Bureau of Labor
and Industries

Wage and Hour Laws

A Handbook for Oregon Employers

2012 Edition

Oregon Bureau of Labor and Industries
Technical Assistance for Employers Program

Technical Assistance for Employers Program

WAGE AND HOUR LAWS

A Handbook for Oregon Employers

2012 Edition

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Oregon Bureau of Labor and Industries
Technical Assistance for Employers Program

Brad Avakian
Commissioner

Dylan Morgan, Managing Editor
Technical Assistance for Employers Program Coordinator

BOLI Editorial Staff:
Christie Hammond, Wage and Hour Division Administrator
Jennifer Germundson, Technical Assistance for Employers Program Manager
Jeffrey Burgess, Technical Assistance for Employers Program Coordinator
Joseph Tam, Technical Assistance for Employers Program Coordinator
Donald DeMont, Technical Assistance for Employers Administrative Specialist

Commissioner Brad Avakian

Bureau of Labor and Industries

Dear Friend of Technical Assistance:

Welcome to the Bureau of Labor and Industries (BOLI)'s newest *Wage and Hour Laws* handbook. 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 more than 20,000 employer questions via phone and e-mail each year, conduct more than 150 public and private seminars each year, and produce a high-quality, two-day law conference each December.

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 http://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 the Bureau of Labor and Industries, 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 through our website and includes topics like:

- *Civil Rights Laws;*
- *Family and Medical Leave Laws in Oregon;*
- *Recent Changes in Labor and Employment Laws (for 2010-2011); and*
- *Employee Classification & Wage and Hour Exemptions*

Revisions to our popular handbooks on *Policy Writing Guidelines* and *Documentation Discipline and Discharge* are also underway and should be available soon!

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

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

Technical Assistance for Employers
Bureau of Labor and Industries
800 NE Oregon Street, Suite 1045
Portland, OR 97232
971-673-0824

www.oregon.gov/BOLI/TA

BOLI
Bureau of Labor and Industries

CONTACTING BOLI

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!

OFFICE	ADDRESS	PHONE
PORTLAND	800 NE Oregon St., Suite 1045 Portland 97232	971-673-0761 Ore. TTY Relay: 711- Fax: 971-673-0762
BEND Apprenticeship Division ONLY	1645 NE Forbes Rd, Suite 106 Bend, OR 97701	541-322-2435
EUGENE	1400 Executive Pkwy Suite 200 Eugene, OR 97401	541-686-7623
MEDFORD Apprenticeship Division ONLY	119 N Oakdale Ave Medford, OR 97501	541-776-6270
PENDLETON Civil Rights Division ONLY	1327 SE 3rd St Pendleton, OR 97801	541-276-7884
SALEM	3865 Wolverine Ave NE Building E, Suite 1 Salem, OR 97305-1268	503-378-3292
www.oregon.gov/BOLI		

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HOW TO USE THIS HANDBOOK

TA has produced this handbook as a general summary and teaching guide in order to help employers understand the basic requirements of Oregon's wage and hour laws and to avoid potential liability for violations. Please keep in mind, however, that this handbook is not intended as legal advice regarding any particular situation. Those seeking legal advice should contact an attorney.

The tabbed sections of this handbook address each of the major topics of Oregon's wage and hour laws. Specific information on a given topic may also be found by way of the table of contents or the subject matter index.

Several sections of this handbook contain answers to commonly asked questions, best practice tips and legislative updates to further illustrate the application of wage and hour law.

Significant differences between federal and state wage and hour laws are highlighted, and citations to the text of the relevant statutes, rules and regulations are provided for ease of reference. All the statutes and regulations referred to in this handbook can easily be accessed by way of the internet. Links to the full text of the laws and administrative rules enforced by BOLI are available on our website at: http://www.oregon.gov/BOLI. Federal statutes (specifically, the Fair Labor Standards Act) and implementing regulations are also available on the internet at the U.S. Department of Labor's website, www.dol.gov.

Employers should be aware that additional requirements (beyond the scope of this handbook) also apply to specific types of employers, including farm and forest labor contractors, construction contractors on public works projects, and private employment agencies. Employers are encouraged to contact TA for further information on any of these topics.

WAGE AND HOUR LAW

Wage and hour laws regulate a variety of aspects of employment relationships and include requirements on items like minimum wage, overtime, wage payment and recordkeeping requirements as well as basic working conditions such as rest and meal period requirements.

INTER-RELATIONSHIP OF STATE AND FEDERAL LAW

Oregon employers should be aware that most employment relationships are subject to regulation under both state and federal wage and hour laws. Although often similar, the provisions of state and federal law are not identical. Where one or the other provides a higher standard on similar matters such as the minimum wage or overtime, the standard that is most advantageous to the employee will apply.
OAR 839-020-0115(3).

FEDERAL WAGE AND HOUR LAW

Federal wage and hour law is set out by the Fair Labor Standards Act ("FLSA") and codified as 29 U.S.C. § 201, *et seq*. Regulations implementing the FLSA are found in the Code of Federal Regulations ("C.F.R.") at Title 29 - Labor, Chapter V, Wage and Hour Division, Department of Labor.

FEDERAL COVERAGE

Not all employment relationships are subject to federal law, but employers should be aware that there are two ways in which federal coverage can be established, enterprise coverage and individual coverage. The FLSA applies to *all employees* of certain enterprises. These enterprises are:

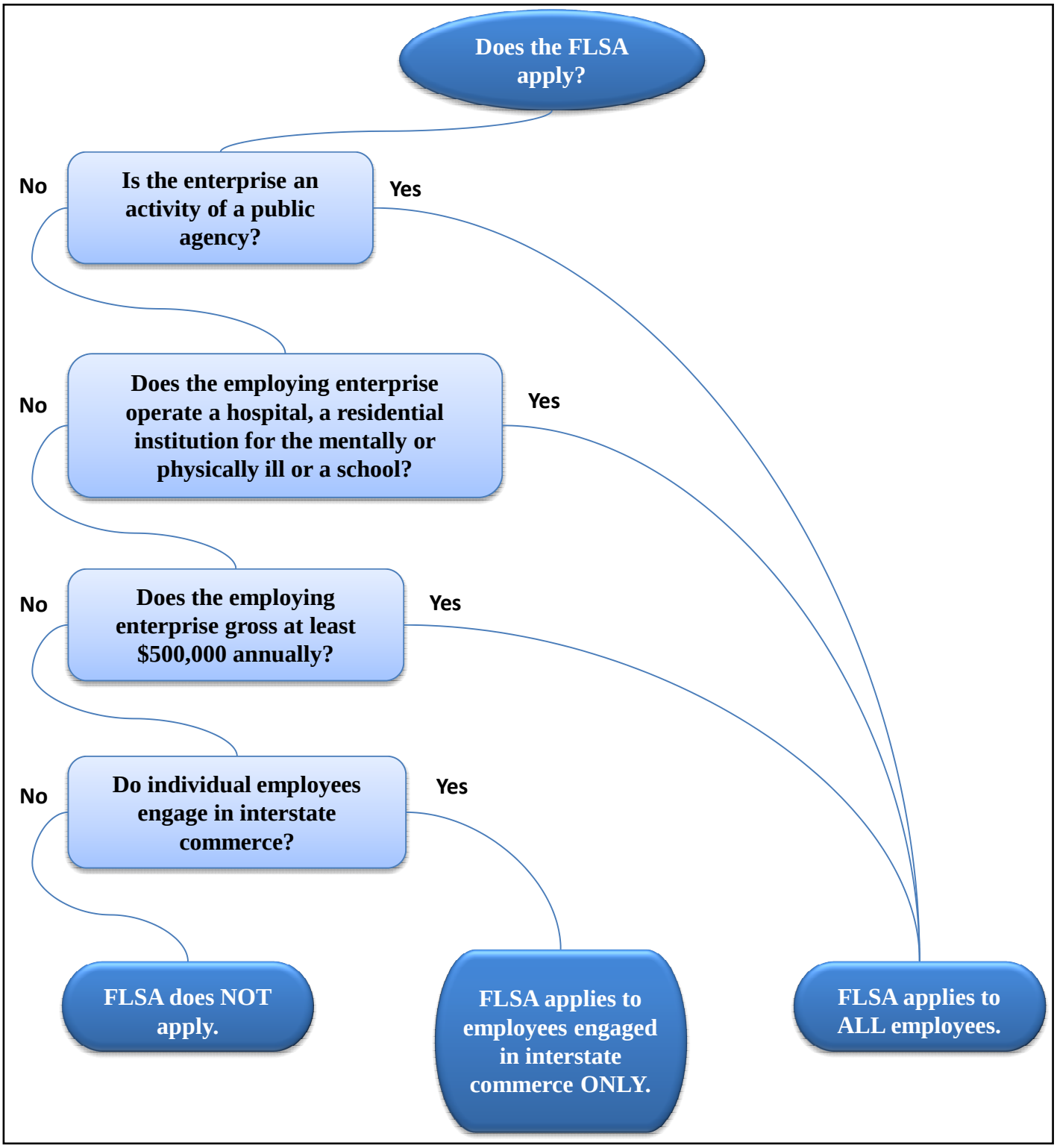
1. those with annual gross volume of sales made or business done is $500,000 or more; or
2. those which are engaged in the operation of a hospital, an institution primarily engaged in the care of those who are physically or mentally ill or disabled or aged, and who reside on the premises, a school for children who are mentally or physically disabled or gifted, a preschool, an elementary or secondary school, or an institution of higher education (whether operated for profit or not for profit); or
3. those which are an activity of a public agency.

The FLSA may also apply to individual employees of an enterprise even if the enterprise itself is not covered. In addition to occupations specifically named in the FLSA (such as certain domestic employment), the FLSA applies to any employees who are themselves engaged in interstate commerce, the production of goods for interstate commerce, or a closely-related process or occupation directly essential to production of goods for interstate commerce.

The definition of interstate commerce is construed very broadly. For example, employees engaged in interstate commerce include those who: work in communications or transportation; regularly use the mail, telephone, computer e-mail system and/or facsimile machine to communicate with persons in another state; make deposits in banks; use an electronic device which authorizes a credit card purchase; keep records of interstate transactions; handle, ship, or receive goods moving in interstate commerce; regularly cross state lines in the course of employment; or work for independent employers who contract to do clerical, custodial, maintenance, or other work for firms engaged in interstate commerce or the production of goods for interstate commerce. 29 C. F. R. § 779.103 *et seq*.

Q. Is there an easy way to know if my business is subject to federal (FLSA) regulation?

A. The flow chart on the following page may help. Alternatively, you could visit the U.S. Department of Labor (USDOL) website at www.dol.gov. You may also contact USDOL directly at 503-326-3057.


Does the FLSA apply?
Is the enterprise an activity of a public agency?
No
Yes
Does the employing enterprise operate a hospital, a residential institution for the mentally or physically ill or a school?
No
Yes
Does the employing enterprise gross at least $500,000 annually?
No
Yes
Do individual employees engage in interstate commerce?
No
Yes
FLSA does NOT apply.
FLSA applies to employees engaged in interstate commerce ONLY.
FLSA applies to ALL employees.

FEDERAL WAGE AND HOUR LAW ENFORCEMENT

The Wage and Hour Division of the United States Department of Labor (USDOL) is charged with enforcement of the FLSA. To enforce the federal minimum wage and overtime laws, the USDOL has statutory authority to inspect records and require two years back payment of unpaid wages. If a violation is found to be "willful," the division may go back a third year and require additional payment of unpaid minimum wages and/or overtime. If a lawsuit results from a dispute with an employer, liquidated damages (twice the amount of unpaid wages) may be sought as well.

OREGON WAGE AND HOUR LAW

All Oregon employers are subject to state wage and hour laws, including those who are also covered by federal law. Employees of the federal government are the only exception to this rule, as they are NOT subject to Oregon's wage and hour laws. ORS 652.310(1)(a) and 653.020(4).

The full text of Oregon's wage and hour laws is found within the Oregon Revised Statutes ("ORS"), chapters 652 and 653. These two chapters are commonly referred to as Oregon's Wage Collection Law and Oregon's Minimum Wage and Overtime Law, though each chapter contains provisions that extend beyond those general descriptions. Child labor laws and working conditions requirements, for example, can be found in Oregon's Minimum Wage and Overtime Law, and daily overtime requirements for manufacturing establishments actually appear in Oregon's Wage Collection Law.

The Oregon Administrative Rules ("OAR") that interpret and implement these statutes are found at OAR chapter 839, divisions 001, 020, and 021. Both statutes and rules can be accessed online through TA's website at www.oregon.gov/BOLI/TA under the headings "Oregon Revised Statutes" and "Administrative Rules."

OREGON WAGE AND HOUR LAW ENFORCEMENT

The Commissioner of the Oregon Bureau of Labor and Industries is charged with enforcing laws and adopting administrative rules regarding Oregon's minimum wage and overtime requirements, working conditions, child labor, and wage collection. Those enforcement duties are carried out by the Bureau's Wage and Hour Division.

Oregon's Wage Collection Law, set out in ORS Chapter 652, authorizes the Commissioner to investigate and attempt equitable settlement of wage claims that have been made by any employees who have worked in Oregon. The Commissioner has the authority to initiate and conduct contested case hearings or file lawsuits against employers or other responsible parties to recover unpaid wages, penalty wages, civil penalties, court costs, and attorney fees. ORS 652.330, 652.332.

The Commissioner may assess civil penalties for willful violations of many rules and statutes enforced by the Wage and Hour Division. Examples include, but are not limited to, willful violations of minimum wage and final pay requirements, failure to

keep required records, failure to post the minimum wage poster, and violations of various rules relating to working conditions. ORS 653.256, OAR 839-020-1010.

The Commissioner has the authority to file a complaint in criminal court for any violation of any law providing for the payment of wages which bears a criminal penalty. ORS 652.330.

The Commissioner also has statutory authority to require an employer who has demonstrated an inability to meet payroll obligations to post a bond in an amount sufficient to pay wages for a period of time up to six months. The Commissioner may also seek to enjoin such an employer from doing business in Oregon until a sufficient bond is provided. ORS 652.125; 652.340.

Other responsibilities of the Commissioner include negotiating reciprocal agreements with other states for the purpose of enforcing wage claims, acting as secretary and executive officer of the Wage and Hour Commission (see paragraph below), and approving special contracts between employers and employees relating to the payment of wages. ORS 652.360, 652.425 and 653.515.

Child Labor Law

The Wage and Hour Commission, comprised of three persons appointed by the governor, administers, executes and carries out the provisions of the child labor laws. The Commission is empowered by statute to adopt rules regulating the employment of minors. ORS 653.520 and 653.525. The Commission investigates compliance with its rules and conducts studies to evaluate existing rules and to identify those that need to be changed. ORS 653.305, 653.535, 653.540.

The Commissioner of the Bureau of Labor and Industries may impose civil penalties for violations of child labor rules or the orders of the Wage and Hour Commission. For more information, see the *Employment of Minors* section of this handbook.

Wage Security Fund

Oregon's Wage Security Fund (WSF), established by the Oregon Legislature and administered by the Bureau of Labor and Industries, protects Oregon workers from wage loss when a plant or company closes and is without sufficient assets to pay the final wages earned by its employees. Qualified claimants may be paid from the fund for the amount they earned during the 60 days preceding the closure date of the business or the claimant's last day of employment, up to a maximum of $4,000. The WSF pays amounts equal to unpaid wages only and does not cover vacation, sick leave or other fringe benefits. Likewise the WSF does not pay damages, civil penalties or interest. ORS 652.409 to 652.414.

Money for the WSF comes from a diversion of .03 of one percent of the employment tax collected during the second calendar quarter of every odd numbered year. The diverted funds go directly to the Wage Security Fund and not to the Employment Trust Fund.

The Bureau has paid over $18 million from the WSF to over 17,000 displaced Oregon workers since the WSF was established in 1985.

The Bureau may commence an appropriate action, suit or proceeding to recover amounts paid from the WSF from the employer, or other persons or property liable for the unpaid wages. In addition to any amounts paid, the Bureau is also entitled to recover reasonable attorney fees and a penalty of 25% of the amounts paid or $200, whichever is greater. ORS 652.414.

Among the "other persons" liable for the amounts paid from the WSF are (1) any successor to the business of the former employer, or (2) any lessee or purchaser of any of the former employer's business property for the continuance of the same business. ORS 652.310(1).

COMMONLY ASKED QUESTIONS – Successor Employers

Q. How would BOLI decide whether my business is a "successor"?

A. BOLI's determination as to whether you are responsible for unpaid wages owed by a previous owner or operator of a business depends on whether you operate essentially the same business (as either a "successor" or as someone who purchases/leases business property in order to continue operation of the same business). The Bureau uses a six-part test to establish whether the current business is essentially the same as the previous business:

1. The name or identity of the business;
2. Its location;
3. The lapse of time between the previous operation and the new operation;
4. Whether the same or substantially the same work force employed;
5. Whether the same product is manufactured or the same service is offered; and,
6. Whether the same machinery, equipment, or methods of production are used.

Keep in mind that not every element needs to be present for an employer to be a successor; the facts of each circumstance are considered together.

NOTE: In a case before the Oregon Court of Appeals, it was held that the definition of an employer in Oregon's Wage Collection Law at ORS 652.310(1) (which includes a "successor") would not permit a claim against a successor employer, unless the claim was before BOLI. See *Stout v. Citicorp Industrial Credit, Inc.*, 102 Or App 637, 796 P2d 373 (1990).

THE EMPLOYMENT RELATIONSHIP

Wage and hour laws apply exclusively to employment relationships. Under both state and federal law, the term "employ" is broadly defined and includes to "suffer or permit" another to perform work. ORS 653.010(2); 29 U.S.C. § 203(g).

Oregon law further defines an "employer" as one who "employs" or "engages the personal services" of an employee. ORS 652.310(1); 653.010(3). Not all individuals who provide personal services, however, are considered "employees." Copartners of an employer, for example, are excluded from definition of an employee. ORS 652.310(2). In addition to copartners of the employer, there are three specific types of workers that also are NOT considered to be employees. The obligations and protections of wage and hour laws employment laws do not apply to:

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

INDEPENDENT CONTRACTORS

Like copartners, independent contractors are excluded from the definition of an employee. ORS 652.310(2). Unfortunately, businesses and workers too often fail to realize that under Oregon law, there are specific legal criteria which distinguish an "employee" from a *bona fide* "independent contractor." In fact, a number of considerations commonly relied upon to identify an independent contractor are **not** determinative in deciding whether a worker is an independent contractor:

- Payment off the books or "under the table,"
- Casual or short term assignments,
- 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, and
- The worker submits an invoice to the business for payment.

In general, a person who provides services for remuneration (pay) will be considered an *employee* - unless that worker also meets the specific criteria required of an independent contractor. Both the courts and regulatory agencies (including BOLI) apply specific legal criteria to the facts of each case to determine:

1. Whether the worker in question is *free from direction and control*; and with the potential exception of the Workers' Compensation Division,

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*).

A number of state agencies (notably, the Department of Revenue, the Oregon Employment Department, and the Construction and Landscape Contractors Boards) use a statutory test (found at ORS 670.600) to address these questions. Owing to established legal precedent, BOLI has followed the federal courts in adopting the "economic reality" test to determine whether a worker is an employee or an independent contractor.

The "economic reality" test weighs five factors (listed below) to gauge the degree to which a worker is economically dependent upon an alleged employer in his or her ability to perform the work.

1. The degree of control exercised by the alleged employer;

2. The extent of the relative investments of the worker and the 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; and

5. The permanency of the relationship.

Bottom line: If under these criteria a worker is deemed dependent upon the alleged employer in order to be able to provide services, he or she will most likely be classified as an employee.

Specific information and guidance on making independent contractor classification determinations is available online at www.oregon.gov/ic, or you may wish to purchase a copy of Technical Assistance's comprehensive worker classification handbook. From our webpage at www.oregon.gov/boli/ta, click "Publications" and scroll down to *Employee Classification & Wage and Hour Exemptions; a Handbook for Oregon Employers*.

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). Volunteers may be paid a stipend for expenses as long as the payment is not consideration for work performed.

STUDENT INTERNS AND TRAINEES

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 USDOL 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. 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 (e.g., no promise of employment present) or that the focus of the test ought to be weighted toward determining who received the primary benefit of the training. What is clear is that labeling the relationship an “unpaid internship” or “work based training program” has no bearing on whether the work performed is subject to wage and hour law.

