires that employees receive at least minimum wage during all stages of employment. This includes any period of on-the-job training.

Oregon law does allow for three potential exceptions under which an employer may pay less than minimum wage: (1) employment of certain student-learners; (2) employment of persons with disabilities; and (3) public assistance recipients in work training programs.

Student-learners

As opposed to participants in the student intern / trainee program of the sort described above, student-learners are employees. The Commissioner of the Bureau of Labor and Industries has the authority to issue special certificates authorizing the employment of student-learners at a subminimum wage (not less that 75 percent of the current minimum wage). Only student-learners enrolled in a bona fide professional training program which is designed to provide technical training and which is integrated with the student's regular course of instruction at an accredited school, college or university will qualify for payment at subminimum wages. ORS 653.070; OAR 839-020-0015

Persons with disabilities

Like student-learners, people with mental or physical disabilities who perform work are employees, and as such, they are generally protected by Oregon's minimum wage, working conditions and overtime laws. However, the Commissioner may approve an application for eligibility to pay individuals with mental or physical disabilities less then the minimum wage provided the Commissioner has determined that requiring the payment of the minimum wage to the individual would substantially curtail opportunities for employment. ORS 653.070; OAR 839-020-0015

Public assistance recipients

Oregon's minimum wage law excludes from coverage services performed by general or public assistance recipients as part of any work training program administered under state or federal assistance laws. ORS 653.010(2). Federal law does not provide a blanket exemption from coverage, however, federal minimum wage has lagged behind Oregon's minimum wage for some time. Also, depending on the nature of the assistance program, participants may be excluded from coverage as "trainees" (see above section on *Student Learners and Trainees*).

Classifying Exempt Employees

Both state and federal law provide a number of exemptions from certain wage and hour law provisions, including the requirements to pay a minimum wage and / or overtime. Employees who meet the criteria for an exemption listed below may be classified as "exempt"

It is important to remember, however, that the exemptions available under Oregon law are not identical to those available under federal law. Where the provisions of state and federal law conflict, employers must apply the standard which is most beneficial to the employee. For example, although federal law provides an exemption from both minimum wage and overtime for switchboard operators, Oregon law does not. Switchboard operators in Oregon must therefore be compensated at no less than the applicable state minimum wage.

In some instances, it is Oregon law that provides a minimum wage or overtime exemption that is unavailable under federal law. In such cases, the standard most beneficial to the employee would be federal law, specifically the Fair Labor Standards Act (FLSA). Employers who are subject to the FLSA must ensure that their employees are paid at least the applicable federal minimum wage and any overtime required by that law.[1]

In addition, be aware that the exemptions provided under state and federal law are construed narrowly by the courts; the burden ultimately falls to the employer to demonstrate that a given employee fits squarely within the exemption claimed. Keep in mind that current and former employees who feel they have been misclassified and are due unpaid overtime may file wage claims with BOLI's Wage and Hour Division, the U.S. Department of Labor, or in civil court. Claims for unpaid overtime may go back two years under state law (ORS 12.110) and in some cases up to three years under federal law.

The table below lists minimum wage and overtime exemptions under state law, as well as exemptions to overtime only, but not minimum wage. Further explanation for each of the exemptions listed follows the table and is keyed to the number of the exemption.

NOTE: Taken together with the appendix on exemptions applicable to certain of state and local government employees, the following tables set out the most commonly claimed exemptions to the minimum wage and / or overtime requirements of wage and hour law. Employers should be aware, however, that some employees are subject to minimum wage and or overtime standards beyond the scope of this handbook. For

[1] All Oregon employers are subject to state wage and hour law. Some private sector employers may not be subject to federal regulation. For example, a retail business entity which grosses less then $500,000 per year whose employees are not engaged in "interstate commerce" need not apply wage and hour standards which are more beneficial than those set out under state law. Questions relating to employer coverage under the FLSA should be directed to the U.S. Department of Labor at 503-326-3057.

example, Oregon law requires a “prevailing” minimum wage for workers who labor on public works contracts; employees in manufacturing establishments, mines or canneries must be paid daily overtime; and employees of certain hospitals may be paid overtime on a daily and biweekly basis. Employers are encouraged to contact TA for further information on any of these topics.

MINIMUM WAGE AND OVERTIME EXEMPTIONS*

Exemption	Oregon law		Federal law	
	MW	OT	MW	OT
1. Agricultural employees (MW exemption limited to certain farmworkers & small farms) – p.21	√	√	√	√
2. Babysitter/child care worker (casual) – p.22	√	√	√	√
3. Babysitter/child care worker (non-casual) – p.22	√	√		
4. Computer professionals meeting specified criteria – p.22	√	√	√	√
5. Conference ground/center employees (certain nonprofit) – p.23	√	√		
6. Domestic service employees (casual) – p.24	√	√	√	√
7. Golf caddy trainees and marshals – p.24	√	√		
8. In-home companions to the elderly or infirm – p.25	√	√	√	√
9. Inmate labor (Generally not held to be employees under the FLSA) – p.26	√	√		
10. Outside salespeople – p.26	√	√	√	√
11. Resident (domiciled) maintenance, management, and assistant management employees of multiunit housing – p.26	√	√		
12. Resident hosts of publicly owned campgrounds – p.26	√	√		
13. Resident managers of adult foster home – p.27	√	√		
14. Resident mobile home park employees – p.27	√	√		
15. Salaried executive, administrative or professional employees – p.27	√	√	√	√
16. Seasonal employees of certain organized camps – p.50	√	√	√	√
17. Ski patrol employees (nonprofessional) – p.51	√	√		
18. Soccer referees (deemed independent contractors under ORS 670.610) – p.51	√	√		
19. Students employed by a primary or secondary educational institution in which they are enrolled – p.51	√	√		
20. Taxicab operators – p.52	√	√		√

*** Additional exemptions to either minimum wage or overtime under federal law which do not also appear in state law do not apply to Oregon employers.** The above information is provided as a summary and teaching guide and is not intended as legal advice. If you need legal advice, please consult an attorney. We attempt to update materials pertaining to the information laid out above as soon as practicable following changes or developments in the laws and rules affecting Oregon employers, but we make no warranties or representations, express or implied, about whether the information provided is current. We urge you to check the applicable statutes and administrative rules yourself and to consult with legal counsel prior to taking action that may invoke employee rights or employer responsibilities or omitting to act when required by law to act.

OVERTIME ONLY EXEMPTIONS *

Exemption	Oregon law		Federal law	
	MW	OT	MW	OT
OT-1. Agricultural waterway maintenance (nonprofit) – p.53		√		√
OT-2. Buyers of agricultural products – p.53		√		√
OT-3. Certain fishing operations – p.53		√	√	√
OT-4. Certain *seasonal* establishments (amusement/recreation, camp, religious, nonprofit educational) – p.54		√	√	√
OT-5. Common carrier (air or railway) employees – p.55		√		√
OT-6. Domestic service employees who reside in the home of the employer – p.55		√		√
OT-7. Fruit and vegetable transportation workers – p.55		√		√
OT-8. Homeworkers making wreaths – p.56		√		√
OT-9. Motion picture theater employees – p.56		√		√
OT-10. Newspaper delivery to consumers – p.56		√	√	√
OT-11. Petroleum products distributors (bulk or wholesale) – p.56		√		√
OT-12. Radio station employees in small markets – p.56		√		√
OT-13. Recreational / amusement employees in national forests, parks, or refuges (OT after 56 hours) – p.57		√		√
OT-14. Retail sales / service employees paid on commission – p.57		√		√
OT-15. Salespeople selling boats, trailers, or aircraft for non-manufacturing establishment – p.57		√		√
OT-16. Salespeople, parts people and mechanics of automobile, truck or farm implement retailers – p.58		√		√
OT-17. Seamen – p.58		√		√
OT-18. Small country elevator operators – p.58		√		√
OT-19. Small forestry operations – p.58		√		√
OT-20. Truck drivers and their helpers – p.59		√		√

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Exemptions to Both Minimum Wage and Overtime

Oregon law		Federal law	
MW	OT	MW	OT
√	√	√	√

1. Agricultural employees

All employees employed in agriculture are exempt from overtime under both state and federal law. OAR 839-020-0135; 29 U.S.C. § 213(b)(13).

The exemption from minimum wage does NOT apply to all agricultural employees. State and federal laws do, however, provide several exemptions for *some* agricultural employees and *certain* agricultural employers.

Small farms

Both federal and state laws also provide minimum wage exemptions for "small" farms, however, the criteria are different for each. Employers in small farming operations must take care to be sure that they are exempt under each law before deciding not to pay minimum wage.

Federal criteria: If the employer did not employ more than 500 man-days of agricultural labor in any calendar quarter of the preceding calendar year, the minimum wage exemption applies for all agricultural employees for the entire following year. A man-day is any day during which an employee performs agricultural labor for at least one hour.

State criteria: If the employer did not employ more than 500 piece rate work days in any calendar quarter of the preceding calendar year, the employer's hand harvesters and pruning laborers who are paid on a piece rate basis are exempt from minimum wage for the entire following year. ORS 653.020(1)(a).

Family

The parent, spouse, child or other member of the agricultural employer's immediate family are exempt from both minimum wage and overtime. ORS 653.020(1)(b).

Commuters

Hand harvesters or pruning laborers who commute daily from their permanent residence, regardless of age, are exempt from minimum wage if they are paid on a piece rate basis and if they have been employed in agriculture less than 13 weeks in the previous calendar year. ORS 653.020(1)(c).

Minor hand harvesters or pruning laborers

Minors 16 and under who are employed as hand harvest labor and paid on a piece rate basis are exempt from minimum wage and overtime provided the piece rate is the same as that paid to other workers on the same farm. ORS 653.020(1)(d).

Range production of livestock

Workers who spend more than 50 percent of their time in the range production of livestock are exempt from minimum wage. To be exempt, Oregon workers must be paid on a salary basis, which is defined as 2,080 hours times the current minimum wage, then divided by 12. (Example: effective January 1, 2011, the Oregon minimum wage increased to $8.50, so the required salary would be $8.50 times 2,080 hours divided by 12 months = $1,473.33. The salary will change annually with minimum wage adjustments pursuant to Ballot Measure 25, passed in November 2002. See ORS 653.020(1)(e) and ORS 653.010(9).

2. Babysitters (casual)

Oregon law		Federal law	
MW	OT	MW	OT
√	√	√	√

State and federal law exempt ***casual*** babysitters / child care workers from minimum wage and overtime requirements. Employment on a "casual basis" means employment which is irregular and intermittent *and* which is performed by someone whose vocation is not child care / domestic service. ORS 653.020(13); 29 U.S.C. § 213(a)(15).

3. Babysitters (non-casual)

Oregon law		Federal law	
MW	OT	MW	OT
√	√		

Although state law exempts any individual performing child care services (in the home of the individual or the child) from minimum wage and overtime, federal law includes babysitters (employed on other than a casual basis) within the category of domestic service which must be compensated at no less than minimum wage and overtime. 29 U.S.C. § 206(f); 29 C.F.R. § 552.106. Live-in domestic service providers (including child care workers) need not, however, be paid overtime for hours worked over 40 in a work week. OAR 839-020-0125(3)(n); 29 U.S.C. § 213(b)(21).

4. Computer professionals

Oregon law		Federal law	
MW	OT	MW	OT
√	√	√	√

Federal rules provide an exemption for computer professionals who are paid no less than the equivalent of an hourly rate of $27.63 per hour and who primarily perform work in one or more of the following categories:

- The application of systems analysis techniques and procedures including determination of hardware, software, or system functional specifications; or
- The design, development, documentation, analysis, creation, testing or modification of computer systems or programs; or
- The design, documentation, testing, creation or modification of computer programs related to machine operating systems.

Computer professionals who meet this test are also exempt under Oregon law.
OAR 839-020-0125(2)(h); 29 U.S.C. § 213(a)(17).

Computer professionals who do not earn the equivalent of at least $27.63 per hour may also qualify for exemption as a salaried professional employee (see exemption number 15 below for specifics) provided they meet the duties test (including holding an advanced educational degree) and provided they are paid a salary of at least $455 per week.
OAR 839-020-0005(3).

Oftentimes, the duties of computer professionals are also directly related to management policies or to the implementation of business operations, and thus they may qualify as salaried executive or administrative employees, neither of which requires the an advanced academic degree. Again, see exemption number 15 below.

