

# WAGE & HOUR PART II NON-EXEMPT EMPLOYEES

PRESENTED AT 22<sup>ND</sup> ANNUAL ASSE/MSSC/AE  
SAFETY/LEADERSHIP & HR CONFERENCE  
MARCH 8-9, 2017

PRESENTED BY:



## APPLICABLE LAWS



- FLSA (Federal Labor Standards Act)
  - Federal Minimum Wage (\$7.25/hour)
  - Overtime
- State Laws
  - MT Minimum Wage (**\$8.15/hour as of 1/1/2017**)
  - WY Minimum Wage – same as Federal

## MONTANA WAGE PAYMENT ACT

- MCA §39-3-201 through §39-3-209
- Defines Wages
- Establishes when wages are due and payable
- Withholding from Wages
- Final Wages

## NON-EXEMPT EMPLOYEES...

- do NOT meet any one of the FLSA exemption tests;
- are paid on an hourly basis; and
- are covered by wage and hour laws regarding minimum wage, overtime pay, and hours worked.

## NON-EXEMPT EMPLOYEES

- **Minimum Wage**

- Federal- \$7.25 (since 7/24/2009); **\$10.20 for Federal Contractors (as of 1/1/2017)**
- **MT - \$8.15 as of 1/1/2017**

(Montana's minimum wage is adjusted annually for cost-of-living based of CPI)

- Workweek
- Hours Worked
- Overtime

## MINIMUM WAGE & OVERTIME EXCEPTIONS

There are some exemptions to the minimum wage and overtime requirements:

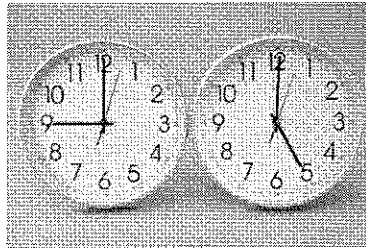
■ See Federal list at:  
<http://www.dol.gov/compliance/guide/minwage.htm>

■ See Montana list at:  
<http://erd.dli.mt.gov/labor-standards/wage-and-hour-payment-act/minimum-wage>

These lists differ, so you must review both and do what is most favorable to the employee

## WHAT CONSTITUTES HOURS WORKED?

- All the times an employee is required to be on duty or on the employer's premises or at a prescribed work place and all the time during which he is suffered or permitted to work for the employer.



## HOURS WORKED – “PREP TIME”

- Preparatory/Concluding Activities
  - All activities which are an integral part of a principal activity
- Examples:
  - Getting machinery ready for use
  - Donning/doffing special and protective clothing
  - Changing Clothes & Preparing for Work
- Call center employees who had to log in and out each day, time spent, etc.

## HOURS WORKED, CONTINUED



### ■ Time Spent Waiting

- Is employee engaged to wait or is employee waiting to be engaged?



### ■ On Call Time

- “Can employee use time for own purposes?”

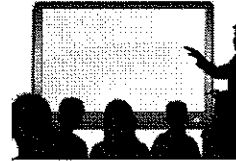
## BREAKS & MEAL PERIODS

- No state or federal law requiring employer to furnish a break or meal period
- Paid unless longer than 30 minutes and employee completely relieved of duties
- Automatic deductions for meal periods are NOT recommended

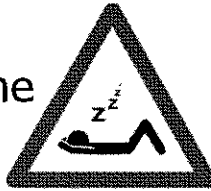


## OTHER CONSIDERATIONS...

- Lectures, Meetings, Training



- Sleep Time

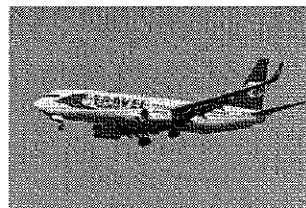


- Travel Time



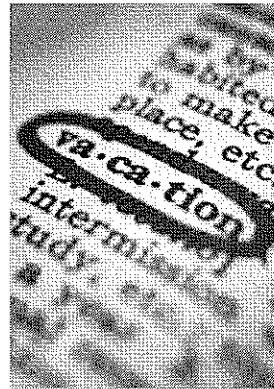
## LET'S TALK ABOUT TRAVEL TIME

- Home to Work
- Home to Work in Another City
- Travel All in the Day's Work
- Travel Away from Home Community
- Work Performed While Traveling



