

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**

Form #2

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2015 JUN 26 P 3:01

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: West Virginia Division of Labor TITLE NUMBER: 42

RULE TYPE: Legislative CITE AUTHORITY: W. Va. Code §§21-5C-1, 21-5C-4 and 21-5C-6

AMENDMENT TO AN EXISTING RULE: YES ☒ NO ☐

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 8

TITLE OF RULE BEING AMENDED: Minimum Wages and Maximum Hours Standards Regulations

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON July 27, 2015 AT 5:00 p.m. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

John R. Junkins, Acting Commissioner

West Virginia Division of Labor
State Capitol Complex

Building 6, Room B-749
Charleston, WV 25305

or by email: john.r.junkins@wv.gov

THE ISSUES TO BE HEARD SHALL BE
LIMITED TO THIS PROPOSED RULE.



Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

WEST VIRGINIA DIVISION OF LABOR

749-B Building 6 , Capitol Complex • Charleston, West Virginia 25305

Phone (304) 558-7890 • Fax (304) 558-2273

www.wvlabor.org

EARL RAY TOMBLIN
Governor



JOHN R. JUNKINS
Acting Commissioner

Statement of Facts and Circumstances

and

Summary of Proposed Amendments to Title 42, Series 8

Minimum Wages, Maximum Hours, and Overtime Compensation

The current rule, "Minimum Wages and Maximum Hours Standards Regulations," Title 42, Series 8, has been in effect since 1982. Revisions are needed to incorporate the Legislature's 2014 amendments to Sections 1, 2, and 4 of the Minimum Wage and Maximum Hours Standards Act, and to reflect the Division of Labor's current practices with regard to enforcement of the Act.

The proposed rule includes the following revisions and amendments:

- Section 3 in the proposed rule includes many new definitions, most of which clarify terms used in Sections 8, 11 and 12 of the rule. These Sections concern employee exemptions from the statute's coverage, criteria for the determination of compensable time, and criteria for employer credits against the minimum wage. Definitions in the current rule that are in the statute have been deleted.
- Section 3 on enforcement has been deleted in the proposed rule because the enforcement provisions are set forth in the statute.
- Sections 5 and 6 in the proposed rule incorporate the 2014 legislative amendments to the definition of employer in W. Va. Code 21-5C-1(d). Section 5 sets forth the criteria for determining when an employer is subject to the minimum wage provisions of the statute. Section 6 sets forth the criteria for determining when an employer is exempt from the overtime provisions of the statute.
- Section 6 concerning petitions for exceptions to record-keeping requirements has been deleted from the proposed rule because there is no authority for such an exception in the statute.
- Section 7 in the proposed rule expressly prohibits an employer from having an employee "volunteer" his or her services in any activity that is a regular part of the employee's job.
- Section 8 in the proposed rule sets forth the criteria for determining when an employee is exempt from the statute's coverage as set forth in the definition of "employee" in W. Va. Code §21-

5C-1(f). Exemptions for computer professionals, creative professionals, per diem employees of the Legislature, and seasonal white water rafting employees have been added to the proposed rule.

- Section 9 in the proposed rule on record-keeping requirements and the contents of employee records updates provisions that were in Sections 4, 5 and 11 and excludes items that are not required by the statute.

- Section 11 in the proposed rule on the determination of compensable time updates and clarifies provisions that were in Section 9.

- Section 12 in the proposed rule on employer credits has been revised to incorporate the 2014 statutory amendments on employer tip credits, which changed from a 20% credit to the employer to a 70% credit. The employer meal credit has been increased from \$1.00 per day to \$4.00 per day and from \$0.125 an hour to \$0.50 an hour.

- Sections 13 and 14 in the proposed rule concerning employee claims for unpaid wages or other violations of the statute expand the provisions that were in Section 12, and set forth the Division's current practices with regard to the investigation of employee claims.

- Section 13 concerning amendments to regulations has been deleted because these provisions have been superceded by the state Administrative Procedures Act.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Minimum Wages and Maximum Hours Standards Regulations

Type of Rule: ☒ Legislative ☐ Interpretive ☐ Procedural

Agency: West Virginia Division of Labor

Address: State Capitol Complex
Building 6, Room B-749
Charleston, WV 25305

Phone Number: 304.558.7890 x 58018 Email: john.r.junkins@wv.gov

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

The proposed rule will have no impact on the costs or revenues of state government.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
2. Estimated Total Revenues	0.00	0.00	0.00

Rule Title: Minimum Wages and Maximum Hours Standards Regulations

Rule Title:

Minimum Wages and Maximum Hours Standards Regulations

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

N/A.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

N/A.

Date: 6-26-2015

Signature of Agency Head or Authorized Representative

Joshua W. Jans

TITLE 42
LEGISLATIVE RULE
DIVISION OF LABOR

FILED

2015 JUN 26 P 3:01

SERIES 8
MINIMUM WAGES, AND MAXIMUM HOURS,
STANDARDS REGULATIONS
AND OVERTIME COMPENSATION

OFFICE WEST VIRGINIA
SECRETARY OF STATE

§42-8-1. General.

1.1. Scope. -- ~~These This legislative rules and regulations for Minimum Wage and Maximum Hours Standards for Employees are promulgated pursuant to article five-c, chapter twenty-one of the Code of~~ sets forth criteria for employer and employee exemptions, determination of compensable time, employer credits and all other matters concerning minimum wages, maximum hours, and overtime compensation pursuant to W. Va. Code §21-5C-1, et seq., as amended, under authority of W. Va. Code §21-5C-6.

1.2. Authority. -- W. Va. Code §§ 21-5C-1(h), 21-5C-4 and 21-5C-6.

1.3. Filing Date. -- ~~December 31, 1982.~~

1.4. Effective Date. -- ~~December 31, 1982.~~

~~1.5. Severability. -- If any provisions of these Regulations or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of these Regulations which can be given effect without the invalid provision or application and to this end the provisions of these Regulations are severable.~~

§42-8-2. Application and Enforcement.

