

## WAC 296-128-530

### Professional.

The term "individual employed in a bona fide . . . professional capacity" in RCW 49.46.010 (5)(c) shall mean any employee:

- (1) Whose primary duty consists of the performance of work:
  - (a) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or
  - (b) Original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the intention, imagination, or talent of the employee; or
  - (c) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the school system or educational establishment or institution by which he is employed; and
- (2) Whose work requires the consistent exercise of discretion and judgment in its performance; and
- (3) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work) and is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and
- (4) Who does not devote more than 20 percent of his hours worked in the work week to activities which are not an essential part of and necessarily incident to the work described in paragraphs (1) through (3) of this section; and
- (5) Who is compensated for his services on a salary or fee basis at a rate of not less than \$170 per week exclusive of board, lodging, or facilities: Provided, That this paragraph (5) shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law, medicine, or dentistry and who is actually engaged in the practice thereof: Provided, That an employee who is compensated on a salary or fee basis at a rate of not less than \$250 per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the performance of work either requiring knowledge of an advanced type in a field of science or learning, which includes work requiring the consistent exercise of discretion and judgment, or requiring invention, imagination, or talent in a recognized field of artistic endeavor, shall be deemed to meet all of the requirements of this section.

[Order 76-5, § 296-128-530, filed 2/24/76.]

## WAC 296-126-092

### Meal periods—Rest periods.

- (1) Employees shall be allowed a meal period of at least thirty minutes which commences no less than two hours nor more than five hours from the beginning of the shift. Meal periods shall be on the employer's time when the employee is required by the employer to remain on duty on the premises or at a prescribed work site in the interest of the employer.
- (2) No employee shall be required to work more than five consecutive hours without a meal period.
- (3) Employees working three or more hours longer than a normal work day shall be allowed at least one thirty-minute meal period prior to or during the overtime period.

(4) Employees shall be allowed a rest period of not less than ten minutes, on the employer's time, for each four hours of working time. Rest periods shall be scheduled as near as possible to the midpoint of the work period. No employee shall be required to work more than three hours without a rest period.

(5) Where the nature of the work allows employees to take intermittent rest periods equivalent to ten minutes for each 4 hours worked, scheduled rest periods are not required. [Order 76-15, § 296-126-092, filed 5/17/76.

**WAC 296-126-002**

**Definitions.**

(1) "Employer" means any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees, unless exempted by chapter 49.12 RCW or these rules. For purposes of these rules, the state or its political subdivisions, municipal corporations, or quasi-municipal corporations (collectively called "public employers") are considered to be "employers" and subject to these rules in the following manner:

(a) Before May 20, 2003, public employers are not subject to these rules unless the rules address:

- (i) Sick leave and care of family members under RCW 49.12.265 through 49.12.295.
- (ii) Parental leave under RCW 49.12.350 through 49.12.370.
- (iii) Compensation for required employee uniforms under RCW 49.12.450.
- (iv) Employers' duties towards volunteer firefighters and reserve officers under RCW 49.12.460.

(b) On or after May 20, 2003, public employers are subject to these rules only if these rules do not conflict with the following:

- (i) Any state statute or rule.
- (ii) Any local resolution, ordinance, or rule adopted before April 1, 2003.

(2) "Employee" means an employee who is employed in the business of his employer whether by way of manual labor or otherwise. "Employee" does not include:

(a) Any individual registered as a volunteer with a state or federal volunteer program or any person who performs any assigned or authorized duties for an educational, religious, governmental or nonprofit charitable corporation by choice and receives no payment other than reimbursement for actual expenses necessarily incurred in order to perform such volunteer services;

(b) Any individual employed in a bona fide executive, administrative or professional capacity or in the capacity of outside salesperson;

(c) Independent contractors where said individuals control the manner of doing the work and the means by which the result is to be accomplished.

- (3) "Employ" means to engage, suffer or permit to work.
- (4) "Adult" means any person eighteen years of age or older.
- (5) "Minor" means any person under eighteen years of age.

(6) "Student learner" means a person enrolled in a bona fide vocational training program accredited by a national or regional accrediting agency recognized by the United States Office of Education, or authorized and approved by the Washington state commission for vocational education, who may be employed part time in a definitely organized plan of instruction.

(7) "Learner" means a worker whose total experience in an authorized learner occupation is less than the period of time allowed as a learning period for that occupation in a learner certificate issued by the director pursuant to regulations of the department of labor and industries.

(8) "Hours worked" shall be considered to mean all hours during which the employee is authorized or required by the employer to be on duty on the employer's premises or at a prescribed work place.

(9) "Conditions of labor" shall mean and include the conditions of rest and meal periods for employees including provisions for personal privacy, practices, methods and means by or through which labor or services are performed by employees and includes bona fide physical qualifications in employment, but shall not include conditions of labor otherwise governed by statutes and rules and regulations relating to industrial safety and health administered by the department.

(10) "Department" means the department of labor and industries.

(11) "Director" means the director of the department of labor and industries or the director's designated representative.

[Statutory Authority: Chapter 49.12 RCW. WSR 10-04-092, § 296-126-002, filed 2/2/10, effective 3/15/10; Order 76-15, § 296-126-002, filed 5/17/76; Order 74-9, § 296-126-002, filed 3/13/74, effective 4/15/74.