5. Conference ground/center employees

Oregon law		Federal law	
MW	OT	MW	OT
√	√		

An individual employed at a *nonprofit* conference ground or center which is operated for educational, charitable or religious purposes is exempt from both Oregon minimum wage and overtime. ORS 653.020(11).

NOTE: Federal law does not provide an identical exemption. A similar exemption applies to employees of a *seasonal* establishment "which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center." Employers subject to the FLSA (most employers) will need to ensure the conference ground meets the federal requirements for a seasonal establishment before deciding not to pay federal minimum wage and overtime.

The federal law defines the qualifying seasonal establishment in either of two ways:

The establishment (1) does not operate for more than seven months in any calendar year, or (2) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year.

In any case, this federal exemption does not apply to any employee of a private entity engaged in providing services or facilities in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture (other than a private entity engaged in providing services and facilities directly related to skiing). 29 U.S.C. § 213(a)(3).

A separate exemption from overtime ONLY applies to employees of private amusement or recreational establishments located on a national park or a national forest, or on land in the National Wildlife Refuge System for hours worked up to 56 in a work week. Hours worked in excess of 56 would need to be paid at one and one-half times the regular rate of pay. 29 U.S.C. § 213(b)(29).

6. Domestic service employees (casual)

Oregon law		Federal law	
MW	OT	MW	OT
√	√	√	√

Both state and federal wage and hour laws generally require that domestic service employees like cooks, housekeepers, nurses, maids and janitors be paid at least minimum wage and overtime (though there is an exemption from overtime for live-in domestic service employees) (29 U.S.C. §§ 206(f) and 207(l)).

Oregon law does, however, exempt domestic service work performed on a ***casual basis*** from minimum wage and overtime. ORS 653.020(2). For purposes of the exemption, "casual basis" means employment which is irregular and intermittent and which is not performed by an individual whose vocation is providing domestic services. OAR 839-020-0004(6).

Federal law requires the payment of minimum wage and overtime to domestic service employees except under specific circumstances, such as when the employee's compensation would not be considered wages under 42 U.S.C. § 409(a)(6).

> By way of 29 C.F.R. 552.2, US DOL extends minimum wage and overtime requirements to employees employed as domestic service employees under either of the following circumstances:
>
> (1) If the employee's compensation for such services from his/her employer would constitute wages under section 209(a)(6) of title II of the Social Security Act, that is, if the cash remuneration during a calendar year is not less than $1,000 in 1995, or the amount designated for subsequent years pursuant to the adjustment provision in section 3121(x) of the Internal Revenue Code of 1986; or
>
> (2) If the employee was employed in such domestic service work by one or more employers for more than 8 hours in the aggregate in any workweek.

Questions relating to when payment of minimum wage and overtime for casual domestic service employment is required should be directed to the U.S. Department of Labor at 503-326-3057.

7. Golf caddy trainees and marshals

Oregon law		Federal law	
MW	OT	MW	OT
√	√		

An individual who performs services as a caddy at a golf course is exempt from both minimum wage and overtime provided the services are performed as part of an established program for the training and supervision of caddies under the direction of a person who is an employee of the golf course. ORS 653.020(15).

HB 3030 (2011) established a new exemption from minimum wage standards for volunteer golf course marshals, effective January 1, 2012. Exempt marshals may not provide marshal services in excess of 30 hours per week and may receive no wage other than golf passes. Additionally, the marshal's duties must be limited to monitoring starting times and speed of play and informing golfers of golf course etiquette. ORS 653.020(16).

NOTE: Federal law does not provide similar exemptions. Any employer subject to the FLSA will need to ensure employees receive at least federal minimum wage and any overtime due for all hours worked.

8. In-home companions to the elderly or infirm

Oregon law		Federal law	
MW	OT	MW	OT
√	√	√	√

Both state and federal wage and hour laws generally require that domestic service employees like cooks, housekeepers, nurses, maids and janitors be paid at least minimum wage and overtime. 29 U.S.C. §§ 206(f) and 207(l).

The important exception to this rule is that individuals employed in domestic service ***in a family home*** to provide ***companionship services*** need not be paid minimum wage or overtime. ORS 653.020(14); 29 U.S.C. § 213(a)(15). "Companionship services" consist of providing care, fellowship and protection for individuals who cannot care for their own needs because of advanced age or mental or physical infirmity.

Companionship services may include things like meal preparation, bed making, washing of clothes and other similar services. They may also include the performance of general household work so long as it does not exceed 20% of the total weekly hours worked by the companion.

Companionship services do not include services which require and are performed by trained personnel like registered or practical nurses. Companions who provide such services would be subject to Oregon's minimum wage and overtime law unless exempted under another provision of that law. OAR 839-020-0004(11); 29 C.F.R. § 552.6).

Note that this exemption does not apply to babysitters. Although ***casual*** babysitters are exempt under both state and federal law, federal law includes babysitters employed on other than a casual basis within the category of domestic service employment which must be compensated at no less than minimum wage. 29 U.S.C. § 206(f); 29 C.F.R. § 552.106. ***Live-in*** domestic service providers (including child care workers) need not, however, be paid overtime for hours worked over 40 in a work week. OAR 839-020-0125(3)(n); 29 U.S.C. § 213(b)(21).

NOTE: US DOL has proposed revisions to its companionship exemption rules that would dramatically impact the scope of this exemption. As December, 2012, US DOL has not indicated whether it will adopt any or all of its proposed revisions. Employers should visit http://www.dol.gov/whd/flsa/companionNPRM.htm for the current status of this exemption under federal rules.

9. Inmate labor

Oregon law		Federal law	
MW	OT	MW	OT
√	√		

Inmates of the Oregon Department of Corrections are exempt from state minimum wage and overtime if they are assigned to a work release program or otherwise working in gainful private employment pursuant to ORS 144.480. OAR 839-020-0150(2).

Although the courts have generally not considered them to be "employees" under the FLSA, there is no specific federal minimum wage or overtime exemption in the act for inmates to the federal minimum wage and overtime. Employers should check the applicable statutes and administrative rules and to consult with legal counsel prior to taking action that may invoke employee rights or employer responsibilities.

10. Outside salespeople

Oregon law		Federal law	
MW	OT	MW	OT
√	√	√	√

Employees who regularly sell or obtain orders or contracts for goods, services, or facilities away from the employer's business locations are exempt from minimum wage and overtime, provided that the hours worked in "other than outside sales" in each workweek do not exceed 30 percent of the hours worked by other nonexempt employees.

There is no minimum salary requirement for the outside sales exemption.

Although federal law changed in 2004 and now requires only that outside salespeople have such sales as their "primary duty," Oregon employers must follow the stricter standard described above. ORS 653.020(6); OAR 839-020-0005(4);
29 U.S.C. § 213(a)(1).

11. Resident (domiciled) multiunit housing employees

Oregon law		Federal law	
MW	OT	MW	OT
√	√		

An individual domiciled at (i.e., has as his or her permanent residence) a multiunit accommodation for temporary or permanent housing for the purpose of maintenance, management or assisting in the management of the multiunit accommodations is exempt from minimum wage and overtime. ORS 653.020(9); OAR 839-020-0004(14).

NOTE: Federal law does not provide a similar exemption. Any employer subject to the FLSA will need to ensure employees receive at least federal minimum wage and any overtime due for hours worked over 40 in a workweek.

12. Resident hosts of publicly owned campgrounds

Oregon law		Federal law	
MW	OT	MW	OT
√	√		

An individual who volunteers as a campground host and who resides in a campground owned by a public agency that provides temporary accommodations for travelers,

whether under public or private management, and who provides information and emergency assistance is exempt from both minimum wage and overtime. Note that the exemption applies only to employees of publicly owned campgrounds (even if under private management). ORS 653.020(18).

NOTE: Federal law does not provide an identical exemption. Employees of a private amusement or recreational establishment engaged to provide services or facilities located in a national park or national forest or on land in the National Wildlife Refuge System need not receive overtime at one and one-half times their regular rate of pay unless and until the employee works in excess of **fifty-six** hours in the workweek.

13. Resident managers of adult foster homes

Oregon law		Federal law	
MW	OT	MW	OT
√	√		

A resident manager of an adult foster home licensed pursuant to ORS 443.705 to 443.825 and who is domiciled (i.e., has his or her permanent residence) at the adult foster home is exempt from state minimum wage and overtime. ORS 653.020(17); OAR 839-020-0004(14).

NOTE: Federal law does not provide a similar exemption. A resident manager may qualify for exemption as a salaried executive or perhaps administrative employee (see exemption number 15 below for specifics). Absent exemption under another provision of federal law, any employer subject to the FLSA will need to ensure employees receive at least federal minimum wage and any overtime due for all hours worked.

14. Resident mobile home park employees

Oregon law		Federal law	
MW	OT	MW	OT
√	√		

Individuals employed for the purpose of maintenance, management or assisting in the management of a mobile home park or manufactured dwelling park and who reside (they need not be "domiciled") on-site are exempt from minimum wage and overtime ORS 653.020(17).

NOTE: Federal law does not provide a similar exemption. Any employer subject to the FLSA will need to ensure employees receive at least federal minimum wage and any overtime due for hours worked over 40 in a workweek.

15. Salaried executive, administrative or professional employees

Oregon law		Federal law	
MW	OT	MW	OT
√	√	√	√

Among the most commonly applied exemptions are those pertaining to the so-called "white collar" employees, referred to as the "Executive, Administrative and Professional" exemptions. Employers of qualifying "white collar" workers need not apply the requirements set out under minimum wage and overtime law. ORS 653.020(3); 29 U.S.C. § 213(a)(1).

In addition to being among the most commonly used exemptions, however, these exemptions are also among the most frequently misapplied. The misclassification of employees as exempt can of course create substantial potential liability for overtime claims. Misclassification of "white collar" employees often arises from the misconception that an employee with a management title and/or who is paid a salary automatically qualifies for an exemption. In reality, within all three (executive, administrative and professional) categories of the exemption, exempt status requires the performance of specific exempt duties, as well as payment on a salary basis.

Although the "white collar" exemptions are complex, it is critical that employers understand the regulatory criteria for these exemptions before classifying employees as exempt from minimum wage or overtime. The U. S. Supreme Court has long held that if employers claim that an exemption applies to their employees, they must show that the employees fit "plainly and unmistakably within the exemption's terms." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). Both state and federal regulations require that an executive, administrative or professional employee meet a series of duties tests in order to be exempt. If even one requirement of the applicable test is unmet, or the employee does not meet the salary basis test, the employee may not be classified as exempt.

Applicable Regulations

The "white collar" exemptions provided for in state and federal statutes are further defined by regulation. Federal regulations are set out in 29 C.F.R. § 541.0-541.710 and apply to both private and state and local government employees. Oregon regulations defining "white collar" exempt employees are found at OAR 839-020-0004(25), (29) and (30) and OAR 839-020-0005. State and local government agencies are not subject to these state regulations (provided collective bargaining agreements or other laws apply). ORS 653.261(3). State and local government agencies are, however, subject to federal regulation as well as a separate set of state rules for supervisory and professional employees of a public agency. OAR 839-020-0300 to 0350.

Regulatory Coverage

Type of employer	Subject to federal regulations	Subject to state regulation (OAR 839-020-0004, 0005)	Subject to state regulation (OAR 839-020-0300-0350)
Private sector employers	Yes	Yes	No
State and local government agencies	Yes	No	Yes

Regulatory Guidance

Oregon's "white collar" exemptions and the implementing regulations were patterned largely after federal law. Federal regulations, however, provide substantially more detail and interpretive guidance for employers. As always, where there is a conflict between state and federal regulations, employers who are subject to both laws must apply the standard which is most beneficial to the employee.

EXECUTIVE / SUPERVISORY EXEMPTION

The table on the following page summarizes the requirements for a salaried executive / supervisory employee to qualify for the exemption:

EXECUTIVE / SUPERVISORY EXEMPTION CRITERIA

	Oregon law OAR 839-020-0005(1)	Federal law 29 C.F.R. §§ 541.100-106
Required Duties Test	Primary duty consists of the management of the enterprise in which the employee is employed (or of a customarily recognized department or subdivision of the enterprise). This requirement does not apply to an employee who is in sole charge of an independent establishment or a physically separated branch establishment or who owns at least 20 percent interest in the enterprise where the employee is employed; **and**	Primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; **and**
	Customarily and regularly directs the work of two or more other employees therein; **and**	Customarily and regularly directs the work of two or more other employees; **and**
	Has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion of any other change of status of other employees will be given particular weight; **and**	Has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.
	Customarily and regularly exercises discretionary powers, i.e., exercise authority to make decisions of significance.	Federal regulations define management to include activities likely to require independent judgment and discretionary powers.
Salary Basis Test	Earns a salary and is paid on a salary basis pursuant to ORS 653.025, exclusive of board, lodging, or other facilities.	Compensated on a salary basis at a rate of not less than $455 per week, exclusive of board, lodging or other facilities. This requirement does not apply to employees in management who own 20% of the employing enterprise.