2.1. This rule applies to all persons, employers, and employees governed or otherwise within the purview of the Minimum Wages and Maximum Hours Standards for Employees Act, W. Va. Code §21-5C-1, et seq.

2.2. Enforcement. The enforcement of this rule is vested with the West Virginia Division of Labor.

§42-8-2 3. Definitions.

~~2.1. 3.1. "Act" means the Minimum Wage and Maximum Hours Standard Act for Employees Act, W. Va. Code §21-5C-1, et seq. passed February 8, 1966, and in effect ninety (90) days from passage, and amended March 8, 1980, to be effective June 1, 1980.~~

3.2. "Agriculture" means farming in all its branches, including the cultivation of the soil, dairy farming, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodity, the raising of livestock, bees, fur-bearing animals, or poultry, or any practice performed by a farmer or on a farm as a part of farming operations, including forestry or lumbering operations.

~~2.2. "Appeal" means an application to the Commission for corroboration or decision.~~

~~2.3. "Authorized Representative" means, and includes, the director and employees of the Labor Division under his or her supervision.~~

3.3. "Bona fide sleep period," for an employee who is on duty for twenty-four (24) or more consecutive hours, means a time period of eight (8) hours of uninterrupted sleep in adequate sleeping quarters provided by the employer.

3.4. "Claimant" means an employee or former employee who submits a request for assistance to the Division, alleging that he or she is owed unpaid minimum wages, overtime wages, or alleging any other violation of the Act or this rule.

3.5. "Commission" means a fee paid by an employer to an employee for transacting the employer's business or for performing a service for the employer.

~~2.4. "Commissioner" means the Commissioner of Labor or his or her duly authorized representatives.~~

3.6. "Compensable time" means the time an employer requires, permits, or suffers an employee to work and for which the employee must be paid.

3.7. "Customarily and regularly" means work normally performed during every workweek, but does not include isolated or one-time tasks.

3.8. "Customarily recognized department or subdivision" means a unit within an employer's organization with permanent status and functions.

3.9. "Directly related to management or general business operations" means directly assisting with or overseeing the running or servicing of an employer's business, including financial management, quality control, purchasing and procurement, advertising and marketing research, safety and health, personnel management and human resources, labor relations, public relations, government relations, computer network and database administration, legal and regulatory compliance, and similar activities.

~~2.6. 3.10. "Director" means the Wage and Hour Section Director appointed by the Commissioner as administrative head director of the Wage and Hour Section, or his or her designee.~~

~~2.5. "Division" means the West Virginia Division of Labor.~~

~~2.7. "Diversified Employment" means work performed as both service and nonservice on any day.~~

3.11. "Director's review" means, upon a claimant's request, and subject to the Director's approval, a review of the results of the Division's investigation by the Director.

~~2.12. "The Law" or "This Law" means the West Virginia Minimum Wage and Maximum Hours Standards Act as embraced in W. Va. Code §21-5C-1 et seq.~~

3.12. "Discretion and independent judgment" means having the authority to: formulate, affect, interpret, or implement an employer's management policies or operating practices; carry out major assignments in conducting the operations of the business; perform work that affects business operations to a substantial degree; commit the employer in matters that have significant financial impact; waive or deviate from established policies and procedures without prior approval; and similar activities.

3.13. "Division" means the West Virginia Division of Labor.

3.14. "Dual job employee" means an employee who performs work as both a service, or tipped, employee and a non-service, or non-tipped, employee for one employer.

~~2.10. "Employ" means to hire or permit to work.~~

~~2.8. "Employee" includes any individual employed by an employer.~~

~~2.9. "Employer" means the State of West Virginia, its agencies, departments and all its political subdivisions, any individual, partnership, association, public or private corporation, or any person or group of persons acting directly or indirectly in the interest of any employer in relation to an employee, and who employs during any calendar week six (6) or more employees in any one (1) separate, distinct and permanent location or business establishment, but shall not include an employer if eighty percent (80%) of his or her employees are subject to any federal act relating to minimum wage, maximum hours and overtime compensation.~~

3.15. "Engaged to wait" means the time an employer suffers, permits or requires an employee to remain at work and under the employer's direction and control, even if the employee is not performing work-related tasks.

3.16. "Exempt employee" means an employee who is not covered by the Act and this rule.

3.17. "Fee basis" means a predetermined agreed amount of compensation for a single job, regardless of the amount of time required to complete the job.

3.18. "Field of science or learning" means and includes law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and

biological sciences, pharmacy and other occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but is not in a field of science or learning.

3.19. "Final order" or "Commissioner's final order" means an order issued by the Commissioner which the employer either does not appeal pursuant to W. Va. Code 29A-5-4, or which has been upheld after the employer has exhausted his or her appeal rights pursuant to W. Va. Code §§29A-5-4 and 29A-6-1.

2.11. "Full-time Employee" means any employee other than a "Student Worker" as defined in Subsection 2.17 of this section.

3.20. "Full-time student" means a student who is enrolled in the number of courses, credits, or hours established by the school to qualify as full-time.

3.21. "Hours worked" means, in addition to the Act's definition, the time an employee is under an employer's direction and control, even if the employee is not performing work-related tasks.

3.22. "Making sales" means and includes the selling, exchanging, contracting to sell, consigning for sale, shipping for sale or other similar disposition of an employer's merchandise or services.

3.23. "Management" means and includes such activities as interviewing, selecting, and training employees; setting and adjusting of employees' rates of pay and work schedules; directing the work of employees; maintaining production or sales records for supervising and evaluating employees' productivity and efficiency; recommending promotions or other changes in employees' status; handling employee complaints and grievances; disciplining employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees and property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

3.24. "Matters of significance" means a level of substantial importance or consequence of the work performed.

3.25. "Non-exempt employee" means an employee who is covered by the Act and this rule.