ADMINISTRATIVE POLICY  
STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES  
EMPLOYMENT STANDARDS

TITLE: EXEMPTION FROM MINIMUM  
WAGE AND OVERTIME REQUIREMENTS  
FOR PROFESSIONAL POSITIONS

NUMBER: ES.A.9.5

CHAPTER: RCW.49.46.010(3)(c),  
RCW 49.46.130(2)(a),  
WAC 296-128-530

ISSUED: 6/24/2005  
REVISED: 7/15/2014  
SEE ALSO: ES.A.9.2 - 4  
and ES.A.9.6 - 8,  
WAC 296-128-530  
ES.A.8.1 and ES.A.8.2,  
ES.A.9.1, ES.A.10.1  
ES.A.10.2, and  
ES.A.10.3

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**PROFESSIONAL (WAC 296-128-530 )**

1. On August 23, 2004, the U.S. Department of Labor published revised regulations for the "white collar" overtime exempt regulations, including executive, administrative, professional, and outside sales positions. The State regulation on the professional exemption has not changed. The federal regulations, and existing state regulations, affect *white-collar employees only (executive, administrative, professional, outside sales)*.

Employers must comply with both state and federal overtime regulations. Where differences exist between Washington State and new federal overtime regulations, an employer must follow the regulation that is most favorable to the worker. The following chart is designed to provide a summarized analysis of both state and federal regulations for the professional exemption. Greater details of the state professional exemption follow this chart. For more specific information on federal regulations, check with the U.S. Department of Labor at their toll free # 1-866-487-9243, or at their website @ <http://www.dol.gov/esa/regs/compliance/whd/fairpay/main.htm> or with a qualified

5

consultant, to determine how changes in federal overtime requirements affect the specific circumstances.

**Professional**

Requirements under state regulations	Requirements under new federal regulations	Differences between state and federal regulations
<p>Must meet all parts of this four-part test in the state regulation:</p> <ol style="list-style-type: none"> <li>1) Meets minimum salary or fee basis payment of not less than \$250/wk;</li> <li>2) Primary duty consists of the performance of work either requiring knowledge of an advanced type in a field of science or learning, or</li> <li>3) Primary duty consists of work requiring invention, imagination, or talent in a recognized field of artistic endeavor</li> <li>4) Work must require the consistent exercise of discretion and judgment.</li> </ol>	<p>Must meet all parts of this four-part test in the federal regulations:</p> <ol style="list-style-type: none"> <li>1) Meets minimum salary or fee requirement of not less than \$455/wk;</li> <li>2) Primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;</li> <li>3) Advanced knowledge must be in a field of science or learning, and;</li> <li>4) Advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.</li> </ol>	<p>Washington's minimum salary for overtime-exempt workers is \$250/wk vs. the new federal minimum of \$455/wk.</p> <p>Washington does not specifically split professional into learned and creative subdivisions, but there is little difference in application.</p>
<p>Employees classified as <b>"creative professional."</b> Examples may include: music, writing, acting and graphic arts, composers, conductors, soloists, painters, cartoonists, essayists, novelists, short-story writers, screenplay writers, responsible writing positions in advertising agencies, certain journalists.</p>	<p>Must meet all parts of this two-part test in the federal regulation:</p> <ol style="list-style-type: none"> <li>1) Meets minimum salary or fee requirement of \$455/wk;</li> <li>2) Primary work requires invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.</li> </ol>	<p>Washington's minimum salary for overtime-exempt workers is \$250/wk vs. the new federal minimum of \$455/wk.</p>
<p>"Computer-related professional" comparison is in <u>Policy ES.A.9.6</u></p>		<p>It may be possible that a computer professional employee paid on a salary basis may be exempt under the professional exemption. See <u>ES.A.9.6</u> paragraph number 4.</p>

The new federal regulations provide that executive, administrative, or professional workers are also exempt from overtime pay if they are earning more than \$100,000 per year as long as they perform at least one duty in an executive, administrative, or professional function job. State regulations contain no similar provision. Professional workers must meet all of the state requirements for the exemption to apply.

The new federal regulations allow an employer to impose *unpaid* disciplinary suspensions of *one or more full days* for workplace-conduct rule infractions for exempt workers. Washington State allows an *unpaid* disciplinary suspension in increments of less than one week *only* for violations of safety rules of major significance. Unpaid disciplinary suspensions for non-major safety violations cannot be in less than full-week increments.

**2. Reliance On Pre-August 23, 2004 Federal Interpretation.** Prior to August 23, 2004, state and federal "white collar" exempt regulations had many identical parts. On August 23, 2004, substantial changes were made to the federal regulations. The Department relies on the interpretations of the pre-August 23, 2004 regulations where identical.

**3. The Job Duties Determine Who Meets the Professional Exemption.** A person who is employed in a bona fide professional capacity is exempt from the payment of minimum wage and overtime wages.

Certain workers are considered to be professionals according to industry practice or company standard. However, that consideration does not automatically determine the professional exemption in WAC 296-128-530. It is the duties required of the job, not the employee's expertise or title that determines whether the exemption applies. Even though workers may be technically expert, knowledgeable in their field, experienced from many years in the industry, and perform their work to an excellent standard, the job duties must meet the requirements of WAC 296-128-530 to be exempt from payment of minimum wage and overtime.

**4. Professional Employees Must be Compensated on a Salary or Fee Basis.** In order to qualify for the professional exemption, the employee must meet the duties and must be compensated on a salary or fee basis. This standard also provides for application of a short test and a long test. See ES.A.9.8 Fee Basis and ES.A.9.1 Questions and Answers About Salary Basis.

**5. Lawyers, Doctors and Dentists are Exempt Professionals.** An employee who has a valid license to practice law, medicine, including residents and interns, or dentistry and who actually practices in his or her field is an exempt professional regardless if paid on a salary, hourly, or fee basis. If an individual meets these criteria no further analysis is required. If they hold the degree but do not practice within their licensed profession, the appropriate short or long test must be satisfied for the exemption to apply.

**6. Special Short Test Proviso.** Employees are considered exempt if they meet the duties and salary test. The salary test is met if they are compensated on a salary or fee basis of \$250 per week or its equivalent and meet the duties test; the duties test is met if their primary duty is work requiring knowledge of an advanced type in a field or science or learning, and it is work that requires the consistent exercise of discretion and judgment, or their primary duty is work which requires invention, imagination or talent in a recognized field of artistic endeavor. If an

employee qualifies for exemption under the short test proviso, it is not necessary to test the employee's qualifications in detail under the long test.