Primary Duty

The first hurdle in the duties tests for executive / supervisory exemption is that the employee's "primary duty" must be to manage a distinct unit or subdivision within the organization.

Oregon defines "primary duty" as the major part, or over 50 percent, of an employee's time (and the federal definition is very similar). However, a determination as to whether an employee has management as his or her primary duty is based on all the facts of a particular case. Time alone is not the sole test, and in situations where the employee does not spend over 50 percent of his or her time in managerial duties, the employee might have management as a primary duty if other pertinent factors support such a conclusion. Factors which would be considered include

- the relative importance of the managerial duties as compared with other duties,
- the frequency with which the employee exercises discretionary powers,
- the relative freedom from supervision and the relationship between the salary paid the employee and wages paid other employees for the kind of non-exempt work performed by the supervisor.

OAR 839-020-0004(25); 29 C.F.R. § 541.700.

Example: Consider assistant managers in a retail establishment who perform exempt executive work such as supervising and directing the work of other employees ordering merchandise, managing the budget and authorizing payment of bills. Such employees may have management as their primary duty even if they spend more than 50 percent of their time performing nonexempt work such as running the cash register. However, if such assistant managers are closely supervised and earn little more than the nonexempt employees, the assistant managers generally would not satisfy the primary duty requirement. 29 C.F.R. § 541.700(c).

Management

Both state and federal regulations require that the primary duty of the exempt executive / supervisory employee be "management" of a customarily recognized department or subdivision. When interpreting the term "management," however, the focus is on supervisory responsibilities. Examples of such responsibilities include:

- interviewing, selecting and training employees;
- setting and adjusting rates of pay and hours of work;
- directing work;
- maintaining production or sales records for use in supervision;
- appraising productivity and efficiency;
- handling complaints and grievances;
- carrying out discipline when necessary;
- planning the work and determining techniques to be used;
- apportioning work among the workers;
- determining materials, supplies, machinery or tools to be used;
- determining merchandise to be bought, stocked and sold;
- controlling the flow and distribution of materials, supplies or merchandise;
- providing for the safety of employees and property.

29 C.F.R. § 541.102.

Supervision of Employees (Two or More FTEs)

The second duties test requirement for supervisors is that the executive must customarily and regularly direct the work of two or more other full-time employees within the department or subdivision. If part-time employees are supervised, the regulations require that the equivalent of two full-time employees be supervised. For example, one full-time employee and two half-time employees are equivalent to two full-time employees. OAR 839-020-0005(1)(b); 29 C.F.R. § 541.100(a)(3).

Keep in mind that the employees supervised must be employed in the department that the executive is managing. Only one supervisor may be counted as supervising each employee. This requirement is not satisfied if there is a shared responsibility for the supervision of the same employees in the same department. An employee who assists the manager of a department and supervises employees only in the absence of the regular supervisor is not considered an exempt supervisor. 29 C.F.R. § 541.104.

Hiring or Firing Authority Required

A third requirement for the executive exemption is that the executive employee must have authority to hire and/or fire employees. If executive employees do not have final authority in these areas, their recommendations must be "effective," i.e., given particular weight. This means that exempt executives must be involved in the interview process and the decision-making process when hiring new employees. Additionally, they must be in charge of disciplinary issues and unless there are good business reasons to the contrary, their decisions to terminate employees must be followed.
OAR 839-020-0005(1)(c); 29 C.F.R. § 541.105.

Customary and Regular Exercise of Discretion

The final requirement for the executive exemption is that the exempt employee must customarily and regularly exercise discretionary powers. This means that the executive must be more than a figurehead and must be given real authority to make decisions of importance. This must be a normal and recurring part of the individual's responsibilities in the daily performance of work. It is not enough to occasionally exercise discretion. OAR 839-020-0005(1)(d).

Although federal regulations do not specifically require that a manager exercise discretionary powers, Oregon law is the stricter standard and must be applied. The same requirement applies to exempt executive employees of state and local government agencies under a separate rule. OAR 839-020-0320(1)(d).

Oregon rules define "independent judgment and discretion" as "the selection of a course of action from a number of possible alternatives after consideration of each, made freely without direction or supervision with respect to matters of significance. It does not

include skill exercised in the application of prescribed procedures."
OAR 839-020-0005(5).

NOTE: An employee who does not meet all of the duties tests does not qualify for exempt status and must be paid appropriate overtime as required by law.

Salary Basis

In addition to all of the duties tests, exempt executives must be paid a salary as defined by state and federal regulations.

Management employees with at least a 20 percent ownership interest in the employing enterprise qualify for exemption from the requirements of minimum wage and overtime under federal law regardless of whether they are paid the equivalent a weekly salary of $455. To be exempt under Oregon law, however, the employee would still need to be paid on a salary basis which is at least the annual equivalent of 2,080 hours times the current state minimum wage (currently $8.50 per hour for a total of $340.00 per week). ORS 653.010(9); OAR 839-020-0004(29).

Because the same salary requirements apply to all executive, administrative and professional employees under Oregon law, a full explanation of the "salary basis" test appears below following the material on the administrative and the professional exemptions.

ADMINISTRATIVE EXEMPTION

The second category of exemptions is for a group of management employees who do not necessarily supervise other employees, but who perform responsible management duties within the organization: Administrative Personnel. As with the executive category, administrative personnel must satisfy both a series of duties tests and a salary basis test to qualify for exemption.

The table on the following page summarizes the requirements for a salaried administrative employee to qualify for the exemption under state and federal law:

ADMINISTRATIVE EXEMPTION CRITERIA

	Oregon law OAR 839-020-0005(2)	Federal law 29 C.F.R. §§ 541.200-204
Required Duties Test	Primary duty consists of either: (A) The performance of office or non-manual work directly related to management policies or general business operations of the employee's employer or the employer's customers; **or** (B) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; **and**	Primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; **or** Performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision; **and**
	Customarily and regularly exercises discretion and independent judgment; **and**	Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.
	Regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity; **or** Performs work under only general supervision along specialized or technical lines requiring special training, experience, or knowledge; **or** Executes special assignments and tasks under general supervision only	Not specifically required by federal law.
Salary Basis Test[2]	Earns a salary and is paid on a salary basis pursuant to ORS 653.025, exclusive of board, lodging, or other facilities.	Compensated on a salary basis at a rate of not less than $455 per week, exclusive of board, lodging or other facilities.

[2] Both state and federal law permit a fee basis alternative to the salary basis test under certain circumstances. See the section below on *Fee Basis Alternative*.

Primary Duty

The first requirement for administrative personnel is that their "primary duty" must be either performing "office or non-manual work directly related to management policies or general operations" of the business. The same work when performed for customers of the employer is also exempt. In educational institutions the administrative exemption applies to work directly related to academic instruction or training.
OAR 839-020-0005(2); 29 C.F.R. §§ 541.200 to 204.

As discussed under the executive exemption, "primary duty" is defined as the major part, or over 50%, of an employee's time. The determination as to whether an employee has management as his or her primary duty is based on all the facts of a particular case. Time alone is not the sole test, and in situations where the employee does not spend over 50 percent of his or her time in management-related duties, the employee might have management as a primary duty if other pertinent factors support such a conclusion. Factors which would be considered include the relative importance of the managerial duties as compared with other duties, the frequency with which the employee exercises discretionary powers, the relative freedom from supervision and the relationship between the salary paid the employee and wages paid other employees for the kind of non-exempt work performed by the supervisor. OAR 839-020-0004(25); 29 C.F.R. § 541.700.

The phrase "office or non-manual work directly related to management policies or general operations" is intended to distinguish the administrative operations of a business from "production" or "sales" work. Thus, the administrative exemption is limited to employees who perform work of substantial importance to the management or operation of the business of the employer or of the employer's customers. 29 C.F.R. § 541.201.

Examples of exempt administrative work could include:

- advising management,
- planning,
- negotiating,
- representing the company,
- purchasing,
- promoting sales,
- business research and control.

This means that the work must be directly related to the running of a business and not merely the day-to-day carrying out of its affairs. It is not a requirement that administrative employees help formulate management policy, but they must influence policy or have the responsibility to carry out that policy.

The second half of the phrase is often misunderstood in regard to "general business operations." Many employees who do not work at the management level may be considered to be indispensable to general business operations. However, the regulations

emphasize that it is the nature of the work and not its ultimate consequence which controls whether the duties pertain to the general business operations.

An employee may also qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations *of the employer's customers*. Thus, for example, employees acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may be exempt.

Practice Tip: Review job descriptions and responsibilities of all administrative exempt employees. Duties must consist mainly of carrying out company policy for either their employer or their employer's customers. If employees are mainly working in "production" or "sales" work, they are nonexempt.

Academic Administrators

The administrative exemption is also available to employees whose primary duty is the administration of a school system, or educational establishment or institution, or department or subdivision, *in work directly related to the academic instruction or training* carried on there.

In this form, the exemption pertains to the work related to the academic operations and functions in a school as opposed to the administration of its general business operations. Examples of employees engaged in academic administrative functions could include:

- the superintendent or other head of an elementary or secondary school system, and any assistants, responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program;
- the principal and any vice-principals responsible for the operation of an elementary or secondary school;
- department heads in institutions of higher education responsible for the administration of the mathematics department, the English department, the foreign language department, etc.; or
- academic counselors who perform work such as administering school testing programs, assisting students with academic problems and advising students concerning degree requirements 29 C.F.R. § 541.204(c)(1).

Work performed in academic settings but which does not pertain to academic administration such as building management and maintenance, the health of the students, and staff such as social workers, psychologists, lunch room managers or dietitians who do not perform *academic administrative* functions do not qualify for the academic administrative exemption, though they may qualify for exemption under the general criteria listed above. 29 C.F.R. § 541.204(c)(2).

Discretionary Powers

As in the case of exempt executives, the employee must be more than a figurehead and must, as a normal part of the work, be called upon to make decisions of significance. Though their decisions may be reviewed at a higher level, the exempt administrator has the authority to make independent choices "free from immediate direction or supervision." It is not enough to occasionally exercise discretion. 29 C.F.R. § 541.202.

Administrative Work Categories

Under Oregon law, the duties of an exempt administrator must fit within one of three categories:

1. Assistants to Executives;
2. Advisory Specialists or Department Heads; and
3. Personnel Who Perform Special Assignments.

Assistants to Executives

This first category encompasses those employees who assist a proprietor, executive or administrator with management responsibilities. There is no requirement that the administrative exempt employee personally supervise employees.

Administrative assistants who qualify for exempt status are usually found in large establishments where the executive assisted has so many demands that some responsibilities of significance must be delegated.

Advisory Specialists or Department Heads

The second category of exempt administrators includes those staff employees who act as advisory specialists to management or those who are in charge of functional departments. These individuals work under only very general supervision and perform work along specialized or technical lines which require special training, experience or knowledge. Advisory specialists are employees who provide expertise and technical information for management purposes, examples of which could include:

- tax experts,
- insurance experts,
- sales research experts,
- wage-rate analysts,
- foreign exchange consultants,
- statisticians.

Advisory specialists must do more than merely tabulate data. They must analyze that data and draw conclusions that determine and inform financial, merchandising or other management policies of the business.

Examples of functional department heads could include:

- credit managers,
- purchasing agents,
- buyers,
- safety directors,
- personnel directors,
- labor relations directors.

Personnel Who Perform Special Assignments

The final category of exempt administrative employees includes those employees who perform special assignments. Examples of employees who perform special assignments and who may qualify for the administrative exemption might include:

- lease buyers,
- field representatives of utility companies,
- special organization planners,
- customers' brokers in stock exchange firms,
- account executives in advertising firms.