~~2.13-~~ 3.26. "Non-service Employee" "Non-service employee" means an employee whose duties include preparation or cooking of food or beverage, washing of dishes, maintenance or cleaning of premises and all others who do not customarily receive tips or gratuities in connection with his or her work.

3.27. "Non-work time" means a time period of at least 30 minutes during which an employer

has completely relieved an employee from duty and the employee has not been made to wait by the employer.

3.28. "On-call time" means the time an employer requires an employee to remain on, or in close proximity to, the employer's premises, or at his or her home, so that the employee is not free to use the time as he or she wishes.

3.29. "Overtime" means compensation at one and one-half times a non-exempt employee's regular rate of pay for all time worked in excess of forty (40) hours in the employer's established workweek.

3.30. "Pay period" means a defined time frame established by an employer for which an employee receives a paycheck.

3.31. "Particular weight" means that an executive employee's recommendations regarding the hiring, firing, promotion or other changes in status of subordinate employees are frequently requested by, made to, and relied upon by the executive's superior or higher level manager.

2.14. "Part-time Basis" 3.32. "Part-time basis" means a student worker who is employed employment of twenty-four (24) hours or less in a workweek.

3.33. "Political subdivision" means and includes a county, city, township, village, school, sanitation, utility, irrigation, drainage and flood-control districts, and similar governmental entities that are created or authorized by statute.

3.34. "Primary duty" means an employee's principal, main, major or most important duty, as determined by the character of the employee's job as a whole.

3.35. "Regular rate" means the compensation an employer pays to a non-exempt employee for his or her work for no more than forty (40) hours worked in the employer's established workweek.

2.15. "Regulations" means regulations as defined by Section 1.1 of these rules:

3.36. "Request for Assistance" or "RFA" means a form provided by the Division and submitted by a claimant alleging that he or she is owed unpaid wages or alleging any other violation of the Act or this rule.

3.37. "Salary" means a predetermined fixed amount of pay that constitutes an employee's compensation for a pay period, and which is not subject to a reduction based on the quality or quantity of work the employee performs.

3.38. "Seasonal employee" means an employee who works less than seven (7) months in any one calendar year.

~~2.16. "Service Employee"~~ 3.39. "Service employee" means a tipped employee an individual who customarily receives tips or gratuities in connection with his or her work.

3.40. "Status conference" means an employer's informal meeting with the Division regarding the status of the Division's investigation into an alleged violation of the Act or this rule.

~~2.17. "Student worker" means an individual who has matriculated and participates in regular and prescribed courses at any recognized school, college or university.~~

3.41. "Volunteer" means a person who performs or offers to perform a service for an educational, charitable, religious, fraternal, or similar non-profit organization without compensation, and who is not otherwise an employee of the organization.

~~2.18. "Wage" means compensation due an employee by reason of his or her employment.~~

3.42. "Work day" means any continuous twenty-four (24) hour period within a workweek.

3.43. "Work requiring advanced knowledge" means work that is predominantly intellectual and requires the consistent exercise of discretion and judgment.

~~2.19. "Workweek" means a regular recurring period of one hundred sixty-eight (168) hours in the form of seven (7) consecutive twenty-four (24) hour periods.~~

~~§42-8-3. Enforcement:~~

~~3.1. These regulations shall be enforced as prescribed by W. Va. Code §21-5C et seq.~~

~~3.2. Powers of the Commissioner.~~

~~(a) The Commissioner is charged with the administration of the West Virginia Minimum Wage and Maximum Hours Standards Act.~~

~~(b) The Commissioner may make and amend, alter or repeal general rules and regulations of procedure for carrying into effect all provisions of the Act, for obtaining statistical data respecting wages and hours, and to prescribe means, methods and practices to make effective such provisions.~~

~~(c) The Commissioner may make such investigations and inspections and take any actions as authorized by the Act which in his or her judgment are necessary to administer and enforce the Act and these regulations.~~

~~3.3. Inspection by division.~~

~~(a) The Wage and Hour Section of the West Virginia Division of Labor is designated~~

as the Commissioner's representative for the enforcement of these regulations; it shall have authority to make such inspections and to take such other actions as are required to enforce these regulations.

~~_____ (b) The Commissioner's representative shall, during reasonable hours, make such inspections of places of employment within this State to determine compliance with the law and these regulations:~~

~~_____ 3.4. Penalty for violation. -- Any person, firm or corporation violating any provisions of these Rules and Regulations shall be subject to the penalties prescribed by W. Va. Code §21-5C-7:~~

§42-8-4. Establishment of a Workweek; Required Employee Notification of Changes; Required Posting of the Minimum Wage Poster.

4.1. An employer shall establish a workweek for all employees, consisting of seven (7) consecutive work days, totaling one hundred sixty-eight (168) consecutive hours.

4.2. A employer may establish a workweek that begins on any day of the week and at any hour of the day.

4.3. If an employer alters an employee's workweek, the employer shall provide the employee with at least one full pay period's notice of the change.

~~4.4. Posting of notices. -- Every employer, as defined in subsection (c), section one of the Act, or who as specified employee exemptions, as defined as subsection (f) of section one of the Act shall post and keep posted such notices pertaining to the applicability of the Act, as shall be prescribed and furnished by the Wage and Hour Section in conspicuous places in every establishment where employees are employed so as to permit them to observe readily such notices:~~

~~11.1. Notification to employees and posting of notices required. -- Every employer employing employees as defined by the law and these regulations shall notify employees and post notices as required by Section 4.2 of these regulations.~~

4.4. An employer shall keep posted in a place accessible to all employees the Minimum Wage poster prepared and provided by the Commissioner.

§42-8-5. Employers Subject to the Minimum Wage Provisions of the Act.

5.1. The Division shall determine whether an employer is subject to the minimum wage provisions of the Act set forth in W. Va. Code §21-5C-2 and this rule on a case-by-case basis according to the actual job duties performed by each employee.