A prime characteristic of professional work is the fact that the employee does apply his or her special knowledge or talents with discretion and judgment. Purely mechanical or routine work is not professional.

**7. Trainees.** The exemption for professional employees does not apply to workers in training for these positions and not actually performing the duties of a full-fledged professional employee. However, a bona fide professional employee does not lose his or her exempt status merely by undergoing further training for the job performed.

**8. Learned Professions Require Knowledge of An Advance Type In a Field of Science or Learning.** The learned professions are those requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study that is different from a general academic education, from an apprenticeship, from training in the performance of routine mental, manual, or physical processes. Generally speaking, it must be knowledge that cannot be attained at the high school level.

The word "customarily" implies that in the vast majority of cases the specific academic training is a prerequisite for entrance into the profession. It makes the exemption available to the occasional chemist who is not the possessor of a degree in chemistry, or law, because they have obtained status that is equal to a degreed professional, whose attainments and word are the same but did not graduate from a college or university or law school. It does not include the members of such quasi-professions as journalism in which the bulk of the employees have acquired their skill by experience rather than by any formal specialized training. It should be noted also that many employees in these quasi-professions might qualify for exemption under the executive or administrative regulations or under the alternative paragraph of the professional definition applicable to the artistic fields.

Generally speaking the requisite knowledge which meet the requirement for a prolonged course of specialized intellectual instruction and study include nursing, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical, and biological sciences, including pharmacy and registered or certified medical technology and so forth. The professional must be able to use the advanced knowledge gained in the job performed.

The typical symbol of the professional training and the best evidence of its possession is, of course, the appropriate academic degree, and in these professions an advanced academic degree is standard. In the case of registered or certified medical technologists, successful completion of three academic years of preprofessional study in an accredited college or university plus a fourth year of professional course work in a school of medical technology approved by the Council of Medical Education of the American Medical Association will be recognized as a prolonged course of specialized intellectual instruction and study. Typical Learned Professions include:

8

**8.1 Registered nurses** have traditionally been recognized as professional employees. Although, in some cases, the course of study has become shortened, but more concentrated, nurses who are registered by the appropriate State examining board will continue to be recognized as having met the professional requirement.

**8.2 Many accountants** are exempt as professional employees, regardless of whether they are employed by public accounting firms or by other types of enterprises. Some accountants may qualify for exemption as bona fide administrative employees. However, exemption of accountants, as in the case of other occupational groups, must be determined on the basis of the individual employee's duties and the other criteria in the regulations. Certified public accountants who meet the salary requirement of the regulations will, except in unusual cases, meet the requirements of the professional exemption. Similarly, accountants who are not certified public accountants may also be exempt as professional employees if they actually perform work that requires the consistent exercise of discretion and judgment and otherwise meet the tests prescribed in the definition of professional employee.

Accounting clerks, junior accountants, and other accountants, on the other hand, normally perform a great deal of routine work that is not an essential part of and necessarily incident to any professional work which they may do. Such accountants are not normally exempt when the majority of their work is routine work. The professional exemption is determined on the basis of the individual employee's duties, which must include the consistent exercise of discretion and judgment. The title "Junior Accountant," however, is not determinative of failure to qualify for exemption any more than the title "Senior Accountant" would necessarily imply that the employee is exempt.

**8.3 Teaching and Related Professions.** Teaching, instructing or lecturing with the result of imparting knowledge is work subject to the professional exemption.

The primary duty of an employee as a teacher must be that of activity in the field of teaching. The exemption is also met if the teacher has satisfied the educational requirements of the Office of Superintendent of Public Instruction and has been granted the right to teach in public or private schools. Mere certification by the State, or employment in a school will not suffice to qualify an individual for exemption if the individual is not in fact both certified and engaged as a teacher.

Teaching consists of the activities of teaching, tutoring, instructing, lecturing, and the like in the activity of imparting knowledge. Teaching personnel may include the following (although not necessarily limited to): Regular academic teachers, teachers of kindergarten or nursery school pupils or of gifted or handicapped children; teachers of skilled and semiskilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrumental music instructors. Those faculty members who are engaged as teachers but also spend a considerable amount of their time in extracurricular activities such as coaching athletic teams or acting as

moderators or advisers in such areas as drama, forensics, or journalism are engaged in teaching. Such activities are a recognized part of the school's responsibility in contributing to the educational development of the student.

**8.4 Artistic Professions.** This is work that is original and creative in nature, and work that requires invention, imagination, or talent and discriminating skills in a recognized field of artistic endeavor. This is professional work that requires the individual to be original in the particular artistic field and express creative powers to achieve such results. This is distinguished from work that can be produced by a person with general manual or intellectual ability and training. The result of work that is original and creative in nature depends on and varies according to the intention, imagination and talent of the employee.

The exemption may be met if the work is in a recognized field of artistic endeavor. This includes such fields as music, writing, the theater, and graphic arts.

Musicians, composers, conductors, and soloists who are engaged in original and creative work within the sense of this definition. In graphic arts the requirement is, generally speaking, met by painters who at most are given the subject matter of their painting. The exemption is similarly met by cartoonists who are merely told the title or underlying concept of a cartoon and then must rely on their own creative powers to express the concept. The exemption would not normally be met by a person who is employed as a copyist, or as an animator of motion-picture cartoons, or as a retoucher of photographs since it is not believed that such work is properly described as creative in character.

In the field of writing, essayists or novelists or scenario writers who choose their own subjects and hand in a finished piece of work meet the definition. The exemption would generally be met persons holding the more responsible writing positions in advertising agencies.