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 may not 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.

Practice Points

Keep in mind that students may be considered employees and subject to both state and federal wage and hour laws 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.

Be sure to closely monitor the activities performed by student interns or trainees within your operation, and make sure the emphasis stays on providing a transferable, educational experience.

COMMONLY ASKED QUESTIONS – Stipends

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.

SUMMARY ON EMPLOYMENT RELATIONSHIP

State and federal wage and hour laws share a broad definition of an "employee." Generally, anyone who is "suffered or permitted" to perform work is an employee and as such, subject to wage and hour laws. However, workers who meet the criteria described for an ***independent contractor***, ***volunteer*** *or bona fide* ***student intern / trainee*** are NOT employees, and they are NOT, therefore, subject to state or federal wage and hour laws.

WAGE COLLECTION LAW

Oregon's wage collection law (ORS 652) has to do primarily with the payment of wages to employees and the enforcement of wage claims in the event of a dispute or an employer's failure to pay wages due.

PAY PERIODS

Oregon law requires all employers to establish and maintain a regular payday at which point employers are required to pay all wages due and owing to employees. ORS 652.120.

The time prior to a payday may not extend beyond 35 days from either the employee's first day of work or the date of the employer's previous regular payday. An employer is free to establish a more frequent payday interval. ORS 652.120(1).

Under this requirement, employers may not withhold or delay paychecks as a disciplinary measure. An employee who fails to submit time sheets on a timely basis, for example, must still receive a paycheck on the regularly scheduled payday. An employer does remain free to take other disciplinary measures.

UNDERPAYMENTS

When an employer has notice that an employee has not been paid all of the wages due and owing on a particular payday (and there is no dispute about the amount actually due) the employee must be paid the remaining unpaid wages.

If the unpaid wages are **less than five percent** of the gross wages that should have been paid, the employer must pay the unpaid wages **no later than the next regular payday**.

If the unpaid wages are **five percent or more** of the gross wages that should have been paid, the employer must pay the employee the unpaid portion of wages due **within three business days** of receiving notice of the underpayment. A business day does not include Saturday, Sunday or holidays. ORS 652.120(5).

METHODS OF PAYMENT

Payment of wages must be made in cash or by a negotiable instrument. The statute defines a negotiable instrument as one which is payable on demand without fee or discount at a bank or other place of business in the county where it was issued. ORS 652.110.

UPDATE: Effective January 1, 2012, HB 2039 (2011) has amended Oregon's wage collection law, authorizing BOLI to assess additional civil penalties against an employer for issuing a check for wages with insufficient funds. The civil penalty is payable to the employee in the amount of $100 or triple the amount of the dishonored check, whichever is greater. The total civil penalty may not exceed $500 more than the amount of the check.

DIRECT DEPOSIT AND DEBIT CARDS

Oregon law allows employers to pay wages by direct deposit, automated teller machine card, payroll card, or other means of electronic transfer as long as the employee voluntarily agrees. The employee must be able to make an initial withdrawal of the entire amount without cost or be able to choose another means of receiving wages which does not involve any cost to the employee. ORS 652.110

The agreement regarding the means of payment need not be made in writing but must be made in the language the employer principally uses to communicate with the employee. The employer may want to document the employee's verbal consent prior to instituting a particular means of payment. ORS 652.110(5)

Employers who use the direct deposit, automated teller machine card, or payroll card method of paying wages must still provide an itemized statement of earnings and any deductions/withholdings made. See the section on *Itemized Statements* below. Regardless of the method, payment of final paychecks must meet the deadlines applicable to the wage payments and wage payments on termination of employment. ORS 652.140(4).

ITEMIZED STATEMENTS

All Oregon employers are required to provide an itemized statement of any amounts withheld or deducted from any payment made to an employee. The statement must be furnished to the employee at the time of the payment and be sufficiently itemized to show the amount and purpose of each deduction as well as the pay period to which the payment corresponds.

Except for employees that are specifically exempted from Oregon's minimum wage law, the written itemized statement must also include:

(a) The total gross payment being made;

(b) The amount and a brief description of each and every deduction from the gross payment;

(c) The total number of hours worked during the time covered by the gross payment;

(d) The rate of pay;

(e) If multiple rates of pay are paid, the total number of hours worked at each rate of pay;

(f) If the worker is paid on a piece rate, the number of pieces done and the rate of pay per piece done;

(g) The net amount paid after any deductions;

(h) The employer's name, address and telephone number;

(i) The pay period for which the payment is made.

When a compensation payment is a draw or advance against future earnings, and no deductions are being made from the payment, the written itemized statement must include the information required in items (a), (h) and (i). In addition, the employee must be provided with a statement containing all of the information listed above on the employee's next regular payday, even if the employee is not entitled to payment of any additional wages at that time. OAR 839-020-0012(1).

Under ORS 84.001 to 84.061, the itemized statement may be provided in an electronic format if:

(a) The employee agrees; and

(b) The employee has the ability to print or store the electronic itemized statement at the time of receipt.

ORS 84.022; ORS 165.002; OAR 839-020-0012(3).

Pay Statements for Exempt Employees

Specific employees are exempted from Oregon's minimum wage requirements. For these employees, an employer merely needs to provide an itemized statement with each paycheck of any deductions taken from wages and which shows the amount and purpose of each deduction. The statement may be a part of the paycheck, attached to it, or a separate statement. ORS 652.610(1) and (2).

For information on which employees are exempt from Oregon's minimum wage requirements and supporting administrative rules, see the section below on *Exemptions from Minimum Wage and Overtime Requirements and "White Collar" Exemptions* or refer to a copy of Technical Assistance's comprehensive handbook on worker classification. From our webpage at www.oregon.gov/boli/ta, click "Publications" and scroll down to *Employee Classification & Wage and Hour Exemptions, a Handbook for Oregon Employers*.

Pay Statements for Agricultural Employees

Workers who harvest perishable farm crops must be given a written statement each time they are paid that shows the total wages being paid and each deduction made. ORS 652.640.

Pay Statements for Piece Work in Forest Product Industries Employees

Employers who are engaged in logging, securing timber or other forest products, or manufacturing sawlogs or other timber into lumber and pay employees on a piece work scale or quantity work basis must give those employees a statement that shows their production at least once a month. ORS 652.130.

Yearly Statement of Earnings Required

Upon request of any employee or former employee, an employer having five or more workers during any calendar month must furnish a statement of total earnings for the preceding calendar year. The statement must be furnished no later than March 10 and within five days of the employee's request. ORS 652.620.

Exceptions

Oregon law requiring payroll statements and itemized statements of payroll deductions applies to all employers in the state of Oregon except the federal government, its agencies, and Indian tribes. ORS 652.610 and 652.620.

DEDUCTIONS FROM WAGES

Employers are prohibited by Oregon law from deducting, withholding or otherwise diverting any portion of an employee's wages unless:

- The employer is required to do so by law (examples: state and federal taxes, social security, or a garnishment order);

- The deductions are authorized in writing by the employee, are for the employee's benefit, and are recorded in the employer's books (examples: group health insurance premium contributions or cash loans made to employees for their own benefit);

- The employee has voluntarily signed an authorization for a deduction for any other item, provided that the ultimate recipient of the money withheld is not the employer, and that such deduction is recorded in the employer's books (example: union dues);

A deduction may be made from the payment of final wages upon termination of employment for the repayment of a loan *provided*:

- The deduction is authorized pursuant to a voluntarily signed written agreement from the employee;
- The loan was paid to the employee in cash or other medium permitted by ORS 652.110;
- The loan was made solely for the employee's benefit and was not used, either directly or indirectly, for any purpose required by the employer or connected with the employee's employment with the employer;
- The amount of the deduction at termination of employment does not exceed the amount permitted to be garnished under ORS 18.385; and
- The deduction is recorded in the employer's books.

ORS 652.610(3).

Deductions may NOT be made from the wages of employees for items required by the employer, including the following items:

- Uniforms, tools, and transportation that are required to do the job (or "draws" for the purchase of such items);
- Deposits for equipment, shortages, breakages, losses, or theft; or
- Meals and lodging, if they are required by the employer.

An employee may be required to pay for these items (so long as a deduction is not made from the employee's wages) if the amount paid by the employee does not have the effect of reducing the employee's earnings below the applicable wage rate (i.e., state minimum wage, federal minimum wage, Service Contract Act, or Migrant and Seasonal Agricultural Worker Protection Act wage rate) for all hours worked and the requirement to pay for such items is disclosed in advance to the employee.

Payroll deductions may be made for items such as raingear, gloves and hats, meals and lodging only if they are not required, are for the private benefit of the employee, and are authorized in writing by the employee and recorded in the employer's books.

Employers may deduct the fair market value meals, lodging or other such facilities from the minimum wage so long as they are provided for the private benefit of the employee (not required by the employer), are authorized by the employee and recorded in the employer's books. More specifically, lodging or other facilities or services are considered to be required by the employer when:

1. Their acceptance is a condition of employment;

2. The expense is incurred by an employee who must travel away from his or her home on the employer's business;

3. Acceptance of the item is involuntary or coerced; or

4. The provision of the item is necessary in order for the employer to maintain an adequate work force at the times and locations needed by the employer. OAR 839-020-0025.

The employer is responsible to keep and maintain records establishing the fair market value of these items if authorized as deductions. ORS 653.035; OAR 839-020-0004(17) and -0082.

Deductions for Garnishments

Although not part of wage and hour law, the laws governing the garnishment of wages owed to an employee do have an impact on permissible deductions.

When a creditor or "garnishor" issues a proper writ of garnishment, the employer, also known as the "garnishee" must prepare a response within seven calendar days and process the garnishment. The employer is required to withhold wages of the employee, or "debtor", for a period of 90 days from receipt of the writ, unless earlier satisfied or released, and must pay the withheld amounts to the garnishor every time wages are paid to the employee, with the final payment made when the garnishee next pays wages to the employee after the writ expires. ORS 18.735. If the garnishee fails to deliver payment, underreports property of the employee held by the garnishee or fails to respond to the writ, the employer may be liable to the garnishor for the amounts that were required to be withheld plus the creditor's costs. ORS 18.775.

The law sets a limit on the amount of wages subject to a garnishment. The maximum is generally 25% of the employee's disposable earnings (net after taxes), so long as the employee is left with at least $218 per week after the garnishment. ORS 18.385. The same maximum applies to deductions from final wages for the repayment of a loan. ORS 652.610(3)(f)(D).

UPDATE: The amount of the garnishment exemption (and therefore the limit on deductions for the repayment of loans from final wages) was increased from $196 per week to $218 per week, effective June 2, 2011, by the passage of HB 2682 (2011).

Employers should be aware that although it is an unlawful employment practice to terminate an employee because of a garnishment or a support order, an employer may charge the employee for the bookkeeping required in administering garnishments. ORS 18.385(9); ORS 25.424(6)(a).

Under ORS 18.736, an employer may charge a processing fee of $2 for each week or portion of a week during which garnishment payments were made to the garnishor (this amount increased from $1 effective January 1, 2010). The fee may not be charged to the employee until after the last garnishment is made, and may not be charged if to do so would take the employee below the garnishment limits of ORS 18.385.

Employers should also be aware that not all garnishments are subject to the provisions described above. Garnishments for child support, spousal support, state and federal taxes as well orders of the bankruptcy court are entitled to varying degrees of priority over normal garnishments. Because of the complexities involved in processing garnishments and the potential for garnishee liability, employers may wish to enlist the help of a professional payroll service or contact an employment attorney who is knowledgeable in the area of garnishments. For assistance in responding to wage withholding orders for family support, employers should feel free to contact the Child Support Division at the Oregon Department of Justice (800-850-0228 or online at www.oregonchildsupport.gov).

Deductions for Benefits for Employees on OFLA Leave

Under the Oregon Family Leave Act (ORS 659.470 to 659.494), when an employer pays the employee's portion of the cost of providing health, disability, life or other insurance coverage for an employee while that employee is on family leave, the employer may recover such cost under the following circumstances:

1. Upon the employee's return to work, the employer may deduct from the employee's pay the amount of the costs it paid, provided, however, that the total amount deducted from any paycheck may not exceed 10% of the employee's gross wages earned in the pay period covered by the paycheck.

2. If an employee does not return to work, the employer may deduct all of the costs it paid from amounts due and owing to the employee, provided, however, that no deduction may be made if the employee fails to return to work for the following reasons:

   (a) The employee's absence from work is caused by a continuation, recurrence or onset of a serious health condition that would entitle the employee to family leave; or

   (b) The employee's absence from work is caused by circumstances beyond the control of the employee.

3. If an employee does not return to work the employer may seek to recover amounts paid for insurance coverage on behalf of the employee by any other legal means provided however, that no legal action may be initiated if the

employee failed to return to work for the reasons set out in subsections (2)(a) or (2)(b) of this rule.

4. The deduction provided for in this rule may be made with or without the employee's authorization. The employer shall notify the employee of the deduction before the deduction is made.

OAR 839-001-0250.

Deductions for Benefits for Employees on Jury Duty

Current state laws prohibit employers from discharging or threatening to discharge, intimidating or coercing employees who are summoned for jury service. Under HB 2828 (2011), effective January 1, 2012, employers of 10 or more employees will be required to continue health, disability, life or other insurance coverage for an employee who elects to have such coverages continue during times when the employee serves or is scheduled to serve as a juror.

Employers will be able to recover the cost of continuing benefits by making deductions for these amounts from the employee's pay upon his or her return to work. Deductions from the employee's pay may continue until the amounts advanced have been repaid so long as the amount deducted from any pay check does not exceed 10 percent of the employee's gross pay for that pay period.

If an employee (for whom the employer has paid any portion of the cost of providing insurance benefits) stops working for the employer before the cost of providing benefits has been recovered, the employer may deduct the total remaining amount from the any amounts owed to the employee, despite the limitations on deductions from final wages described above.

Deductions for Overpayments

Oregon's statute regarding deductions from wages, ORS 652.610, does not specifically address the issue of making deductions to recover wage overpayments. Deductions by employers that represent recouping wage overpayments have not historically been viewed by the Bureau of Labor and Industries as unlawful deductions from paychecks; however, at least one federal court ruling determined that this practice constituted an unlawful deduction. Thus, payment plans that do not involve deductions from an employee's paycheck are the wisest option for an employer seeking reimbursement of overpayments from an employee.

Deductions for Draws / Loans

A draw or advance is payment for wages earned within the same pay period that the draw or advance is received. A loan is typically repaid though deductions from wages earned in future pay periods. There is no legal requirement, however, for an employer to provide "draws," "advances" or "loans" of any kind to employees. Employers should address this matter in their employment policies if they intend to provide draws or advances. If an employee is given a draw or advance, the employee

must still be provided with a complete itemized statement of earnings on the employee's next regular payday, even if the employee is not entitled to payment of any further wages at that time. (See the section on *Itemized Statements* above).

Forwarding Amounts Deducted from Wages

Whenever the employer makes a legal deduction from an employee's wages, the deduction must be paid over to the appropriate recipient in accordance with the criteria established by law or agreement. When there are no established criteria, the employer must pay the deduction over to the appropriate recipient within seven days from the date the wages were due to the employee.

Failure to pay over deductions in this time frame is an unlawful deduction from the employee's paycheck. ORS 652.610(4)

Deductions for Medical Care

Any deductions from wages for medical care made pursuant to a contract are classified as trust funds and those funds must be kept in separate accounts, apart from the employer's assets. They may not be applied in any part to the cost of compensation to employees for on-the-job injuries. They may not be used for the employer's benefit. Such funds must be paid promptly to the contractor of the medical services as required by contract. ORS 652.710 to 652.720.

FINAL PAYCHECKS

Oregon's wage collection law sets out specific requirements for the payment of final wages in the event of a termination.

"Business Day" Defined for Purpose of Final Paycheck Rules

For final paycheck purposes, the bureau defines a "business day" as Monday through Friday, excluding state holidays, during the hours the employer conducts business operations. OAR 839-001-0410.

When an Employee Quits Without Notice

When an employee quits without providing the employer with at least 48 hour notice, excluding Saturdays, Sundays and holidays, the final paycheck is due and payable within five business days after an employee quits, (again, excluding Saturdays, Sundays and holidays), or at the next regularly scheduled payday, whichever occurs first. ORS 652.140(2).

If an employee who is regularly required to submit time records to the employer quits without at least 48 hours notice and fails to submit time records, the employer must pay whatever amount of compensation the employer estimates is due to the employee within five calendar days of the date the employee quits. If the employee subsequently submits time records, the employer must pay any additional wages due to the employee within five days of receiving the additional time records. Under these circumstances, an employer is not liable for penalty wages even if additional wages are actually due and owing, so long as the estimated wages were paid within

five days of the employee's last day of employment and any additional wages due were paid within five days of receiving the additional time records. ORS 652.140; ORS 652.140(2)(c).

When an Employee Has Given Notice

When an employee gives at least 48 hours of notice (excluding Saturdays, Sundays and holidays) the final paycheck is due on the final day worked. If the final day worked falls on a Saturday, Sunday or holiday, the paycheck is due no later than the end of the next business day. ORS 652.140(2) and (3).

When an Employer Terminates Employee or Termination Is by Mutual Agreement

When an employer terminates an employee or the termination is by mutual agreement, the final paycheck must be paid no later than the end of the first business day after the termination. ORS 652.140(1).

Final Pay for State or County Fair Employees

If the employment of a state or county fair employee ends on a Saturday, Sunday or holiday, the paycheck is due no later than the end of the second business day after termination. ORS 652.140(3).

Final Pay for Seasonal Farmworkers

All wages are due immediately when the employment of a seasonal farmworker terminates. However, if a seasonal farmworker quits with less than 48 hours notice, all wages are due within 48 hours or on the next regular payday, whichever occurs first. ORS 652.145.

Final Pay Affecting Commissions for Employees of Motor Vehicle and Farm Implement Businesses

A commission owed to an employee by a business that primarily sells motor vehicles or farm implements is not due until all of the terms and conditions of the agreement between the employer and employee concerning the method of payment of commissions are fulfilled. If there is no agreement, commissions are due in accordance with the final paycheck statute. ORS 652.150(3)(a).

Final Paycheck Exception for Collective Bargaining Agreements

If a union agreement provides for payment of wages upon termination, the final pay provisions of the law do not apply. ORS 652.140(5).

Layoffs and Strikes

If an employee is laid off but will return to work within 35 days, the final paycheck may be paid on the next regular payday. The layoff is considered a termination if there is no reasonable expectation that an employee will return to work or the time off will exceed 35 days. OAR 839-001-0430.

Wages owed to striking employees are due on the next regular payday or 30 days after the strike begins, whichever occurs first. ORS 652.170.

Final Paycheck of Deceased Employee

When an employee dies, all unpaid wages earned and unpaid up to $10,000 must be paid to the surviving spouse, or, if there is no surviving spouse, to the employee's dependent children as if the wages had been earned by the surviving spouse or dependent children. ORS 652.190.

Terminations Resulting From the Sale of a Business

When an employee is terminated as a result of the sale of a business, the employer who sells the business is not required to cash out accrued leave benefits as long as the purchaser continues to employ the employee and the employee receives full credit for accrued but unused leave. ORS 652.140(6).

Unconditional Final Payment

If a dispute arises regarding the amount of final wages due an employee, the employer must pay the amount the employer agrees is due without setting any conditions upon the payment. The employee, in turn, retains the right to pursue any balance the employee alleges is due by filing an action in court, a claim with the Bureau of Labor and Industries, USDOL, or through a union grievance procedure (if applicable). ORS 652.160.

Mailing / Depositing Final Paychecks

If requested by the employee, an employer must mail the final paycheck to any address designated by the departing employee.

Likewise, an employer and an employee may agree to have final wages deposited without discount to an Oregon account designated by the employee. OAR 839-001-0450(1).

Unless the departing employee requests mailing or deposit of his or her final wages, employers are not required to mail final wages.

Unclaimed Checks

If paychecks are unclaimed, employers are required to hold the wages for three years. Any wages unclaimed after three years must be forwarded to the State of Oregon Department of Lands. For more information, call 503-986-5200 or visit their website at www.oregon.gov/DSL.

Penalty Wages for Withholding Final Paycheck

Any employer who willfully fails to pay any wages of an employee whose employment ceases is liable for additional wages for every day the employee remains unpaid, up to a maximum of 30 days. The penalty for each day is calculated at eight times the employee's hourly rate. ORS 652.150.