## NOT INCLUDED IN HOURS WORKED

- Holidays
- Sick
- Vacation
- Personal Time Off (PTO)
- Other paid leaves

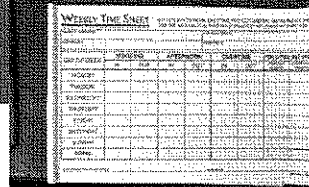


## TIME RECORDS

### FLSA requirements for

#### Non-Exempt employees:

- Time and day of week when workweek begins
- Hours worked each day
- Total hours worked each workweek
- Basis on which wages are paid (i.e., per hour, piece rate, commission, etc.)
- Regular hourly pay rate
- Total daily or weekly straight-time earnings
- Total overtime earnings
- Additions to or deductions from wages
- Total wages paid each pay period
- Date of payment and pay period covered by payment



## TIPS ON TIME RECORDS

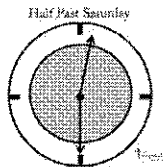


- Employers may use any timekeeping method they choose – time clocks, manual timesheets, electronic timesheets
- Employers may record employees' starting and ending times to the nearest 5 minutes or nearest 1/10<sup>th</sup> or quarter of an hour, provided that amounts rounded off average out over time and do not fail to properly compensate the employee

## WORKWEEK

- A regularly reoccurring period of 168 hours in the form of 7 consecutive 24-hour periods

➤ Example: Saturday @ midnight to the following Saturday @ 11:59 p.m.

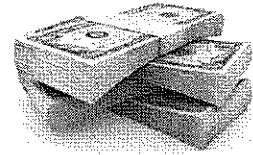


- Each workweek stands alone; cannot be averaged together
- Applies to all non-exempt employees, regardless of how paid (salary, piece rate, commissions)



## EXAMPLE:

- Employee paid on commission, biweekly
- Week 1
  - Employee works 50 hours and earns \$225
  - Regular rate is \$4.50/hour (\$225/50 hours)
  - Employer must make up difference between \$4.50/hour and minimum wage (\$8.05/hour \$8.15/hour 1/1/17); must also pay overtime for 10 hours at 1.5 times \$8.05/hour \$8.15/hour 1/1/17
- Week 2
  - Employee works 30 hours and earns \$270
  - Regular rate is \$9.00/hour (\$270/30 hours)
- Each workweek stands alone



## METHODS OF PAYMENT

- |  |   |
|--|---|
| <ul style="list-style-type: none"> <li>✓Hourly</li> <li>✓Commission</li> <li>✓Piece Rate</li> <li>✓Salary</li> </ul> | <ul style="list-style-type: none"> <li>✓Salary Plus Bonus</li> <li>✓Salary Plus<br/>Commission</li> <li>✓Combination</li> </ul> |
|--|---|

# OVERTIME



- Unless exempt, an employee must be paid at a rate of one and one-half times the employee's regular rate for all hours worked over 40 per week.
- Help calculating overtime:

<http://www.dol.gov/elaws/otcalculator.htm>

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## OVERTIME PAY

- FLSA does not require overtime pay for work on Saturdays, Sundays or holidays
- FLSA also does not require overtime pay for work on nights or weekends
- An employee must work more than 40 hours during his/her established 7-day workweek to be entitled to overtime pay

GOOGLE INC.  
2600 AMHERST STREET  
MOUNTAIN VIEW, CA 94043

Check No: 0100000000  
Client No: 00000000

Date: JANUARY 25, 2012

Pay to the order of: JAMES M. THORNTON

Amount: \$979.55

Payable to: JAMES M. THORNTON

For: JAMES M. THORNTON

## REGULAR RATE

- Before an employer can determine how much a non-exempt employee is owed in overtime, employer must determine the employee's "regular rate" of pay



- "Regular rate" cannot be less than minimum wage
- "Regular rate" includes all remuneration from employer except certain payments excluded by the FLSA itself

## WYOMING PAYMENT OF WAGES

Establishes when wages are due and payable for certain industries

- Semi-monthly for railroad, mine, refinery, and work incidental to prospecting for or production of oil and gas, or other factory, mill or workshop, within Wyoming
- On or before 1<sup>st</sup> day of month and 15<sup>th</sup> day of month

• **Cheyenne Office:**

WY Dept. of Workforce Services  
1510 E. Pershing Blvd. West Wing, Room 150  
Cheyenne, WY 82002  
Phone: (307) 777-7261 Fax: (307) 777-5633

• **Casper Office:**

WY Dept. of Workforce Services  
851 Werner Court  
Casper, WY 82601  
Phone: (307) 235-3679 Fax:  
(307) 235-3688

## EXAMPLES OF COMPENSATION INCLUDED IN REGULAR WAGES

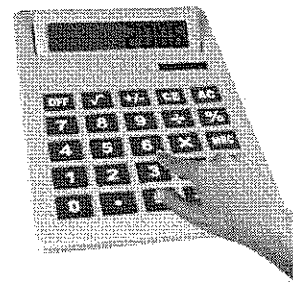
- Contest prizes
- Shift differentials
- Hazardous duty pay
- Longevity pay
- "On-call" time
- Bonuses promised for accuracy of work, good attendance, continuation of employment, incentive, production, quality of work