Another requirement is that the employee be engaged in work the result of which depends primarily on the invention, imagination, or talent of the employee. A person employed as an actor, or a singer, or a violinist, or a short-story writer easily meets this requirement.

**8.5 Radio and Television.** There is considerable variation in the type of work performed by various announcers, ranging from predominantly routine to predominantly exempt work. The wide variation in earnings as between individual announcers, from the highly paid name announcer on a national network who is greatly in demand by sponsors to the staff announcer paid a comparatively small salary in a small station, indicates not only great differences in personality, voice and manner, but also in some inherent special ability or talent which, while extremely difficult to define, is nevertheless real.

The duties which many announcers are called upon to perform include: Functioning as a master of ceremonies; playing dramatic, comedy, or straight parts in a program; interviewing; conducting farm, fashion, and home economics

programs; covering public events, such as sports programs, in which the announcer may be required to ad lib and describe current changing events; and acting as narrator and commentator. Such work is generally exempt. Work such as giving station identification and time signals, announcing the names of programs, and similar routine work is nonexempt work. In the field of radio entertainment as in other fields of artistic endeavor, the status of an employee as a bona fide professional is in large part dependent upon whether his duties are original and creative in character, and whether they require invention, imagination or talent. The determination of whether a particular announcer is exempt as a professional employee must be based upon his or her individual duties and the amount of exempt and nonexempt work performed, as well as compensation paid.

**8.6 Journalism.** The field of journalism also employs exempt as well as nonexempt employees under the same or similar job titles. Newspaper writers, with possible rare exceptions in certain highly technical fields, do not meet the requirements for exemption as professional employees of the learned type. Exemption for newspaper writers as professional employees is normally available only under the provisions for the artistic type. Newspaper writing of the exempt type must, therefore, be predominantly original and creative in character. Only writing that is analytical, interpretative or highly individualized is considered to be creative in nature. The writing of fiction to the extent that it may be found on a newspaper would also be considered as exempt work. Newspaper writers commonly performing work that is original and creative are editorial writers, columnists, critics, and top-flight writers of analytical and interpretative articles.

In the case of newspaper employees the distinction here is similar to the distinction observed in connection with the requirement that the work be original and creative in character. The majority of reporters do work which depends primarily on intelligence, diligence, and accuracy. It is the minority whose work depends primarily on invention, imagination, or talent.

The reporting of news, the rewriting of stories received from various sources, or the routine editorial work of a newspaper is not predominantly original and creative in character and must be considered as nonexempt work. A reporter or news writer ordinarily collects facts about news events by investigation, interview, or personal observation and writes stories reporting these events for publication, or submits the facts to a rewrite employee or other editorial employees for story preparation. Such work is nonexempt work. Reporters covering a police beat, or sent out under specific instructions to cover a murder, fire, accident, ship arrival, convention, sport event, etc., are normally performing duties which are not professional in nature.

Incidental interviewing or investigation, when it is performed as an essential part of and is necessarily incident to an employee's professional work, however, need not be counted as nonexempt work. If a dramatic critic interviews an actor or actress and writes a story around the interview, the work of interviewing and writing the story would be exempt work. However, a dramatic critic who is assigned to cover a routine news event such as a fire or a convention would be

11

doing nonexempt work since covering the fire or the convention would not be necessary and incident to his or her work as a dramatic critic.

**9. Exercise of Discretion and Judgment.** A professional must perform work requiring the consistent exercise of discretion and judgment. Work that requires discretion and independent judgment is work that is not ordinary or routine in nature.

In general, the exercise of "discretion and independent judgment" implies that the person applies their advanced knowledge gained from their course of study to the particular circumstances. A professional employee must perform work that requires the consistent exercise of discretion and judgment. A prime characteristic of professional work is the fact that the employee does apply his or her special knowledge or talents with discretion and judgment. Purely mechanical or routine work is not professional.

Work that exercises discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance. This is different from use of skill in applying techniques, procedures or specific standards or from freedom to make decisions independently on matters of little consequence. Tasks that are comparatively routine in nature can involve the exercise of discretion and judgment if the person who actually makes the ultimate decisions is doing them.

There are duties that are an essential part of and necessarily incident to professional work. This includes menial tasks that must be performed in order for a professional to complete his or her job and which are essential to the successful completion of the job. An example could include menial tasks in conjunction with a chemist's experiments, despite the fact that identical tasks can and are performed by lab assistants.

**10. Application of "Short Test" vs. Long Test.** If employees do not meet all of the short test requirements, or hold licenses to practice law, medicine, or dentistry and do not practice in their field as outlined in section 5, all of the long test requirements must be met.

Examples of exercising discretion and judgment for pharmacists.

- Advise customers on drug interactions and over-the-counter remedies.
- Have the authority to deny filling a prescription if he had questions as to its validity or if, in the exercise of his judgment, he believed the prescription was contraindicated based on other medications that the customer was taking.
- Ensure that the pharmacy followed state and federal drug laws.
- Have the authority to refill a customer's prescription without a current prescription while the customer waited to get the doctor's new prescription.
- Could inform customers of generic alternatives.
- Have the authority to deal with customers who attempted to obtain an illegal prescription. If he had a concern and thought the prescription was fraudulent, he had the discretion to not fill the prescription.
- Have the discretion to sell (or not sell) syringes to customers.
- Could advise customers on remedies that might help them avoid having to see a doctor or obtain relief from their symptoms



ADMINISTRATIVE POLICY

STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES  
EMPLOYMENT STANDARDS

**TITLE: QUESTIONS AND ANSWERS  
ABOUT SALARY BASIS**

**NUMBER: ES.A.9.1**

**CHAPTER: RCW 49.46.010(5)(c)  
RCW 49.46.130(2)(a)  
WAC 296-128-500 through 533**

**SEE ALSO: ES.A.9.2  
ES.A.9.3, ES.A.9.4,  
ES.A.9.5, ES.A.9.6,  
ES.A.9.7**

**ISSUED: 12/02/03  
REVISED: 6/24/2005  
REVISED: 7/15/2014**

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**Question and Answer Fact Sheet**

This document addresses questions on the salary basis regulation for bona fide executive, administrative, and professional workers exempt from the Washington State Minimum Wage and Overtime Law, RCW 49.46.010 (3)(c) and RCW 49.46.130 (2)(a). The definitions for each of these exemptions are in WAC 296-128-510, WAC 296-128-520, and WAC 296-128-530. The effective date of the salary basis regulations, WAC 296-128-500, WAC 296-128-532 and WAC 296-128-533, is February 21, 2003.