Penalty wages are limited to 100 percent of the amount of unpaid wages unless the employee or a representative acting on the employee's behalf gives the employer written notice of the wages due and the employer fails to respond within 12 days of receiving the notice. ORS 652.150(2). This limitation does not apply if:

1. The employer has violated the final pay provisions of ORS 652.140 or ORS 652.145 one or more times in the year before the employee's employment ceased; or

2. The employer terminated one or more other employees on the same date that the employment of the employee seeking penalty wages ceased.

An employer may avoid liability of penalty wages by proving a financial inability to pay the wages at the time they accrued. ORS 652.150; OAR 839-001-0470.

Penalty provisions for Motor Vehicle and Farm Implement Businesses

If there is a dispute between the employer and the employee regarding the amount of commissions due and the amount of unpaid commission is subsequently found to be less than 20 percent of the amount of unpaid commission claimed by the employee, the employer's penalty wage liability for failure to provide the final paycheck may not exceed the amount of the commission or $200, whichever is greater.
ORS 652.150(3)(b); OAR 839-001-0490.

WAGE CLAIMS AND ENFORCEMENT

Employers should be familiar with the remedies available to employees for violations of Oregon's wage and hour laws.

Employees are free to pursue unpaid wages and civil penalty wages in small claims court or (with the assistance of an attorney) in civil court. Under ORS 652.200, the court may include in its judgment for prevailing plaintiffs unpaid wages or wages paid with insufficient funds checks, costs and reasonable attorney fees.

Employees have an additional private right of action regarding unpaid wages as a result of gender discrimination in payment for work of comparable character. Employees may seek (on behalf of themselves as well as other, similarly situated employees) unpaid wages going back one year, plus liquidated damages, reasonable attorney fees and expert witness fees. ORS 652.230.

As an alternative to the courts, employees may file claims for unpaid wages, minimum wage and overtime wages. Employees may also file complaints regarding other alleged violations of wage and hour laws with the Bureau of Labor and Industries Wage and Hour Division (WHD).

Finally, the U.S. Department of Labor Wage and Hour Division (USDOL) enforces the provisions of several federal employment laws. These provisions include the federal minimum wage, overtime, recordkeeping, and child labor law requirements. USDOL is also responsible for enforcing employment law on other topics like family and medical leave, migrant worker protections, lie detector tests, worker protections in certain temporary worker programs, and prevailing wages for government service and construction contracts.

STATUTE OF LIMITATIONS

Under Oregon's wage collection law, any employee who has back wages due may file a claim. The statute of limitations for filing claims for unpaid wages is six years. ORS 12.080(l). The statute of limitations for overtime claims is two years. ORS 12.110(3). For actions brought under federal law, an employee may seek overtime wages going back three years for willful violations of the FLSA.

POTENTIAL LIABILITY

In addition to any unpaid wages, employers are potentially liable for penalty wages (discussed above under payment of final wages), interest, costs and any applicable attorney fees. The Bureau may also impose civil penalties for violations of wage and hour law, such as violations of rest and meal period violations or child labor law violations, among others.

LIQUOR LICENSE HOLDER LIABILITY

In an establishment where food and beverages are served, the holder of a full on premises liquor license issued under ORS 471.175 is liable for the unpaid wages of employees in the dining facilities even though they may have been hired by a person leasing the dining area if they are operating a commercial establishment. ORS 652.335.

PAYROLL BOND

The Commissioner also has statutory authority to require an employer who has demonstrated an inability to meet payroll obligations to post a bond in an amount sufficient to pay wages for a period of time up to six months. The Commissioner may also seek to enjoin such an employer from doing business in Oregon until a sufficient bond is provided. ORS 652.125; 652.340.

BOLI'S WAGE CLAIM PROCESS

Any employee who has earned wages and believes he or she has not been paid in full may file a wage claim with BOLI's Wage and Hour Division. This can be done by mail or in person at one of the Bureau's offices. The claim form requires information such as the dates the work was performed, the rate of pay, the reason the wages have not been paid in full, and an estimate of the amount of unpaid wages due. The claim must be assigned to the Commissioner. ORS 652.330.

Responding to a Claim

Upon receipt of a wage claim, the Wage and Hour Division makes a record of the claim and notifies the employer by mail. The letter sent to the employer is called a "Notice of Claim." It requires payment of the amount claimed unless the employer is able to show valid reasons for not paying any or all of the wages claimed. If the employer agrees that the amount claimed is due, the employer should issue a check to the claimant and send it to the Bureau. The wages will be forwarded to the employee and the claim closed. If the employer agrees that a portion of the amount claimed is due, that amount should be paid promptly. Statements such as "paid in full" or "in full settlement of all claims" written on checks do not meet the requirement that undisputed wages must be paid without condition under ORS 652.160.

If the employer disputes the claim, the employer may provide information and records to support the employer's position.

Wage Claim Investigations

If the employer and wage claimant dispute that wages are owed or the amount owed, the wage claim will be assigned to a compliance specialist for investigation. The compliance specialist will review the employer's payroll records. If the compliance specialist finds the employer's records insufficient to resolve the dispute, the compliance specialist may obtain other records and interview witnesses to determine the validity of the wage claim. The compliance specialist will attempt to settle the matter before initiating an administrative proceeding.

Invalid Claims

Sometimes the Wage and Hour Division determines that wage claims are invalid. Some of the reasons for this determination are that the Bureau lacks jurisdiction, the claimant was not an employee, or that the employer provides documentary proof that the wage claimant was paid all wages due. ORS 652.310.

Collection of Wages

When wage claims are found to be valid, a compliance specialist will calculate the amount of wages due. It is sometimes difficult to make an accurate calculation if records are not accurate. In such cases, the compliance specialist will calculate an equitable figure and attempt to collect the amount from the employer. The claim is closed if the wages are received before an administrative proceeding is initiated.

Administrative Hearings and Lawsuits

If an employer fails or refuses to pay wages the Wage and Hour Division determines to be due, the division may initiate an administrative proceeding by issuing an Order of Determination and serving it on the employer. The employer may request a contested case hearing or court trial in this process.

If a court trial is requested, the case is referred to the Department of Justice. The attorney assigned the claim will file a suit on behalf of the Commissioner. The

claimant is not regarded as a party to the action and appears in court as a witness only.

If the employer requests a contested case hearing, the case will be set for hearing before an administrative law judge employed by the Bureau in which the Administrative Procedures Act and the Bureau's contested case hearing rules will apply. ORS 183.413 to 183.470, OAR 839 Division 50.

The Commissioner is entitled to recover the wages due, court costs and attorney fees, and penalty wages of up to an additional 30 days of wages. ORS 652.150; ORS 652.330. The Commissioner is also entitled to assess penalty wages, of up to an additional 30 days of wages, if the claim involves a failure to pay the minimum wage or overtime. ORS 653.055.

The Commissioner may also assess a civil penalty of $1,000 for willful violations of most general employments statutes and administrative rules. ORS 652.900 and 653.256.

Right of Union Members to File Wage Claims

Members of a labor union who have wage claims should follow the grievance procedure set forth in their union contract. The Oregon Supreme Court has held that, with exceptions, the Bureau may not accept a claim from a union member if the claim is based solely on a provision in the collective bargaining agreement. *State ex rel Nilsen v. Berry*, 248 Or 319, 434 P2d 471 (1967). Consequently, the Bureau may not process wage claims from claimants who are parties to a collective bargaining agreement when all of the following circumstances are present:

- There is or was a collective bargaining agreement in effect;
- The claimant is a member of the union subject to the agreement;
- The claimant is engaged in interstate commerce;
- The collective bargaining agreement has a grievance procedure;
- The issue is grievable under the grievance procedure;
- The grievance procedure requires binding arbitration;
- The claim does not involve a minimum substantive guarantee, *i.e.* minimum wages, final pay, or other statutory right independent of those arising out of the collective bargaining agreement; and
- There is no evidence that the union has failed to represent its member(s) fairly under the contract, using the grievance procedure would be futile, or the employer has failed to abide by the grievance procedure.

RETALIATION PROHIBITED

Discharging or otherwise retaliating against an employee because that employee has filed a wage claim or has testified in any wage claim proceeding is prohibited under ORS 652.355 and 653.060.

Retaliation on account of wage and hour claims or complaints (regarding matters including wage claims, final pay violations, irregular payday violations, violations in the medium/manner of paying wages or working conditions) recently became an unlawful employment practice under ORS 659A. Complaints may be filed with the Civil Rights Division under ORS 659A.820 as well as more general "whistleblowing" retaliation provisions. ORS 659A.230.

UPDATE: In a decision handed down March 22, 2011, the U.S. Supreme Court held that the anti-retaliation provisions of the FLSA (29 C.F.R. § 215(a)(3)), which forbid employers "to discharge or in any way discriminate against any employee because such employee has filed any complaint" apply to *oral* as well as written complaints and that such complaints need not be filed with a government agency to trigger anti-retaliation protections of the law. See *Kasten v. Saint-Gobain Performance Plastics Corp.*, No. 09-834.

EMPLOYER-EMPLOYEE COMMUNICATIONS

Many claims are filed as a result of a misperception on the part of the employee regarding the wage agreement. Employers who wish to avoid wage disputes should keep their employees well informed regarding company policies and procedures and clearly communicate the employee's rate of pay and benefits.

MINIMUM WAGE AND OVERTIME LAW

Both state and federal wage and hour laws set out requirements for the payment of a minimum hourly wage and overtime. More specifically, employers are required to pay at least minimum wage for any time the employer "suffers or permits" an employee to work. ORS 653.010(2). Additionally, under both laws, employees must generally be paid one and one-half times their regular rate of pay for any time worked over 40 hours in a workweek (seven consecutive days). ORS 653.261 and OAR 839-020-0030. Oregon's minimum wage law, ORS 653, also contains a number of provisions regulating required posting, recordkeeping and working conditions.

MINIMUM WAGE

For January 1, 2011 through December 31, 2011, Oregon's minimum wage is $8.50 per hour. Federal minimum wage is currently $7.25 per hour. As the most beneficial provision for the employee, all Oregon employers are required to pay the Oregon minimum wage rate. OAR 839-020-0115(3).

The Oregon minimum wage rate is adjusted annually for inflation when there is a change in the consumer price index. The law requires the Commissioner to calculate the minimum wage by September 30 of each year for the following year. The new minimum wage becomes effective on January 1 the following year. ORS 653.025.

UPDATE: For wages earned beginning January 1, 2012, the Oregon minimum wage will be $8.80 per hour.

COMMISSIONS AND MINIMUM WAGE

Employers may include commission payments to employees as part of the applicable minimum wage. In any pay period where the combination of wages and commission payments does not add up to the applicable minimum wage, the employer must pay the employee at least the minimum wage for all hours worked. ORS 653.035(2)

An employer may not deduct any amount required to be paid as minimum wage from an employee's future commission earnings unless the employee's commission agreement specifically provides for the payment of a minimum wage draw against future earnings. Absent such an agreement, the amount paid as minimum wages is viewed as a "guarantee" that may not be recouped from future earnings.

NO TIP CREDIT ALLOWED

Oregon employers, including employers regulated under the Federal Fair Labor Standards Act, may not include any amount received by employees as tips in satisfying the obligation to pay minimum wage. ORS 653.035(3).

UPDATE: Federal law limits tip pooling arrangements among employees to those

who typically receive tips (e.g., wait-staff, bartenders, bellhops, but NOT managers or kitchen staff), however, the Ninth Circuit Court of Appeals recently held that the restrictions on who may participate in a tip-pooling arrangement only applied to employers who claimed tips as wages toward the minimum wage. Under this decision, Oregon employers, who are precluded from claiming tips against the minimum wage by state law, remain free to impose a tip-pooling arrangement which includes staff who are not customarily tipped, such as kitchen staff. *Cumbie v. Woody Woo, Inc*., 2010 WL 610603 (9th Cir. Feb. 23, 2010).

Following the Cumbie decision, the U.S. Department of Labor amended its regulations to state that employers are prohibited from using the tips of employees for *anything* other than (1) a valid tip pool (again, a pool that includes *only* employees who are customarily tipped - 29 C.F.R. § 531.54) or (2) a credit against the (federal) minimum wage. 29 C.F.R. § 531.52

Oregon employers may wish to seek the advice of an employment law attorney prior to implementing a tip pooling arrangement that would include employees who are not customarily tipped.

OVERTIME

Generally, federal and state law require that employees (who are not otherwise exempt) be paid one and one-half times their regular rate of pay for any time worked over 40 hours in a workweek (seven consecutive days). 29 C.F.R. § 778.107, OAR 839-020-0030.

Some employers are required to pay overtime on a daily basis. For example, manufacturing establishments or canneries, driers and packing plants that are not located on farms must pay overtime on a daily basis. Likewise, most workers employed on public works projects are subject to daily overtime requirements. See the *Hours Limitations in Certain Industries* section of this handbook for more complete information. The *Calculating Overtime* section of this handbook explains how to compensate employees for overtime hours worked.

COMPULSORY OVERTIME

It is not unlawful to require employees to work overtime as long as employees are properly compensated. It is always a good idea to use written policies as a method of informing employees of rules and/or expectations regarding the circumstances under which overtime work might be required.

BENEFITS

Benefits may include forms of compensation such as vacation pay, holiday pay, bonuses, or sick leave. There is no legal requirement to offer these benefits, but once promised, they may not be arbitrarily withheld.

Employers who offer benefits should define how and when they are earned in a

written policy that is distributed to employees and new hires. The language should be clear and precise to avoid disputes and wage claims that frequently arise when policies are ambiguous.

Case law demonstrates that the courts find benefits offered to be part of the employment agreement. This is true whether the agreement is written, oral, or based on past practices. Unpaid benefits may be pursued by employees through private legal actions or by filing a wage claim with BOLI.

POSTERS

The minimum wage law requires employers to post minimum wage posters summarizing the basic requirements of minimum wage and overtime law.

UPDATE: Under HB 2040 (2011), ORS 653.050 has been amended to allow employers to obtain required wage and hour law summaries (posters) from BOLI's website. The posters are now available for all employers to download from BOLI's website on the internet. Hard copies remain available by mail upon request, but will no longer be routinely mailed.

Civil penalties may be assessed if covered employers fail to comply with Oregon posting requirements. ORS 653.256(1).

CAVEAT EMPTOR: There are many private companies across the country in the business of selling labor law posters. The Bureau of Labor and Industries is not associated in any way with these organizations. Before purchasing posters, employers should contact the appropriate regulatory agency to verify that the poster is required and determine whether the posters may be obtained FREE of charge from the agency.

Oregon and federal required posters may be downloaded for free in their legally required forms from the Bureau's web site at www.oregon.gov/boli/ta. For employers who prefer not to post the 6 to 8 required postings separately, TA has also developed affordable composite posters which are available for purchase on BOLI's website.

COMPENSABLE WORK TIME

In order to accurately calculate wages and overtime owed to employees, employers must understand what counts as "hours worked" or "paid time" and have maintained an accurate record of that time. Under federal and state rules, "hours worked" includes both time worked ("suffered or permitted") and time of authorized attendance. This means that employers must pay for any time an employee performs work, whether the work was authorized or not. This includes work performed away from the job site or even at home. OAR 839-020-0040(2); 29 C.F.R. § 785.12.

Employer Responsibility for Compensable Work Time

An employer may not accept the benefit of an employee's work without compensating the employee. It is an employer's duty to ensure that work is not performed if the employer does not want such work performed. The mere promulgation of a rule or policy prohibiting unauthorized work is not enough. The employer must enforce the rule, including disciplining employees who violate the employer's policy regarding work time. OAR 839-020-0040(4); 29 C.F.R. § 785.13.

Preparatory and Concluding Activities

An employer must pay for the time an employee spends in preparation for and subsequent to his or her principal work activities. For example, a bank teller counts the till and arranges the work space in preparation for receiving customers. This preparatory activity is an integral and indispensable part of the principal activity for which the employee is employed and must therefore be included as hours worked.

Waiting Time

Wage and hour law distinguishes between two types of waiting time: (1) being engaged to wait and (2) waiting to be engaged.

Time spent "engaged to wait" is compensable hours worked. Where waiting is an integral part of the job, i.e., when the time spent waiting belongs to and is controlled by the employer and the employee is unable to use the time effectively for his or her own purposes, the employee is engaged to wait and such time is considered as part of hours worked.

Time spent "waiting to be engaged" is not compensable hours worked. Periods during which an employee is completely relieved from duty and which are long enough to enable the employee to use the time effectively for the employee's own purposes are not hours worked.

An employee is not completely relieved from duty, however, and may not use the time effectively for his or her own purposes unless the employee is told in advance that he or she may leave the job and that he or she will not have to commence work until a specified hour has arrived. Whether the time is long enough to enable the employee to use the time effectively for the employee's own purposes depends upon all of the facts and circumstances of the case. OAR 839-020-0041(1) and (2).

On-Call Time

An employee who is required to remain on-call on the employer's premises or so close thereto that the employee may not use the time effectively for the employee's own purposes is working while "on-call" and must be paid for such time.

An employee who is not required to remain on the employer's premises, but is merely required to leave word where he or she may be reached, need not be paid for being "on-call."

Whenever an employee is called to perform services, such time is of course included within compensable hours worked. Keep in mind that if the frequency or duration of calls to perform service become so restrictive that an employee may not use the time effectively for his or her own benefit, they may be considered as "engaged to wait," in which case all time spent "on-call" would be compensable. OAR 839-020-0041(3).

Meal Time

Generally, employers are required to ensure employees who work more than six hours receive no less than a 30 minute unpaid meal period. The entire meal period becomes compensable, however, whenever an employee is required to perform tasks or remain on duty during his or her meal period. OAR 839-020-0043. The requirements under wage and hour law to provide a meal period are discussed below under the section on *Working Conditions*.

Travel Time

Home-to-work and work-to-home travel (often referred to as "portal to portal" travel) is generally unpaid time. Travel time that occurs during the course of the employee's work day must be paid.

In addition, if an employee who regularly works at a fixed official work station is given an assignment to work in another city more than 30 miles away, the employee must be paid for all travel time.

On overnight trips, travel time that falls within the employee's regular work hours must be paid. This includes travel time that falls within the employee's regular work hours on days that the employee would ordinarily not be working. The employer need not compensate an employee for travel time outside of working hours which is spent *as a passenger* on an airplane, bus, train, boat or in an automobile.

In the context of overnight travel, an employer who offers an employee public transportation but allows the employee to use his or her own car may count as hours worked either (1) the time spent driving the car or (2) the time that the employer would have had to count as hours worked during normal work hours had the employee taken public transportation.

Of course time spent working while traveling must be included as compensable hours worked regardless of when it occurs. OAR 839-020-0045.

Training Time and Meeting Time

In general, training or meeting time must be counted as hours worked when an employer requires an employee's attendance. OAR 839-020-0044.

When specialized or follow up training is required by any law or ordinance for certification of employees and the training takes place outside of the employee's regular working hours, employers are not required to pay employees for the training

time. OAR 839-020-0044(7).

Sleep Time

Under certain conditions, an employee is considered to be working even if some of the employee's time is spent sleeping.

An employee who is required to be on duty for less than 24 hours is working even though the employee is permitted to sleep or engage in other activities when not busy.

Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude *bona fide* meal periods and a *bona fide* regularly scheduled sleeping period of up to eight hours from hours worked. (If an agreed upon sleeping period is more than eight hours, only eight hours may be credited against hours worked.) In order to deduct sleep time from compensable hours worked, the employer must provide adequate sleeping facilities and the employee must usually be able to enjoy an uninterrupted sleep period of no less than five hours.

If the sleep period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee may not get a reasonable sleep period (at least five continuous hours) the entire period must be counted as hours worked.

NOTE: If there is not an expressed or implied agreement regarding sleep time and meal periods, the eight hours of sleeping time and meal periods will be considered compensable hours worked.

Employees who Live on the Premises

Employees who reside on the employer's premises are not necessarily considered to be working all the time the employee is on the premises. Employers are not required to pay employees for time in which employees are free to engage in normal, private pursuits such as eating, sleeping, entertaining, and other periods of complete freedom from duties.

In determining the number of actual hours worked, any reasonable agreement between the parties that is a true reflection of the situation will be acceptable. OAR 839-020-0042.