## COMPENSATION NOT INCLUDED IN REGULAR WAGES

- Sums paid as gifts (e.g. Christmas bonus not tied to production goals or profitability of company)
- Vacation, illness, or bereavement (unless employer has policy stating otherwise)
- Severance pay
- Payments for idle time beyond employer's control (i.e., machinery breakdowns, weather conditions, etc.)
- Health and welfare fund benefits received by employee

## STEPS TO CALCULATE "REGULAR RATE" OF PAY

- Step 1 – Determine any income that needs to be considered, such as non-discretionary bonuses
- Step 2 – Define timeframe in which the other pay was earned
- Step 3 – Recalculate the "regular rate"
- Step 4 – Determine overtime pay amount
- Step 5 – Determine total gross pay



## EXAMPLE 1

- Henry makes \$10 per hour “base pay”
- He worked 40 hours during workweek
- Received a perfect attendance award of \$100 for the workweek



- No action is needed because Henry did not work over 40 hours during workweek
  - However, remember the \$100 attendance award is part of his “regular pay”

## EXAMPLE 2

- Jenny makes \$8 per hour “base pay”
- Jenny receives a production bonus of \$9.20
- Jenny worked 46 hours during the workweek
- Calculation of “regular rate”
  - $46 \text{ hours} \times \$8 = \$368$
  - $\text{Total compensation} = \$368 + \$9.20 \text{ production bonus} = \$377.20$
  - $\$377.20 / 46 \text{ hours} = \$8.20 \text{ per hour}$  (which is new “regular rate” for purposes of calculating overtime)
  - $\text{Overtime} = \$8.20 \times 0.5 \times 6 = \$24.60$
  - $\text{Total pay} = \$377.20 + \$24.60 = \$401.80$

## EXAMPLE 3

- Marty is paid \$10/hour and receives \$100 productivity bonus for week
- Marty worked 50 hours
- Calculate regular rate  $\$10 \times 50 \text{ hours} = \$500 + \$100 \text{ bonus} = \$600$  divided by 50 hours = \$12 adjusted regular rate
- Overtime to be paid on 10 hours =  $\$12/2 \times 10 = \$60$
- Total pay is \$600 regular + \$60 OT = \$660



## EXAMPLE 4

### ■ Toni works different positions, with varying rates of pay

- Waitress for 36 hours at \$7.80/hour
- Cooks for 6 hours at \$9/hour
- Hostess work for 4 hours at \$8/hour

### ■ Weekly regular wages = \$367

- 36 hours @ \$7.80 = \$281
- 6 hours @ \$9 = \$54
- 4 hours @ \$8 = \$32



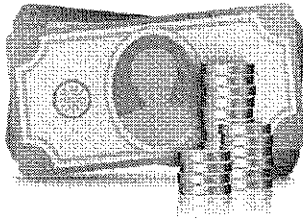
SEE NEXT SLIDE....

## EXAMPLE 4 - CONTINUED

### ■ Overtime = \$23.94

- $\$367/46 \text{ hours} = \text{regular rate} = \$7.98$
- $\$7.98/2 = 1/2 \text{ time rate} = \$3.99/\text{hour}$
- $\$3.99 \times 6 \text{ overtime hours} = \$23.94$

### ■ Total pay is \$367 regular + \$23.94 Overtime = \$390.94

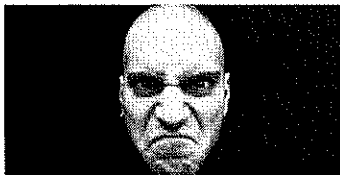


## COMPENSATORY ("COMP") TIME

- Not allowed in private sector
  - Private sector employers **MUST** pay non-exempt employees wages equal to one and one-half times their regular hourly rate of pay for all hours worked over 40 in a workweek
- Applies to public sector only
  - State, County, City government or any political subdivision and School Districts
- Non-exempt public employees accumulate comp time at 1 1/2 rate for hours over 40 within a workweek



## DOCKING NON-EXEMPT EMPLOYEE'S WAGES



- Cannot withhold from a non-exempt employee's wages for shortages, damages, breakages, etc.
- Must have a signed statement from employee authorizing any deduction from wages
- Deduction must benefit the employee

## WAGE & HOUR LAWS DO NOT REQUIRE...

- Vacation pay or PTO (private sector)
- Holiday or Sick pay (private sector)
- Severance pay
- Rest breaks or meal periods
- Holidays off
- Pay raises or fringe benefits
- Time clocks to be used
- Do not have any say in scheduling of employees, disciplinary actions or terminations