5.2. An employer who employs six (6) or more non-exempt employees during a calendar week in any one separate, distinct and permanent location shall pay the non-exempt employees at least the minimum wage as required in W. Va. Code §21-5C-2.

5.2.1. If an employer has employees working at more than one separate, distinct and permanent location, the number of non-exempt employees at each location shall be considered separately.

5.2.2. If an employer has employees working at a location that is temporary and of limited duration, such as a construction site, the employees shall be treated as working at the employer's permanent location.

§42-8-6. Petition for exceptions: Employers Exempt from the Maximum Hours and Overtime Provisions of the Act.

~~6.1. Written petition. -- Any employer who, due to peculiar conditions under which he or she must operate, desires authority to maintain records in a manner other than required in this part, or to be relieved of preserving certain records for the period specified herein, may submit a written petition to the Commissioner setting forth the authority desired and reason thereof.~~

~~6.2. Commissioner determines relief sought. -- The Commissioner may grant the authority prayed for if it does not hamper or interfere with the enforcement of the provisions of the Act; such authority, however, may be limited as the Commissioner determines as requisite, and subject, also, to subsequent revocation.~~

~~6.3. Employer must comply with regulations during adjudication period. -- The submission of a petition or the delay of the Commissioner in acting upon such petition shall not relieve any employer from any obligations to comply with regulations of this Act. However, the Commissioner shall give notice of petition with due promptness.~~

6.1. The Division shall determine whether an employer is exempt from the maximum hours and overtime provisions of the Act set forth in W. Va. Code §21-5C-3 and this rule on a case-by-case basis according to the Act's provisions and the provisions of any federal act relating to maximum hours and overtime compensation.

6.2. The following employers are exempt from the provisions of the Act as long as 80% or more of their employees are covered by any federal act relating to maximum hours and overtime compensation:

6.2.1. The State of West Virginia, its agencies, departments and political subdivisions; and

6.2.2. An individual, partnership, association, public or private corporation, or any person or group of persons acting directly or indirectly in the interest of any employer in relation to an employee.

6.3. The Division shall determine whether 80% or more of an employer's employees are

covered by any federal act relating to maximum hours and overtime compensation by considering the actual job duties of each non-exempt employee.

§42-8-7. Employer Use of Employee Volunteers Prohibited.

An employer may not require or permit an employee to volunteer his or her services in any activity that is a normal and regular part of the employee's job duties.

§42-8-8. ~~Specific exemptions and other special requirements.~~ Employee Exemptions from Coverage of the Act.

~~8.1. Records on exempt employees to be kept. -- Every employer operating under the complete exemptions of subsection (c), section one, article five-c, chapter twenty-one of the Act shall maintain and preserve records directly related to payrolls, as heretofore required, and also records shall be maintained and preserved by employers who employ persons defined as employees who are exempted under W. Va. Code §21-5C-1(f):~~

8.1. The Division shall determine whether an employee is covered by the Act and this rule based on the employee's actual, customary and regular job duties that he or she performs during any given workweek, and not based upon the employee's job title.

8.2. Pursuant to W. Va. Code §21-5C-1(f), if an employee is exempt from coverage of the Act and this rule, but spends 50% or more of his or her time performing work during a workweek that is not exempt, the employer shall treat the employee as non-exempt for all hours worked during that workweek.

~~8.2. 8.3. Employees of the United States. -- Any individual employed by the United States. The individuals employed by the federal government means those who receive their wages or salary from any department or agency of the United States government but is not meant to include any employer as defined in W. Va. Code §21-5C-1(c), who, directly or indirectly, performs work for, contracts work (including subcontractors) or, in any manner whatsoever, furnishes employees to any department or agency of the United States government. An employee of the United States is exempt from coverage of the Act as long as he or she is directly employed by an agency or department of the federal government.~~

~~8.3. 8.4. Voluntary service employees. -- Any individual engaged in the activities of any educational, charitable, religious, fraternal or nonprofit organization where the employer-employee relationship does not in fact exist, or where the services rendered to such organizations are on a voluntary basis. An individual who is a volunteer is exempt from coverage of the Act.~~

~~(a) Employer-employee relationship shall be determined thusly: An employee is an individual employed by an employer and to employ means to suffer or permit to work. This definition is very broad and the relationship must be treated as a matter of economic reality, that~~

which is necessarily real as to worker's material resources. There have been very few decisions on an independent contractor relationship, and this Act is not intended to destroy traditional common-law definitions of master and servant. Therefore, the law defines "Employ" as meaning to hire or permit to work:

(b) Educational, charitable, religious, fraternal and nonprofit organizations who fall within the scope of the Act and individuals who render services to such organizations on a voluntary basis are not included under the provisions of the Act. The word "Voluntary" means the action or deed of one's own free will without valuable consideration or legal obligation.

~~8.4. 8.5. Newsboys, shoeshine boys, golf caddies, etc. -- Newsboys, shoeshine boys, golf caddies, pin boys and pin chasers in bowling lanes. These occupations listed as exempt under the provisions of the Act are self-explanatory. An individual who delivers newspapers, shines shoes, caddies at a golf course, or sets pins at a bowling alley is exempt from coverage of the Act.~~

~~8.5. 8.6. Traveling salesmen. -- Traveling salesmen and outside salesmen who are: An individual engaged in making outside sales is exempt from coverage of the Act if he or she meets the following tests:~~

~~(a) 8.6.1. Employed salesmen and outside salesmen who are The employee is customarily and regularly engaged away from their employer's place or places of business; and in:~~

~~(1) Making sales within the meaning of selling, exchanging, contracting to sell, consignment for sale, shipment for sale or other disposition, or~~

~~(2) Obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by a client or customer; and~~

~~(b) Whose hours of work are of a nature other than that described in Section 8.5 of this regulation do not exceed thirty percent (30%) of the hours worked in the workweek by nonexempt employees of the employer: Provided, That the work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work.~~

~~8.6.2. The employee's primary duty is in making sales, or in obtaining orders or contracts for services or for the use of facilities for which a client or customer pays consideration.~~