RECORDKEEPING REQUIREMENTS

It is the employer's responsibility to maintain accurate time and payroll records. OAR 839-020-0080. Employers who neglect this important responsibility may deprive themselves of some of the best evidence for defending a wage claim or complaint. In addition, BOLI's Wage and Hour Division may assess civil penalties against employers who fail to keep required records. ORS 653.045; OAR 839-020-1010.

Employers may require employees to submit time records and may discipline

employees who fail to submit timely records of hours worked. That said, it remains the employer's responsibility to ensure such records are made and kept available. In addition, an employee's failure to submit timely records of hours worked is not a lawful reason for delaying or withholding wages due on payday.

Records required by federal law must be kept for a period of three years past the date of the records. 29 C.F.R. § 516.5. Oregon law requires that employers keep the records for only two years. Oregon employers who are also subject to the FLSA must apply the stricter federal standard. Because wage claims and/or contract claims may be filed in Oregon for up to six years, it is advisable to keep records for longer than the law requires.

Records required under wage and hour law must be kept safe and accessible and must be made available to the Wage and Hour Division for inspection or transcription. OAR 839-020-0083.

Minimum Recordkeeping Requirements

Employers are generally required to keep a record of the following information for each employee:

(a) Name and identification number if a number is used;
(b) Address, including zip code
(c) Date of birth, if under 19;
(d) Occupation in which employed;
(e) Time of day and day of week when workweek begins;
(f) Rate of pay and an explanation of the basis for payment;
(g) Actual hours worked each day;
(h) Total hours worked each workweek;
(i) Weekly (or daily) straight-time earnings due;
(j) Weekly overtime compensation due;
(k) Total additions to or deductions from wages for pay period;
(l) Total wages paid each pay period; and
(m) Date of payment, pay period covered and total paid.

OAR 839-020-0080(1).

Recordkeeping Requirements for Exempt Employees

Special recordkeeping provisions apply to certain employees who are exempt from all or part of the recordkeeping requirements of the minimum wage law. (See the section below "*Exemption from Minimum Wage and Overtime*" for information regarding employees that qualify for exemption from minimum wage and/or overtime requirements.)

For exempt salaried employees or outside salespersons, employers need only maintain records listed above from (a) through (e) as well as the basis upon which

wages are paid sufficient to permit the calculation of the employee's total remuneration for each pay period. OAR 839-020-0080(4).

Recordkeeping Requirements for "8 and 80" Overtime Employees

For employees whose overtime earnings may be computed on the basis of a 14 consecutive day period under OAR 839-020-0125(2)(d), (the "8 and 80" rule for hospitals and certain residential institutions) employers must maintain and preserve the general records listed above except that items (e) and (g) through (i) must reflect:

1. Time of day and day of week on which the employee's 14-day work period begins;

2. Hours worked each workday and total hours worked each 14-day work period;

3. Total straight-time wages paid for hours worked during the 14-day work period;

4. Total overtime excess compensation paid for hours worked in excess of eight in a workday and 80 in the work period.

In addition to these records, employers must keep and maintain a copy of the agreement or understanding with respect to using the 14-day period for overtime pay computations or, if such agreement or understanding is not in writing, a memorandum summarizing its terms and showing the date it was entered into and how long it remains in effect. OAR 839-020-0080(5). (For information regarding the 8 and 80 rule for computing overtime see "Overtime in Hospitals and Residential Care Facilities" in the "*Computing Overtime*" section below.)

Personnel Records

Employees have the right to inspect or obtain certified copies of certain personnel records. These records are defined as any records that are used or have been used to determine the employee's qualifications for hiring, promotion, pay increases, or employment termination or other disciplinary action. An employer must provide a reasonable opportunity for the employee to inspect the records or provide a certified copy of the records within 45 days after the employee makes the request to inspect or obtain certified copies. The employer may charge the employee for the actual cost of providing these services.

Not all personnel records held by the employer are subject to disclosure. Records relating to arrest or conviction or to the investigation of criminal conduct and confidential reports from previous employers, including references and records maintained by the State Board of Higher Education concerning student or faculty members' activities, are excluded from this law and need not be provided. ORS 652.750; 351.065.

Civil penalties up to $1,000 may be assessed for violations of ORS 652.750 under ORS 652.900.

When an employee is terminated, the employer must retain the employee's personnel records for at least 60 days. If the terminated employee requests a certified copy during this time, the employer must furnish the copy within 45 days after receiving the request. If the request is made after the 60 day period, the employer must furnish the certified copy if the employer has retained the records. ORS 652.750.

Non-Competition and Bonus Restriction Agreements

A *non-competition agreement* is an express or implied, oral, or written agreement between the employer and employee in which the employee agrees not to compete with the employer in providing products, processes or services that are similar to that of the employer for a specified period of time within a specific geographic region.

The employer may not require an employee to be party to a non-competition agreement unless the employee receives written notice that the agreement is a condition of employment at least two weeks before employment starts or the agreement is entered into upon advancement of the employee by the employer.

Non-competition agreements are only permissible for employees who meet the criteria for salaried exempt employees. The employer must also have an interest to protect, such as trade secrets; sensitive, confidential business or professional information; product development plans; launch plans; marketing strategy or sales plans, and the agreement may only extend to two years following the end of employment with the employer. ORS 653.295.

Bonus restriction agreements are enforceable in Oregon courts if the following conditions are met:

- Competition by the employee with the employer, after termination of employment, is limited to a period of time, a geographic area, and specified activities related to the employee's former job responsibilities; and

- The employee performed services for the employer that included substantial involvement in the management of the employer's business, personal contact with customers, knowledge of customer requirements related to the employer's business or knowledge of trade secrets or other proprietary information of the employer.

The penalty provided in the bonus restriction agreement is limited to forfeiture of profit sharing or bonuses that have not yet been paid to the employee. ORS 653.295.

Arbitration Agreements

Although not regulated by BOLI, recent changes by the legislature made changes to the current requirements for employers to notify employees of arbitration agreements.

House Bill 3450 (2011) amends ORS 36.620 and reduces the timeframe for notifying an employee about an arbitration agreement from two weeks to 72 hours before their first day on the job. Additionally, the employer is now required to provide the employee with the arbitration agreement containing an acknowledgement including the following, printed in boldfaced type, and signed by the employee:

> I acknowledge that I have received and read or have had the opportunity to read this arbitration agreement. I understand that this arbitration agreement requires that disputes that involve the matters subject to the agreement be submitted to mediation or arbitration pursuant to the arbitration agreement rather than to a judge and jury in court.

EXEMPTIONS FROM MINIMUM WAGE AND OVERTIME

Both state and federal wage and hour laws provide exemptions from minimum wage and overtime requirements for certain employees.

It is important to remember 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 an exemption that is unavailable under federal law. In those cases, the standard most beneficial to the employee would be federal law. 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.

Exemptions from minimum wage and/or overtime are narrowly construed by both the courts and enforcement agencies. Employers should be able to demonstrate that an employee fits plainly and unmistakably within a specific exemption provided by law before deciding not to pay either minimum wage or overtime.

A full description of all the available exemptions to minimum wage and/or overtime is set out in TA's *Employee Classification & Wage and Hour Exemptions* handbook. The list below provides a brief summary of the most commonly applied exemptions to both minimum wage AND overtime.

CERTIFICATES TO PAY LESS THAN MINIMUM WAGE

Student-Learners

Employers of student-learners in vocational training situations may apply (under Oregon law to the Wage and Hour Division, Bureau of Labor and Industries; under federal law to the USDOL's Wage and Hour Division) to pay a sub-minimum wage of not less than 75 percent of the state or federal minimum wage to a student-learner. All of the following conditions must be met:

- The work hours of the student-learner combined with the student's school hours may not exceed 8 hours per day or 40 hours per week;
- The requirement to pay less than minimum wage must be necessary to prevent curtailment of employment opportunities in the employer's place of business;
- The occupation for which the training is being given must require a sufficient degree of skill to necessitate a substantial learning period;
- The training may not be for repetitive operations requiring only manual dexterity;
- The student-learner may not displace another worker; and
- The training of student-learners must tend to serve occupational needs of the community or industry.

ORS 653.070, 29 C.F.R. § 519.13.

Persons with Disabilities

Employers of individuals with mental or physical disabilities may apply to the Commissioner for certification to pay less than the state minimum wage, provided it can be shown that the employees' opportunities for employment would definitely be curtailed if payment of the full minimum wage was required. ORS 653.030. Civil penalties may be assessed if an employer fails to pay the minimum amount specified in an approved certification. OAR 839-020-1010(1)(c).

Under certain circumstances, the Commissioner may grant blanket approval for a specific employer to employ unnamed individuals with mental or physical disabilities at less than the minimum wage. An employer desiring such authority must apply to the Commissioner for such authority OAR 839-020-0015(3).

Employers in federally regulated establishments may apply to the Wage and Hour Division, USDOL, for certification to pay disabled workers less than the federal minimum wage, provided the employer can show the worker's earnings or productive capacity would be impaired if the federal minimum wage was required.

OUTSIDE SALESPERSONS

An outside salesperson is exempt if the employee's primary duty is making sales and the employee is customarily and regularly engaged away from the employer's place or places of business. Under state law, work performed in activities unrelated to the employee's sales work may not exceed 30 percent of the hours worked in a week by the nonexempt employees of the employer.

There is no minimum salary requirement for the outside sales exemption.
29 C.F.R. § 541.500 through 502; ORS 653.010(7); ORS 653.020(6).

BABYSITTERS/CHILD CARE WORKERS

Under state law, an individual who performs child care services in the home of the individual or the home of the child is exempt from minimum wage and overtime laws. ORS 653.020(13).

Under federal law, a babysitter must be employed on a "casual basis" to be exempt. "Casual basis" means irregular or intermittent employment by one whose occupation is not babysitting. 29 U.S.C. § 213(a)(15). A babysitter/child care worker who works on anything other than a "casual basis" must be paid no less than the federal minimum wage and for any overtime worked.

COMPANIONS TO THE ELDERLY AND INFIRM

Both federal and Oregon law exempt companions to the elderly or infirm employed in a family home from minimum wage and overtime. ORS 653.020(14);
29 U.S.C. § 213(a)(15).

AGRICULTURAL EMPLOYEES

See the *Agricultural Employment* section of this handbook for specific exemptions from minimum wage in agriculture. All employees employed in agricultural work are exempt from overtime. However, if any non-agricultural work is performed by an employee in a workweek, the exemption is lost for that week and overtime must be paid if the employee works more than 40 hours. 29 C.F.R. § 780.11.

CERTAIN RESIDENT EMPLOYEES OF MULTI-UNIT ACCOMMODATIONS

Managers, assistant managers and maintenance workers employed by and residing in multi-unit accommodations are exempt from minimum wage and overtime under Oregon law. ORS 653.020(9).

NOTE: Under federal law, these employees are not exempt and must be paid no less than the federal minimum wage and overtime, if the employer is subject to federal law.

SEASONAL EMPLOYEES OF EDUCATIONAL OR ORGANIZED CAMPS

Seasonal employees of educational or organized camps are exempt from the state minimum wage and overtime laws if the camp grosses less than $500,000 annually or is a nonprofit organized camp. ORS 653.020(10).

NOTE: In order for the employee to be exempt under federal law, the camp must not operate more than seven months in any calendar year, or the average receipts for any six months of the preceding calendar year may not be more than 33⅓ percent of the average receipts of the remaining months of that year. 29 U.S.C. § 213(a)(3).

EMPLOYEES OF NON-PROFIT CONFERENCE GROUNDS

Employees of non-profit conference grounds or centers operated for religious, charitable, or educational purposes are exempt from the state minimum wage and overtime laws. ORS 653.020(11).

NOTE: In order for the employee to be exempt under federal law, the center must not operate more than seven months in any calendar year or the average receipts for any six months of the preceding calendar year may not be more than 33⅓ percent of the average receipts of the remaining six months of that year. 29 U.S.C. § 213(a)(3).

VOLUNTEER CAMPGROUND HOSTS

Volunteer campground hosts who reside in campgrounds owned by public agencies and who provide information and emergency assistance to campground users and travelers are exempt from minimum wage and overtime. ORS 653.020(18).

NOTE: Under federal law, these employees are not exempt and must be paid no less than the federal minimum wage and overtime, if the employer is subject to federal law.

NONPROFESSIONAL SKI PATROLLERS

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

NOTE: Under federal law, these employees are not exempt and must be paid no less than the federal minimum wage and overtime, if the employer is subject to federal law.

GOLF CADDY TRAINEES AND MARSHALS

Caddies are exempt from minimum wage and overtime when they are employed at a golf course in a supervised training program. ORS 653.020(15).

UPDATE: 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.

NOTE: Under federal law, neither of these employees are exempt and must be paid no less than the federal minimum wage and overtime, if applicable, if the employer is subject to federal law.

SOCCER REFEREES

A person serving as a referee or assistant referee in a youth or adult recreational soccer match is exempt from state minimum wage and overtime laws. OAR 839-020-0150(3).

NOTE: Under federal law, these employees are not exempt and must be paid no less than the federal minimum wage and overtime, if the employer is subject to federal law.

RESIDENT MANAGERS OF ADULT FOSTER HOMES

Resident managers of a licensed adult foster home who are "domiciled" at the home and who are directly responsible for the care of residents in the home on a day to day basis are exempt from minimum wage and overtime under Oregon law.
ORS 653.020(16), ORS 443.705-443.825.

NOTE: Under federal law, these employees are not exempt and must be paid no less than the federal minimum wage and overtime, if the employer is subject to federal law.

CERTAIN MOBILE HOME PARK EMPLOYEES

Managers, assistant managers, and maintenance workers employed by and residing in a mobile or manufactured home dwelling park are exempt from state minimum wage and overtime. ORS 653.020(17).

NOTE: Under federal law, these employees are not exempt and must be paid no less than the federal minimum wage and overtime, if the employer is subject to federal law.

INMATE LABOR

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.

"WHITE COLLAR" EXEMPTIONS

Executive, administrative, and professional employees who meet "salary basis" and specific "duties" tests are exempt from the minimum wage, overtime, and some recordkeeping requirements of the law. Employees in these categories are commonly called "white collar" employees.

CAUTION: As noted above, these exemptions from minimum wage and overtime are narrowly construed by courts. Employees must fit plainly and unmistakably within the exemptions provided by law. The following information is only a summary of federal and state exemptions for "white collar" employees. A full description of these exemptions is available in TA's handbook *Employee Classification & Wage and Hour Exemptions*. At a minimum, employers should check the applicable statutes and administrative rules and may wish to consult with an employment law attorney before classifying an employee as exempt.

For information about "white collar" employees working in state and local government agencies, see OAR 839-020-0300 through 839-020-0350.

SALARY BASIS TEST FOR "WHITE COLLAR" EMPLOYEES

To be exempt, "white collar" employees must be paid on a salary basis. Oregon law defines "salary" as a predetermined amount paid for each pay period of one week or longer (but not to exceed one month) that represents the equivalent of not less than 2,080 hours times the current minimum wage, divided by 12 months. For 2011, that calculation yields $340.00 per week. Beginning January 1, 2012, that calculation comes to $352.00 per week. ORS 653.010(9); OAR 839-020-0004(29).

Under federal regulations enacted in 2004, however, all employers subject to the FLSA must pay salaried exempt employees a minimum salary of $455 per week or $23,660 annually. Oregon employers must pay the higher salary in order for their executive, administrative, and professional employees to remain exempt.

The salary must be a predetermined amount that does not vary based on the quantity or quality of work performed. 29 C.F.R. § 541.600. In general, although exempt employees need not be paid for weeks in which no work is performed, they must be paid for any week in which work is performed, regardless of the number of hours or days worked. 29 C.F.R. § 541.602(a).

Permissible Salary Reductions

Reductions to an exempt employee's salary may be made under the following circumstances:

- An employee's salary may be prorated (reduced) if an exempt employee takes a full day or more off for personal reasons, other than sickness or disability. 29 C.F.R. § 541.602(b)(1).
- An employee's salary may be reduced for absences of a day or more for sickness or disability if the reduction is made according to the employer's plan, policy, or practice of providing paid sick or disability leave. For example, if an employer has a paid sick leave plan and the employee has exhausted all available paid leave under that plan, then the salary may be reduced by those absences of a day or more for sickness or disability. 29 C.F.R. § 541.602(b)(2).
- During any workweek when serving on jury duty, military leave, or when attending a proceeding as a witness, the exempt employee's full 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. 29 C.F.R. § 541.602(b)(3).

UPDATE: Under HB 3034 (2011) employers are prohibited from requiring employees to used vacation leave, sick leave, or other annual leave for time spent in jury service.

- Reductions in an exempt employee's salary may be made as a disciplinary measure (as suspensions in full day increments) for violations of safety rules of major significance such as smoking in an explosive plant or oil refinery or for violations of workplace conduct policies as long as non-exempt employees would be suspended for the same violations. 29 C.F.R. § 541.602(b)(4)(5).
- Reductions in an exempt employee's salary may be made during the initial and final workweeks. An employer may pay a prorated amount of the employee's salary for the time actually worked in the first and last week of employment. 29 C.F.R. § 541.602(b)(6).
- In private sector employment, an 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. (Special rules apply to government agencies). 29 C.F.R. § 541.602(b)(7) and OAR 839-020-0004(30).
- Government agencies have special provisions under established statutes and policies pursuant to the principles of public accountability. Leave without pay for partial days missed is allowed in some instances for public agencies. 29 C.F.R. § 541.710 and OAR 839-020-0330.

Acceptable Payroll Practices That Do Not Violate Salary Basis

Payroll practices that do not violate the salary basis test include:

- Deducting from paid leave banks;
- Tracking exempt employees' hours;
- Requiring a specific work schedule;
- Making *bona fide* across the board schedule changes; and
- Paying amounts in addition to an employee's salary for additional work performed.

COMMONLY ASKED QUESTIONS – Part day deductions for sickness

Q. When a salaried exempt employee puts in only half a day due to illness, may an employer charge the employee's sick leave bank for a part day absence?

A. Yes. As long as the employee receives the full amount of his or her salary, deductions from leave banks do not affect the exempt employee's status or the salary basis of payment. It is essential, however, that the exempt employee's salary is not subject to reduction for partial day absences. Therefore employers should adopt policies which clearly state that the salary of an exempt employee will not be reduced for part-day absences if the employee has no available accrued leave to access.

Payment on a Fee Basis

Exempt administrative and professional employees (but not executive employees) may be paid on a fee basis for completing a single job regardless of the time required to complete the work. The fee payment must meet the minimum salary level of at least $455 per week, had the employee worked 40 hours. 29 C.F.R. § 541.605.

EXECUTIVE EMPLOYEE EXEMPTION

Employees are exempt as executive employees if all of the following conditions are met. The employee must:

- have management of the enterprise or a department, or subdivision as his or her primary duty;
- customarily and regularly supervise two or more employees;
- have hiring and firing authority or be able to make recommendations that carry particular weight;
- regularly exercise independent judgment and discretionary power; and
- be paid on a salary basis.

OAR 839-020-0320; 29 C.F.R. § 541.100.

ADMINISTRATIVE EMPLOYEE EXEMPTION

Employees are exempt as administrative employees if all of the following conditions are met. The employee must:

- have as his or her primary duty:
  - the performance of responsible office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; or
  - the performance of functions in the administration of a school system, educational establishment, or institution and the work is directly related to academic instruction carried on there;
- regularly exercise independent judgment and discretionary power;
- regularly assist an executive or proprietor or
  - perform specialized or technical work requiring special training, experience, or knowledge under only general supervision; or
  - execute special assignments and tasks under only general supervision; and
- be paid on a salary or fee basis.

OAR 839-020-0320(2); 29 C.F.R. § 541.200.

PROFESSIONAL EMPLOYEE EXEMPTION

Employees are exempt as professional employees if all of the following conditions are met. The employee must:

- have as his or her primary duty
  - the performance of work requiring an advanced type of knowledge usually obtained through a prolonged course of study; OR
  - the performance of work that is original or creative in an artistic field, or work as a certified teacher or practicing law or medicine;
- regularly exercise independent judgment and discretion; and
- perform work that is predominantly intellectual and varied in character (i.e., not routine mental, mechanical or physical work) that because of its character may not be standardized in relation to a given period of time.
- be paid on a salary or fee basis;

OAR 839-020-0320(4); 29 C.F.R. § 541.300 through 541.304.

Computer Professionals

Under federal law, computer professionals may also meet the requirements for the professional exemption if they 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.

