Published under s. 35.93, Wis. Stats., by the Legislative Reference Bureau.

Chapter DWD 274

HOURS OF WORK AND OVERTIME

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History: Chapter Ind 74 as it existed on March 31, 1977 was repealed and a new chapter Ind 74 was created effective April 1, 1977. Chapter Ind 74 was renumbered chapter ILHR 274 under s. 13.93 (2m) (b) 1., Stats., Register, February, 1996, No. 482. Chapter ILHR 274 was renumbered chapter DWD 274 under s. 13.93 (2m) (b) 1., Stats., and corrections were made under s. 13.93 (2m) (b) 6. and 7., Stats., Register, May, 1997, No. 497.

DWD 274.01 Definitions. (1) "Day" means a calendar day or a period of 24 consecutive hours.

(2) "Week" means a calendar week or a regular reoccurring period of 168 hours in the form of 7 consecutive 24 hour periods.

(3) "Regular" time means 40 hours of work per week.

(4) "Overtime" means hours in excess of 40 hours of work per week.

(5) "Mercantile" means "pertaining to merchants or trade," and is synonymous with the word commercial. Commercial is viewed with regard to profit or designed for profit; designed for mass appeal, emphasizing skill and subjects useful in business. "Trade" means the business or work in which one engages regularly, an occupation requiring manual or mechanical skill; the persons engaged in an occupation, business, or industry, dealings between persons or groups; the business of buying and selling or bartering commodities or services; to do business with, to have dealings, to give one thing in exchange for another.

History: Cr. Register, March, 1977, No. 255, eff. 4-1-77; am. (1) to (4) and cr. (5), Register, December, 1980, No. 300, eff. 1-1-81; correction in (3) and (4) made under s. 13.93 (2m) (b) 7., Stats., Register, February, 1996, No. 482; CR 03-053: am. (3) and (4) Register November 2003 No. 575, eff. 12-1-2003.

DWD 274.015 Applicability of chapter. Pursuant to s. 103.01 (1), Stats., employees employed in manufactories, mechanical or mercantile establishments, beauty parlors, laundries, restaurants, confectionary stores, telegraph or telephone offices or exchanges or express or transportation establishments, hotels, and by the state, its political subdivisions and any office, department, independent agency, authority, institution, association, society or other body in state or local government created or authorized to be created by the constitution or any law, including the legislature and the courts, are covered by this chapter. Employees employed in domestic service in a household by a household are not subject to this chapter.

History: Cr. Register, December, 1980, No. 300, eff. 1-1-81; emerg. am. eff. 12-18-90; am. Register, August, 1991, No. 428, eff. 9-1-91; CR 03-053: am. Register November 2003 No. 575, eff. 12-1-2003.

DWD 274.02 Hours of work. (1) No person shall be employed or be permitted to work in any place of employment or at any employment for such period or periods of time during any day, night or week as shall be dangerous or prejudicial to the life, health, safety or welfare of such person.

(2) It is recommended that each employer allow each employee, 18 years of age or over, at least 30 minutes for each meal period reasonably close to the usual meal period time (6:00 a.m., 12:00 noon, 6:00 p.m. or 12:00 midnight) or near the middle of a shift. Shifts of more than 6 consecutive hours without a meal period should be avoided.

Note: The above meal period requirements are mandatory for minors under 18 years of age.

(3) The employer shall pay all employees for on-duty meal periods, which are to be counted as work time. An on-duty meal period is a meal period where the employer does not provide at least 30 minutes free from work. Any meal period where the employee is not free to leave the premises of the employer will also be considered an on-duty meal period.

History: Cr. Register, March, 1977, No. 255, eff. 4-1-77; cr. (3), Register, February, 1992, No. 434, eff. 3-1-92.

DWD 274.03 Overtime pay. Except as provided in s. DWD 274.08, each employer subject to this chapter shall pay to each employee time and one-half the regular rate of pay for all hours worked in excess of 40 hours per week.

History: Cr. Register, March, 1977, No. 255, eff. 4-1-77; reprinted to correct printing error, Register, April, 1977, No. 256; am. Register, December, 1980, No. 300, eff. 1-1-81; emerg. am. eff. 12-18-90; am. Register, August, 1991, No. 428, eff. 9-1-91.

DWD 274.04 Exemptions. Except as provided in s. DWD 274.08, each employer subject to ch. DWD 274 shall be exempt from the overtime pay requirements in s. DWD 274.03 and these exemptions shall be interpreted in such a manner as to be consistent with the Federal Fair Labor Standards Act and the Code of Federal Regulations as amended, relating to the application of that act to all issues of overtime in respect to the following employees:

(1) Persons whose primary duty consists of administrative, executive or professional work.