~~(c) This exemption does not include employees training to become traveling salesmen or outside salesmen who are not actually performing the duties of traveling salesmen or outside salesmen.~~

~~8.6.3. An individual who is training to work in outside sales but who is not independently working on his or her own is not exempt from coverage of the Act.~~

~~8.6. 8.7. Services performed by son, daughter, etc. -- Services performed by an individual in the employ of his or her parent, son, daughter or spouse are exempt. An individual performing services for, or who is otherwise employed by, his or her parent, child, or spouse is exempt from coverage of the Act.~~

~~8.7. 8.8. Professional, administrative or executive employee. -- Any individual employed in a bona fide professional, executive or administrative capacity shall be recorded as exempt if he or she fulfills the duties of such capacity as defined thusly: A learned professional employee is exempt from coverage of the Act if he or she meets all of the following tests:~~

~~(a) A professional employee is an individual whose primary duty consists of the performance of work:~~

~~(1) 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~~

~~(2) 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; and~~

~~(3) Whose work requires the consistent exercise of discretion and judgment in its performance; and~~

~~(4) 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 a given period of time.~~

8.8.1. The employee is compensated on a salary or fee basis at a rate equal to at least \$455.00 per workweek;

8.8.2. The employee's primary duty is the performance of work requiring advanced knowledge;

8.8.3. The advanced knowledge is in a field of science or learning; and

8.8.4. The advanced knowledge is customarily acquired by a prolonged course of specialized intellectual instruction.

8.9. A creative professional employee is exempt from coverage of the Act if he or she meets all of the following tests:

8.9.1. The employee is compensated on a salary or fee basis at a rate equal to at least

\$455.00 per workweek; and

8.9.2. The employee's primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor, such as music, writing, acting, and the graphic arts.

8.10. A computer professional employee is exempt from coverage of the Act if he or she meets all of the following tests:

8.10.1. The employee is compensated either on a salary or fee basis at a rate not less than \$455.00 per workweek or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;

8.10.2. The employee is employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described in subsection 8.10.3; and

8.10.3. The employee's primary duty consists of the following or a combination of the following:

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

8.10.3.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; or

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

~~(b) 8.11. An executive employee is an individual whose primary duty consists of the management of an enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and 8.11. An executive employee is exempt from coverage of the Act if he or she meets all of the following tests:~~

~~8.11.1. The employee is compensated on a salary basis at a rate of at least \$455.00 per workweek;~~

~~8.11.2. The employee's primary duty is the management of the employer's organization, or the management of a customarily recognized department or subdivision of the organization;~~

~~(1) 8.11.3. Who The employee customarily and regularly directs the work of two (2) or more employees therein; and full-time employees or the equivalent of two (2) full-time~~

employees; and

~~(2) 8.11.4. Who~~ The employee has the authority to hire and fire other employees or whose the employee's suggestions and recommendations as to the hiring, and firing, and as to the advancement, and promotion and or any other change of status of other employees ~~will be~~ is given particular weight.

~~(3) Who customarily and regularly exercises discretionary powers.~~

~~(c) 8.12. An administrative employee is an individual whose primary duty consists of the performance of office or nonmanual work directly related to management policies or general business operations of his or her employer or his or her employer's customers; and~~ exempt from coverage of the Act if he or she meets all of the following tests:

8.12.1. The employee is compensated on a salary or fee basis at a rate at least equal to \$455.00 per workweek;

8.12.2. The employee's primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

~~(1) 8.12.3. Who customarily and regularly exercises~~ The employee's primary duty includes the exercise of discretion and independent judgment with respect to the employer's matters of significance.

~~(2) Who regularly and directly assists a proprietor, or an employee employed in bona fide professional, executive or administrative capacity; or~~

~~(3) Who performs under only general supervision work along specialized or technical lines requiring special training, experience or knowledge; or~~

~~(4) Who executes under only general supervision special assignments and tasks provided in Section 8.7(a), (b) and (c), wherein the terms bona fide professional, executive and administrative employees have been defined and qualify under the immunity only in relation to W. Va. Code §21-5C-2 & 3.~~

8.8: 8.13. Employee in on-the-job training- An individual employed for the purpose of on-the-job training is exempt from coverage of the Act for the duration of the training program if he or she meets all of the following tests:

~~(a) "On-the-Job Training" means a complete plan of terms and conditions for the employment and training of individuals which conforms to standards which are-~~

~~(b) Such plan shall be one which is registered, recognized and approved by either the~~

~~area vocational education program as set forth in W. Va. Code §18-2B-1 or the Bureau of Apprenticeship and Training of the United States Department of Labor, or the Commissioner.~~

~~8.13.1. The employee is enrolled in a training program that is registered with and approved by a vocational education program pursuant to W. Va. Code §18-2B-1, et seq., or the Commissioner;~~

8.13.2. The employee is enrolled in a training program that sets forth the terms and conditions for his or her training and employment, and that involves skills that are:

~~(1) 8.13.1.a. Customarily learned in a practical way;~~

~~(2) 8.13.1.b. Clearly identified with and commonly recognized throughout a specific industry or trade; and~~

~~(3) 8.13.1.c. Requires related instruction to supplement the work experience Developed by participation in both classroom instruction and work experience; and~~

~~(4) 8.13.3. The keeping of appropriate records concerning The training program maintains a written record of the employee's time and progress.~~

~~8.9: 8.14. Handicapped person in a sheltered workshop. --- Any person having a physical or mental handicap so severe as to prevent his or her employment or employment training in any training or employment facility other than a nonprofit sheltered workshop. Such a handicapped person whose earning capacity is impaired by such deficiencies may be served in accordance with the recognized rehabilitation program of a nonprofit sheltered workshop for the purpose of employment training. The said rehabilitation program is defined in W. Va. Code §18-10B et seq.. A physically or mentally disabled person is exempt from coverage of the Act if he or she is employed by a nonprofit sheltered workshop or rehabilitation program that is operated pursuant to W. Va. Code §§18-10A-1, et seq. or 18-10B-1, et seq.~~