Under federal rules, computer professionals who meet this duties test need not meet the requirements regarding the exercise of independent judgment or discretion and they need not have an advanced academic degree. In addition, computer professionals may be compensated either on a salary basis (of at least $455 per hour) or on an hourly basis at a rate of not less than $27.63. 29 U.S.C. §§ 213(a)(1) and (17); 29 C.F.R. §§ 541.400-402.

Oregon's professional exemption rules do not provide an alternate duties test for computer employees. Instead, Oregon law provides an entirely separate exemption from overtime for computer professionals who perform the duties listed above (under the federal computer professional exemption) and who are paid not less than the equivalent of $27.63 per hour.

Unlike the federal rule, however, Oregon's exemption does not allow for the payment of anything less than the equivalent of $27.63 for each hour worked.
OAR 839-020-0125(2)(h).

Oregon employers of computer professionals who do not wish to pay the equivalent of $27.63 per hour may wish to revisit the criteria for the executive or administrative exemptions discussed above.

IMPORTANT DEFINITIONS FOR "WHITE COLLAR" EXEMPTIONS

Primary Duty means, as a general rule, the major part, or over 50 percent, of an employee's time. However, a determination of whether an employee has management as the employee's primary duty must be based on all the facts of a particular case, with the major emphasis on the character of the employee's job as a whole. OAR 839-020-0004(25).

Customarily and regularly means "greater than occasional but less than constant" and includes work normally done every workweek, but does not include isolated or one-time tasks. 29 C.F.R. § 541.701.

Independent Judgment and Discretion means 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).

Additional information regarding terms used in these "white collar" exemptions is available on the USDOL's website at www.dol.gov/esa/whd.

EXEMPTIONS FROM OVERTIME BUT NOT MINIMUM WAGE

Both Oregon and federal laws provide a number of exemptions from the requirement to pay overtime. These include (but are not limited to):

- Domestic employees who reside in the household of the employer;
- All agricultural employees who perform only agricultural work in the workweek. [Keep in mind, however, that if any non-agricultural work is performed by an employee in a workweek, the agricultural exemption is lost for that week and overtime must be paid if the employee works more than 40 hours. 29 C.F.R. § 780.11.];
- Truck drivers and their helpers who are subject to federal regulation by the Motor Carrier Act;
- Salespeople, parts people, and mechanics primarily engaged in selling or servicing automobiles, trucks, or farm implements when the employee is employed by a non-manufacturing establishment primarily engaged in selling such vehicles or implements to the ultimate purchasers.[1]
- Salespeople primarily engaged in selling boats, trailers, or aircraft when the salesperson is employed by a non-manufacturing establishment primarily engaged in selling trailers, boats or aircraft to ultimate purchasers;
- Mechanics and parts people employed by a non-manufacturing establishment primarily engaged in selling autos, trucks and farm implements;
- Retail sales or retail service employees who are paid commissions when the commissions are more than 50 percent of the employee's total compensation for a "representative period" of not less than one month, if the employee is paid more than one and one-half times the minimum wage for all hours in the pay period;
- Employees of private recreational or amusement establishments engaged in providing services or facilities in a national forest, national park, or national wildlife refuge under a contract with either the Secretary of the Interior or the Secretary of Agriculture. These employees must be paid overtime for hours worked over 56 in a workweek instead of the usual 40 hours in a workweek;
- Employees of motion picture theater enterprises; and
- Computer professionals who are paid at least the equivalent of $27.63 per hour. See OAR 839-020-0125(2)(h) for the definition of "computer professional."

OAR 839-020-0125.

CALCULATING OVERTIME

Overtime must be paid for all hours worked over 40 in a given workweek by all non-exempt employees. OAR 839-020-0030.

DEFINING THE WORKWEEK

Overtime pay must be calculated for each workweek without regard to hours worked in

[1] 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.

any other workweek and without regard to the pay period. Employers are required to establish the workweek for each employee. The workweek may begin at any hour and day the employer chooses and ends seven consecutive days later. Once an employee's workweek is established, however, it must remain the same and may not be changed unless the change is intended to be permanent and not made to avoid the payment of overtime.
OAR 839-020-0030(2)(a).

DEFINING THE REGULAR RATE

Under wage and hour law, employees may be paid an hourly wage, a salary, or on some other basis like a piece-rate, commission or day-rate basis. Whatever the method of compensation, however, employers must ensure that their employees receive no less than the equivalent of the minimum wage for all hours worked and one and one-half times the "regular rate" of pay for any overtime hours worked.
OAR 839-020-0030(1).

The "regular rate" is an hourly rate, which must be at least equal to the minimum wage. In general, the regular rate is determined by dividing the total remuneration for employment in any workweek by the total number of hours actually worked.
OAR 839-020-0030(2)(b); 29 C.F.R. § 778.109.

COMPUTING THE REGULAR RATE OF PAY

When an employee is paid an hourly rate of pay and that is the only compensation received, that rate is the employee's "regular rate" of pay and any overtime worked must be paid at one and one-half times that hourly rate.

Example: An employee works 41 hours during a 7-day workweek at a single hourly rate of $9.00 per hour. The employee's regular rate is $9.00 per hour and the employee's overtime rate is one and one-half times the regular rate, or $13.50.

DAY	HOURS WORKED
Sunday	0
Monday	8
Tuesday	11
Wednesday	7
Thursday	8
Friday	7
Saturday	0
Total hours worked	**41**
40 straight time hours @ $9.00	$360.00
1 overtime hour @ 13.50 (1.5 x $9.00)	$13.50
Total compensation	**$373.50**

Different Rates of Pay in the Same Workweek

When an employee works over 40 hours in a workweek and is paid different hourly rates of pay, the regular rate of wage is the weighted average of the rates of pay for the workweek. To calculate a weighted average rate of pay:

1. Determine the total amount of straight time earnings for the workweek.

2. Divide this total amount by number of hours worked in the workweek.

3. Multiply the number of overtime hours worked by one-half the regular hourly rate to calculate the additional overtime due.

Example: An employee works 16 hours at $10.00 per hour, and 30 hours at $12.00 per hour.

1. The total straight time amount earned is $520.00 ($160.00 + $360.00)
2. The weighted average hourly rate (the "regular rate") is $11.30 ($520 / 46 hours)
3. The overtime earnings are $33.90 (½ x $11.30 x 6 overtime hours)

In this example, the employee would need to be paid gross wages of $553.90 ($520.00 + $33.90).

When employees are paid by a form of payment other than an hourly rate, it is still necessary to compute a regular hourly rate of pay in order to calculate overtime. Oregon law does not require the inclusion of commissions, overrides, spiffs, or bonuses paid in computing this rate (OAR 839-020-0030), but federal law does. Consequently, FLSA-covered employers must apply the federal standard (because it is more beneficial to employees) and include commissions, bonuses, and other payments in determining the regular rate of pay when computing overtime.

Piece Rates and Day Rates

When calculating overtime for employees who are paid on the basis of piece rates, day rates, or job rates, divide the employee's total earnings for the week by the actual hours worked in that week to compute the employee's regular hourly rate for that workweek. The employee's piece rate earnings represent his or her straight time earnings for all hours worked. In addition to an employee's piece rate earnings, the employer will also need to pay each hour worked over 40 in the workweek at a rate that is one-half times the regular rate.

Example: An employee makes 600 widgets at $1.25 per widget over the course of 50 hours in a workweek.

1. The total earnings for the week are $750.00 (600 widgets x $1.25 per widget)
2. The weighted average hourly rate (the "regular rate") is $15.00 per hour ($750.00 / 50 hours)
3. The overtime earnings are $75.00 (½ x $15.00 x 10 overtime hours)

In this example, the employee would need to be paid gross wages of $825.00 ($750.00 + $75.00).

Regular Rate for Salaried Employees

Employers often believe that paying an employee on a salary basis relieves them of the responsibility to pay overtime. Unless an employee fits within a statutory exemption from overtime, however, merely paying an employee a salary does not exempt the employee from overtime. Overtime for such non-exempt, salaried employees must still be computed at one and one-half times the employee's regular rate of pay, computed on an hourly basis.

The regular hourly rate for salaried employees is equal to the amount of the weekly salary divided by the number of hours the salary is intended to compensate in a regular workweek.

Example 1: An employee is hired at a salary of $525.00 for a 35 hour workweek. The employee's regular rate is $15.00 per hour ($525.00 / 35 hours). If the employee were to work 50 hours in a workweek, he or she must be paid $15.00 per hour for the first 40 hours and $22.50 for each overtime hour worked. Total wages for the week would be $825.00.

Example 2: An employee is hired at a salary of $600.00 for a 45 hour workweek. The employee's regular rate is $13.34 per hour ($600.00 / 45 hours). If the employee were to work 47 hours in a workweek, he or she would need to be paid $13.34 per hour for the first 40 hours ($533.60) and $20.01 for each of 7 overtime hours worked ($140.07). Total wages for the week would be $673.67.

Where the salary represents a period other than a workweek, the salary must be reduced to its workweek equivalent. OAR 839-020-0030(3)(g). A monthly salary would be converted to its weekly equivalent by multiplying the monthly amount by 12 to obtain an annual salary and then dividing that annual amount by 52 to obtain a weekly salary. The regular hourly rate can then computed by the same methods outlined above.

Example: The regular hourly rate for an employee whose monthly salary of $1,500.00 based on 40 hours per week, is computed as follows:	
$1,500.00 / month x 12 months / year	= $18,000.00 / year
$18,000.00 / year divided by 52 weeks / year	= $346.15 / week
$346.15 / week divided by 40 hours / week	= $8.65 / hour (regular rate)
$8.65 / hour x 1.5	= $12.98 / hour (overtime rate)

Regular Rate for Salaries Based on a Fluctuating Workweek

Under certain circumstances, a fixed salary may be paid for all hours worked, whether few or many. This type of arrangement (referred to as the "fluctuating workweek method") is permissible provided: (1) there is a clear mutual understanding that the employee will receive a fixed salary for the hours worked each week, whatever their number; (2) the amount of the salary provides compensation to the employee at no less than the applicable minimum wage; and (3) in addition to the fixed salary, the employee receives overtime compensation for all hours worked in excess of 40. Since the number of hours actually worked may fluctuate from week to week, the regular rate for the employee will also vary from week to week and is determined by dividing the amount of the salary by the number of hours worked in the given workweek. The employee would then be paid for any overtime hours worked at one half of this regular hourly rate (since under the terms of the salary arrangement all hours have already been compensated at the regular rate).

To calculate overtime using this method:

1. Reduce the salary to a weekly equivalent, if necessary.

2. Divide the weekly salary by the total number of hours worked in the workweek to determine the employee's regular hourly rate for the week.

3. Multiply the number of overtime hours worked by ½ the regular hourly rate to compute the additional overtime due.

Example 1: An employee who is paid a $1,900 monthly salary on a fluctuating workweek basis works 48 hours.

1. The weekly salary is $438.46/wk. ($1,900.00 x 12 = $22,800; $22,800 / 52 = $438.46)
2. The regular hourly rate is $9.13/hr. ($483.46 divided by 48 hours worked)
3. Additional overtime due is $36.52 (½ x $9.13 x 8 overtime hours)

In this example the employee would be due his or her salary of $1,900.00 plus overtime wages of $36.52 or $1,936.52 total wages.

Example 2: The same employee works 44 hours.

1. The weekly salary remains $438.46/wk.
2. The regular hourly rate is now $9.95/hr. ($438.46 divided by 44 hours worked)
3. Additional overtime due is $19.90. (½ x $9.95 x 4 overtime hours)

In this example the employee would be due his or her salary of $1,900.00 plus overtime wages of $19.90 or $1,919.90 total wages.

CAUTION: It should be noted that the "fluctuating workweek" salary method is intended for employment when the employee's hours vary due to the nature of the work. There must be a clear, mutual understanding between the employer and employee that this method of compensation will be used. It is advisable to have the understanding in the form of a written policy provided to the employee. Under such a salary arrangement the salary will be paid in full for any workweek of 40 hours or less. 29 C.F.R. § 778.323.

In any workweek when the employee's regular hourly rate for the week is not equal to or greater than the minimum wage, the employer must bring the rate up to minimum wage and compute overtime based on that hourly rate. OAR 839-020-0030(3)(f)(A).

PREMIUM PAY FOR HOLIDAY/WEEKEND WORK

Employers may apply certain premiums paid for work on Saturdays, Sundays, or holidays toward the weekly overtime obligation when the premium pay is at least time and one-half times the employee's established hourly rate Such premiums need not be included in the regular rate. 29 C.F.R. § 778.201.

OVERTIME IS BASED ON ACTUAL HOURS WORKED

Overtime is only required to be paid for hours actually worked. Employers are not required to include sick days, vacation days, or other hours not actually worked to determine the total number of hours worked in a workweek when calculating overtime.

NOTE: There are special requirements for calculating "hours worked" by firefighters employed by cities, municipalities or fire districts. See the *State and Local Government Employers* section of this handbook.

MANDATORY OVERTIME

No provision in the law requires an employer to give notice to its employees that they are required to work overtime. It is an employer's prerogative to set the work schedule and require an employee to work overtime without notice unless the employer's policy or a union contract provides otherwise.

UNAUTHORIZED OVERTIME

An employee who works unauthorized overtime must still be paid one and one-half times their regular rate for all hours worked over 40 hours in the employer's seven day workweek. An employer may discipline or terminate an employee who works unauthorized overtime but must still pay the employee for the time worked.

COMPENSATORY TIME NOT ALLOWED IN PRIVATE SECTOR EMPLOYMENT

Compensatory time is allowed only for government employees. Oregon and federal law prohibits private sector employers from giving non-exempt employees compensatory time off in lieu of paying overtime. Private sector employees may not elect to take time off in lieu of receiving overtime wages. If an employee has worked extra hours on one day of the workweek, the employer may provide an equal amount of time off in the same workweek so that no overtime will be due, (assuming there is no daily overtime requirement). 29 C.F.R. § 553.21.

OVERTIME AND HOURS LIMITATIONS IN SPECIFIC INDUSTRIES

MANUFACTURING ESTABLISHMENTS

Employees "employed in" mills, factories, and manufacturing establishments must be paid at one and one-half times the employee's regular rate of pay for hours worked in excess of 10 in any day. In addition, employees may not work more than 13 hours in any given day. ORS 652.020(1).

Just as employers are required to establish a regular, recurring seven-day period for the purposes of computing weekly overtime, employers are also required to establish

a regular, recurring 24-hour day for purposes of computing daily overtime. OAR 839-001-0140.

Employees who are represented by a collective bargaining agreement are excluded from this requirement, provided limits on the required hours of work and overtime payment have been addressed in the agreement. ORS 652.020(4).

These restrictions do not apply to sawmills, planing mills, shingle mills, and logging camps unless and until similar laws have been enacted in California, Washington, and Idaho. ORS 652.030; OAR 839-001-0127.

CANNERIES

Employees who work more than 10 hours per day in canneries, driers and packing plants (excluding such establishments that are located on farms and which primarily process products produced on such farms) must be paid for any hours worked over 10 at one and one-half times their regular rate of pay. ORS 653.265.

Agricultural employers should note that even when a cannery, drier or packing plant is located on a farm, employees must be paid daily overtime if the cannery does not primarily process products produced on such farm. In addition, employees of such plants MAY STILL BE SUBJECT to state and federal overtime requirements for hours worked in excess of 40 in a workweek. See "*Agricultural Employment*" section below, page 69 and following.

Agricultural employers should also note that the provisions of ORS 652.020 may also require the payment of daily overtime and impose a maximum limit to hours worked each day when operations of the establishment constitute "manufacturing." Manufacturing is defined as "the process of making goods or any material produced by machinery; anything made from raw materials by machinery; the production of articles for use from raw or prepared materials by giving such materials new forms, qualities, properties or combinations, by the use of machinery." OAR 839-001-0100(11)(a).

A worker under 18 years of age may work a maximum of 10 hours in one day in a cannery. OAR 839-021-0067(3). Employers must apply to the Wage and Hour Commission for a special permit in order to employ 16- and 17-year-old workers more than 10 hours per day. Like their adult counterparts, minors working more than 10 hours per day by permit must be paid one and one-half times their regular rate of pay.

MINES

Persons working in underground metals mines may not be required to work longer than eight hours in any 24-hour period. This restriction does not apply in case of emergency when life or property is endangered. It does not apply to mines in their first stages of development, such as tunnel work to a length of 200 feet, or shaft work to a depth of 150 feet, or to any surface excavation. ORS 652.040.

LABOR PROVIDED TO STATE AND LOCAL GOVERNMENTS

When a contractor employs labor to work on a contract with a state or local government agency, school district, municipal corporation or subdivision, the employee may not be required or permitted to work more than 10 hours per day or 40 hours per week except in emergencies or when absolutely necessary. When such overtime hours are worked, employees must be paid at the rate of one and one-half times the employee's regular rate of pay for the following time worked:

- Over eight hours in one day in any five-day workweek Monday to Friday, OR Over 10 hours in one day if the employer has established a work schedule of four consecutive days during the period Monday through Friday;
- Over 40 hours in a week;
- On Saturdays and on the following legal holidays:
- Each Sunday;
- New Year's Day (January 1);
- Memorial Day (last Monday in May);
- Independence Day (July 4);
- Labor Day (first Monday in September);
- Thanksgiving Day (4th Thursday in November); and
- Christmas Day (December 25).

ORS 279C.540.

These requirements do not apply to public improvement contracts or contracts for services if the contractor is a party to a collective bargaining agreement. Contracts for services, personal services, and services at county fairs are subject to different overtime provisions. See ORS 279C.540 for more information.

Workers employed on public works projects are subject to a number of additional minimum (prevailing) wage, overtime and reporting requirements under Oregon's prevailing wage rate law (ORS 297C.800 *et seq.*). Public agencies, contractors, and subcontracts who have questions about this law are encouraged to contact BOLI's Wage and Hour Division at 971-673-0761. Email inquiries may also be sent to pwremail.boli@state.or.us.

See the *Special Employment Situations* section below regarding the wage and hour laws, including overtime provisions which apply specifically to employees of state and local government employers.

PAYMENT OF DAILY AND WEEKLY OVERTIME

When employees who are entitled to daily overtime have worked more than 40 hours in the workweek and have also exceeded the maximum number of hours on one or more days, thereby earning daily overtime, the employer should calculate overtime hours worked on both the daily and weekly bases and pay the greater amount.

Example: A manufacturing establishment employee must be paid overtime for any hours worked over ten in a day and 40 in a workweek:

A. Where daily overtime hours are greater than weekly:

Mon	12 hours
Tue	8 hours
Wed	5 hours
Thurs	5 hours
Fri	11 hours

Total Hours Worked = 41 hours
Daily Overtime Hours Worked = 3 hours
Weekly Overtime Hours Worked = 1 hour
The employee must be paid for three hours of overtime

B. Where weekly overtime hours are greater than daily:

Mon	11 hours
Tue	8 hours
Wed	8 hours
Thur	11 hours
Fri	8 hours

Total Hours Worked = 46 hours
Daily Overtime Hours Worked = 2 hours
Weekly Overtime Hours Worked = 6 hours
The employee must be for six hours overtime

HOSPITALS AND RESIDENTIAL CARE FACILITIES

Hospitals and certain residential care facilities such as nursing homes, homes for the aged, and residential care facilities for the mentally ill may use an alternative work period for calculating the number of overtime hours worked. Under this method, the qualifying employer may use a work period of 14 consecutive days (in place of the usual 40 hour workweek) provided that employees are paid for overtime for any hours worked in 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. OAR 839-020-0125(2)(e); 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.

Example:

Week #1		**Week #2**	
Saturday	8 hours	Saturday	8 hours
Sunday	8 hours	Sunday	8 hours
Monday	10 hours	Monday	8 hours
Tuesday	6 hours	Tuesday	8 hours
Wednesday	8 hours	Wednesday	0 hours
Thursday	8 hours	Thursday	0 hours
Friday	8 hours	Friday	0 hours
TOTAL	**56 hours**	**TOTAL**	**32 hours**

Total hours worked:	88	(56 + 32)
Overtime hours over 80 hours:	8	
Overtime hours over 8 hours:	2	
Total overtime hours to pay:	8	(the greater of the hours worked over 80 in the pay period and the hours worked over 8 in any given day)

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.