Only those employees who meet the definition of executive, administrative, or professional and who are paid on a salary basis are considered "exempt" employees. The salary basis regulation does not cover employees who are paid on a salary basis but do not meet the definition of an executive, administrative, or professional.

There are some differences for public sector employees, which are outlined in WAC 296-128-533. "Employer" generally includes all public and private employers; the differences are addressed in questions 21 through 24.

**1. What does salary basis mean?**

Salary is where an employee regularly receives for each pay period of one week or longer a predetermined monetary amount (salary) consisting of all or part of his or her compensation. The salary shall not be subject to deductions because of variations in the quantity or quality of the work performed, except as provided in the regulation. The salary amount cannot be less than the amount required in WAC 296-128-510, WAC 296-128-520, and WAC 296-128-530. The pay period cannot exceed one month.

**2. Are employers required to pay additional compensation to exempt employees for overtime hours worked?**

No. The minimum wage and overtime laws do not require overtime pay or compensatory time to exempt employees. However, employees and employers may negotiate agreements for additional pay or compensatory time or other compensation in addition to the salary.

**3. If exempt employees receive a bonus for working over 40 hours in a workweek, does this affect the salary basis?**

No. The overtime law provides that the payment of compensation or a provision for compensatory time off in addition to a salary does not destroy the salary basis. See No. 2.

**4. If a company shuts down for one week due to lack of work and none of the salaried employees receive payment, does this destroy the salary basis?**

No. Payment of salary is not required in particular weeks in which an employee or employees perform no work regardless of the circumstances. This includes weeks in which a holiday or holidays or vacation days occur and the company shuts down for the remaining days in that week.

**5. If the company shuts down for a partial week without paying the salaried exempt workers for the full week, does this destroy the salary basis?**

Yes. If the company shuts down for a partial week, exempt employees must be paid their full salary for that week when they work any part of that week.

**6. If an employee requests a day off work, may the employer deduct the pay for the whole day from the employee's salary?**

Yes. When the employee takes a full day off for personal reasons other than sickness or accident, deductions are permitted in full-day increments.

- 7. **If an employee requests a half-day off, may the employer deduct the pay for the half day from the employee's salary?**

For private sector employees, no. Deductions from pay for partial day absences are not permitted except for very limited circumstances allowed in the Federal Family and Medical Leave Act. Public sector employers may make deductions from salary for partial day absences under certain circumstances, as discussed in question No. 22 below.

- 8. **Are partial day deductions from pay permitted by employers when the time off is taken under the federal Family and Medical Leave Act?**

Yes. Deductions can be made in partial day increments if it is leave that is taken under the federal Family and Medical Leave Act. Employers are advised to seek advice from the U.S. Department of Labor (USDOL) to ensure compliance with FMLA requirements. The toll-free number to the USDOL is 1-866-487-9243.

- 9. **Are deductions permitted from pay for disciplinary absences due to major safety violations or serious employee misconduct?**

Yes. Deductions are allowed for disciplinary absences that are imposed for violations of safety rules of major significance. Major significance includes only those relating to prevention of serious danger to the plant, the public, or other employees. An example might be violating rules prohibiting smoking in an explosives plant or around hazardous or other flammable material.

- 10. **If an employee has not yet qualified under the employer's plan, or has exhausted all of his or her sick leave bank, may the employer deduct the whole day from the employee's salary?**

Yes. The employer's written plan, policy, or practice must include conditions under which the leave is granted. If the employee has not yet qualified under the plan or has exhausted all of his or her sick leave, the employer may then deduct pay in full-day increments from employees who have not yet qualified under the plan, or in full-day increments after an employee's sick leave bank is exhausted.

- 11. **If an employee takes a partial day off due to sickness, and the employee's sick leave bank is exhausted, may the employer deduct the partial day absence?**

For private sector employees, no. The employer cannot deduct from pay for a partial day's absence for use of sick leave even when the sick leave has been exhausted. Public sector employers may make deductions from salary for partial day absences under certain circumstances as discussed in question No. 22 below.

- 12. **If the employee takes a sick day off but the employer does not provide sick leave, may the employer deduct for the whole day?**

No. The employer cannot deduct for sickness or accident when there is no bona fide policy in effect. An employer's written policy that "there is no policy" is not a bona fide sick leave policy.

**13. May an employer make deductions from pay for absences due to jury duty or military duty less than a whole week?**

No. The employer cannot deduct when the employee participates in jury duty, attendance as a witness, or temporary military leave if the employee performs any work in that week. The employer may offset any amounts received by the employee as a jury member or witness fees, or military pay. Payment is not required for weeks in which the employee performs no work in the entire week, regardless of circumstances.

**14. What is a bona fide leave bank?**

A bona fide leave bank is a benefit provided to employees in the case of absence from work due to sickness or personal time off (PTO), including vacation time. The benefit plan must be in writing and be contained in a contract or an agreement, or in a written policy that is distributed to the employees. If the plan is used as a subterfuge to circumvent or evade the requirements of this regulation, it is not bona fide.