(a) "Executive" means an employee employed in a bona fide executive capacity who meets the following criteria:

1. Whose primary duty consists of the management of the enterprise in which they are employed or of a customarily recognized department of subdivision thereof; and

2. Who customarily and regularly directs the work of 2 or more other employees therein; and

3. Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

4. Who customarily and regularly exercises discretionary powers; and

5. Who does not devote more than 20%, or in the case of an employee of a retail or service establishment who does not devote as much as 40%, of their hours of work in the workweek of activities which are not directly and closely related to the performance of the work described in subds. 1. through 4. provided, that this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically sepa-

rated branch establishment, or who owns at least a 20% interest in the enterprise in which he is employed; and

6. Who is compensated for their services on a salary basis at a rate of not less than $700 per month.

(b) "Administrative" means an employee employed in a bona fide administrative capacity who meets the following criteria:

1. Whose primary duty consists of the performance of office or nonmanual work directly related to management policies or general business operations of their employer or their employer's customers, or

2. Who customarily and regularly exercises discretion and independent judgment; and

3. a. Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity; or

b. Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

c. Who executes under only general supervision special assignments and tasks; and

4. Who does not devote more than 20%, or in the case of an employee of a retail or service establishment who does not devote as much as 40%, of their hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in subds. 1. through 3.; and

5. Who is compensated for their services on a salary or fee basis at a rate of not less than $700 per month.

(c) "Professional" means an employee employed in a bona fide professional capacity who meets the following criteria:

1. Whose primary duty consists of the performance of:

a. Work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or

b. Work that is original and creative in character in a recognized field of artistic endeavor (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 invention, imagination, or talent of the employee, or

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 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% of their hours worked in the workweek to activities which are not an essential part of and necessarily incidental to the work described in subs. (1) through (3); and

5. Who is compensated for services on a salary or fee basis at a rate of not less than $750 per month.

(2) An employee who meets all of the following conditions:

(a) The employee's primary duty, as determined under 29 CFR 541.500 (b), is any of the following:

1. Making sales, as defined under 29 USC 203 (k).

2. Obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer.

(b) The employee is customarily and regularly engaged away from the employer's place of business, as described under 29 CFR 541.502, in performing the employee's primary duty described under par. (a).

(3) Higher paid commission employees of retail and service establishments if a) 50% of earnings is from commission, and b) time and one-half of minimum wage is received for all hours worked.

(4) Drivers, driver's helpers, loaders or mechanics of a motor carrier or a private or contract carrier who are covered under the provisions of section 204 of the Motor Carrier Act 1935 as amended. Any employee of an employer engaged in the operation of a common carrier by rail and subject to the provision of Part I of the Interstate Commerce Act as amended and any employee of a carrier by air subject to the provision of the Railway Labor Act as amended.

(5) Drivers of taxi cabs.

(6) Time spent in related classroom instruction by indentured apprentices need not be counted as work time for the purpose of computing overtime.

(7) Parts persons, salespersons, service managers, service writers, or mechanics selling or servicing automobiles, trucks, farm implements, trailers, boats, motorcycles, snowmobiles, other recreational vehicles or aircraft, when employed by a nonmanufacturing establishment primarily engaged in selling such vehicles to ultimate purchasers.

(8) Any employee employed by an establishment which is an amusement or recreational establishment, if a) it does not operate for more than 7 months in any calendar year, or b) if during the preceding calendar year, its average receipts for any 6 months of such year were not more than $33^1/_3\%$ of its average receipts for the other 6 months of such year. This rule shall be construed in such manner as to be in conformity with any comparable federal statute or regulation.

(9) Persons employed in agriculture including farming in all its branches, including, among other things, 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, furbearing 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.

(10) Employees employed in any motion picture theater.

(11) Employees of a hospital or other institutions primarily engaged in the care of the sick, the aged, the mentally ill or persons with developmental disabilities who reside on the premises may have an agreement between the employer and the employee before performance of the work for the purpose of overtime computation. A work period of 14 consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation if time and one-half the regular rate of pay is paid for all hours worked in excess of eight hours per day and 80 hours within the 14 day period.

(12) Employees employed as a driver or driver's helper making local deliveries, who are compensated for such employment on the basis of trip rates or other delivery payment plan, if each plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them.

(13) Employees employed in any funeral establishment.

(14) Any employee employed in the following forestry or lumbering operations, if the number of employees employed by the employer in the operation does not exceed 8:

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(a) Planting or tending trees, cruising, surveying or felling timber;

(b) Preparing logs or other forestry products; or

(c) Transporting logs or other forestry products to a mill, processing plant or railroad or other transportation terminal.