COMMONLY ASKED QUESTIONS – The "8 and 80" Rule

Q. Does a nurse have to be an RN in order to be paid overtime under the 8 and 80 rule?

A. No. In fact, the employee need not be a nurse at all. The 8 and 80 rule applies to the employer (not the employee), so any employee of a hospital or qualifying residential care facility, from a nurse or a CNA to the payroll or information technology staffers may be paid overtime under the 8 and 80 rule.

WORKING CONDITIONS

All employers in Oregon, except U.S. government employers, must comply with state laws that establish working conditions standards. Employees who are exempt from minimum wage are generally exempt from the working conditions rules as well. ORS 653.020 and ORS 653.261. Note, however, that provisions relating to rest breaks for the expression of breast milk also apply to salaried exempt "white collar" workers. ORS 653.077(9). Civil penalties may be assessed for failure to comply with Oregon rules regulating working conditions. OAR 839-020-1010(1)(j)(l).

REST PERIODS

Oregon law requires an employer to provide a *paid* rest period of not less than 10 minutes for every segment of four hours or every "major portion thereof" (meaning two hours and one minute through four hours) worked in a work period. This time must be taken in addition to and separately from required meal periods. The rest period should be taken as nearly as possible in the middle of the work segment. It is prohibited for an employer to allow employees to add the rest period to a meal period or to deduct the rest periods from the beginning or end of the employee's work shift. OAR 839-020-0050(6)(a)(B).

Employers also bear the burden of showing that they have provided the rest periods required by law. OAR 839-020-0050(6)(a)(C).

Rest Period Exception

On shifts of five or less hours, retail or service establishment employees 18 years or older, who work alone, are not required to be given a rest break as long as they are allowed sufficient time to use restroom facilities when necessary.
OAR 839-020-0050(6)(b).

MEAL PERIODS

Oregon law requires an employer to provide an *unpaid* meal period of not less than 30 minutes to each non-exempt employee who works six or more hours in a work period. An employee must be relieved of all work duties during the meal period. If an employee is not relieved of all work duties during a 30 minute meal period, the employer must pay the employee for that time. OAR 839-020-0050(3)(c).

For work periods between six and seven hours, the meal period is to be taken between the second and fifth hours worked. For work periods greater than seven hours, the meal period is to be taken between the third and sixth hours worked.
OAR 839-020-0050(2)(c). Additional meal periods are required for work periods of 14 and 22 hours

For work periods that are less than six hours, no meal period is required.

Meal Period Exceptions

When an employer fails to provide an employee with a required meal period, Oregon law places upon the employer the burden to show that one of the following exceptions applies:

1. **Unexpected Event**. On rare occasions unexpected events may occur that prevent an employer from providing employees with the meal period. These events include unforeseen equipment failures, acts of nature, or other exceptional and unanticipated circumstances. In such an event, if an employee is not relieved of all duties for 30 continuous minutes during the meal period, the employer must pay the employee for the entire meal period. OAR 839-020-0050(3)(c).

2. **Industry Custom**. Where the employer can demonstrate that an industry has an established custom or practice of providing a meal period that is less than 30 minutes but not less that 20 minutes, the employer may continue the practice provided that during the meal period, the employee is relieved of all duties. OAR 839-020-0050(3)(b).

3. **Undue Hardship**. The employer must be able to show that providing the meal period would pose an undue hardship on the employer's business. An employer must provide written notice to each employee for whom the employer has claimed an undue hardship. The form of the notice is available on BOLI's website. The notice must be given in the language that the employer uses to communicate with the employee and be retained for at least six months after the employee's termination. The undue hardship exception does not relieve an employer from the requirement to provide the employee with adequate periods in which to eat, rest, and use the restroom *without* reducing the employee's pay.
   OAR 839-020-0050(5).

Undue Hardship means significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the business. OAR 839-020-0050(4).

To determine if the "undue hardship" exceptionapplies, the following factors should be considered:

- What is the cost of complying with the meal period requirement?
- What are the overall financial resources of the employer?
- Is there anyone qualified to relieve the employee at the worksite? How many employees does the employer have overall? How many worksites does the employer have? How separate are the worksites? What are the purposes of the various worksites?
- What effect does giving the meal period have on continuous operations pertinent to machinery start-up and shutdown time and expense? On intermittent workflow? On perishables used at the site? On the health and safety of other employees, patients, clients or the public?

4. **Tipped Food or Beverage Servers**. An employer and a tipped food and beverage server may agree to waive the required meal period under certain circumstances:
    - The employee is employed to serve food or beverages, receives tips and reports those tips to the employer.
    - The employee is at least 18 years of age.
    - The employee voluntarily requests to waive the meal period. (For newly hired employees, the request to waive the meal period may not be made until the employee has worked for the employer at least seven days.) The request to waive the meal period is in writing on a form prescribed by BOLI and available on BOLI's website The employer must retain a copy of the meal waiver for six months after the employee separates from employment.

An employee that has requested a meal period waiver must still be provided with an opportunity to consume food during shifts of six hours or longer, and must be paid for any meal period in which the employee is not relieved of all duty.

When the employee works longer than eight hours, the employee must be given a meal period in which the employee is relieved of all duty.

The employer must keep records clearly showing whether or not the employee has received the meal period as well as conspicuously post a notice provided by BOLI regarding rest and meal periods. The notice is also available on BOLI's website.

The agreement to waive a meal period may be revoked by either the employer or the employee by providing seven calendar days written notice. An employee may also request to take a meal period without revoking the agreement to waive the meal period by submitting a written request to the employer at least 24 hours prior to the meal period requested. OAR 839-020-0050(8).

WORK PERIOD DEFINED

For purposes of rest and meal periods, *work period* means the period between the time the employee begins work and the time the employee ends work and includes rest periods and any period of one hour or less NOT designated as a meal period during which the employee is relieved of all duties. Meal periods are not included as part of the work period unless the employee continues to perform duties during the meal period. OAR 839-020-0050(10).

To determine the number of rest periods to which an employee is entitled, the employer must calculate the number of four-hour segments (or major portions thereof) that are included in the work day.

Example: In a six and one-half hour work period, there is one four-hour segment and one two and one-half hour segment (the major portion of four hours), so the employer is required to provide two rest breaks in addition to a meal period.

Numbers of Rest and Meal Periods Required Based on Length of Work Period		
Length of work period	**Number of rest breaks required**	**Number of meal periods required**
2 hrs or less	0	0
2 hrs 1 min — 5 hours 59 min	1	0
6 hrs	1	1
6 hrs 1 min — 10 hours	2	1
10 hrs 1 min — 13 hours 59 min	3	1
14 hrs	3	2
14 hrs 1 min — 18 hours	4	2
18 hrs 1 min — 21 hrs 59 min	5	2
22 hrs	5	3
22 hrs 1 min — 24 hrs	6	3

REST AND MEAL PERIODS UNDER COLLECTIVE BARGAINING AGREEMENTS

The provisions of the rest and meal period rules may be modified by the terms of a collective bargaining agreement if the terms of the agreement specifically prescribe rules concerning rest and meal periods. OAR 839-020-0050(6)

REST PERIODS FOR EXPRESSION OF MILK

ORS 653.077 and OAR 839-020-0051 require employers of 25 or more employees to provide reasonable rest periods to accommodate an employee who needs to express milk for her child 18 months of age or younger.

A *reasonable rest period* is defined as not less than 30 minutes during each 4-hour work period or major part of a 4-hour work period to be taken by the employee approximately in the middle of each work period.

Whenever feasible, the employee should take expression of milk rest periods at the same time as other statutorily required rest and meal periods. Employers need only compensate the portion of the rest period which would otherwise be paid under law or contract. Where taking this rest break with other required rest and meal periods is not feasible, the employee must be allowed to take an additional unpaid rest break of 30 minutes during each 4-hour period to express milk.

Employers are also required to make reasonable effort to provide a private location which is reasonably close to the employee's work station where she can express milk. The location may not be a public restroom or toilet stall and must be free from intrusion by other employees or the public.

An employer must allow the employee to bring a cooler or other insulated container to store the expressed milk. If the employer allows employees to use a refrigerator for personal use, the employee must be permitted (but may not be required by the employer) to use the available refrigeration to store the milk.

Employers may not require an employee to use paid leave time for the expression of milk.

Amendments to the FLSA – 29 U.S.C. § 207 (2010): Federal law now requires accommodations for the expression of milk in the workplace similar to those of Oregon. Oregon employers who are covered by the FLSA must comply with both standards and should be aware of the following inconsistencies between state and federal law.

Coverage: State law applies to employers of 25 or more employees. Rest periods to express milk are required for non-exempt employees (as well as exempt administrative, executive and professional employees) with a child 18 months of age or younger. Federal law applies to all employers covered by the FLSA. Rest periods, however, need not be provided to employees who are exempt from overtime under section 7 of the FLSA, or for employees with a child over one year of age.

Frequency and Timing of the Breaks: State law requires a 30 minute break for every 4 hour segment of the work period. Federal law is potentially more generous in that it requires a break "each time an employee has need to express milk" and allow for "a reasonable time," which could exceed the 30 minutes required by state law.

Undue Hardship Exemption: Under state law, an employer need not provide rest breaks for the expression of milk if doing so would impose an "undue hardship." Federal law only allows such an exemption for employers of less then 50 employees.

OTHER WORKING CONDITIONS PROVISIONS

The Bureau's administrative rules also prohibit employers from requiring employees to lift excessive weights and require employers to provide sanitary and safe work areas with adequate lighting, ventilation, washrooms, and toilet facilities. The working conditions rules also require employers to comply with the provisions of ORS Chapter 654 (the Oregon Safe Employment Act) enforced by the Oregon Occupational Safety and Health Division (OR-OSHA). OAR 839-020-0060 and 839-020-0065.

ADEQUATE WORK / "SHOW-UP" PAY PROVISIONS ABOLISHED

A former rule requiring "adequate work" or "show-up pay" for adult workers was abolished in 1990. Under certain circumstances, the Bureau's child labor regulations still require minors under the age of 18 to be paid for time scheduled but not worked. See the *Employment of Minors* section of this handbook for rules that regulate working conditions for minors.

SPECIFIC EMPLOYMENT SITUATIONS

COLLECTIVE BARGAINING AGREEMENTS

Under wage and hour law there are a number of special provisions pertaining to employment under the terms of collective bargaining agreements. These provisions include:

DEDUCTIONS

ORS 652.610(d) allows for deductions from an employee's wages as long as they are authorized by a collective bargaining agreement to which the employee and employer are parties.

MEAL AND REST BREAKS

The provisions of the rest and meal period rules may be modified by the terms of a collective bargaining agreement if the terms of the agreement specifically prescribe requirements concerning rest and meal periods. OAR 839-020-0050(5)

NOTE: Any exceptions to meal and break requirements for minors must be approved by the Wage and Hour Commission pursuant to OAR 839-021-0072(4)(5)(6).

BREAKS FOR THE EXPRESSION OF MILK

Expression of milk break rules may be modified by the terms of a collective bargaining agreement provided the agreement includes provisions that prescribe break requirements for the expression of milk. OAR 839-020-0051(11)

OVERTIME EXCEPTIONS FOR PUBLIC EMPLOYEES

Rules governing overtime and/or compensatory time may be modified for workers employed by public employers who are covered by a collective bargaining agreement that expressly waives the overtime provisions of ORS 653.268.

ORS 653.268(2) states, "Nothing in this section shall prevent a labor organization under the National Labor Relations Act or ORS 243.650 to 243.782 or other employees from negotiating additional overtime pay requirements with a public employer."

EXCEPTIONS FOR MILLS, FACTORIES AND MANUFACTURING ESTABLISHMENTS

ORS 652.020(4) exempts employees covered by a collective bargaining agreement from the maximum work hours and overtime provisions in ORS 652.020(1) and (2), provided limits on work hours and overtime payment have been agreed upon by the employer and the labor organization.

FINAL PAYCHECK EXCEPTION

Final paycheck requirements outlined under ORS 652.140 do not apply when collective bargaining agreements contain specific timelines and/or requirements under which payment of final wages must be made. ORS 652.140(5)

WAGE CLAIM RESTRICTIONS FOR UNION MEMBERS

Members of a labor union having wage claims should follow the grievance procedures set forth in their union contract. Unless certain conditions are met, the Bureau may not accept a wage claim from a union member if the recovery sought in the wage claim is covered by a union contract containing a grievance procedure. Exceptions are made for wage claims filed when a business closes without paying its employees or an alleged wage and hour law violation involves a “minimum standard” provided by law, e.g., minimum wage or final pay violation.

STATE AND LOCAL GOVERNMENT EMPLOYMENT

The general principles of wage and hour law contained in the preceding material also apply to government employers unless a specific exemption applies. This section summarizes the areas of wage and hour laws that apply specifically to state and local government employers that differ from wage and hour law generally.

The rules relating to overtime and working conditions contained in Division 20 of the Oregon Administrative Rule do not apply to individuals employed in public agencies if other laws or collective bargaining agreements regulate those areas.

Likewise, state and local government employers are not required to comply with state rest and meal period regulations if other provisions of law or collective bargaining agreements prescribe rules pertaining to these working conditions. ORS 653.261(3).

Public employees must be compensated for overtime worked in excess of 40 hours in any workweek at one and one-half times the employee’s regular rate of pay if budgeted funds for overtime are available. If budgeted funds are not available for the payment of overtime, the employee is entitled to compensatory time off at not less than time and one-half the overtime hours worked. ORS 653.268; 29 C.F.R. § 553.20, *et seq*.

EXCEPTIONS TO OVERTIME REQUIREMENTS

Certain public employees are excluded from the application of these overtime requirements, including:

- Fire protection and law enforcement personnel employed by public employers (see *Firefighters and Police Protection Employees* below for alternate overtime requirements);
- Workers employed to fight forest fires;
- Employees of an irrigation system district actually engaged in the distribution of water for irrigation or private use;
- Executive, supervisory, administrative and professional employees as defined in OAR 839-020-0320 and 29 C.F.R. § 541; and
- Workers covered by a collective bargaining agreement which expressly waives the overtime provisions of ORS 653.268.

ORS 653.269.

MAXIMUM ACCRUALS OF COMPENSATORY TIME

Federal law places a cap on the maximum number of compensatory time or "comp time" hours that may be accumulated. For most employees, that cap is 240 hours, which represents 160 actual overtime hours worked. Overtime must be paid in cash when that cap is reached. Public agencies may establish their own policies setting a lower limit on the number of hours employees may accrue.

Seasonal workers who work long hours during one period of the year may accrue hours of compensatory time up to 480 hours if their anticipated compensatory time accrual during their busy season is more than 240 hours. Snow plowing, road maintenance, tax return processing, and outdoor swimming pool attendance are possible examples of work performed by seasonal workers. 29 C.F.R. § 553.24.

Specific provisions regarding the maximum accrual of compensatory time apply to firefighters and law enforcement personnel. See "*Firefighters and Police Protection Employees*" section below.

USE OF COMPENSATORY TIME

Public employees must be permitted to use compensatory time within a "reasonable" period after requesting the time off unless the employee's absence would unduly disrupt the operations of the agency. Records must be kept of all overtime hours worked and compensatory time hours accrued and used. 29 C.F.R. § 553.21.

CASHING OUT COMPENSATORY TIME

Compensatory time may be cashed out at any time and must be paid at the regular rate earned by the employee at the time the employee receives the payment. At termination, the employer must pay any accrued hours at the employee's current rate of pay or the average rate earned over the last three years of employment, whichever is higher. 29 C.F.R. § 553.27.

PUBLIC HOSPITALS, NURSING HOMES AND RESIDENTIAL TREATMENT FACILITIES

Like their complements in the private sector, hospitals and residential care facilities (such as nursing homes, homes for the aged, and residential care facilities for the mentally ill) operated by local government agencies may use a work period of 14 consecutive days for the purpose of calculating overtime, provided the employee and employer have agreed to it prior to the performance of any work. The agreement must state the time and day of the week that the 14-day period begins. This must be noted in the employer's records. The care facility must pay one and one-half times the regular rate for any work performed over 80 hours in the 14-day period and one and one-half times the regular rate for any hours worked over eight in a day. See the *Minimum Wage and Overtime Laws* section of this handbook for a daily overtime calculation example for hospitals and residential care facilities using the 14-day rule. ORS 653.269(6).

FIREFIGHTERS AND POLICE PROTECTION EMPLOYEES

Special overtime requirements apply to most firefighters and law enforcement employees.

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.

Civilian employees who work in dispatching, repair or maintenance, and clerical work are excluded from the 53-hour-week provision and must be paid one and one-half times their regular rates for hours worked over 40 in a week.

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 any time 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 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.

LAW ENFORCEMENT EMPLOYEES

Municipal corporations employing five or more law enforcement employees must pay certain law enforcement officers one and one-half times their regular rates for hours worked over 43 in a week or 171 in a 28-day period. Police departments may also elect to pay overtime after 40 hours in each workweek. Police protection personnel employed by agencies having fewer than five police employees are exempt from overtime requirements.

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

Maximum Compensatory Time Accrual of 480 Hours

Federal regulations allow government employers to set a maximum 480 hour limit for accrued compensatory time hours for fire and police protection personnel. The higher maximum may also be used for emergency response employees such as ambulance workers or dispatchers and rescue work in connection with fire and police protection. “Compensatory time” is defined as time off in lieu of monetary overtime compensation. 29 C.F.R. § 553.21.

AGRICULTURAL EMPLOYMENT

DEFINITION OF AGRICULTURE

In order for agricultural provisions of wage and hour laws to apply, the work performed by the employee must meet the definition of agriculture.

> *Agriculture* includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities, the raising of livestock, bees, fur-bearing animals, or poultry and any practices performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market, or to carriers for transportation to market.
> OAR 839-021-0006(1).

Under this definition, (which applies to the employee rather than the employer) agriculture has two distinct meanings: one relates to the *primary* meaning of agriculture; the other gives to the term a somewhat broader *secondary* meaning.

The primary meaning includes certain specific farming operations such as cultivation, growing and harvesting of any agricultural commodities. If an employee is involved in any of these activities, he or she is engaged in agriculture.

The secondary meaning of agriculture encompasses operations other than those that fall within the primary meaning of the term and includes any practices that are performed either (1) by a farmer or (2) on a farm as an incident to or in conjunction with that farming operation *whether or not they are themselves farming practices*. Examples could include office work, maintenance, and protective work. Secretaries, clerks, bookkeepers, night watchmen, maintenance workers, engineers, and others who are employed by a farmer or on a farm are employed in secondary agriculture if their work is part of the agricultural activity and is subordinate to the farming operations of that farmer or on that farm.

The secondary meaning of agriculture does NOT apply with respect to employees engaged in any practices performed by their employer in connection with farming operations *that are not his/her own*, e.g, processing the crops of *other farms*.

Work that is sometimes confused with agriculture includes:

- Employment in forestation or reforestation;
- Employment in the collection of wild forest products such as mushrooms, evergreen boughs, beargrass, yewbark, salal or ferns; and
- Employment handling agricultural products produced on another farm.

AGRICULTURAL WORKERS EXEMPT FROM OVERTIME

All employees who perform only agricultural work during a workweek are exempt from overtime. ORS 653.261(2); OAR 839-020-0135.

NOTE: Where an employee performs work that is both exempt and non-exempt in the same workweek, the employee is NOT exempt during that workweek.

CANNERIES, DRIERS AND PACKING PLANTS: Employees who work more than 10 hours per day in canneries, driers and packing plants (excluding such establishments that are located on farms which primarily process products produced on such farms) must also be paid for any hours worked over 10 at one and one-half times their regular rate of pay. ORS 653.265.

Agricultural employers should note that even when a cannery, drier or packing plant is located on a farm, employees must be paid daily overtime if the cannery does not primarily process products produced on such farm. In addition, employees of such plants MAY STILL BE SUBJECT to state and federal overtime requirements for hours worked in excess of 40 in a workweek.

Agricultural employers should also note that the provisions of ORS 652.020 may also require the payment of daily overtime and impose a maximum on the number of hours worked per day when operations of the establishment constitute "manufacturing." Manufacturing is defined as "the process of making goods or any material produced by machinery; anything made from raw materials by machinery; the production of articles for use from raw or prepared materials by giving such materials new forms, qualities, properties or combinations, by the use of machinery." OAR 839-001-0100(11)(a).

AGRICULTURAL EXEMPTIONS TO MINIMUM WAGE

Small Farm Exemption

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).

In addition to the small farm exemptions, certain minimum wage (and overtime) exemptions are also available to specific types of agricultural employees.