**15. If an employee requests a day off work, may the employer deduct from the leave bank for the whole day?**

Yes. The employer can deduct from the leave bank in full-day increments provided there is a bona fide plan as described in question No. 14.

**16. When an employee requests a half-day off work, may the employer deduct from the leave bank for the half-day?**

Yes. The employer can deduct from the leave bank for partial-day increments provided there is a bona fide written plan as described in question No. 14.

**17. May an employer make leave bank deductions for less than one hour?**

For private sector employees, no. Leave bank deductions may not be made for less than one full hour. If the absence is for at least a full hour, it may then also be taken in additional increments of less than one hour thereafter. For example, an employer may not deduct 45 minutes from a leave bank, but could deduct 75 minutes if the employee took that amount of leave. Public sector employers may deduct from leave banks in any increment, as discussed in question No. 22 below.

**18. May an employer promptly correct a mistaken deduction without destroying the salary basis?**

Yes, provided the deduction is infrequent and inadvertent. A limited window of correction may be permitted if the employer immediately begins taking corrective steps to promptly resolve the improper deduction brought to the attention of the employer or other appropriate representative of the employer.

**19. May an employer prorate the salary for the first and final weeks of employment?**

Yes. The salary can be prorated for the actual days worked in the first and final weeks of employment.

**20. Does the Salary Basis Regulation apply to employer actions prior to February 21, 2003?**

No. WAC 296-128-500, WAC 296-128-532 and WAC 296-128-533 apply to the payment of a salary and deductions from salary on and after February 21, 2003, which is the effective date of this rule.

**Public Employees**

**21. Who are public employees?**

Public employees are defined in the salary basis regulation as "an employee directly employed by a county, incorporated city or town, municipal corporation, state agency, institution of higher education, political subdivision or other public agency and includes any department, bureau, office, board, commission or institution of such public entities". Most of the salary basis provisions for private employees apply to public employees. However, there are some differences, as addressed in the following questions.

**22. May public employees take off a partial day off without pay without destroying the salary basis?**

Yes. A public employer may deduct for partial day absences in any increment when the pay system is established according to principles of public accountability, under which the public employee accrues sick or personal leave and permits leave without pay for absences of personal reasons or illness or injury of less than one day when accrued leave is not taken.

**23. May a public employer furlough employees for budget reasons?**

Yes. The salary basis exemption would be lost for the week in which the furlough occurred and all requirements of the minimum wage and overtime act apply, if the employees performed any work during the week. Payment is not required for weeks in which the employee performs no work in the entire week, regardless of circumstances.

**24. May a public employer deduct from leave banks in any increment?**

Yes.



ADMINISTRATIVE POLICY  
STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES  
EMPLOYMENT STANDARDS

**TITLE:** DEFINITION OF FEE BASIS  
IN ADMINISTRATIVE, PROFESSIONAL  
AND OUTSIDE SALES POSITIONS

**NUMBER:** ES.A.9.8

**CHAPTER:** RCW.49.46.010(3)(c),  
RCW 49.46.130(2)(a),  
WAC 296-128

**ISSUED:** 6/24/2005  
**REVISED:** 7/15/2014  
**SEE ALSO:** ES.A.9.2 – 7,  
ES.A.8.1 and ES.A.8.2,  
ES.A.9.1, ES.A.10.1,  
ES.A.10.2 and ES.A.10.3

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**DEFINITION OF FEE BASIS**

**WAC 296-128-520(4)(b), WAC 296-128-530(5), and WAC 296-128-540(3)**

**1. Reliance On Pre-August 23, 2004 Federal Interpretation.** Prior to August 23, 2004, state and federal "white collar" exempt regulations had many identical parts. On August 23, 2004, substantial changes were made to the federal regulations. The Department relies on the interpretations of the pre-August 23, 2004 regulations where identical.

**2. Fee Basis.** The requirements for exemption as an administrative, professional, or outside sales employee may be met by an employee who is compensated on a fee basis as well as by one who is paid on a salary basis.

A fee basis means a fixed charge for work performed. These arrangements are characterized by the payment of an agreed sum for a single job, regardless of the time required for its completion.

This is similar to piecework, but with the distinction that a fee payment is generally made for the kind of job that is unique rather than for a series of jobs that are repeated an indefinite number of times and for which payment on an identical basis is made over and over again.

**3. Payments Not Considered a Fee Basis.** Payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis.

**4. Adequacy of a Fee Payment.** Payment of fees of not less than \$250 per week to administrative and professional employees can ordinarily be determined only after the time worked on the job is known. In determining whether payment is at the rate specified in the regulations, the amount paid to the employee will be tested by reference to a standard workweek of 40 hours. Compliance will be tested in each case of a fee payment by determining whether the payment is at a rate, which would amount to at least \$250 per week.

There is no dollar amount established in the fee basis payment for the outside sales exemption. The amount of the fee compensation is based on the agreement between the employer and outside sales employee.

**5. Salary Basis.** See Administrative Policy ES.A.9.1 for payment on a salary basis.



ADMINISTRATIVE POLICY

STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES  
EMPLOYMENT STANDARDS

**TITLE: MEAL AND REST PERIODS  
FOR NONAGRICULTURAL WORKERS  
AGE 18 AND OVER**

**NUMBER: ES.C.6**

**REPLACES: ES-026**

**CHAPTER: RCW 49.12  
WAC 296-126-092**

**ISSUED: 1/2/2002  
REVISED: 6/24/2005**

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**1. Are meal and rest periods conditions of labor that may be regulated by the department under RCW 49.12, the Industrial Welfare Act?**

Yes, the department has the specific authority to make rules governing conditions of labor, and all employees subject to the Industrial Welfare Act (IWA) are entitled to the protections of the rules on meal and rest breaks. The actual meal and rest break requirements are not in the statute but appear in WAC 296-126-092, Standards of Labor.