~~8.10: 8.15. Summer camp worker. --- Any individual employed in a boys or girls summer camp is exempt from coverage of the Act.~~

~~8.11: 8.16. Person over An individual who is at least sixty-two (62) years receiving old and who receives age or survivors benefits from the Social Security Administration is a clearly defined explanation is exempt from coverage of the Act.~~

~~8.12: 8.17. Person engaged in agriculture under the Federal FLSA. --- Any individual employed in agriculture as the word agriculture is defined in the Federal Fair Labor Standards Act of 1938, as amended (29 USC 201 et. seq.). Agriculture includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities defined as agricultural commodities which are defined in subsection (g), section fifteen of the Agricultural~~

~~Marketing Act, as amended, of the Code of the United States. The raising of livestock, bees, fur-bearing animals or poultry and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparations for market, delivery to storage or to market or to carriers for transportation to market is exempt from coverage of the Act.~~

~~8.13: 8.18. Firefighting for a state agency. -- Any individual employed as a firefighter by the state or agency thereof. This does not refer to municipal, county, industrial or similar agencies who employ firemen or firefighters~~ State of West Virginia or one of its agencies is exempt from coverage of the Act.

~~8.14: 8.19. Ushers in theaters. -- Ushers in theaters~~ An individual employed as an usher in a theater is exempt from coverage of the Act.

~~8.15: 8.20. Student worker. -- Any individual employed twenty-four (24) hours or less who is a student in any recognized school or college. A full-time student enrolled in a recognized school or college is exempt from coverage of the Act if he or she is employed on a part-time basis. A full-time student who is employed for more than twenty-four (24) hours during a workweek is not exempt from coverage of the Act for all hours he or she works during that workweek.~~

~~(a) The purpose of this exemption is not to create unfair competitive labor cost advantages nor have the effect of impairing or depressing wage or working standards established for experienced workers for work of a like or comparable character in the industry; and~~

~~(b) An individual so employed shall be bona fide student in a recognized school or college as set forth in W. Va. Code §18 et seq., or similar acts of other states.~~

~~8.16: 8.21. Local or interurban motorbus driver. -- Any individual who is employed by a local or interurban~~ inter-urban motorbus carrier is exempt from coverage of the Act.

~~8.17: 8.22. Salesperson. -- So far as the maximum hours and overtime compensation provisions of this law are concerned, any salesperson, partsperson or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling vehicles to ultimate purchasers: An individual who works in sales or as a mechanic in a non-manufacturing business that sells vehicles, trailers, farm implements or aircraft, and related parts, is exempt from coverage of the Act.~~

~~8.18: 8.23. Employee under the regulations of DOT. -- Any employee with respect to whom the United States Department of Transportation has statutory authority to establish qualifications and maximum hours of service. An employee whose qualifications and maximum hours of service are established by the United States Department of Transportation is exempt from coverage of the Act.~~

8.24. An individual employed on a per diem basis by either body of the West Virginia Legislature, or by any legislative committee or joint committee, is exempt from coverage of the Act.

8.25. An individual employed as a seasonal employee by a commercial whitewater outfitter is exempt from coverage of the Act.

§42-8-4 9. Records to be kept by employers— Record-keeping Requirements; Contents of Employee Records; Employee Pay Stub Information.

~~4.1. Form of records; scope of records. -- No particular order or form of records is prescribed. However, every employer who is subject to any of the provisions of the Act is required to maintain records for a period of not less than two (2) years.~~

9.1. An employer shall maintain written payroll and employment records for exempt employees as required by W. Va. Code §21-5-9.

~~4.2. Content of records. -- The written record or records with respect to each and every employee shall contain:~~

9.2. An employer shall maintain written payroll and employment records for non-exempt employees that contain the following:

~~(a) Name in full, identifying symbol or number if such is used in place of name on any time, work or payroll record. This shall be the same as that used for Social Security record purposes;~~

9.2.1. The employee's full name;

~~(b) Home address;~~

9.2.2. The employee's home address;

~~(c) Date of birth, if under eighteen (18);~~

~~(d) Occupational or job classification;~~

9.2.3. The employee's occupational title or job classification;

~~(e) Sex (may be indicated by use of the prefixes Mr., Mrs., Ms. or Miss);~~

~~(f) Rate of pay;~~

9.2.4. The employee's regular rate of pay, whether hourly, by piece rates, by commission, etc;

~~(g) Hours worked each workday and total hours worked each workweek;~~

9.2.5. The employee's total hours worked each workday and total hours worked each workweek;

~~(h) Time of day and day of week on which the employee's workweek begins. If the employee is part of a work force or employed in or by an establishment, all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of day and beginning day of the workweek for the whole work force or establishment shall suffice. If any employee or group of employees has a workweek beginning and ending at a different time, a separate notation shall then be kept for that employee or group of employees;~~

9.2.6. The time of day and the day of the week that the employee's workweek begins;

~~(i) Regular hourly rate of pay for any week overtime is worked and such overtime excess compensation as due under of the Act, W. Va. Code §21-5C-3;~~

~~(j) Total weekly straight-time earnings or wages and total overtime excess compensation which amount is over and above all straight-time earnings or wages thereby showing the total wages paid each pay period;~~

9.2.7. The employee's total weekly regular wages and total overtime wages earned each pay period;

~~(k) Total deductions, itemized, from wages paid each pay period;~~

9.2.8. The employee's itemized deductions for each pay period; and

~~(l) Date~~ The date of payment and pay period covered.