Immediate 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 they are paid 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, 2012, the Oregon minimum wage is $8.80, so the required salary would be $8.80 times 2,080 hours divided by 12 months = $1,1525.33. The salary will change annually with minimum wage adjustments pursuant to Ballot Measure 25, passed in November 2002. See ORS 653.020(1)(e), 653.010(9) and 653.020(1)(e).

REST AND MEAL PERIODS IN AGRICULTURE

Unless a worker employed in agriculture is exempt from minimum wage, working conditions requirements and rest and meal period requirements apply to agricultural employees in the same way as they apply to non-agricultural employees.

ADDITIONAL INFORMATION

Additional information and publications pertaining to agricultural employment are available from the US Department of Labor at www.dol.gov/esa/whd or by contacting the Wage and Hour Division of the USDOL at 503-326-3057.

EMPLOYMENT OF MINORS

Both state and federal laws and place strict limitations on the employment of minors, including limitations on the number of hours minors of different ages may work and the various types of work permissible for minor employees. These provisions aim not only to protect the health of young people in the work place, but also to safeguard their well being and educational opportunities outside the workplace.

EMPLOYERS SUBJECT TO BOTH STATE AND FEDERAL CHILD LABOR LAWS

Employers who hire minors should be familiar with Oregon and federal laws that regulate the employment of minors. The provisions of state and federal law are not identical and where one or the other provides a higher standard relating to child labor restrictions or minimum ages for certain activities, the more stringent standard will apply.

OREGON CHILD LABOR LAW

The Wage and Hour Commission, a three-person board appointed by the governor, is responsible for establishing minimum standards for the work hours and working conditions of minors. ORS 653.305.

The text of Oregon child labor law (a subset of wage and hour law) is found at ORS 653.305 to 653.370. The Oregon Administrative Rules which implement state child labor law are found at OAR 839, division 021. These provisions can be accessed online through BOLI's website at www.oregon.gov/BOLI/TA under the headings "Oregon Revised Statutes" and "Administrative Rules."

Violation of these laws can result in civil penalties of up to $1,000 per violation as well as revocation of an employer's right to hire minor employees. ORS 653.307, 653.370, OAR 839-021-0320, 839-021-0490.

FEDERAL CHILD LABOR LAW

Federal child labor law is authorized by the FLSA at 29 U.S.C. § 201, *et seq*. Regulations implementing the FLSA are found at 29 C.F.R. 570.

Employers who are subject to the Fair Labor Standards Act (federal law) may obtain additional information from the USDOL's website at www.dol.gov/esa/whd or by calling 503-326-3057.

Federal civil penalties are subject to a civil money penalty of up to $11,000 for each employee that is the subject of a child labor violation.

HIRING MINORS

The process of hiring a minor employee is very much like the process for hiring an adult employee. There are, however, three additional administrative requirements which pertain to the employment of any minor:

1. Obtaining an annual employment certificate;
2. Verifying the applicant's age; and
3. Meeting special posting / recordkeeping requirements.

NOTE: There are additional conditions placed on the employment of minors under 14 years of age and for specific industries like door to door sales and the entertainment industry (see relevant sections below).

Annual Employment Certificate

Employers who employ minors 14–17 years of age must first obtain an Employment Certificate from the Child Labor Unit of the Bureau's Wage and Hour Division. This employment certificate is renewable annually. Individual work permits are not required for minors ages 14 through 17, but employers are required to verify the ages of all minors hired.

Employment Certificate applications may be obtained from the Bureau's website at www.oregon.gov/boli or by calling the Child Labor Unit at 971-673-0836. Yearly renewal applications are sent to employers who have been issued an Employment Certificate. Each employer who applies for an employment certificate receives a summary of state and federal child labor laws. ORS 653.307.

The Employment Certificate application requires the name and address(es) of the employer and the company representative who completes the application, an estimate of the number of minors to be employed during the year, the ages of the minors anticipated to be employed, and a description of the duties to be performed, including any equipment or machinery to be operated by minors. If any changes in the duties or equipment to be operated are made after the Employment Certificate is issued, the employer must complete and submit a "Notice of Change in Duties" form. OAR 839-021-0220(2)(b).

Process for Issuing Employment Certificates

The Bureau's Child Labor Unit reviews each Employment Certificate application. If the proposed employment complies with state and federal child labor regulations, the Bureau will issue a validated Employment Certificate to the employer. The validated certificate must be posted in a conspicuous location where employees may easily review it. If the employer employs minors at multiple sites, a copy of the Employment Certificate must be posted at each site.

If the employment proposed by the employer in the Employment Certificate application appears not to comply with state or federal law, the employer will be contacted by the Child Labor Unit. Sometimes the Employment Certificate is issued with restrictions relating to the work which may be performed by minors.

Employment Permits for Minors Under 14 Years of Age

Oregon's Wage and Hour Commission has authorized the Bureau's Wage and Hour Division to issue employment permits to children under 14 years of age under limited circumstances. If issued, the permit authorizes the child to work for one particular employer only and only when the federal FLSA does not apply. ORS 653.320. Authorized occupations and hours are very restricted for this age group. OAR 839-021-0246.

Employment Permit Applications for Minors under 14 are available from the bureau's website at www.oregon.gov/boli or by contacting the Child Labor Unit of the Bureau of Labor and Industries at 971-673-0836.

Federal law does not generally permit the employment of minors under 14 years of age in non-agricultural employment.

Employers Must Verify Age of Minors

When an employer hires a minor, the employer must require the minor to produce an acceptable document that verifies his or her age, such as a birth certificate or hospital birth record, driver's license or state-issued photo ID card, passport, alien registration card, U.S military card, certificate of U.S. citizenship, or a baptism record that includes the minor's date of birth. Records must be maintained to show that the employer has met this requirement. A notation in the employee's personnel file of which document was used to verify the minor's age or a copy of the document will meet the recordkeeping requirement. OAR 839-021-0185.

Special Posting / Recordkeeping Requirements

In addition to records and postings required for employers of adult employees, there are several additional requirements which apply to all employers of minors.

Employers Must Maintain List of Minors Employed

Oregon law requires employers to maintain a list of all minors employed.
ORS 653.310; OAR 839-021-0170.

In addition to the minor employee's full name (as used for social security recordkeeping purposes) the employer's records are required to contain the following information for each minor employed:

- Any identifying symbol or number if such is used in place of name on any time, work or payroll records;
- Home address, including zip code;
- Date of birth;
- Sex (sex may be indicated by use of the prefixes Mr., Mrs., Miss or Ms.);
- Occupation in which the minor is employed;
- Time of day and day of week on which the minor's workweek begins;
- Hours worked each workday and total hours worked each workweek; and
- Date the minor became employed by the employer and date employment was terminated.

For minors under 16 years of age, employers must also maintain and preserve records containing:

- The time of day that each minor began working and the time of day that each minor stopped working; and
- A schedule of the maximum number of hours to be worked each day and each week by each minor.

OAR 839-021-0170.

Posting Requirements for Minors

In addition to general postings required for all employers, employers of minors under the age of 16 must also post the schedule of maximum hours of work (required by OAR 839-021-0170(2)(b)) in a conspicuous place where minor employees may regularly view it. OAR 839-021-0180.

Records Availability

Any record required to be maintained under child labor law must be preserved for two years. The record must be kept in a safe place which is readily accessible; the records must be made available for inspection and or transcription by the Bureau.

CHILD LABOR LAW EXEMPTIONS

As with all of wage and hour law, child labor laws apply only to employees and therefore they do not extend to work performed by *bona fide* independent contractors, volunteers or students participating in *unpaid* work based learning programs, including work experience and "school-to-work" programs.

NOTE: If a student is placed in a regular job as a part of a paid work experience program, the provisions of Oregon and federal child labor laws apply and the student must be paid no less than the minimum wage for hours worked.

For additional information, see the introductory material above in *"The Employment Relationship."*

OCCUPATIONS EXCLUDED FROM CHILD LABOR REGULATIONS

Newspaper carriers/vendors and minors performing domestic work or chores in private residences are not subject to the provisions of the child labor laws. However, the provisions of other laws, including minimum wage, overtime, working conditions and wage collection laws still apply to these employees. OAR 839-021-0500.

Persons under 18 years of age serving as a referee or assistant referee in a youth or adult recreational soccer match are exempt from both the child labor and minimum wage laws.
OAR 839-020-0150(3); OAR 839-021-0500.

PARENTAL AND FAMILY EXEMPTIONS

Federal law allows parents to employ their own children in any occupation except those that have been declared hazardous by the Secretary of Labor. Federal law places additional restrictions on parents of minors who are under 16 by prohibiting employment not only in occupations declared hazardous but also in manufacturing, construction, and mining occupations. 29 U.S.C. § 203(l).

Under Oregon law, parents who employ their own children must comply with the same requirements that apply to all other employers of minors, including:

- Obtaining Employment Certificates (for minors 14–17) and employment permits (for minors under the age of 14),
- Complying with the maximum hours provisions of the Child Labor law, and
- Paying no less than the minimum wage as well as overtime for all hours work in excess of 40 in a workweek.

Parents may apply to the Wage and Hour Commission for special permits to employ their children to work at later times than are otherwise permitted by law but may not employ their children to work more hours than the law permits.

A minor may be employed by a parent or person standing in place of the parent in agriculture to operate power-driven farm machinery without an employment

certificate. OAR 839-021-0276(1)(d). Minors who are employed by an agricultural employer who is an immediate family member are exempt from the payment of minimum wage. ORS 653.020(1)(b). See the "*Employment of Minors in Agriculture*" section below.

Under ORS 653.365, parents are exempt from the imposition of civil penalties for any violation of child labor laws. Oregon law does not, however, provide a parental exemption from criminal sanctions. Under ORS 653.991, any violation of child labor laws or Wage and Hour Commission rules is punishable as a misdemeanor.

PAYMENT OF WAGES TO MINOR EMPLOYEES

The state minimum wage and overtime requirements for minors are the same as for adults. Where there is a conflict between state and federal law, the standard most beneficial to the employee will apply.

MINIMUM WAGE

Although federal law allows a "training wage" of less than the federal minimum wage rate to be paid to workers under the age of 20 during their first 90 consecutive calendar days of employment with an employer, Oregon law does not allow the payment of such a training wage. Unless otherwise exempt from state law, all minors employed must be paid no less than the state minimum wage.

Minors who are immediate family members of an agricultural employer are exempt from the payment of minimum wage. ORS 653.020(1)(b).

OVERTIME FOR MINOR EMPLOYEES

Employees under 18 years of age must be paid time and one-half their regular rates of pay for any overtime hours worked, just like their adult counterparts. There are, however, additional restrictions on the number of hours minors of various ages are permitted to work. See "*Working Conditions for Minor Employees*" below. OAR 839-021-0067 and -0070.

ADEQUATE WORK OR "SHOW-UP PAY"

An employer may not require a minor to report for work without providing adequate work to earn a "reasonable compensation" or paying the minor a reasonable compensation in lieu of providing adequate work.

Adequate work is defined as sufficient work to earn at one-half the amount the minor would have earned at the minor's regular rate had the minor worked the hours to which the minor and employer previously agreed.

Reasonable compensation means the greater of the amount the minor receives for one hour of work at the minor's regular rate of pay or the amount determined by multiplying the minor's regular rate of pay by one-half the number of hours the minor and employer agreed the minor would work.

The requirement to provide "adequate work" does not apply if a minor was provided notice not to report to work and ALL the following conditions are met:

- The employer has a policy describing how notice not to report to work will be provided to minors; and
- The policy is posted in a conspicuous place frequented by employees at the worksite where the minor is employed; and
- The employer communicates this policy to the minor prior to the minor's first day of work; and
- The employer makes a good faith attempt to follow its policy so as to give the minor notice before the minor must leave home to travel to work; or
- When circumstances beyond the employer's control prevent the performance of the work the minor was to perform during the hours the minor had agreed to or was scheduled to work. Such circumstances include, but are not limited to, acts of nature (snowstorms, flooding, etc.), emergencies (fires, power outages, etc), and unforeseeable equipment failures.

OAR 839-021-0087(5), (6) and (7).

WORKING CONDITIONS FOR MINOR EMPLOYEES

One of the primary differences between adult and minor employees is the limitations placed on the hours of work a minor employee may work in a given day or week.

HOURS OF WORK FOR MINORS AGES 16 AND 17

Although Sixteen and 17-year-old employees are free to perform work at any time of day, they may not be required to work more than 44 hours in any one workweek unless their employer has obtained a special emergency overtime permit from the Wage and Hour Commission. OAR 839-021-0067.

Minors employed in canneries may not work longer than 10 hours in any one day without a special permit.

HOURS OF WORK FOR MINORS AGES 14 AND 15

General Limitation

Fourteen and 15 year olds may not work during school hours when school is in session.

Daily Limitations

During the school year, 14 and 15 year olds may work up to 3 hours per day on school days and up to 8 hours per day when school is not in session. Work must be performed between the hours of 7 AM and 7 PM.

During the summer, specifically, June 1 through Labor Day, a minor employee may work up to 8 hours per day. Work must be performed between the hours of 7 AM and 9 PM.

Weekly Limitations

During the school year, 14 and 15 year olds may work up to 18 hours per week.

During summer (June 1 through Labor Day), 14 and 15 year olds may work up to 40 hours per week. OAR 839-021-0070; 29 C.F.R. 570.35.

HOURS OF WORK FOR MINORS EMPLOYED IN YOUTH CAMPS

Minors 14 and 15 years of age employed in youth camps may not work before the hours of 6 AM or past 10 PM and may not work more than 8 hours per day. OAR 839-021-0097.

REST PERIOD REQUIREMENTS FOR MINORS

Paid rest periods of at least 15 minutes must be provided for all minors during each work period of four hours or the major part of four hours. If possible, breaks should be given approximately midway in the work period. The Wage and Hour Commission may exempt an employer from the rest period rule if good cause is shown. OAR 839-021-0072(3) and (4).

REQUIRED MEAL PERIODS FOR MINORS

Meal periods of at least 30 minutes must begin no later than five hours and one minute after the minor reports for work. This time is not required to be paid if the employee is relieved of all duty. Sixteen and 17 year-old employees may be required to remain on duty or on call while eating their meal, but this is only permissible when the nature of the work prevents the minor from being relieved of all duty. In this case, the time must be paid. OAR 839-021-0072(2). If the minor is under 16 years of age, he or she *must be* relieved of all duty during meal periods.

WEIGHT LIFTING RESTRICTIONS

No minor may be required to lift excessive weights. Complaints of violations of this rule are investigated on an individual case basis. OAR 839-021-0092.

PROHIBITED EMPLOYMENT

Both state and federal law prohibit the employment of minors in certain occupations deemed hazardous. Among these are restrictions which apply to all minor employees as well as a set of additional restrictions which apply to minors under 16 years of age.

Prohibited activities for non-agricultural occupations also apply to agricultural work under state law, however, there a number of special exceptions. For specifics, see the "*Employment of Minors in Agriculture*" section below. OAR 839-021-0285.

PROHIBITED EMPLOYMENT FOR ALL MINORS UNDER 18

(Hazardous Occupations Orders) [2]

The following 17 federal Hazardous Occupations Orders have been declared by the U.S. Department of Labor to be particularly hazardous for all minors, or detrimental to their health and well-being, regardless of whether the minor is employed by a parent or person standing in the place of a parent.

These Hazardous Occupations Orders apply either on an industry basis, specifying the occupations in the industry that are not permitted, or an occupational basis irrespective of the industry in which they are found. Some of the orders, as indicated by an asterisk (*) contain limited exemptions.

Oregon law has adopted the federal Hazardous Occupations Orders within state law and applies them to ***all minors under the age of 18***. OAR 839-021-0104; 29 C.F.R. 570.50-570.68.

[2] The actual text of these orders as adopted by state law may be found in 29 C.F.R. § 570.50-68.

Hazardous Occupations Orders	
Hazardous Order 1	Manufacturing and storing of explosives. (Oregon law further prohibits the employment of minors in occupations where explosives are used);
Hazardous Order 2	Motor-vehicle driving and outside helper on a motor vehicle.
Hazardous Order 3	Coal mining.
Hazardous Order 4	Occupations in forest fire fighting, forest fire prevention, timber tract operations, forestry service, logging, and sawmilling.
Hazardous Order 5*	Power-driven woodworking machines.
Hazardous Order 6	Exposure to radioactive substances.
Hazardous Order 7	Power-driven hoisting apparatus, including forklifts.
Hazardous Order 8*	Power-driven metal-forming, punching, and shearing machines.
Hazardous Order 9	Mining, other than coal mining.
Hazardous Order 10*	Operating power-driven meat processing equipment, including meat slicers and other food slicers, in retail establishments (such as grocery stores, restaurants kitchens and delis) and wholesale establishments, and most occupations in meat and poultry slaughtering, packing, processing, or rendering.
Hazardous Order 11	Power-driven bakery machines including vertical dough or batter mixers.
Hazardous Order 12*	Power-driven balers, compactors, and paper processing machines.
Hazardous Order 13	Manufacturing bricks, tile, and kindred products.
Hazardous Order 14*	Power-driven circular saws, bandsaws, chain saws, guillotine shears, wood chippers, and abrasive cutting discs.
Hazardous Order 15	Wrecking, demolition, and shipbreaking operations.
Hazardous Order 16*	Roofing operations and all work on or about a roof.
Hazardous Order 17*	Excavation operations.

**Hazardous Occupations Orders Nos. 5, 8, 10, 12, 14, 16, and 17 contain exemptions for 16- and 17-year-old apprentices and student-learners provided they meet the requirements for "student-learners" and "apprentices" described in* Child Labor Bulletin 101, WH-1330 *and available online at www.dol.gov.*

In addition to the hazardous occupations listed above, occupations as messengers or delivery persons before 5 a.m. or after 10 p.m. are also prohibited for all minors under 18 years of age under Oregon law. ORS 653.340.

PROHIBITED EMPLOYMENT FOR MINORS UNDER 16

Both state and federal law provide additional restrictions (beyond the hazardous occupations orders described above) for 14 and 15 year old minor employees.

Unless exempt from federal law, employers are required to apply the more restrictive standard of either state or federal law. For example, federal law permits the employment of certain minors between the ages of 14 and 18, who have been excused from compulsory school attendance, inside and outside of places of business where machinery is used to process wood products. State law, however, prohibits the employment of minors under 16 in a workshop or any premise, room or place where power-driven machinery is used (OAR 839-021-0102(2)(v)). Employers would need to apply the more restrictive standard for minors under 16 which prohibits minors from working in places where power-driven machinery is in use – even if the minor is not operating, or assisting in the operation of power-driven machines.

To find determine whether a given occupation or type of work is permitted for a minor under the age of 16:

1. Check the federal list of occupations that MAY be performed by minors under 16 (below).

2. If the occupation or activity does not fit squarely within one of the permitted occupations, minors under 16 may NOT perform that duty if the employment is subject to the FLSA.

3. If the occupation or activity appears to fit within one of the permitted occupations, (or the employment is not subject to federal law), proceed to verify that the it does not appear within:
   a. the 17 hazardous occupations orders listed in the previous section;
   b. the federal list of prohibited occupations for minors under 16; or
   c. the state restrictions on the employment of minors under 16.[3]

4. If the occupation or activity appears on any of the lists named above in step 3, minors under 16 may NOT perform that duty.

Keep in mind that restrictions on the total number of daily and weekly hours a minor may work and restrictions on the schedule a minor may work will apply to any work permitted for minors (see section on working conditions above).

[3] If the occupation or activity is agriculture, see also the section below on agricultural employment. Unless specifically stated otherwise, prohibited activities for non-agricultural work also apply to agricultural work. OAR 839-021-0285.