**Note: Minor employees (under 18) and agricultural workers are not covered by these rules. The regulations for minors are found in WAC 296-125-0285 and WAC 296-125-0287. The regulations for agricultural employees are found in WAC 296-131-020.**

**2. Are both private and public employees covered by these meal and rest period regulations?**

Yes. The IWA and related rules establish a minimum standard for working conditions for all covered employees working for both public sector and private sector businesses in the state, including non-profit organizations that employ workers.

**3. Does a collective bargaining agreement (CBA) or a labor/management agreement allow public employers to give meal and rest periods different from those under WAC 296-126-092?**

Yes. Effective May 20, 2003, the legislature amended RCW 49.12.005 to include "the state, any state institution, state agency, political subdivisions of the state, and any municipal corporation or quasi-municipal corporation". Thus it brought public employees under the protections of the IWA, including the meal and rest period regulations, WAC 296-126-092. See *Administrative Policy ES.C.1 Industrial Welfare Act and ES.A.6 Collective Bargaining Agreements*.

Exceptions--The meal and rest periods under WAC 296-126-092 do not apply to:

- Public employers with a local resolution, ordinance, or rule in effect prior to April 1, 2003 that has provisions for meal and rest periods different from those under WAC 296-126-092, or
- Employees of public employers who have entered into collective bargaining contracts, labor/management agreements, or other mutually agreed to employment agreements that specifically vary from or supersede, in part or in total, the rules regarding meal and rest periods, or
- Public employers with collective bargaining agreements (CBA) in effect prior to April 1, 2003 that provide for meal and rest periods different from the requirements of WAC 296-126-092. The public employer may continue to follow the CBA until its expiration. Subsequent collective bargaining agreements may provide for meal and rest periods that are specifically different, in whole or in part, from the requirements under WAC 296-126-092.

If public employers do not meet one of the above exceptions, then public employees are included in the requirements for meal and rest periods under WAC 296-126-092.

**4. May a collective bargaining agreement have different provisions for meal and rest periods for employees in construction trades?**

Yes. Effective May 20, 2003, RCW 49.12.187 was amended to include a provision that the rules regarding appropriate meal and rest periods (WAC 296-126-092) for employees in the construction trades, i.e., laborers, carpenters, sheet metal, ironworkers, etc., may be superseded by a CBA negotiated under the National Labor Relations Act. The terms of the CBA covering such employees must specifically require rest and meal periods and set forth the conditions for the rest and meal periods. However, the conditions for meal and rest periods can vary from the requirements of WAC 296-126-092.

Construction trades may include, but are not necessarily limited to, employees working in construction, alteration, or repair of any type of privately, commercially, or publicly-owned building, road, or parking lot, or erecting playground or school yard equipment, or other related industries where the employees are in a recognized construction trade covered by a CBA.

This exception does not apply to employees of construction companies without a CBA.

**5. When is a meal period required?**

Meal period requirements are triggered by more than five hours of work:

- Employees working five consecutive hours or less need not be allowed a meal period. Employees working over five hours shall be allowed a meal period. See WAC 296-126-092(1).

- The 30-minute meal period must be provided between the second and fifth working hour.
- The provision in WAC 296-126-092(4) that no employee shall be required to work more than five consecutive hours without a meal period applies to the employee's normal workday. For example, an employee who normally works a 12-hour shift shall be allowed to take a 30-minute meal period no later than at the end of each five hours worked.
- Employees working at least three hours longer than a normal workday shall be allowed a meal period before or during the overtime portion of the shift. A "normal work day" is the shift the employee is regularly scheduled to work. If the employee's scheduled shift is changed by working a double shift, or working extra hours, the additional meal period may be required. Employees working a regular 12-hour shift who work 3 hours or more after the regular shift will be entitled to a meal period and possibly to additional meal periods depending upon the number of hours to be worked. See WAC 296-126-092(3).
- The second 30-minute meal period must be given within five hours from the end of the first meal period and for each five hours worked thereafter.

**6. When may meal periods be unpaid?**

Meal periods are not considered hours of work and may always be unpaid as long as employees are completely relieved from duty and receive 30 minutes of uninterrupted mealtime.

It is not necessary that an employee be permitted to leave the premises if he/she is otherwise *completely* free from duties during the meal period. In such a case, payment of the meal period is not required; however, employees must be completely relieved from duty and free to spend their meal period on the premises as they please. These situations must be evaluated on a case-by-case basis to determine if the employee is on the premises in the interest of the employer. If so, the employee is "on duty" during the meal period and must be paid.

Employees who remain on the premises during their meal period on their own initiative and are completely free from duty are not required to be paid when they keep their pager, cell phone, or radio on *if* they are under no obligation to respond to the pager or cell phone or to return to work. The circumstances in determining when employees carrying cell phones, pagers, radios, etc., are subject to payment of wages must be evaluated on a case-by-case basis.

**7. When must the meal period be paid?**

Meal periods are considered hours of work when the employer requires employees to remain on duty on the premises or at a prescribed work site *and* requires the employee to act in the interest of the employer.

When employees are required to remain on duty on the premises or at a prescribed work site and act in the interest of the employer, the employer must make every effort to provide employees with an uninterrupted meal period. If the meal period should be interrupted due to the employee's performing a task, upon completion of the task, the meal period will be continued until the employee has received 30 minutes total of mealtime. Time spent performing

the task is not considered part of the meal period. The entire meal period must be paid without regard to the number of interruptions.

As long as the employer pays the employees during a meal period in this circumstance and otherwise complies with the provisions of WAC 296-126-092, there is no violation of this law, and payment of an extra 30-minute meal break is not required.