Salary Basis

As with exempt executives, exempt administrators must be paid a salary as defined by state and federal regulations. Because the same salary requirements apply to all executive, administrative and professional employees under Oregon law, the explanations for “salary basis” follows the section on the professional exemption below.

PROFESSIONAL EXEMPTION

The third category of salaried exempt employees is actually comprised of four separate categories:

1. Learned Professionals;
2. Creative Professionals;
3. Teachers or Tutors; and
4. Highly-skilled Computer Professionals

As with executive and administrative personnel, exempt professionals must satisfy both a series of duties tests and a salary basis test to qualify for exemption.

The table on the following page summarizes the requirements for a salaried professional employee to qualify for the exemption under state and federal law:

PROFESSIONAL EXEMPTION CRITERIA

	Oregon law OAR 839-020-0005(3)	Federal law 29 C.F.R. §§ 541.300-402
Required Duties Test	Primary duty consists of the performance 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; **or** (B) Work that is original and creative in character in a recognized field of artistic endeavor, the result of which depends primarily on the invention, imagination, or talent of the employee; **or** (C) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the school system or educational establishment or institution by which the employee is employed	Primary duty is the performance of work: (A) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; **or** (B) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor; **or** (C) Teaching or tutoring in an educational establishment; **or** (D) Practice of Law or Medicine; **or** (E) of a Highly-skilled Computer Employee.
	Whose work requires the consistent exercise of discretion and judgment in its performance; **and**	Not specifically required by federal law.
	Whose work is predominantly intellectual and varied in character and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.	Not specifically required by federal law.
Salary Basis Test[3]	Earns a salary and is paid on a salary basis pursuant to ORS 653.025, exclusive of board, lodging, or other facilities.	Compensated on a salary basis at a rate of not less than $455 per week, exclusive of board, lodging or other facilities. Salary basis payment NOT required by federal law for teachers or licensed practitioners of law or medicine.

[3] Both state and federal law permit a fee basis alternative to the salary basis test under certain circumstances. See the section below on *Fee Basis Alternative*.

Learned Professionals

The first category of exempt professional personnel applies to workers whose primary duty is that of a learned professional. This is work which requires knowledge of an advanced type in a field of science or learning and which is typically acquired by a prolonged course of specialized intellectual instruction as distinguished from a general academic degree, apprenticeships or routine processes. OAR 839-020-0005(3)(a)(A); 29 C.F.R. § 541.301.

In general, it is necessary to have at least a bachelor's degree to meet the educational requirement of a professional employee. Exceptions have been made for some professionals in the medical field. For example, even though the course of study for registered nurses may be concentrated to less than four years, nurses who are registered by the state examining boards still meet the educational requirement.
29 C.F.R. § 541.301(3)(d)(2).

It is also important to note that holding a degree alone is not enough. The employee must be performing work which requires the advanced knowledge afforded the employee by having completed a specialized degree.

Examples of professions that are likely to meet the requirement for a prolonged course of specialized intellectual instruction may include:

- law,
- medicine,
- nursing,
- accounting,
- actuarial computation,
- engineering,
- architecture,
- teaching,
- pharmacy,
- registered and certified medical technology.

Federal regulations address the practice of law and medicine directly and do not require the payment of licensed practitioners on a salary basis. Oregon regulations do not provide an identical exemption, however, and private sector employers in Oregon will still need to apply the salary basis test.

Creative Professionals

A second category of exempt professional employee applies to original and creative work that depends primarily on the invention, imagination or talent of the employee. Such work is to be distinguished from work which can be produced by a person endowed with general manual or intellectual ability and training. Exempt work must be produced in a

recognized field of artistic endeavor including such fields as music, writing, theater, and graphic arts. OAR 839-020-0005(3)(a)(B); 29 C.F.R. § 541.302

Teacher or Tutor

This third category of professional work includes employees whose primary duties entail work performed as a teacher, tutor, instructor or lecturer employed within a school system or educational institution. OAR 839-020-0005(3)(a)(C); 29 C.F.R. § 541.303.

This professional exemption applies to teachers in public or private schools. The primary duties of the teacher must be imparting knowledge. Teachers in kindergartens or nursery schools may be exempt, but day care providers in nursery schools are nonexempt.

Under federal regulation, the possession of an elementary or secondary teacher's certificate will provide a clear means of identifying qualifying individuals whose primary duty is teaching. The certificate is not required, however, in order to qualify for the exemption. (Private schools and institutions of higher education or other educational establishments may not require certification.) A teacher who is not certified may be considered for exemption, provided that such individual is employed as a teacher by the employing school or school system. 29 C.F.R. § 541.303(c).

Federal regulations address teaching and tutoring for an educational establishment directly and do not require payment on a salary basis. Oregon regulations do not provide an identical exemption, however, and private sector employers in Oregon still need to apply the salary basis test.

Highly-skilled Computer Professionals

Certain highly-skilled computer professionals may be classified as exempt under the salaried professional exemption or a separate exemption for highly skilled computer professionals who are paid the equivalent of an hourly rate of at least $27.63 per hour.

Both state and federal law require that the highly-skilled computer professional must primarily perform work in one or more of the following categories to qualify for exemption:

- The application of systems analysis techniques and procedures including determination of hardware, software, or system functional specifications; **or**
- The design, development, documentation, analysis, creation, testing or modification of computer systems or programs; **or**
- The design, documentation, testing, creation or modification of computer programs related to machine operating systems.

NOTE: When a highly skilled computer employee is classified as a *salaried* exempt professional, Oregon regulations require that the employee meet all the requirements for the professional exemption, including the requirement that the employee hold a relevant

advanced educational degree. No degree is required, however, for highly-skilled computer professionals who are paid the equivalent of an hourly rate of at least $27.63 per hour. See item #4, above, "Computer Professionals."

When the duties of computer professionals are directly related to management policies or to the implementation of business operations, they may also qualify as exempt executive or administrative employees without holding an advanced degree.

Customary and Regular Exercise of Discretion

Regardless of the category of primary duty, (learned, creative, educational) the professional employee must customarily and regularly exercise discretionary powers to qualify for the exemption under Oregon law. This means that the professional must be given real authority to make decisions of importance. This must be a normal and recurring part of the individual's responsibilities in the daily performance of work. It is not enough to occasionally exercise discretion. OAR 839-020-0005(3)(b).

Although federal regulations do not specifically require that a professional exercise discretionary powers, State law is the stricter standard and must be applied. The same requirement applies to exempt professional employees of state and local government agencies under a separate rule. OAR 839-020-0320(4)(b).

Oregon rules define "independent judgment and discretion" as "the selection of a course of action from a number of possible alternatives after consideration of each, made freely without direction or supervision with respect to matters of significance. It does not include skill exercised in the application of prescribed procedures."
OAR 839-020-0005(5).

Intellectual and Varied in Character

Finally, under Oregon regulations, exempt professional work must be intellectual and varied in character. This is to distinguish it from work that is routine mental, manual, mechanical, or physical work - and is of such character that the output produced or the result accomplished may not be standardized in relation to a given period of time.
OAR 839-020-0005(3)(c).

COMMONLY ASKED QUESTIONS – Exempt Employees

Q. Are employers required to track hours worked by exempt employees?

A. No, if an employee is truly exempt as a "white collar" employee, there is no affirmative requirement to track hours worked. However, it is permissible for employers to track hours worked for legitimate business purposes such as job costing, or benefit accruals. It is also permissible for employers to require exempt employees to be present during specified hours. In addition, an important benefit of tracking the hours of exempt employees is to determine the entitlement of employees to intermittent family leave. If the employee were to take OFLA or FMLA leave for the employee's own serious health condition or that of a covered family member, and that leave were taken in one continuous block of time (usually 12 weeks), the number of hours worked would be immaterial. However, if that same 12 weeks of leave were taken intermittently, a 40-hour per week employee would be entitled to 480 hours of leave, whereas a 50-hour per week employee would be entitled to 600 hours of leave.

Q. Are rest and meal periods required to be provided to exempt employees?

A. Generally, no. The rest and meal period requirements of the Oregon Administrative Rule arise out of Oregon's minimum wage law (ORS 653.010 to 653.261), and employees who are exempt from the minimum wage law are also exempt from rest and meal period requirements. That said, employers of 25 or more must still provide exempt administrative, executive or professional employees with a reasonable (unpaid) rest period to express milk, unless to do so would cause the employer an "undue hardship." ORS 653.077.

SALARY BASIS

In addition to the duties tests described above, exempt "white collar" employees must also be paid on a genuine salary basis as opposed to an hourly basis or some other method of payment. Almost all Oregon employers are subject to the Fair Labor Standards Act (FLSA), and under that law, employers subject to the FLSA are required to pay a minimum weekly salary of $455 a week or $23,660 annually. This salary level was enacted on August 23, 2004.

The salary must be a predetermined amount that is not reduced based on quantity or quality of work. Exempt employees need not be paid for weeks in which no work is performed, however, the general rule requires that the employee receive the full salary for any week in which work is performed without regard to the number of hours or days worked.

COMMONLY ASKED QUESTIONS – Salary Basis

Q. I am an exempt manager who supervises six employees. My employer requires me to work 80 hour weeks at times. Is he allowed to do this without paying overtime?

A. Assuming you also meet the duties test for an exempt "executive" or "administrator," your employer would not have to pay overtime so long as you are also paid on a salary basis. Payment on a salary basis means that you receive a predetermined amount (not less than $455 per week) constituting all or part of your compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

Q. Is it OK to pay extra amounts, in addition to the salary, to exempt employees?

A. Yes. Oregon regulations specify that extra amounts may be paid to exempt employees even if they are based on hourly rates. Federal regulations do not specify that extra compensation may be paid on an hourly basis, but state that bonuses, commissions, or shift amounts may be paid in addition to the guaranteed salary. Some court cases have questioned the practice of paying extra amounts on an hourly basis. Therefore, it is recommended that extra amounts be in the form of bonuses or other "lump" sums rather than "hour for hour."

Q. Is it permissible to reduce the exempt employee's salary if the employer shuts down for part of a week due to slowdowns in orders, or for equipment failures, or for other operating requirements of the business?

A. Generally, no. An exempt "white collar" employee must be paid a salary which is not subject to reductions because of variations in the quality or quantity of the work performed. An employee will not be considered to be paid on a "salary basis" if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available. 29 C.F.R. § 541.602(a).

That said, the regulations do not prohibit prospective changes to exempt employees' salaries (provided they still receive a minimum salary of $455 per week). An employer may reduce the workweek of an exempt employee, for example, from 40 hours to 32 hours, with a commensurate reduction in pay, provided the change applies to all workweeks going forward. In other words, payroll savings to the employer come from having reduced an exempt employee's salary, not from making occasional or periodic deductions from that salary. Employers should ensure, however, that such changes are not so frequent or so closely tied to hours worked that an employee is not really paid on a salary basis.

Special rules apply to salaried exempt employees of public employers. Public employees

(but NOT private employees) may be "furloughed" for budgetary reasons without losing their exempt status (except during the workweek in which the furlough occurs) and for which the employee's pay is accordingly reduced. See 29 C.F.R. § 541.710 and OAR 839-020-0330(2).

Q. I have an exempt employee who has requested to work part time and will work only 20 hours each week. She is currently paid $600 per week. May I reduce her salary by 50 percent since she will be working half time?

A. No, not if you intend to preserve her exempt status. In order to preserve the employee's exempt status under federal law, she must receive a minimum salary of not less than $455 per week. Federal regulations allow for equivalent salaries which correspond to periods *longer* than one week, (e.g., $910 for a biweekly salary) but specify that the *shortest* period of payment that will meet this compensation requirement is one week. 29 C.F.R. § 541.600(b). You will have to make a business decision as to whether it is worth maintaining the exemption for an employee who will only be working half time.

Permitted Reductions under the Salary Basis

This general rule is subject to exceptions. The salary of an exempt "white collar" employee may be reduced under the following circumstances without jeopardizing the exemption:

1. The salary may be prorated (reduced) if an exempt employee takes one or more full days off for personal reasons, other than sickness or accident.
2. The salary may be reduced for absences of one or more full days for sickness or disability provided the reduction is made according to the employer's plan, policy or practice of providing paid sick or disability leave. In addition, if an employer has a paid sick leave plan and the employee has exhausted all available paid leave under that plan, then his or her salary may be reduced by those absences of a day or more due to sickness or disability.
3. If the employee performs any work during the workweek when serving on jury duty, serving in the military or when attending a proceeding as a witness, the exempt employee's weekly salary must be paid. However, the employer may offset any amounts received by the employee as jury or witness fees or military pay for that week.
4. Reductions to an exempt employee's salary may not be made as a disciplinary measure unless the penalty is imposed for violations of safety rules of major significance such as smoking in an explosive plant or oil refinery. However, if the employee is suspended for a full workweek, and no work is performed during that week, no salary is required.
5. Reductions for suspensions for workplace infractions or workplace conduct (other than major safety violations) may also be made provided (1) the reductions are

made in full-day increments and (2) the unpaid suspensions is imposed pursuant to written policy applicable to all employees (not just exempt employees).

