

# West Virginia Division of Labor

## State Overtime Requirements

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West Virginia Division of Labor  
Wage & Hour Section

**Overtime Wages Fact Sheet 2 - West Virginia Code Chapter 21, Article 5C, Sections 1 & 3**  
(July 2016)

### EMPLOYEE OVERTIME & MAXIMUM HOUR REQUIREMENTS

West Virginia's Minimum Wage and Maximum Hour Standards contain a provision within the definition of employer stating that *relative to maximum hours and overtime compensation only* the term "employer" does not include any individual, partnership, association, corporation, person or group of persons or similar unit if eighty percent of the persons employed are subject to any federal act relating to maximum hours and overtime compensation.

That means if 80% of an employer's workforce is subject to the provisions of the Fair Labor Standards Act (FLSA), the maximum hour and overtime requirements of West Virginia's Minimum Wage & Maximum Hour Standards will not apply. §21-5C-1(e)

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### STATE OVERTIME REQUIREMENTS

In order to determine whether a company is covered under the overtime provisions of state law, an assessment must first be made to establish whether the company itself, or at least 80% of the company's employees, fall under the overtime provisions of the Fair Labor Standards Act. If federal jurisdiction can be established by federal enterprise coverage or individual employee interstate commerce activity, then the requirements of state law cannot be applied.

In order for state overtime laws to apply, *all* of the following conditions *must* be met.

1. The company *does not* qualify for federal "enterprise" coverage.
2. Eighty percent (80%) of the company's employees do not qualify individually for federal overtime coverage based on work duties considered as interstate commerce activity.
3. The company has the required six non-exempt employees working at any one separate, distinct, and permanent business location.

Once a company meets all of the above conditions, the jurisdictional requirements of state law relating to the enforcement of overtime wages are also met. That means the company's non-exempt employees that are working at a business location where the six employee requirement is met are covered by state overtime laws.

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### **The State Overtime Wage Requirement**

Once state jurisdiction is established, non-exempt employees must be paid an overtime rate of one and one-half times their regular hourly rate for all hours *actually worked* over forty within the same seven consecutive day workweek.

### **Hours Actually Worked**

Hours paid in the form of employee benefits such vacation pay, holiday pay, sick leave, PTO etc. are not considered hours worked and are therefore not considered when determining hours worked for the purpose of overtime wages. That means when the payment of such benefits are shown on the employee's paycheck represented as hours, such time is not counted toward the number of hours "actually worked".

For example, an employee is asked to work his or her regular eight hour schedule on a paid holiday. The employee is paid for working forty hours and for eight hours of holiday pay, which totals forty-eight hours for the workweek. Although the employee is being paid for more than forty hours, overtime wages will not apply because the number of actual hours worked remained at forty.

### **Overtime Rate for Piece Workers**

Employees that are paid by the number of items produced or by a unit of measurement are still entitled to the payment of overtime wages under the requirements of state law. Once a calculation is made to determine the employee's hourly rate for the workweek, the number of hours worked in excess of forty for that week are to be paid at a rate of one and one-half times the rate the employee received for working non-overtime hours. §21-5C-3(d)(1)

### **Employees Paid at Different Hourly Rates**

Should an employee receive different rates of pay for different types of work performed within the same workweek, the employee's overtime rate would be based on the regular rate of pay that applied to the type of work that was performed in excess of the forty hours. §21-5C-3(d)(2)

For example, an employee is paid an hourly rate of \$10.00 when working at the shop and a rate of \$15.00 when driving the company's service truck. The employee ends up working a total of forty-two hours for the week, thirty-two hours at the shop and ten hours driving the service truck. As the employee was driving the service truck for the two hours that exceeded forty, that individual's overtime rate would be based on \$15.00 per hour.

### **EXEMPT VERSUS NON-EXEMPT EMPLOYEES**

West Virginia's Minimum Wage & Maximum Hour Standards exempt certain categories of workers from state overtime wage requirements by specific exclusion in the definition of a covered employee. An employee that qualifies for one of the stated exclusions is considered *exempt*, and an employee that does not qualify for any of the exclusions is *non-exempt*.

## **West Virginia Division of Labor State Overtime Requirements**

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Pursuant to the provisions of §21-5C-1(f) of the West Virginia Code, any individual that is involved in one the following categories of work, or descriptions of work, is considered exempt from state overtime requirements.

- 1.) Any individual employed by the United States Government.
- 2.) Volunteers involved in educational, charitable, religious, fraternal or non-profit activities where the employee/employer relationship does not in fact exist.
- 3.) Newsboys; shoeshine boys; golf caddies; pin-boys and pin chasers in bowling alleys.
- 4.) Traveling salesmen and outside-salesmen.
- 5.) Services performed by an employer's parent, son, daughter or spouse.
- 6.) Any individual employed in a bonafide professional, executive or administrative capacity. 7.) Any person whose employment is for the purpose of on-the-job training (vocational). 8.) A handicapped individual working in a nonprofit sheltered workshop.
- 9.) Individuals working in a boys or girls summer camp.
- 10.) Any person 62 years of age or older receiving social security benefits.
- 11.) Agricultural workers.
- 12.) State-employed fire fighters.
- 13.) Ushers in theaters.
- 14.) Students working 24 hours or less a week.
- 15.) Employees of local interurban motorbus carriers.
- 16.) Any employee under Federal Department of Transportation (DOT) regulations.
- 17.) Those employed on a per diem basis by the West Virginia State Senate, House of Delegates, or the Joint Committee on Government and Finance.
- 18.) Any salesman, parts man or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, and aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchases.
- 19.) Any person employed as a seasonal employee of a commercial whitewater outfitter where the seasonal employee works less than seven months in any one calendar year and, in such case, only for the limited purpose of exempting the seasonal employee from the maximum hours provisions of §21-5C-3 of this code.
- 20.) Any person employed as a seasonal employee of an amusement park where the seasonal employee works less than seven months in any one calendar year and, in such case, only for the limited purpose of exempting the seasonal employee from the maximum hours provisions of §21-5C-3 of this code.