#### **8. May an employee waive the meal period?**

Employees may choose to waive the meal period requirements. The regulation states employees "shall be allowed," and "no employee shall be required to work more than five hours without a meal period." The department interprets this to mean that an employer may not require more than five consecutive hours of work and must allow a 30-minute meal period when employees work five hours or longer.

If an employee wishes to waive that meal period, the employer may agree to it. The employee may at any time request the meal period. While it is not required, the department recommends obtaining a written request from the employee(s) who chooses to waive the meal period.

If, at some later date, the employee(s) wishes to receive a meal period, any agreement would no longer be in effect. Employees must still receive a rest period of at least ten minutes for each four hours of work.

An employer can refuse to allow the employee to waive the meal period and require that an employee take a meal period.

#### **9. What is the rest period requirement?**

Employees shall be allowed a rest period of not less than ten minutes on the employer's time in each four hours of working time. The rest break must be allowed no later than the end of the third working hour. Employees may not waive their right to a rest period.

#### **10. What is a rest period?**

The term "rest period" means to stop work duties, exertions, or activities for personal rest and relaxation. Rest periods are considered hours worked. Nothing in this regulation prohibits an employer from requiring employees to remain on the premises during their rest periods. The term "on the employer's time" is considered to mean that the employer is responsible for paying the employee for the time spent on a rest period.

#### **11. When must rest periods be scheduled?**

The rest period of time must be scheduled as near as possible to the midpoint of the four hours of working time. No employee may be required to work more than three consecutive hours without a rest period.

#### **12. What are intermittent rest periods?**

Employees need not be given a full 10-minute rest period when the nature of the work allows intermittent rest periods equal to ten minutes during each four hours of work. Employees must be permitted to start intermittent rest breaks not later than the end of the third hour of their shift.

An "intermittent rest period" is defined as intervals of short duration in which employees are allowed to relax and rest, or for brief personal inactivities from work or exertion. A series of ten one-minute breaks is not sufficient to meet the intermittent rest break requirement. The nature of the work on a production line when employees are engaged in continuous activities, for example, does not allow for intermittent rest periods. In this circumstance, employees must be given a full ten-minute rest period.

**13. How do rest periods apply when employees are required to remain on call during their rest breaks?**

In certain circumstances, employers may have a business need to require employees to remain on call during their paid rest periods. This is allowable provided the underlying purpose of the rest period is not compromised. This means that employees must be allowed to rest, eat a snack or drink a beverage, make personal telephone calls, attend to personal business, close their door to indicate they are taking a break, or make other personal choices as to how they spend their time during their rest break. In this circumstance, no additional compensation for the 10-minute break is required. If they are called to duty, then it transforms the on-call time to an intermittent rest period and they must receive the remainder of the 10-minute break during that four-hour work period.

**14. May an employer obtain a variance from required meal and rest periods?**

Employers who need to change the meal and rest period times from those provided in WAC 296-126-092 due to the nature of the work may, for good cause, apply for a variance from the department. The variance request must be submitted on a form provided by the department, and employers must give notice to the employees or their representatives so they may also submit their written views to the department. See ES.C.9, Variances.

**15. May a Collective Bargaining Agreement negotiate meal and rest periods that are different from those required by WAC 296-126-092?**

No. The requirements of RCW 49.12 and WAC 296-126-092, establish a minimum standard for working conditions for covered employees. Provisions of a collective bargaining agreement (CBA) covering specific requirements for meal and rest periods must be least equal to or more favorable than the provisions of these standards, with the exception of public employees and construction employees covered by a CBA. See Administrative Policy ES.A.6 and/or ES.C.1.



ADMINISTRATIVE POLICY

STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES  
EMPLOYMENT STANDARDS

**TITLE: MEAL AND REST PERIODS  
FOR NONAGRICULTURAL WORKERS  
AGE 18 AND OVER**

**NUMBER: ES.C.6**

**REPLACES: ES-026**

**CHAPTER: RCW 49.12  
WAC 296-126-092**

**ISSUED: 1/2/2002**

**REVISED: 6/24/2005**

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An "intermittent rest period" is defined as intervals of short duration in which employees are allowed to relax and rest, or for brief personal inactivities from work or exertion. A series of ten one-minute breaks is not sufficient to meet the intermittent rest break requirement. The nature of the work on a production line when employees are engaged in continuous activities, for example, does not allow for intermittent rest periods. In this circumstance, employees must be given a full ten-minute rest period.

**13. How do rest periods apply when employees are required to remain on call during their rest breaks?**

In certain circumstances, employers may have a business need to require employees to remain on call during their paid rest periods. This is allowable provided the underlying purpose of the rest period is not compromised. This means that employees must be allowed to rest, eat a snack or drink a beverage, make personal telephone calls, attend to personal business, close their door to indicate they are taking a break, or make other personal choices as to how they spend their time during their rest break. In this circumstance, no additional compensation for the 10-minute break is required. If they are called to duty, then it transforms the on-call time to an intermittent rest period and they must receive the remainder of the 10-minute break during that four-hour work period.

**14. May an employer obtain a variance from required meal and rest periods?**

Employers who need to change the meal and rest period times from those provided in WAC 296-126-092 due to the nature of the work may, for good cause, apply for a variance from the department. The variance request must be submitted on a form provided by the department, and employers must give notice to the employees or their representatives so they may also submit their written views to the department. See ES.C.9, Variances.

**15. May a Collective Bargaining Agreement negotiate meal and rest periods that are different from those required by WAC 296-126-092?**

No. The requirements of RCW 49.12 and WAC 296-126-092, establish a minimum standard for working conditions for covered employees. Provisions of a collective bargaining agreement (CBA) covering specific requirements for meal and rest periods must be least equal to or more favorable than the provisions of these standards, with the exception of public employees and construction employees covered by a CBA. See *Administrative Policy* ES.A.6 and/or ES.C.1.