~~4.3. Records of retroactive payments of wages.~~

~~(a) Record and preserve, as an entry on his or her payroll or other pay records, the amount of such payment to each employee, the period covered by such payment and date of payment.~~

~~(b) Prepare a report of such payment, (i) preserve a copy for his records, (ii) deliver a copy to the employee, and (iii) file the original, which shall evidence payment by the employer and receipt by the employee, with the Commissioner of Labor within ten (10) days after payment is made.~~

9.3. If an employer pays an employee using a piece rate schedule, a commissions schedule, or any schedule other than a regular hourly rate of pay, the employer shall include the written schedule in the employee's payroll and employment records.

9.4. If an employer takes a tip credit, meal credit or living quarters credit against an

employee's wages, as set forth in Section 10 of this rule, the employer shall include a written record of the credits taken in the employee's payroll and employment records.

~~11.2. 9.5. Employees to be furnished with written accounting of wages paid. -- The firm~~ An employer shall furnish the each employees with a written pay stub for each pay period that the employee works that includes the employee's accounting of sums deducted from each pay at the time each wage payment is made. This written accounting shall also state the rate of pay, the overtime rate of pay, if any, (if applicable) and the units of time or rate upon which used to calculate his or her wages, are calculated and a statement of deductions made from his or her gross pay.

~~5.2. Wage rate tables. -- Wage rate tables and schedules of the employer which provide piece rates or other rates used in computing straight-time earnings, salary or wages, or overtime excess computation shall be kept and preserved.~~

~~5.3. Work time schedule. -- There shall be work time schedules or tables which establish the hours and days of employment of individual employees or of separate work forces.~~

~~5.4. Records of additions or deductions. -- Records of additions or deductions from wages paid shall be maintained as to date, amount and nature of the items which make up the total additions and deductions.~~

~~5.5. Written agreements or memoranda. -- Written agreements or memoranda summarizing the terms of oral agreements or understanding which pertain to any item under Section 6 of these regulations shall be preserved.~~

§42-8-7 10. Records to be kept and reserved for a period of not less than two (2) years. Place for keeping records For Keeping Employee Records.

~~5.1. Records to be kept. -- All records of the employer directly relating to wages and hours of persons employed by him or her shall be kept and preserved.~~

~~7.1. Records to be kept. -- Each~~ 10.1. An employer shall keep the employee records required by these regulations the Act and this rule in a safe, secure and accessible location at the place or places of employment, or at one or more established central record-keeping offices where such employee records are customarily maintained. Where the records are maintained at a central record-keeping office, other than in the place or places of employment, such records shall be available within seventy-two (72) hours following written notice from the Commissioner.

~~7.2. 10.2. Records to be open to the Division for inspection. -- All Employee records shall be open at reasonable times to the Division for inspection, examination, copying, photographing or otherwise reproducing of all records directly relating to wages and hours of employment in order to ensure compliance with the Act and this rule.~~

10.3. When employee records are maintained at a central record-keeping office, other than in the place or places of employment, upon receipt of written notice from the Commissioner, an employer shall make employee records available to the Division within seventy-two (72) business hours.

§42-8-9 11. Principles for determination of hours worked- Determination of Compensable Time for Non-Exempt Employees.

~~9.1. The workweek. -- The workweek includes all time during which an employee is necessarily required to be on the employer's premises on duty or at a prescribed work place.~~

~~9.2. Nonwork time. -- Periods during which an employee is completely relieved from duty and which are long enough to enable him or her to use the time effectively for his or her own time are not hours worked.~~

~~9.3. Work time. -- The employee whose time is spent in physical or mental exertion under control and direction of the employer constitutes hours worked.~~

~~9.4. General work. -- General work not requested but allowed or permitted is work time.~~

11.1. An employer shall include all hours worked by an employee works as compensable time. An employer may exclude non-work time from compensable time.

~~9.5. Preparation to work. -- Changing of clothes or washing when indispensable to the employee's work or is required by law, or rules or regulations or by rule of the employer constitutes hours worked.~~

~~9.6. Preliminary or postliminary activity. -- Changing of clothes or washing when by contract, custom or practice is a preliminary or postliminary activity constitutes hours worked.~~

11.2. Preparation to work; preliminary and postliminary activities. An employer shall include as compensable time the time an employee spends in preparing to begin work at his or her place of employment, or in preparing to leave work at his or her place of employment, such as changing clothes or washing, when such activities are an indispensable part of his or her work, when such activities are required by law or by the employer, when required by contract, or by the custom and usage of a particular trade.

~~9.8. Mealtime. -- Bona fide meal periods are not work time.~~

~~9.9. Rest periods. -- Rest periods of short duration, running from five (5) to twenty (20) minutes, must be counted as hours worked.~~

11.3. Employee break time and meal time.

11.3.1. During a work day or shift of six (6) or more hours, an employer shall provide an employee with at least a twenty (20) minute meal time.

11.3.2. When an employer authorizes one or more employee break times or meal times of twenty (20) consecutive minutes or less during a work day, the employer shall treat the break time or meal time as compensable time.

11.3.3. When an employer authorizes one or more employee break times or meal times of thirty (30) consecutive minutes or more during a work day, the employer may treat the break time or meal time as non-work time as long as the employee is completely relieved of his or her work responsibilities. If an employee is not completely relieved of his or her work responsibilities during the break time or meal time, the employer shall treat the entire break time or meal time as compensable time.

~~9.10. On-call time. -- On-call time:~~

~~(a) An employee who is required to remain on-call on the employer's premises, or so close thereto, or at his or her home so that he or she cannot use the time effectively for his own purposes is working while on-call.~~

~~(b) An employee who is not required to remain on the employer's premises but is merely required to leave word at his or her home or with his employer where he may be reached is not working while on-call.~~

11.4. Employee on-call time.

11.4.1. When an employer requires an employee to be on-call, as defined in subsection 3.28 of this rule, the employer shall treat the on-call time as compensable time.

11.4.2. When an employer requires an employee to leave his or her contact information with the employer or with a person at the employee's home, and as long as the employee is free to use the time as he or she wishes, an employer may treat the time as non-work time.