## FINAL WAGES - MONTANA

Employer must pay within 4 hours or by end of business day, whichever occurs first

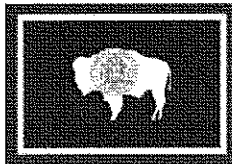
UNLESS the Employer has a written policy

- Extends to next regular payday, or
- 15 days, whichever occurs first

Mont. Code Ann. § 39-3-205(2)

**official  
policy**

## FINAL WAGES - WYOMING



- Final Wages (W.S. 27-4-104(a))
  - Within 5 working days of the date of termination
  - By policy, employer may provide that sick and personal days not be paid at termination
  - Unused vacation days must be paid upon termination of employment
  - See W.S. 27-4-507, Attorneys General Opinion No. 53

## INDEPENDENT CONTRACTORS

### ■ Common Law Test

- How independent is the employee?
- How much control can be exercised over the worker?



### ■ Looks at

- Behavioral Control
- Financial Control
- Relationship between worker and firm

## INDEPENDENT CONTRACTOR, CONTINUED

- Sets own hours; determines own sequence of work
- Can work for multiple employers; services available to the public
- Is self-employed
- A contract governs how the relationship can be severed
- Works by the job
- Permitted to employ assistants
- Performs services under the worker's business name
- Payment by the job; opportunity for profit and loss
- Furnishes own tools, equipment, and training; substantial investment by worker
- Controls the sales process and terms

## PROTECTION FOR EMPLOYERS

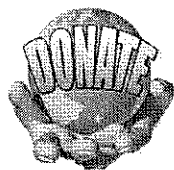
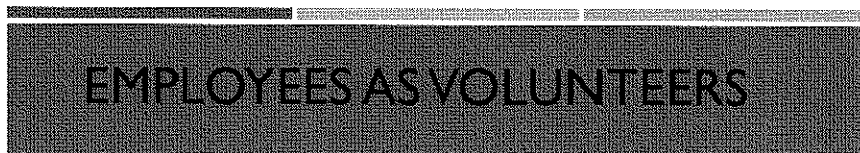
- Have written contract for a defined project with beginning and ending date
- Do not train or provide essential equipment or materials
- Do not pay on a time basis (i.e., hourly)
- Ask for proof of General Liability Insurance
- Ask for proof of Independent Contractor Exemption Certificate (ICEC) if working in Montana – if outside of Montana, check that state's IC regulations
- Obtain references
- Choose to hire only those who carry workers' compensation insurance on themselves

## RESOURCES FOR IC'S:

- IRS Section 530 Relief Requirements
- SS-8 Form  
<http://www.irs.gov/pub/irs-pdf/fss8.pdf>
- Montana Independent Contractor Exemption Certificate (ICEC)  
<http://erd.dli.mt.gov/Portals/54/Documents/Work-Comp-Regs/dli-erd-wcr003.pdf>
- US Department of Labor (Fact Sheet #13)  
<http://www.dol.gov/whd/regs/compliance/whdfs13.pdf>



- **Department of Labor considers:**
  - Who receives the benefits of the individual's work
  - How long it takes to render the services
  - Whether the services are typical volunteer activities
- **Mont. Code** Ann. § 39-4-406(e) has exemption from minimum wage and overtime for:
  - Persons who are not regular employees of a nonprofit organization and who voluntarily offer their services to a nonprofit organization on a fully or partially reimbursed basis.
  - If the "work" is something an employee does or would have done for the organization, it is harder to show person is truly performing a volunteer duty



- Employees can volunteer to do charitable work at suggestion of employer
- Employer cannot coerce employees into volunteering or lead employees to believe failure to volunteer will have adverse effect on their employment
- An employee cannot volunteer to do his own job

## CONTACTS FOR WAGE & HOUR

### Montana

Labor Standards Bureau - Employment Relations Division

PO Box 6518

Helena, MT 59604-6518

406-444-5600

<http://erd.dli.mt.gov/labor-standards/wage-and-hour-payment-act>

### Federal

U.S. Department of Labor

Employment Standards Administration

Gateway Tower East, Suite 1680

10 East South Temple

Salt Lake City, UT 84101

801-524-5706

<http://www.dol.gov/whd/>

### Wyoming

Department of Employment

1510 E. Pershing Blvd.

West Wing, Room 82002

307-777-7261

<https://doe.state.wy.us/wyereg/>

# THANK YOU!



Associated Employers

406-248-6178

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[www.associatedemployers.org](http://www.associatedemployers.org)