6. An employer is not required to pay the full salary in the initial and terminal weeks of employment if the employee does not work the entire week.
7. In private sector employment, the exempt employee's salary may not be reduced when an employee is absent for part of a day, unless the absence qualifies as leave taken under the federal Family and Medical Leave Act (FMLA). (Special rules apply to government agencies.) 29 C.F.R. § 541.602. Note that if the absence also qualifies for protected leave under the Oregon Family Leave Act (OFLA), the employer may make a partial day salary reduction. However, if the absence only qualifies the employee for OFLA leave but not for FMLA leave (i.e., sick child leave, or grandparent, grandchild, same-sex domestic partner with a serious health condition, or the employee is OFLA eligible but not yet FMLA eligible), the employer may not make the partial-day salary reduction without jeopardizing the exemption. OAR 839-009-0240(12).

COMMONLY ASKED QUESTIONS – Salary Reductions

Q. If the employee is absent for a full day or more due to sickness or disability, and has no accrued paid leave to use, may the employer reduce the employee's salary?

A. Yes, as long as the employer has a paid leave plan that provides compensation in cases of illness or disability.

Q. Is it permissible to require exempt employees to use accrued vacation or sick leave when they are absent?

A. Yes, the Ninth Circuit Court of Appeals has decided that deductions from leave banks for absences are permitted as long as the employee receives the appropriate payment in cash or salary. Such deductions from leave banks do not affect the exempt employee's status. However, it is essential that the exempt employee's salary is not "subject to deductions" for partial day absences (except as noted above, i.e., for FMLA leave). Therefore, employers should adopt policies clearly stating that the salary will not be reduced for absences of less than a full day, if the employee has no available accrued leave to access.

Q. May an employer require an exempt employee to use accrued paid leave during a part-week shutdown?

A. The U.S. Department of Labor, ("US DOL") has recently revised its enforcement policy and now relies on opinion letters issued on February 15, 1994 and April 6, 1995. US DOL's current interpretation on this matter is that an employer may require the use of paid leave during a part-week shutdown, so long as the employee receives his or her full weekly salary. This means, however, that an employee who has exhausted all paid leave must nonetheless receive his or her full weekly salary when a part-week shutdown

occurs. US DOL opinion letters are available online at http://www.dol.gov/whd/opinion/opinion.htm.

Q. Does this mean that if an employer does not have a paid sick leave plan that covers both sickness and disabilities, the employer could not deduct for such sickness and/or disability?

A. Correct. If there is no plan, policy or practice of providing compensation for such sickness or disability, the deduction would not be permissible if the employee is to remain exempt. The employer would remain free, however, to reduce an employee's salary for absences of an entire work week if no work is performed.

Q. May I deduct for a day or more of sick leave if the employee has not been with my company long enough to qualify for compensation under my sick leave plan?

A. Yes, you may make reductions to the employee's salary in full day increments.

Q. If an employee has used all accrued sick leave, may I deduct for periods of less than a day?

A. No. Deductions may only be made for a day or more.

Q. What kinds of deductions would not be permissible if the employer wants to regard the employee as being paid on "a salary basis"?

A. Deductions may not be made for:

- Time off because work was not available.
- Absences occasioned by the employer or by the operating requirements of the business.
- Absences caused by jury duty, attendance as a witness or temporary military leave. The employer may, however, offset any amounts received by an employee as jury or witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.
- Absences of less than one day.

Note that although the employer is prohibited from docking an exempt employee for such absences, the employer may require that the exempt employee use accrued paid leave.

Fee Basis Alternative

Federal regulations pertaining to the minimum salary allow employers of exempt administrative and professional employees — but not executive employees — to pay

such employees on a fee basis rather than on a salary basis without jeopardizing their exemption 29 C.F.R. § 541.605.

Specifically, 29 C.F.R. § 541.605(b) provides that:

> To determine whether the fee payment meets the minimum amount of salary required for exemption under these regulations, the amount paid to the employee will be tested by determining the time worked on the job and whether the fee payment is at a rate that would amount to at least $455 per week if the employee worked 40 hours.
>
> Thus, the regulations provide, an artist paid $250 for a picture that took 20 hours to complete meets the minimum salary requirement for exemption since earnings at this rate would yield the artist $500 if 40 hours were worked.

Oregon law also permits the payment on a fee basis as described in 29 C.F.R. § 541.605 without jeopardizing the salary basis of an otherwise exempt employee, provided the fees are paid each pay period and are not less than the equivalent of the current minimum wage. OAR 839-020-0004(30)(b).

COMMONLY ASKED QUESTIONS – Fee Basis Alternative

Q. If I employ an engineer and pay her on a fee basis that amounts to an hourly fee for each hour of engineering services I can bill to a client, will she qualify as an exempt professional employee?

A. No. Under federal regulations, administrative and professional employees (but not executive employees) may be paid on a fee basis rather than on a salary basis and be exempt (29 C.F.R. § 541.605). However, an employee will be considered to be paid on a "fee basis" within the meaning of the regulations only if the employee is paid an agreed sum for a single job regardless of the time required for its completion. These payments resemble piecework payments with the important distinction that generally a "fee" is paid for the kind of job that is unique rather than for a series of jobs repeated an indefinite number of times and for which payment on an identical basis is made over and over again. Payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis. 29 C.F.R. § 541.605(a).

Highly Compensated Employee Exception

Federal law also provides an exception for "highly compensated employees." This exception does not impact the salary basis test but rather the duties test. Under this exception, certain highly compensated employees need not meet all of the required duties

tests in order to qualify for one of the executive, administrative, or professional employee exemptions. 29 C.F.R. § 541.601.

Oregon law does not provide a similar exemption. Therefore, Oregon employers must continue to ensure employees meet the entire duties test however highly paid those employees may be.

Oregon law		Federal law	
MW	OT	MW	OT
√	√	√	√

16. Seasonal employees of certain organized camps

An individual employed on a ***seasonal basis*** at an ***organized camp*** is exempt from both minimum wage and overtime, provided the camp is either (1) a nonprofit camp or (2) generates a gross annual income of less than $500,000. ORS 653.020(10).

An organized camp can be either a day camp or resident camp, established to give campers recreational, creative, religious or educational experience in cooperative group living wherein the activities are conducted on a closely supervised basis, whether or not the camp is used primarily by an organized group or by members of the public and whether or not the activities or facilities are furnished free of charge or for the payment of a fee. ORS 653.010(6).

NOTE: The federal exception is not identical, however, a similar federal exemption applies to employees of a ***seasonal establishment*** "which is an amusement or recreational establishment, ***organized camp***, or religious or non-profit educational conference center." 29 U.S.C. § 213(a)(3).

The federal law defines the qualifying "seasonal establishment" in one of two ways. The establishment either (1) does not operate for more than seven months in any calendar year, or (2) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year.

> Employers should also note that this federal exemption from minimum wage and overtime does NOT apply to any employee of a private entity engaged in providing services or facilities in a national park or a national forest, or on land in the National Wildlife Refuge System under a contract with the Secretary of the Interior or the Secretary of Agriculture (other than a private entity engaged in providing services and facilities directly related to skiing). 29 U.S.C. § 213(a)(3).
>
> In that case, a separate partial exemption from overtime ONLY would apply to employees of private amusement or recreational establishments located on a national park or a national forest, or on land in the National Wildlife Refuge System for hours worked up to 56 in a work week. Hours worked in excess of 56 would need to be paid at one and one-half times the regular rate of pay. 29 U.S.C. § 213(b)(29).

17. Ski patrol (nonprofessional) employees

Oregon law		Federal law	
MW	OT	MW	OT
√	√		

Under Oregon law, nonprofessional ski patrollers are exempt from minimum wage and overtime requirements when they receive no wages, other than ski passes, while performing ski patrol services or services directly related to organizing or conducting skiing or snowboarding races or similar competitions sponsored and organized by nonprofit corporations. ORS 653.020(19)

NOTE: Federal law does not provide an identical exemption. A similar exemption applies to employees of a *seasonal* establishment "which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center." Employers subject to the FLSA will need to ensure the federal requirements for a seasonal establishment are met before deciding not to pay federal minimum wage and overtime.

The federal law defines the qualifying seasonal establishment in either of two ways:

The establishment (1) does not operate for more than seven months in any calendar year, or (2) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year. 29 U.S.C. § 213(a)(3).

A separate exemption from overtime ONLY applies to employees of private amusement or recreational establishments located on a national park or a national forest, or on land in the National Wildlife Refuge System for hours worked up to 56 in a work week. Hours worked in excess of 56 would need to be paid at one and one-half times the regular rate of pay. 29 U.S.C. § 213(b)(29).

18. Soccer referees

Oregon law		Federal law	
MW	OT	MW	OT
√	√		

Under ORS 670.610, referees and assistant referees of youth and adult soccer matches are deemed independent contractors. OAR 839-020-0150(3).

NOTE: Federal law does not provide a similar exemption. Any employer subject to the FLSA will need to ensure employees receive at least federal minimum wage and any overtime due for hours worked over 40 in a workweek.

19. Primary or secondary school student employees

Oregon law		Federal law	
MW	OT	MW	OT
√	√		

A student who is employed by a primary or secondary education institution in which that student is enrolled is exempt from minimum wage and overtime. ORS 653.020(5).

NOTE: Federal law does not provide a similar exemption. Any employer subject to the FLSA will need to ensure employees receive at least federal minimum wage and any overtime due for hours worked over 40 in a workweek. For information about permits to pay Oregon exempt students at less than the federal minimum wage, contact the U.S. Department of Labor at 503-326-3057.

Oregon law		Federal law	
MW	OT	MW	OT
√	√		√

20. Taxicab operators

Taxicab operators are exempt from minimum wage and overtime under Oregon law. ORS 653.020(6).

NOTE: Federal law does not provide a minimum wage exemption. Under federal law, Taxicab operators are exempt from overtime only. Employers which are subject to the FLSA must still pay taxicab operators the federal minimum wage.
29 U.S.C. § 213(b)(17).

Exemptions to Overtime, but Not Minimum Wage

Oregon law		Federal law	
MW	OT	MW	OT
	√		√

OT-1. Agricultural waterway maintenance (nonprofit)

Both state and federal law provide an exemption from overtime for work performed in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water for agricultural purposes.
OAR 839-020-0125(3)(j); 29 U.S.C. § 213(b)(12).

Changes to the federal regulations this year expanded this exemption to include work on waterway systems which deliver up to 10 percent of the water to a municipality to be used for general, domestic, and commercial purposes. 29 C.F.R. § 780.408.

Oregon law		Federal law	
MW	OT	MW	OT
	√		√

OT-2. Buyers of agricultural products

Both state and federal law provide an exemption from overtime for work performed by any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state. OAR 839-020-0125(3)(d); 29 U.S.C. § 213(b)(5).

Oregon law		Federal law	
MW	OT	MW	OT
	√	√	√

OT-3. Certain fishing operations

Both state and federal law provide an exemption from overtime for work performed by any individual employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacean, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing of such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by an employee.

Although federal law extends this exemption from the payment of both the minimum wage and overtime, state law limits the exemption to overtime only.
OAR 839-020-0125(2)(g); 29 U.S.C. § 213(a)(5).

Oregon law		Federal law	
MW	OT	MW	OT
	√	√	√

OT-4. Certain seasonal establishments

(amusement or recreational establishments or religious or non-profit educational conference centers)

Federal law provides an exemption from minimum wage and overtime for employees of a ***seasonal establishment*** "which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center."

The federal law defines the qualifying "seasonal establishment" in either of two ways:

The establishment (1) does not operate for more than seven months in any calendar year, or (2) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year. 29 U.S.C. § 213(a)(3).