1. Occupations that MAY be performed by minors under 16

(29 C.F.R. 570.34)

1. Office and clerical work, including operation of office machines.
2. Work of an intellectual or artistically creative nature such as but not limited to computer programming, the writing of software, teaching or performing as a tutor, serving as a peer counselor or teacher's assistant, singing, the playing of a musical instrument, and drawing.
3. Cooking with electric or gas grills that do not involve cooking over an open flame and with deep fat fryers that are equipped with and utilize devices that automatically lower and raise the baskets into and out of the oil or grease. **NOTE:** This section does NOT permit cooking with equipment such as rotisseries, broilers, pressurized equipment including fryolators, and cooking devices that operate at extremely high temperatures such as "Neico broilers."
4. Cashiering, selling, modeling, art work, work in advertising departments, window trimming and comparative shopping.
5. Price marking and tagging by hand or by machine. assembling orders, packing and shelving.
6. Bagging and carrying out customer orders.
7. Errand and delivery work by foot, bicycle, and public transportation. Except such youth may not be employed by a public messenger service.
8. Cleanup work, including the use of vacuum cleaners and floor waxers, and the maintenance of grounds, but not including the use of power-driven mowers, cutters, trimmers, edgers, or similar equipment.
9. Kitchen work and other work involved in preparing and serving food and beverages, including operating machines and devices used in performing such work. Examples of permitted machines and devices include, but are not limited to, dishwashers, toasters, dumbwaiters, popcorn poppers, milk shake blenders, coffee grinders, automatic coffee machines, devices used to maintain the temperature of prepared foods (such as warmers, steam tables, and heat lamps), and microwave ovens that are used only to warm prepared food and do not have the capacity to warm above 140 °F.
10. Cleaning kitchen equipment. Minors are permitted to clean kitchen equipment (not otherwise prohibited), remove oil or grease filters, pour oil or grease through filters, and move receptacles containing hot grease or hot oil, but only when the equipment, surfaces, containers and liquids do not exceed a temperature of 100°F.
11. Cleaning vegetables and fruits, and the wrapping, sealing, labeling, weighing, pricing, and stocking of items, including vegetables, fruits, and meats, when performed in areas physically separate from a freezer or meat cooler.
12. Loading onto motor vehicles and the unloading from motor vehicles of the light, non-power-driven, hand tools and personal protective equipment that the minor will use as part of his or her employment at the work site; and the loading onto motor vehicles and the unloading from motor vehicles of personal items such as a back pack, a lunch box, or a coat that the minor is permitted to take to the work site. Such light tools would include, but not be

limited to, rakes, hand-held clippers, shovels, and brooms. Such light tools would not include items like trash, sales kits, promotion items or items for sale, lawn mowers, or other power-driven lawn maintenance equipment. Such minors would not be permitted to load or unload safety equipment such as barriers, cones, or signage.

13. The occupation of lifeguard (15-year-olds but not 14-year-olds) at traditional swimming pools and water amusement parks (including such water park faculties as wave pools, lazy rivers, specialized activity areas, and baby pools, but not including the elevated areas of water slides) when properly trained and certified in aquatics and water safety by the American Red Cross or a similar certifying organization. No youth under 16 years of age may be employed as a lifeguard at a natural environment such as an ocean side beach, lake, pond, river, quarry, or pier.
14. Employment of certain youth under specified conditions inside and outside of establishments where machinery is used to process wood products.[4]

2. Occupations specifically PROHIBITED for minors under 16 years of age under federal law

(29 C.F.R. 570.33)

1. Any manufacturing occupation.
2. Any mining occupation.
3. Most processing occupations such as filleting of fish, dressing poultry, cracking nuts, developing of photographs, laundering, bulk or mass mailings (except certain occupations expressly permitted as discussed below).
4. Occupations requiring the performance of any duties in workrooms or workplaces where goods are manufactured, mined or otherwise processed.
5. Any occupation found and declared to be hazardous by the secretary of labor (See Hazardous Occupations Orders above).
6. Occupations involved with the operating, tending, setting up, adjusting, cleaning, oiling or repairing of hoisting apparatus.
7. Work performed in or about boiler or engine rooms or in connection with the maintenance or repair of the establishment, machines, or equipment.
8. Occupations involved with the operating, tending, setting up, adjusting, cleaning, oiling or repairing or of any power-driven machinery, including, but not limited to, lawnmowers, golf carts, all-terrain vehicles, trimmers, cutters, weed-eaters, edgers, food slicers, food grinders, food choppers, food processors, food cutters, and food mixers. Minors age 14 and 15 may operate most office machinery.
9. The operation of motor vehicles or service as helpers on such vehicles.
10. The riding on a motor vehicle inside or outside of an enclosed passenger compartment except as permitted above.
11. Outside window washing that involves working from window sills.
12. All work requiring the use of ladders, scaffolds, or their substitutes.

[4] Note however, that *state law* prohibits the employment of minors under 16 in a workshop or any premise, room or place where power-driven machinery is used. OAR 839-021-0102(2)(v).

13. All baking and most cooking activities except as permitted above.
14. Work in freezers and meat coolers and all work in the processing of meat for sale; however, youth are permitted to occasionally enter freezers only momentarily to retrieve items.
15. Youth peddling, including not only the attempt to make a sale or the actual consummation of a sale, but also the preparatory and concluding tasks normally performed by a youth peddler, such as the loading and unloading of motor vehicles, the stocking and restocking of sales kits and trays, the exchanging of cash and checks with the employer, and the transportation of the minors to where the sales will be made.
16. Loading and unloading of goods or property onto or from motor vehicles, railroad cars, and conveyors, except as permitted above.
17. Catching and cooping of poultry in preparation for transport or for market.
18. Public messenger service.
19. Occupations in connection with:
    a. Transportation of persons or property by rail, highway, air, on water, pipeline, or other means.
    b. Warehousing and storage.
    c. Communications and public utilities.
    d. Construction (including repair).

    Except 14 and 15 year olds may perform office or sales work in connection with a., b., c., and d. above when not performed on transportation media, on an actual means of transportation, or at the actual construction site.

3. Occupations specifically PROHIBITED for minors under 16 years of age by Oregon law

(OAR 839-021-0097 to -0102)

No minor under 16 years of age:

1. May be employed in an occupation or type of work declared hazardous by the commission (see OAR 839-021-0102);

2. May be assigned any duties in connection with an organized youth camp prior to 6 AM or after 10 PM, or more than eight hours per day;

3. May be employed to act as a canvasser, peddler or “outside salesperson“ as defined in ORS 653.010(7), from house to house.

Occupations and Types of Work Declared Hazardous for Minors Under 16

In addition to the foregoing restrictions, workers younger that 16 are not permitted to work in any of the following industries or occupations:

Baking;
Blast furnaces;
Bridge operations;
Briquette plants;
Building cleaning (exterior);
Canvassing door-to-door;
Cattle handling;
Coal plants or bunkers;
Cold storage plants;

Commercial docks;
Construction;
Cooking (except cooking with a gas or electric grill that does not have an open flame, using a microwave to warm food, or using a deep fryer that is equipped with a device that automatically raises and lowers the basket);
Creosoting works;
Distilleries;
Electric power plants, lines;
Electric light plants, lines;
Engineering works;
Fire fighting;
Foundries;
Garbage works;
Gas works;
Grain elevators;
Gravel, sand pit or bunker;
Ice plants;
Kitchen cleaning of equipment when the surface is hotter than 100 degrees Fahrenheit or filtering or disposing of cooking oil or grease that is hotter than 100 degrees Fahrenheit;
Land clearing with blasting or heavy equipment;
Logging operations;
Longshoring;
Peace officer work;
Power works;
Quarries;
Railroads;
Reduction works;
Rock crusher;
Smelters;
Stockyards;
Surveying;
Tanneries;
Tree surgery;
Well digging, drilling;
Window cleaning outside;
Wineries; and
Woodcutting, sawing.

Minors under 16 may not be employed IN ANY ROOM OR AREA CONTAINING POWER-DRIVEN MACHINERY in the following industries:

Boat repair shops;
Canneries;
Chop mills;
Creameries;
Cycle repair shops;
Electrotyping plants;
Engraving plants;
Factories (manufacturing, repair, alteration);
Feed mills;
Flour mills;
Garages;
Grain warehouses;
Irrigation works;
Laundries;
Lithographing plants;
Mills;
Motor repair shops;
Photoengraving plants;
Printing plants;
Shipbuilding operations; and
Stereotyping plants

Minors under 16 may not work on any premises or in any room or place where power-driven machinery is used for the purpose of adapting goods for sale.

OAR 839-021-0102.

Office Work that May Be Performed
Minors under 16 may be employed in the following industries BUT ONLY IN THE OFFICE:

Auto wrecking yards;
Junk dealers;
Motor vehicle (transportation);
Lumbering; and
Water works.

OAR 839-021-0102(3).

PARTIAL PROHIBITIONS IN SPECIAL EMPLOYMENT SITUATIONS

A partial prohibition on occupations as messengers or delivery persons *before 5 AM or after 10 PM* applies to all minors under Oregon law. ORS 653.340. **NOTE:** Federal law prohibits public messenger service altogether for minors 14 and 15 years old.
29 C.F.R. 570.33(d).

A partial prohibition on work on or around any unenclosed commercial wharves or docks or in any unenclosed buildings extending over water applies to all minors unless:

1. There is located at the site of the work and conspicuously displayed at such site adequate safety equipment including, but not limited to:
   a. For every 30 linear feet of unenclosed area no less than one Type IV personal flotation device containing 16.5 pounds of buoyancy and one polypropylene line no less than 30 feet in length attached thereto;
   b. No less than one pole of not less than ten feet in length with a blunt hook attached thereto; and

2. The minors have been adequately instructed in the use of such equipment;

3. There is provision made that no minor employee ever be required to work out of sight and hearing of another employee; and

4. There is located at the site of the work and conspicuously displayed an alarm device adequate to alert all employees on the job site to the existence of a perilous situation.

A partial prohibition on employment on or around fishing vessels applies to all minors except under the following conditions:

1. Minors of 16 and 17 years of age may be employed as assistants on chartered fishing or pleasure boats;

2. Minors of 14 and 15 years of age may be employed at dock areas used by chartered fishing or pleasure boats; and

3. Minors may be employed on commercial fishing vessels without an employment certificate when employed and supervised by the minors' grandfather, grandmother, father, mother, brother, sister, uncle, or aunt.

EMPLOYMENT OF MINORS IN AGRICULTURE

Unless specifically excluded, all rules pertaining to the non-agricultural employment of minors also apply to the employment of minors in agriculture. This includes all the rules pertaining to rest periods, meal periods, working conditions and weight lifting as well as the prohibitions on employment in hazardous occupations for all minors and those pertaining to minors under 16 years of age.

This section of the handbook will describe the points at which the requirements for employment of minors in agriculture *differ* from those set out under child labor laws for non-agricultural employment.

As before, when state and federal laws address the same issue, the stricter standard applies.

ANNUAL EMPLOYMENT CERTIFICATE

The requirement to obtain an annual employment certificate does NOT apply to employers of minors in agriculture **UNLESS** a minor is employed to:

1. operate or assist in the operation power-driven farm machinery;
2. ride in or on power-driven farm machinery; or
3. ride in or on equipment, trailers, or similar conveyances **connected to** power-driven farm machinery for the purpose of transporting, sorting, delivering, or otherwise processing farm products.

Employment certificates are not required if a minor is employed by their parent or person standing in the place of their parent. OAR 839-021-0276.

AGE VERIFICATION

Nothing in the rules for agricultural employment of minors relieves employers of the requirement to verify the age of minor employees. Verification of age is specifically required for minors to be employed to operate, assist in the operation of, or ride in or on power-driven farm machinery. OAR 839-021-0280(3).

PARENTAL / FAMILY EXEMPTIONS IN AGRICULTURE

Minors of any age may work at any time in any occupation on a farm owned or operated by their parents or a person standing in the place of their parent. OAR 839-021-0297.

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).

MINIMUM AGE REQUIREMENTS FOR AGRICULTURAL EMPLOYMENT

Minors age 16 and above may work at any time in jobs not declared hazardous by the Secretary of Labor (USDOL).

Minors ages 14 and 15 may work outside school hours in jobs not declared hazardous by the Secretary of Labor (USDOL).

Minors ages 12 and 13 may work outside school hours in jobs not declared hazardous either with written parental consent or on the same farm where their parents are employed.

Minors ages 9 through 11 may pick berries and beans outside school hours if the child has the written consent of his/her parents or guardians and ONLY if the farm has used fewer than 500 man days of labor in all calendar quarters of the preceding year OR the produce is sold within the state AND the produce is not transported outside the state in any form. The container must be distinctly marked so as to prevent the product from entering interstate commerce.

Local minors ages 10 and 11 may hand harvest short-season crops outside school hours for no more than eight weeks between June 1 and October 15 IF their employers have obtained special waivers from the Secretary of Labor (USDOL).

HOURS LIMITATIONS IN AGRICULTURAL EMPLOYMENT FOR MINORS UNDER 16

Minors under age 16 may not work while school is in session. A maximum of three hours/day may be worked on school days; 10 hours/day on non-school days; and a maximum of 25 hours/week may be worked during school weeks.

During the summer months or other school vacation periods of one week or more, a maximum of 10 hours/day and 60 hours/week may be worked unless a special permit is first obtained from the Wage and Hour Commission. No more than six days/week may be worked. OAR 839-021-0290(2).

Minors under age 16 employed to operate, assist in the operation of, or ride in or on power-driven farm machinery may work a maximum of eight hours/day on non-school days; and 18 hours/week during school weeks. During the harvest season (summer months), a maximum of 10 hours/day and 60 hours/week may be worked unless a special permit is first obtained from the Wage and Hour Commission. Outside the harvest season, a maximum of 44 hours/week is allowed without an emergency overtime permit. Minors under 16 years of age may not be employed to work more than six days/week. OAR 839-021-0290(3).

There is no restriction on daily starting and stopping times for minors employed in agriculture, so long as the minor does not work when school is in session.
OAR 839-021-0290(5); OAR 839-021-0292(4).

HOURS LIMITATIONS IN AGRICULTURAL EMPLOYMENT FOR MINORS OVER 16

Minors 16 and 17 years of age who are employed to operate, assist in the operation of, or ride in or on power-driven farm machinery may work a maximum of 25 hours/week during school weeks and 60 hours/week during the harvest season unless a special permit is first obtained from the Wage and Hour Commission. OAR 839-021-0292(1). Emergency and special overtime permits may be obtained by applying to the Wage and Hour Commission in care of the Bureau of Labor and Industries. OAR 839-021-0292(3).
Minors 16 and 17 years of age who are employed to operate, assist in the operation of, or ride in or on power-driven farm machinery may not be employed to work more than six days/week.

FARM MACHINERY OCCUPATIONS

Employers who employ minors in agricultural employment are not required to obtain an employment certificate unless they employ minors to operate or assist in the operation of power-driven farm machinery or to ride in or on power-driven farm equipment or conveyances connected to power-driven farm machinery. Minors who are so employed must have a Certificate of Training on tractor operation or tractor and machinery operation issued by a 4-H Extension Service Program or approved secondary vocational agriculture program. OAR 839-021-0276; OAR 839-021-0280.

Prior to the employment of minors to operate or assist in the operation of farm equipment, the employer must obtain proof that the minor has the required Certificate of Training and apply for an Employment Certificate. The proof of training must be retained for two years. OAR 839-021-0280(2); OAR 839-021-0175(1).

The requirements for obtaining an Employment Certificate and a Certificate of Training do not apply to a minor employed in agricultural employment by the minor's parent(s) or person(s) standing in the place of the parent(s). OAR 839-021-0276(1)(d); OAR 839-021-0280(4); OAR 839-021-0297.

If no training program is available within 35 miles of the minor's residence, 16- and 17-year-olds may be employed to operate or assist in the operation of power-driven farm equipment if all of the following conditions are met:

- The employer has verified the minor's age to be 16 or 17;
- The employer has applied for an employment certificate;

- The minor, the minor's parent or guardian, and the employer sign a statement attesting that the training is not available within 35 miles, that the employer has provided to the minor not less than eight hours of instruction, including four hours of hands-on training under the supervision of an adult experienced in the safe and proper operation of the specific equipment the minor is to use before the minor begins work, and that the employer agrees to closely supervise the minor. The statement and Employment Certificate application must be submitted to the Child Labor Unit.

OAR 839-021-0280(3).

If no training program is available within 35 miles of the minor's residence, minors under 18 may be employed to ride in or on conveyances connected to power-driven farm equipment if all of the same conditions above are met except that the employer must provide two hours of instruction instead of eight hours of instruction.
OAR 839-021-0282.

EMPLOYMENT OF MINORS IN AGRICULTURAL WAREHOUSES

Minors under 16 may not be employed in feed mills, flour mills, grain warehouses, or any workplace where power-driven machinery is used to process agricultural commodities.

Minors 16 and 17 years of age may be employed to operate or assist in the operation of power-driven machinery in an agricultural warehouse if certain conditions are met. OAR 839-021-0287.

PAYMENT OF MINIMUM WAGE AND OVERTIME IN AGRICULTURAL EMPLOYMENT

Minimum wage must be paid to all minor employees employed in agriculture unless an exemption applies. (See *Agricultural Employment* section.)

Agricultural employment is exempt from the overtime provisions of Oregon and federal law. ORS 653.261(2); OAR 839-020-0135.

EMPLOYMENT OF MINORS IN THE ENTERTAINMENT INDUSTRY

Oregon's Wage and Hour Commission has adopted administrative rules regulating the employment of minors in the entertainment industry. OAR 839-021-0300 to OAR 839-021-0375.

Minors of any age, except babies younger than 15 days, may work in films, television productions, or stage entertainment productions. OAR 839-021-0305.

Federal child labor laws do not contain specific regulations regarding the employment of minors as actors or performers in motion pictures, theatrical, radio or television productions.

EMPLOYER REGISTRATION

If an entertainment industry employer will be employing minors for more than five working days, the employer must obtain an Employment Certificate to employ minors 14–17 years of age and individual employment permits for any minors employed under the age of 14. OAR 839-021-0310(1).

If the proposed employment is for five or fewer working days, the employer may either apply for a regular Employment Certificate for minors 14–17 and individual employment permits for minors under age 14 or, if ten or more minors will be employed, the employer may apply for a "short duration" permit to employ all of the minors, regardless of age. OAR 839-021-0310(2).

Entertainment industry employers who anticipate employing minors in more than one "short term" production may apply to the Wage and Hour Commission for certification as a registered entertainment productions employer. Registration entitles an employer to hire any number of minors for short-term jobs (five days or less) without first obtaining employment certificates or individual work permits. For periods of employment longer than five days, employment certificates and "under 14" permits are required.
OAR 839-021-0320. Registered employers must notify the Bureau's Child Labor Unit no less than 24 hours in advance of employing minors in short term employment.
OAR 839-021-0320(4).

The times and maximum number of hours minors may work in entertainment productions are regulated according to the age of the minor. OAR 839-021-0335.

The Wage and Hour Commission's entertainment industry rules include restrictions relating to hazardous work, and set out education, rest periods and transportation requirements. For complete rules see OAR 839-021-0300 to 0375.

EMPLOYMENT OF MINORS IN DOOR-TO-DOOR SALES

Minors aged 16 or 17 may not be employed to act as canvassers, peddlers, or outside salespersons from house to house unless the employer obtains and maintains a valid registration certificate issued by the Bureau. Minors under 16 years of age may not be employed in outside sales.

In addition to complying with all requirements of the child labor law, employers employing persons 16 and 17 years of age to work in door-to-door employment must provide each minor with an identification card that must be shown to each customer or potential customer of the minor employee.

Minors employed in door-to-door employment may not work later than 9 PM. The Wage and Hour Commission may revoke the registration certificate of an employer when it determines that the employer failed to comply with any rule of the commission or law covering the employment of minors. OAR 839-021-0265.

PENALTIES FOR CHILD LABOR VIOLATIONS

The Commissioner of the Bureau of Labor and Industries may impose civil penalties for violations of Oregon's child labor laws (ORS 653.305 to 653.370) and the Bureau's administrative rules (OAR 839-021-0001 to 839-021-0500) or terms of Wage and Hour Commission orders.

The Commissioner considers the following circumstances when determining the amount of civil penalties:

- The history of the employer in terms of taking corrective and preventive measures to avoid violations;
- Prior violations, if any;
- The magnitude and seriousness of the violation;
- The opportunity and degree of difficulty to comply;
- Any mitigating circumstances. OAR 839-019-0020.

The maximum penalty per violation is $1,000. Each violation is a separate and distinct offense. A serious injury or death of a minor as the result of being employed in violation of the law may result in the maximum penalty per violation. OAR 839-019-0015 to OAR 839-019-0025(4).

In addition to the Commissioner's assessment of civil penalties for child labor violations, the Wage and Hour Commission may revoke the employer's right to hire minors.
OAR 839-021-0490.

Under ORS 653.991, any violation of child labor laws or Wage and Hour Commission rules is punishable as a misdemeanor.

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