(15) Any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than $27.63 an hour, and whose primary duty is one of the following:

(a) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications.

(b) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications.

(c) The design, documentation, testing, creation or modification of computer programs related to machine operating systems.

(d) A combination of the duties described in pars. (a), (b) and (c), the performance of which requires the same level of skills.

Note: This provision is intended to be interpreted in a manner consistent with 29 USC 213(a)(17).

History: Cr. Register, March, 1977, No. 255, eff. 4-1-77; cr. (9), Register, February, 1980, No. 290, eff. 3-1-80; emerg. cr. (10), eff. 6-27-80; am. (intro.), r. (7), renum. (8) and (9) to be (7) and (8) and am. (7), cr. (9) to (13), Register, December, 1980, No. 300, eff. 1-1-81; cr. (14), Register, March, 1983, No. 327, eff. 4-1-83; am. (intro.), Register, August, 1991, No. 428, eff. 9-1-91; corrections made under s. 13.93 (2m) (b) 7., Register, February, 1996, No. 482; cr. (15), Register, May, 1997, No. 497, eff. 6-1-97; CR 03-053: r. and recr. (9) Register November 2003 No. 575, eff. 12-1-2003; 2017 Wis. Act 340: r. and recr. (2) Register April 2018 No. 748, eff. 5-1-18.

DWD 274.045 Interpretation of hours worked. The provisions of s. DWD 272.12 apply to the interpretation of hours worked under this chapter.

History: Cr. Register, February, 1992, No. 434, eff. 3-1-92; correction made under s. 13.93 (2m) (b) 7., Register, February, 1996, No. 482.

DWD 274.05 Waiver or modification. Except as provided in s. DWD 274.08, where a collectively bargained agreement exists, the department may consider the written application of labor and management for a waiver or modification to the requirements of this chapter based upon practical difficulties or unnecessary hardship in complying therewith. If the department determines that in the circumstances existing compliance with this chapter is unjust or unreasonable and that granting such waiver or modification will not be dangerous or prejudicial to the life, health, safety or welfare of the employees, the department may grant such waiver or modification as may be appropriate to the case.

History: Cr. Register, March, 1977, No. 255, eff. 4-1-77; am. Register, August, 1991, No. 428, eff. 9-1-91; am. Register, February, 1992, No. 434, eff. 3-1-92; correction made under s. 13.93 (2m) (b) 7., Register, February, 1996, No. 482.

DWD 274.06 Records. Except as provided in s. DWD 274.08, each employer shall keep permanent records for at least 3 years, available for inspection and transcription by a duly authorized deputy of the department, showing the name and address of each employee, the hours of employment and wages of each and such other records as the department may require.

History: Cr. Register, March, 1977, No. 255, eff. 4-1-77; am. Register, August, 1991, No. 428, eff. 9-1-91; correction made under s. 13.93 (2m) (b) 7., Register, February, 1996, No. 482.

DWD 274.07 Penalties. Any employer who violates order s. DWD 274.02, 274.03 or 274.06 shall be subject to the penalties provided in ss. 103.005 and 109.11, Stats. Each day of violation shall constitute a separate and distinct offense.

History: Cr. Register, March, 1977, No. 255, eff. 4-1-77; correction made under s. 13.93 (2m) (b) 7., Register, February, 1996, No. 482; correction made under s. 13.92 (4) (b) 7., Stats., Register March 2013 No. 687.

DWD 274.08 Coverage of public employees. (1) This section applies to employees of the state, its political subdivisions, and any office, department, independent agency, authority, institution, association, society or other body in state or local government created or authorized to be created by the constitution or any law, including the legislature and the courts.

(2) The provisions of ss. DWD 274.03 through 274.06 regarding overtime pay, exemptions, and records shall not be applicable to employees identified in sub. (1). The provisions applicable to employees identified in sub. (1) shall be the provisions of the federal Fair Labor Standards Act, 29 CFR Part 553, the regulations of the U.S. department of labor relating to the application of the Act to employees of state and local governments, and other federal regulations relating to the application of the Act to overtime issues affecting employees of state and local governments.

(3) Where there is a valid collective bargaining agreement in effect as of December 18, 1990, the provisions of this chapter shall not become effective for employees identified in sub. (1) until one day after expiration of the collective bargaining agreement, unless it is otherwise modified prior to expiration.

History: Emerg. cr. eff. 12-18-90; cr. Register, August, 1991, No. 428, eff. 9-1-91; correction in (2) made under s. 13.93 (2m) (b) 7., Register, February, 1996, No. 482.