> Employers should also note that this federal exemption from minimum wage and overtime does NOT apply to any employee of a private entity engaged in providing services or facilities in a national park or a national forest, or on land in the National Wildlife Refuge System under a contract with the Secretary of the Interior or the Secretary of Agriculture (other than a private entity engaged in providing services and facilities directly related to skiing). 29 U.S.C. § 213(a)(3).
>
> In that case, a separate partial exemption from overtime ONLY would apply to employees of private amusement or recreational establishments located on a national park or a national forest, or on land in the National Wildlife Refuge System for hours worked up to 56 in a work week. Hours worked in excess of 56 would need to be paid at one and one-half times the regular rate of pay. 29 U.S.C. § 213(b)(29).

NOTE: Oregon law does NOT provide an identical exemption. Apart from seasonal employees of certain camps (see section 16 above on page 50), the Oregon exemption is limited employees of seasonal, ***not for profit*** amusement or recreational establishments; ***and*** the exemption applies to overtime ***only***. OAR 839-020-0125(2)(f).

That said, Oregon employees may meet the requirements of both the federal exemption listed above and one or more of the similar minimum wage exemptions of state law listed below:

- Conference ground/center employees (see item 5 above, page 23)
- Resident hosts of publicly owned campgrounds (see item 12 above, page 26)
- Ski patrol (nonprofessional) employees (see item 17 above)

OT-5. Common carrier (air or railway) employees

Oregon law		Federal law	
MW	OT	MW	OT
	√		√

Oregon law provides certain exemptions to overtime for employees who are exempt from overtime under the FLSA because of other federal laws. Among others, federal law provides such an exemption from overtime for

- Any employee of an employer engaged in the operation of a common carrier by rail and subject to the provisions of Part I of the Interstate Commerce Act; or
- Any employee of a carrier by air subject to the provisions of Title II of the Railway Labor Act.

Questions relating to federal coverage of such employees should be directed to the U.S. Department of Labor at 503-326-3057. OAR 839-020-0125(3)(b) and (c); 29 U.S.C. §§ 213(b)(2) and (3).

OT-6. Domestic service employees who reside in the home of the employer

Oregon law		Federal law	
MW	OT	MW	OT
	√		√

Both state and federal law provide an exemption from overtime for work performed by any individual employed in ***domestic service*** in a household and who resides in the household. OAR 839-020-0125(3)(n); 29 U.S.C. § 213(b)(21).

For purposes of the exemption, "domestic service" means services of a household nature performed by an employee in or about a family home (permanent or temporary) of the person by whom the employee is employed. The term includes, but is not limited to, employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, gardeners, and companions to the elderly and infirm.

OT-7. Fruit and vegetable and employee transportation workers

Oregon law		Federal law	
MW	OT	MW	OT
	√		√

Ordinarily, the limitation of the agricultural exemption extends to agricultural work performed by the farmer or on a farm as part of that farm's operations. Both state and federal law provide an exemption from overtime, however, for (1) employees engaged in the transportation and preparation for transportation of fruits and vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the State of Oregon, or (2) any employee engaged in transportation, whether or not performed by the farmer, between the farm and any point within the State of Oregon of persons employed (or to be employed) in the harvesting of fruits or vegetables. OAR 839-020-0125(3)(m); 29 U.S.C. § 213(b)(16).

OT-8. Homeworkers making wreaths

Oregon law		Federal law	
MW	OT	MW	OT
	√		√

Both state and federal law provide an exemption from overtime for work performed by any homeworker engaged in the making of wreaths composed principally of natural holly, pine, cedar or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths). OAR 839-020-0125(4); 29 U.S.C. § 213(d).

OT-9. Motion picture theater employees

Oregon law		Federal law	
MW	OT	MW	OT
	√		√

Both state and federal law provide an exemption from overtime for work performed by any employee employed by an establishment which is a motion picture theater. OAR 839-020-0125(3)(o); 29 U.S.C. § 213(b)(27).

OT-10. Newspaper delivery to consumers

Oregon law		Federal law	
MW	OT	MW	OT
	√	√	√

Both state and federal law provide an exemption from overtime for work performed delivering newspapers to the consumer. OAR 839-020-0125(4); 29 U.S.C. § 213(d).

OT-11. Petroleum products distributors (bulk or wholesale)

Oregon law		Federal law	
MW	OT	MW	OT
	√		√

State and federal law provide a *partial* exemption from overtime for an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products. The enterprise must have an annual gross volume of sales that is less than $1,000,000 exclusive of excise taxes with more than 75 percent of such enterprise's annual dollar volume of its sales made within Oregon and not more than 25 percent of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale.

Qualifying petroleum products distributors need only pay employees for hours worked in excess of forty in a work week at one and one-half times the applicable minimum wage rate, regardless of the employee's actual rate of wage. (Under ORS 653.025, the more beneficial rate is Oregon's minimum wage, so that wage must be paid.) OAR 839-020-0125(2)(b); 29 U.S.C. § 207(b)(3).

OT-12. Radio station employees in small markets

Oregon law		Federal law	
MW	OT	MW	OT
	√		√

State and federal law provide an exemption from overtime for any employee employed as an announcer, news editor, or chief engineer by a radio or television station, the major studio of which is located either:

- In a city or town with a population of one hundred thousand or less, according to the latest available decennial census figures as compiled by the Bureau of the Census, except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the Office of Management and Budget, which has a total population in excess of one hundred thousand, or
- In a city or town of twenty-five thousand population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area.

OAR 839-020-0125(3)(f); 29 U.S.C. § 207(b)(9).

OT-13. Recreational / amusement employees in national forests, parks, or refuges

Oregon law		Federal law	
MW	OT	MW	OT
	√		√

State and federal law provide an exemption from overtime for employees of private amusement or recreational establishments located on a national park or a national forest, or on land in the National Wildlife Refuge System. Employees of such establishments need only be paid overtime for hours worked in excess of 56 in a work week.
OAR 839-020-0125(3)(q); 29 U.S.C. § 213(b)(29).

OT-14. Retail sales / service employees paid on commission

Oregon law		Federal law	
MW	OT	MW	OT
	√		√

Overtime rules do not apply to an employee of a retail or service establishment who is paid on a commission basis, provided that the regular rate of pay for the employee is over 1.5 times the current Oregon minimum wage, and over 50 percent of the employee's pay for a representative period of not less than one month represents commissions earned on goods or services sold. Employers may pay a guarantee or allow draws against anticipated commissions and still qualify for this exemption as long as both criteria are met. OAR 839-020-0125(2)(d); 29 U.S.C. § 207(i).

NOTE: Under federal rules, a "retail or service establishment" is limited to those establishments which have a "retail concept" meaning an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry. See
29 C.F.R. § 779.312 and following.

OT-15. Salespeople selling boats, trailers, or aircraft for a non-manufacturing establishment

Oregon law		Federal law	
MW	OT	MW	OT
	√		√

State and federal law provide an exemption from overtime for employees primary engaged in selling boats, trailers, or aircraft, provided they are employed by establishments primarily engaged in the business of selling trailers, boats or aircraft to ultimate purchasers. OAR 839-020-0125(3)(h); 29 U.S.C. § 213(b)10(B).

OT-16. Salespeople, parts people and mechanics of automobile, truck or farm implement retailers

Oregon law		Federal law	
MW	OT	MW	OT
	√		√

State and federal law provide an exemption from overtime for employees who are primary engaged in selling or servicing automobiles, trucks or farm implements, provided they are employed by establishments primarily engaged in the business of selling such vehicles or implements to ultimate purchasers. OAR 839-020-0125(3)(g); 29 U.S.C. § 213(b)10(A); 29 C.F.R. § 779.371.

UPDATE: The U.S. Department of Labor recently declined to amend its definitions of "salespeople, parts people, and mechanics" to include service advisors, service writers, service salesmen, or service managers within the exemption to overtime.

Current regulations indicate that a "mechanic" is "any employee primarily engaged in doing mechanical work. . . ." Employees who do not actually perform mechanical work are not included. Salespeople are defined as those employees who are engaged for the purpose making sales or obtaining orders or contracts for sale of the automobiles, trucks, or farm implements. The regulation does not mention sales of service work apart from the sale of the auto, truck or farm implement. 29 C.F.R. § 779.372.

OT-17. Seamen

Oregon law		Federal law	
MW	OT	MW	OT
	√		√

State and federal law provide an exemption from overtime for seamen.
OAR 839-020-0125(3)(e); 29 U.S.C. § 213(b)(6).

OT-18. Small country elevator employees

Oregon law		Federal law	
MW	OT	MW	OT
	√		√

State and federal law provide an exemption from overtime for any employee employed within the production area (as defined by the Commissioner) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm, if no more than five employees are employed in the establishment in such operations. OAR 839-020-0125(3)(l);
29 U.S.C. § 213(b)(14).

OT-19. Small forestry operations

Oregon law		Federal law	
MW	OT	MW	OT
	√		√

State and federal law provide an exemption from overtime for any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by the employee's

employer in such forestry or lumbering operations does not exceed eight.
OAR 839-020-0125(3)(p); 29 U.S.C. § 213(b)(28).

Oregon law		Federal law	
MW	OT	MW	OT
	√		√

OT-20. Truck drivers and their helpers

Oregon law provides certain exemptions for employees who are overtime exempt under the FLSA as a result of other federal laws. Among others, federal law provides such an exemption from overtime for "any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service. . . ." 29 U.S.C. § 213(b)(1).

Overtime exempt employees are those who are:

1. Employed by a "motor carrier" or "motor private carrier";
2. Drivers, helpers, loaders or mechanics whose duties affect the safety of operation of motor vehicles on public highways in interstate/international commerce; **and**
3. **NOT** covered by the exemption for small vehicles.

The definition of a "motor carrier" is a person who provides motor vehicle transportation (of people or property) for compensation. 49 U.S.C. § 13102(14)

A "motor private carrier" means a person, other than a "motor carrier," transporting property by motor vehicle when—

1. the person is the owner, lessee, or bailee of the property being transported; **and**
2. the property is being transported for sale, lease, rent, or bailment or to further a commercial enterprise. 49 U.S.C. § 13102(15).

The safety-affecting duties of covered drivers, helpers, loaders or mechanics need not be constant to fall within the exemption, and the proportion of "safety-affecting" duties to other duties is likewise immaterial – except to the extent that they are so trivial, casual, and insignificant that they become *de minimis*.

The transportation duties of covered safety-affecting employees need to involve interstate commerce. This can mean that the employee transports people or property across state lines or continues the transportation of goods in an interstate journey.

Safety-affecting employees may be considered part of interstate commerce even if they have not made an actual interstate trip, if (A) the employer has a demonstrable involvement in interstate commerce and (B) the employee could reasonably have been expected to make an interstate trip or work on a vehicle in interstate commerce.

In fact, the Secretary of Transportation may assert jurisdiction over safety-affecting employees for a four month period beginning with the date that they *could have* or actually engaged in interstate commerce. Such employees would be exempt from the overtime requirements of the FLSA (and state law) for this period.

The overtime requirements of federal law still apply to safety-affecting drivers, helpers, loaders or mechanics of vehicles weighing less than 10,000 pounds, unless:

- The vehicle is designed or used to transport more than eight passengers (including the driver) for compensation; or
- The vehicle is designed or used to transport more than fifteen passengers (including the driver) and is not used to transport passengers for compensation; or
- The vehicle is used to transport hazardous material requiring placards.

Questions relating to federal coverage of employees of motor carriers or motor private carriers should be directed to the U.S. Department of Labor at 503-326-3057.
OAR 839-020-0125(3)(b) and (c); 29 U.S.C. §§ 213(b)(2) and (3).

COMMONLY ASKED QUESTIONS – Truckers Exemption

Q. We have an interstate driver whose primary duty is to operate a full truck and trailer rig (more than 10,000 pounds) but when things get slow, we often will have him making deliveries in one of our smaller vehicles (less than 10,000 pounds). Does overtime apply?

A. Yes. Overtime requirements would apply in any work week where the employee's duties do not qualify for the exemption, even if part of the workweek was spent in exempt driving. See US DOL's fact sheet #19 on The Motor Carrier Exemption under the Fair Labor Standards Act (FLSA) at http://www.dol.gov/whd/regs/compliance/whdfs19.htm.

Conclusion

A good understanding of the legal requirements described in this handbook is an excellent first step toward making solid worker classification and exempt status determinations. Remember, the burden of proving a worker's classification or exempt status rests with you, the employer. As you develop and review job descriptions or your business's other policies, do not hesitate to take advantage of the technical assistance available through BOLI. Although we cannot offer legal advice or review your policies, we can provide ready access the laws and administrative rules enforced by BOLI, as well as free and low-cost resources to Oregon employers, from customized on-site seminars to answers by telephone and email. Our other handbooks for sale cover topics like "Wage and Hour Laws" and "Leave Laws in Oregon," and other products, like our fact sheets, advice columns and posters, can be easily obtained online.

To contact us, please visit our website at http://www.oregon.gov/BOLI/TA or call our Employer Assistance line at 971-673-0824.

Appendices

1. ***STATE AGENCY INDEPENDENT CONTRACTOR CRITERIA***
2. ***ORS 670.600***
3. ***IMPLEMENTING REGULATIONS***
4. ***STATE AND LOCAL GOVERNMENT OVERTIME EXEMPTIONS***

State Agency Criteria for INDEPENDENT CONTRACTORS

	ORS 670.600	Economic Reality Test	Right-to-Control Test	Nature-of-the-Work Test
Agency	Department of Revenue Employment Department Construction Contractors Board Landscape Contractors Board	Bureau of Labor and Industries - Wage and Hour Division	Bureau of Labor and Industries - Civil Rights Division & Workers' Compensation Division	Workers' Compensation Division (Where Right-to-Control Test proves inconclusive)
Criteria	Worker must meet **all** of the requirements of ORS 670.600 to be considered an independent contractor.	Five factors of the test are weighed to determine whether worker is an independent contractor as a matter of economic reality. No single factor is determinative.	Four factors of the test are weighed to determine whether a worker is free from the right to control by the business receiving the worker's services. No single factor is determinative.	Considers the character of the work or business, as a supplement to the Right-to-Control test.
Factors	1. Free from direction and control over the means and manner of providing the services, subject only to the right of the person for whom the services are provided to specify the desired result; and 2. Customarily engaged in an independently established business; and 3. Licensed under ORS 671 or 701 (CCB, State Landscape Architect Board or LCB and State Board of Architect Examiners) if required for the service; and 4. Responsible for other licenses or certificates necessary to provide the service.	1. The degree of control exercised by the alleged employer; 2. The extent of the relative investments of the worker and alleged employer; 3. The degree to which the worker's opportunity for profit and loss is determined by the alleged employer; 4. The skill and initiative required in performing the job; 5. The permanency of the relationship.	1. Direct evidence of the right to, or the exercise of, control; 2. The method of payment; 3. The furnishing of equipment; 4. The right to fire.	1. How much is the work a regular part of the hiring entity's business? 2. How skilled is it? 3. Is the work continuous or intermittent? 4. Is the duration sufficient to amount to the hiring of continuous services as distinguished from contracting for completion of a particular job? 5. To what extent may the work be expected to carry its own accident burden?
Notes	**The classification of a worker under any of these tests is not determinative for the classification of that worker under the remaining tests.** The text of ORS 670.600 as well as additional information regarding the criteria listed above is available at: **www.oregonindependentcontractors.com**.			Please contact the Employer Compliance Unit toll free at 1-888-877-5670 and ask for a Coverage Investigator with questions on independent contractors under workers' compensation law,.

Disclaimer:
The above information is provided as a summary and teaching guide and is not intended as legal advice. If you need legal advice, please consult an attorney. We attempt to update materials pertaining to the information laid out above as soon as practicable following changes or developments in the laws and rules affecting Oregon employers, but we make no warranties or representations, express or implied, about whether the information provided is current. We urge you to check the applicable statutes and administrative rules yourself and to consult with legal counsel prior to taking action that may invoke employee rights or employer responsibilities or failing to act when required by law to act.

OREGON REVISED STATUTE (ORS) 670.600

INDEPENDENT CONTRACTORS

670.600 Independent contractor defined. (1) As used in this section:

(a) “Individual” means a natural person.

(b) “Person” has the meaning given that term in ORS 174.100.

(c) “Services” means labor or services.

(2) As used in ORS chapters 316, 656, 657, 671 and 701, “independent contractor” means a person who provides services for remuneration and who, in the provision of the services:

(a) Is free from direction and control over the means and manner of providing the services, subject only to the right of the person for whom the services are provided to specify the desired results;

(b) Except as provided in subsection (4) of this section, is customarily engaged in an independently established business;

(c) Is licensed under ORS chapter 671 or 701 if the person provides services for which a license is required under ORS chapter 671 or 701; and

(d) Is responsible for obtaining other licenses or certificates necessary to provide the services.

(3) For purposes of subsection (2)(b) of this section, a person is considered to be customarily engaged in an independently established business if any three of the following requirements are met:

(a) The person maintains a business location:

(A) That is separate from the business or work location of the person for whom the services are provided; or

(B) That is in a portion of the person’s residence and that portion is used primarily for the business.

(b) The person bears the risk of loss related to the business or the provision of services as shown by factors such as:

(A) The person enters into fixed-price contracts;

(B) The person is required to correct defective work;

(C) The person warrants the services provided; or

(D) The person negotiates indemnification agreements or purchases liability insurance, performance bonds or errors and omissions insurance.

(c) The person provides contracted services for two or more different persons within a 12-month period, or the person routinely engages in business advertising, solicitation or other marketing efforts reasonably calculated to obtain new contracts to provide similar services.

(d) The person makes a significant investment in the business, through means such as:

(A) Purchasing tools or equipment necessary to provide the services;

(B) Paying for the premises or facilities where the services are provided; or

(C) Paying for licenses, certificates or specialized training required to provide the services.

(e) The person has the authority to hire other persons to provide or to assist in providing the services and has the authority to fire those persons.

(4) Subsection (2)(b) of this section does not apply if the person files a Schedule F as part of an income tax return and the person provides farm labor or farm services that are reportable on Schedule C of an income tax return.

(5) For purposes of determining whether an individual provides services as an independent contractor:

(a) The creation or use of a business entity, such as a corporation or a limited liability company, by an individual for the purpose of providing services does not, by itself, establish that the individual provides services as an independent contractor.

(b) When the individual provides services through a business entity, such as a corporation or a limited liability company, the provisions in subsection (2), (3) or (4) of this section may be satisfied by the individual or the business entity.

OREGON ADMINISTRATIVE RULE 150-670.600

INDEPENDENT CONTRACTOR

(1) Purpose of Rule. The Landscape Contractors Board, Department of Revenue, Department of Consumer and Business Services, Employment Department, and Construction Contractors Board must adopt rules together to carry out ORS 670.600. 670.600 defines "independent contractor" for purposes of the programs administered by these agencies. This rule is intended to ensure that all five agencies apply and interpret ORS 670.600 in a consistent manner; to clarify the meaning of terms used in ORS 670.600; and, to the extent possible, to enable interested persons to understand how all five agencies will apply ORS 670.600.

(2) Statutory Context.

(a) ORS 670.600 generally establishes three requirements for "independent contractors." One requirement is that an "independent contractor" must be engaged in an "independently established business." Another requirement is related to licenses and certificates that are required for an "independent contractor" to provide services. A third requirement is that an "independent contractor" must be "free from direction and control over the means and manner" of providing services to others.

(b) The specific focus of this rule is the "direction and control" requirement. See ORS 670.600 for the requirements of the "independently established business" test and for licensing and certification requirements.

(3) Direction and Control Test.

(a) ORS 670.600 states that an "independent contractor" must be "free from direction and control over the means and manner" of providing services to others. The agencies that have adopted this rule will use the following definitions in their interpretation and application of the "direction and control" test:
(A) "Means" are resources used or needed in performing services. To be free from direction and control over the means of providing services an independent contractor must determine which resources to use in order to perform the work, and how to use those resources. Depending upon the nature of the business, examples of the "means" used in performing services include such things as tools or equipment, labor, devices, plans, materials, licenses, property, work location, and assets, among other things.

(B) "Manner" is the method by which services are performed. To be free from direction and control over the manner of providing services an independent contractor must determine how to perform the work. Depending upon the nature of the business, examples of the "manner" by which services are performed include such things as work schedules, and work processes and procedures, among other things.

(C) "Free from direction and control" means that the independent contractor is free from the right of another person to control the means or manner by which the independent contractor provides services. If the person for whom services are provided has the right to control the means or manner of providing the services, it does not matter whether that person actually exercises the right of control.

(b) Right to specify results to be achieved. Specifying the final desired results of the contractor's services does not constitute direction and control over the means or manner of providing those services.

(4) Application of "direction and control" test in construction and landscape industries:

(a) The provisions of this section apply to:

(A) Architects licensed under ORS 671.010 to 671.220;

(B) Landscape architects licensed under ORS 671.310 to 671.479;

(C) Landscaping businesses licensed under ORS 671.510 to 671.710;

(D) Engineers licensed under ORS 672.002 to 672.325; and

(E) Construction contractors licensed under ORS chapter 701.

(b) A licensee described in (6)(a), that is paying for the services of a subcontractor in connection with a construction or landscape project, will not be considered to be exercising direction or control over the means or manner by which the subcontractor is performing work when the following circumstances apply:

(A) The licensee specifies the desired results of the subcontractor's services by providing plans, drawings, or specifications that are necessary for the project to be completed.

(B) The licensee specifies the desired results of the subcontractor's services by specifying the materials, appliances or plants by type, size, color, quality, manufacturer, grower, or price, which materials, appliances or plants are necessary for the project to be completed.

(C) When specified by the licensee's customer or in a general contract, plans, or drawings and in order to specify the desired results of the subcontractor's services, the licensee provides materials, appliances, or plants, including, but not limited to, roofing materials, framing materials, finishing materials, stoves, ovens, refrigerators, dishwashers, air conditioning units, heating units, sod and seed for lawns, shrubs, vines, trees, or nursery stock, which are to be installed by subcontractors in the performance of their work, and which are necessary for the project to be completed.

(D) The licensee provides, but does not require the use of, equipment (such as scaffolding or fork lifts) at the job site, which equipment is available for use on that job site only, by all or a significant number of subcontractors requiring such equipment.

(E) The licensee has the right to determine, or does determine, in what sequence subcontractors will perform work on a project, the total amount of time available for performing the work, or the start or end dates for subcontractors working on a project.

(F) The licensee reserves the right to change, or does change, in what sequence subcontractors will perform work on a project, the total amount of time available for performing the work, or the start or end dates for subcontractors working on a project.

Stat. Auth: ORS 657.610
Stats. Implemented: ORS 657.040, 670.600, 670.605, 671.010 - 657.710, 672.002 - 672.325,701
Hist.: ED 2-2007, f. 1-31-07, cert. ef. 2-1-07

STATE AND LOCAL GOVERNMENT OVERTIME EXEMPTIONS

ORS 653.261 and OAR 839-020-0030 generally require the payment of overtime to employees for all hours worked in excess of 40 hours in a work week. Although these requirements do not apply to state and local government employees, most public employees are entitled to overtime under separate provisions of law, specifically, ORS 653.268 and 652.070.

Under the minimum wage law, public employees are required to be compensated for overtime worked in excess of 40 hours in work week if budgeted funds for overtime are available. If budgeted funds are not available, the employee is entitled to compensatory time off at not less than one and one-half times the hours worked in excess of 40. ORS 653.268.

There are, however, certain exemptions to the overtime requirements of minimum wage law. The following public employees are not entitled to overtime or compensatory time for hours worked in excess of 40 hours in a work week.

NOTE: Other overtime provisions may apply to these workers, so be sure to read the specifics of each exemption listed below in the corresponding material which follows.

STATE AND LOCAL GOVERNMENT OVERTIME EXEMPTIONS *

Exemption	Oregon law		Federal law	
	MW	OT	MW	OT
SLG-1. Employees engaged in forest fire fighting – p.74		√		√
SLG-2. Employment in fire protection and law enforcement activities (including security personnel in correctional institutions) – p.75		√		√
SLG-3. Employees of a people's utility district organized under ORS 261 – p.78		√		
SLG-4. Irrigation system district employees – p.78		√		√
SLG-5. Salaried executive, administrative or professional employees – p.79		√		√
SLG-6. Employment subject to a collective bargaining agreement waiving overtime provisions of ORS 653.268. – p.79		√		
SLG-7. Employees of hospitals or establishment primarily engaged in the care of the sick aged or mentally ill paid on the "8 and 80" rule – p.80		√		√
SLG-8. Active duty by members of the state militia organized under ORS 399.075. – p.81		√		

*** Additional exemptions to either minimum wage or overtime under federal law which do not also appear in state law do not apply to Oregon employers.** The above information is provided as a summary and teaching guide and is not intended as legal advice. If you need legal advice, please consult an attorney. We attempt to update materials pertaining to the information laid out above as soon as practicable following changes or developments in the laws and rules affecting Oregon employers, but we make no warranties or representations, express or implied, about whether the information provided is current. We urge you to check the applicable statutes and administrative rules yourself and to consult with legal counsel prior to taking action that may invoke employee rights or employer responsibilities or omitting to act when required by law to act.

SLG-1. Employees engaged in forest fire fighting

Oregon law		Federal law	
MW	OT	MW	OT
	√		√

Oregon law provides a specific exemption from the overtime requirements of the minimum wage law for public employees engaged in fighting forest fires and a separate exemption for public employees engaged on a full time basis in fire protection activities (see below). ORS 653.269(1) and (3). Federal law also provides an exemption to overtime for public agencies that employ less than 5 employees in fire protection activities. 29 U.S.C. 213(b)(20).

Although public employees are not entitled to overtime after 40 hours in any work week, for fighting forest fires, fire protection employees of a public agency must still be paid for certain overtime hours (or be provided compensatory time off) under separate state and federal laws. See the following section on *Employees engaged fire protection & law enforcement* for the details.

This exemption does NOT apply to employees of private contractors engaged in forest fire fighting, even if such services are provided by way of a contract with a public agency. ORS 653.269(1); OAR 839-020-0210(3); 29 C.F.R. § 553.202.

SLG-2. Employees engaged in fire protection & law enforcement

Oregon law		Federal law	
MW	OT	MW	OT
	√		√

Oregon law provides a specific exemption from overtime for public employees engaged in fire protection, law enforcement activities (including security personnel in correctional institutions). This exemption does NOT apply to employees of private contractors, even if such services are provided by way of a contract with a public agency.
ORS 653.269(1); OAR 839-020-0210(3).

Fire protection

Exempt public employees engaged in **fire protection activities** include any employee whose principal duties consist of preventing or combating fire of preventing loss of life or property from fire. ORS 652.050.

Under OAR 839-020-0220 the term "firefighter" also includes any (trainee, probationary or permanent) employee:

1. Who is employed by an organized fire department or fire protection district;
2. Who has been trained to the extent required by state statute or local ordinance;
3. Who has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and
4. Who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills, and inspecting homes and schools for fire hazards.

An employee engaged in fire protection activity includes "a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who—(1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and (2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk" 29 C.F.R. § 553.210.

Public employees who do NOT qualify for the exemption under state or federal law (and who WOULD be entitled to overtime) include "civilian" employees of a fire department, fire district, or forestry service who engage in such support activities as those performed by dispatchers, alarm operators, apparatus and equipment repair and maintenance workers, camp cooks, clerks, stenographers, etc. OAR 839-020-0220(2); 29 C.F.R. § 553.210.

Although not entitled to overtime for hours worked in excess of 40 in a work week, employees of a public agency must still be paid for certain overtime hours (or be provided compensatory time off) under separate state and federal laws:
Oregon law requires fire departments employing fewer than four firefighters to pay overtime for any week in which a firefighter works more than 72 hours. Fire departments that employ four or more firefighters must pay overtime anytime a firefighter works more than 56 hours in a week. The fire department may average the hours worked per week over each quarter of its fiscal year for the purpose of calculating overtime.
ORS 652.060(1).

In addition, Oregon law requires that firefighters be allowed 48 consecutive hours off duty during each seven-day period. Each seven-day period is understood to be any seven consecutive days without regard to an established work week. ORS 652.070.

Oregon law requires employers to include vacation and sick leave hours taken along with hours worked for the purpose of calculating overtime hours. However, if the firefighter agrees, fire department employers having four or more firefighters may pay straight time wages for hours in a week when an employee is replacing another on authorized leave or filling a vacancy temporarily, provided the employee's decision to fill the vacancy is freely made. ORS 652.070, 652.080.

Under federal law, Federal law requires an employer having five or more firefighting protection employees to pay those employees at one and one-half times their regular rates for all hours worked over 53 in a week. The employer may average the hours worked over periods longer than a week but not over more than a four-week period. See the chart below for the maximum hours for each possible length of the work period for fire protection activities. 29 U.S.C. § 213(b)(20).

Employers must apply the state or federal standard which is most beneficial to the employee.

Law enforcement

Exempt public employees employed in **law enforcement activities** include any employee who is a uniformed or plainclothed member of a body of officers and subordinates

1. Who are empowered by state statute or local ordinance to enforce 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 and:
2. Who has the power to arrest; and
3. Who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigation and law enforcement techniques, community relations, medical aid and ethics.

In addition, rescue and ambulance service personnel of a public agency (again, NOT private contractors) are exempt from overtime if their services are substantially related to firefighting or law enforcement activities in that:

1. The ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective duties; and
2. The ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents.

Security personnel in public correctional institutions also qualify for the exemption from overtime.

Employees who do not perform the duties listed above do NOT qualify for the exemption and must be paid overtime. Such employees could include:

- Building inspectors;
- Animal control personnel;
- Sanitarians;
- Civilian traffic employees;
- Civilian parking checkers;
- Wage and hour compliance officers;
- Tax compliance officers;
- Coal miners; or
- Building guards.

The federal exemption to overtime applies only to employees of public agencies employing less than 5 employees in law enforcement and requires an employer having five or more law enforcement employees to pay those employees at one and one-half times their regular rate for hours worked over 43 in a week or 171 in a 28-day period. The employer may average the hours worked over periods longer than a week but not over more than a four-week period. 29 U.S.C. 213(b)(20).

The following table summarizes the maximum hours and overtime provisions for fire and law enforcement employees under federal law. Overtime compensation, premium pay, or comp time is required for all hours worked in excess of the listed maximum hours standard.

Work Days	Maximum Fire Protection Hours	Maximum Law Enforcement Hours
28	212	171
27	204	165
26	197	159
25	188	153
24	182	147
23	174	141
22	167	134
21	159	128
20	151	122
19	144	116
18	136	110
17	129	104
16	121	98
15	114	92
14	106	86
13	98	79
12	91	73
11	83	67
10	76	61
9	68	55
8	61	49
7	53	43

29 C.F.R. § 553.230

SLG-3. Employees of a people's utility district organized under ORS 261

Oregon law		Federal law	
MW	OT	MW	OT
	√		

Oregon law provides a specific exemption from the overtime requirements of the minimum wage law for public employees of a people's utility district organized under ORS 261. ORS 653.269(4).

NOTE: Federal law affirmatively covers "political subdivisions" of a state and does not provide a specific exemption from overtime for employees of people's utility district.

SLG-4. Irrigation system district employees

Oregon law		Federal law	
MW	OT	MW	OT
	√		√

Oregon law provides a specific exemption from the overtime requirements of the minimum wage law for public employees of an irrigation system district.
ORS 653.269(2).

Under federal law there is an exemption from overtime for employment in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, that are

not owned or operated for profit, that are used exclusively for supply and storing water at least 90% of which was utilized for agricultural purposes in the preceding calendar year. 29 U.S.C. § 213(b)(12).

SLG-5. Salaried executive, administrative or professional employees

Oregon law		Federal law	
MW	OT	MW	OT
	√		√

Oregon law provides a specific exemption from the overtime requirements of the minimum wage law for public employees because of the executive, supervisory, administrative or professional nature of their work. ORS 653.269(5)(a); OAR 839-020-0320 to -0350.

These exemptions differ from the exemptions available to private employers in only a few details. The significant differences are:

1. Oregon rules require that no more that 20 percent of the exempt employee's duties entail activities which are not directly and closely related to his or her primary duty.

2. The exception to this rule is that in the case of an employee of a retail or service establishment, the employee's work in activities not directly and closely related to his or her primary duty must be less than 40 percent.

3. Deductions may be made from the payment of a salaried exempt employee for absences due to a budget-required furlough.

The federal requirement as to a minimum salary of $455 per week remains the more beneficial provision regarding the salary basis required for the so called "white collar" exemptions, however, certain ***professional employees*** of a public agency need not be paid a salary under both federal and state law. These employees include lawyers, doctors and teachers when such individuals hold a valid license or certificate for such work and are actually engaged in the work of a lawyer, doctor or teacher. OAR 839-020-0320(4)(e); 29 C.F.R. § 541.600(e).

SLG-6. Collective bargaining agreement waiving overtime

Oregon law		Federal law	
MW	OT	MW	OT
	√		

Oregon law provides a specific exemption from the overtime requirements of the minimum wage law for public employees who are subject to a collective bargaining agreement (CBA) that specifically waives the requirements (which pertain to overtime) of ORS 653.268. ORS 653.269(5)(b).

Under federal law, parties to a CBA may not negotiate provisions that waive employees' statutory rights. Under federal law, however, overtime provisions may be modified such that:

1. Overtime is not due under the terms of a CBA which provides that no employee shall be employed more than 1,040 hours during any period of 26 consecutive weeks; or

2. Overtime is not due under the terms of a CBA which provides that during a specified period of 52 consecutive weeks the employee shall be employed not more than 2,240 hours and shall be guaranteed not less than 1,840 (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than 2080 hours of employment for which he or she shall receive compensation for all hours guaranteed or worked and for all hours in excess of the guaranty which are also in excess of 40 in a work week or 2,080 in the period at a rate not less than one and one-half times the regular rate at which he is employed.

SLG-7. Employees of hospitals, etc., who are paid on the "8 and 80" rule

Oregon law		Federal law	
MW	OT	MW	OT
	√		√

Oregon law provides a specific exemption from the overtime requirements of the minimum wage law for employees of a public employer engaged in the operation of a hospital or institution for the care of the sick, aged or mentally ill provided the same alternative work period for calculating the number of overtime hours by private employers of such institutions is used. ORS 653.269(6); OAR 839-020-0125(2)(d)

Under this exemption, the qualifying employer may use a work period of 14 consecutive days (in place of the usual 40 hour work week) provided that employees are paid for overtime for any hours worked excess of eight in a day and for any hours worked in excess of 80 in the work period. The arrangement is often referred to as the "8 and 80 Rule" for computing overtime hours worked. 29 U.S.C. § 207(j).

In order for a hospital or qualifying care facility to compensate overtime hours worked using a 14-day work period, the employee and employer must have agreed to such an arrangement prior to the performance of any work.

In addition, the agreement *must* provide that overtime will be paid on a daily basis for all hours worked over eight in a day as well as for hours worked over 80 in the 14-day work period. The agreement must also state the time and day of the week that the 14-day period begins and must be noted in the employer's records.

To compute the number of overtime hours in a work period where an employee has worked more than 80 hours and has also exceeded 8 hours in one or more days, an employer must add up the number of daily overtime hours and the number of bi-weekly overtime hours and pay the greater of the two.

NOTE: There are specific provisions regarding the amount of overtime that may be required for certain health care workers that are enforced by the Health Division of the Department of Human Services. ORS 441.166 prohibits a hospital from requiring a registered nurse to work more than two hours beyond a regularly scheduled shift and

more than 16 hours in a 24-hour time period except under certain emergency circumstances. BOLI does not enforce these maximum overtime provisions. Employers may direct any inquiries pertaining to maximum hours of work for nurses to the Department of Human Services, Health Services, Health Care Licensure & Certification Section at 971-673-0540.

ORS 441.178 prohibits hospitals from retaliating against nursing staff who report violations of these maximum overtime provisions or other unsafe conditions, and gives enforcement authority to BOLI to investigate any reported retaliation under the "whistleblowing" provisions of the civil rights law. Questions about retaliation for reporting unsafe conditions in hospitals, including overtime violations, should be referred to the BOLI's Civil Rights Division at 971-673-0764.

SLG-8. Active duty by members of the state militia

Oregon law		Federal law	
MW	OT	MW	OT
	√		

Oregon law excludes members of the state organized militia on active duty from the overtime requirements of ORS 653.268. Under ORS 399.75 such individuals are excluded from the application of definitions to term like "public employee" at ORS 243.650. ORS 653.269(7).

NOTE: Federal law does not provide a similar exemption. Competent legal advice should be sought prior to determining that federal overtime requirements do not apply.

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