~~9.11. Extended periods on duty - duty of twenty-four (24) hours or more:~~

~~(a) Where an employee is required to be on duty twenty-four (24) hours or more, the employer and employee may agree on a bona fide meal period and a bona fide regularly scheduled sleeping period of not more than eight (8) hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. Where no expressed or implied agreement to the contrary is present, the eight (8) hours of sleeping time and lunch periods constitute hours worked.~~

~~(b) If the sleeping period is interrupted by a call to duty, the interruption counts as hours worked. The entire period of interruption must be counted if the employee cannot get a~~

reasonable night's sleep.

11.5. Employee on duty for extended periods of twenty-four (24) or more consecutive hours.

11.5.1. If the employer and employee have an express or implied agreement regarding the employee's scheduled meal times, break times and bona fide sleep periods, the employer may treat the meal times and break times of thirty (30) consecutive minutes or more and bona fide sleep periods as non-work time.

11.5.2. If the employer and employee do not have an express or implied agreement regarding the employee's scheduled meal times, break times and bona fide sleep periods, the employer shall include the employee's meal times, break times and bona fide sleep periods as compensable time.

11.5.3. When an employee's meal time, break time or bona fide sleep period is interrupted by a call to duty, the employer shall count the entire meal time, break time or bona fide sleep period as compensable time.

~~9.7. Waiting time. -- General waiting time will be counted as hours worked when based on the fact that the employee was engaged to wait.~~

11.6. Employee engaged to wait. If an employee has been engaged to wait by an employer, the employer shall include the time the employee is engaged to wait as compensable time.

11.7. Employee attendance or presentation at a training session, meeting, or lecture.

11.7.1. If an employer requires an employee to attend or to present material at a training session, meeting, or lecture, the employer shall include as compensable time the time the employee spends attending or preparing for the training session, meeting, or lecture, including travel time as set forth in subsections 11.8 and 11.9 of this rule.

11.7.2. If an employee chooses on his or her own to attend or to present material at a training session, meeting, or lecture, the employer may treat as non-work time, the time the employee spends attending or preparing for the training session, meeting, or lecture, including travel time as set forth in subsections 11.8 and 11.9 of this rule.

11.8. Travel time when no overnight stay is required by the employer. If an employer requires an employee to travel when no overnight stay is required, the employer shall include the following as compensable time:

11.8.1. The time the employee spends traveling away from and returning to the employee's assigned work location; and

11.8.2. The time the employee spends traveling to perform his or her job assignments and responsibilities.

11.9. Travel time when an overnight stay is required. If an employer requires an employee to travel when an overnight stay away from the employee's home is authorized, the employer shall include the following as compensable time:

11.9.1. The time the employee spends traveling during his or her normal work hours on any day of the week, including days when the employee is not normally scheduled to work, such as Saturday or Sunday; and

11.9.2. The time the employee spends traveling either before or after his or her normal work hours on any day of the week, including days when the employee is not normally scheduled to work, such as Saturday or Sunday, except for the time that the employee spends as a passenger in an automobile or taxi, or on an airplane, train, boat, or bus. If the employee is performing work duties required by the employer while he or she is a passenger in an automobile or taxi, or on an airplane, train, boat, or bus, the employer shall treat this time as compensable time.

~~9.12. Principal activity. -- The term principal activity includes all activities which are an integral part of a principal activity.~~

§42-8-10 12. Credits Criteria for Determining Employer Credits Toward the Minimum Hourly Wage; No Credit for Uniforms.

~~10.1. Gratuities. -- Statutory interference renders invalid any agreement or requirement that all gratuities be turned over to the employer. In determining the wage of a tipped employee, the amount paid such employee shall be deemed to be increased on account of the tips by an amount determined by the employer, but not by an amount in excess of twenty percent (20%) except that in the case of an employee who shows to the satisfaction of the Commissioner that the actual amount of the tips received by him or her was less than the amount determined by the employer as the amount by which the wage paid him or her was deemed to be increased under this sentence, the amount paid such employee by his or her employer shall be deemed to have been increased by such lesser amount.~~

12.1 Tip credit.

12.1.1. An employer shall be entitled to take a tip credit equal to seventy per cent (70%) of the minimum wage for all hours worked by a service employee, as long as the service employee receives tips or gratuities equal to at least seventy per cent (70%) of the current minimum wage for all hours worked.

12.1.2. When a service employee spends more than twenty per cent (20%) of his or her time during a workweek performing duties for which he or she does not receive tips, such as cleaning or setting tables, making coffee, etc., an employer shall pay the employee at least the full minimum wage, without taking a tip credit, for the time the employee spends performing such duties.

12.1.3. An employer shall be entitled to take a tip credit equal to seventy per cent

(70%) of the minimum wage for all hours worked by a dual job employee as a service employee, as long as the employee receives tips or gratuities equal to at least seventy per cent (70%) of the current minimum wage.

12.1.4. An employer shall pay a dual job employee at least the full minimum wage, without taking a tip credit, for all hours worked by the employee as a non-service employee.

12.1.5. In order to take the tip credit, an employer shall have written tip records completed by the employee and, in addition to the tip records, an employer shall have a record of the time worked by a dual job employee as a service employee.

12.1.5.a. The employee's report of tips shall specify the time period in which the tips were received, the amount of cash tips received, the amount of credit or debit card tips received, the amount of tips paid out, and the amount of net tips retained by the employee. The employee shall sign and date the report.

12.1.5.b. An employee may use IRS Form 4070, "Employee's Report of Tips to Employer," IRS Form 4070A, "Employee's Daily Record of Tips," or any other form that contains the information required by subsection 12.1.5.a of this rule.

12.1.6. An employer shall not be entitled to take a tip credit for a non-service employee.

12.1.7. If an employer permits tip-sharing or tip pooling, the employer shall divide the shared or pooled tips among only service employees and dual job employees working as service employees, and shall ensure that the employees individually document the amount of tips paid out.

12.1.8. The employer shall not be entitled to receive any shared or pooled tips.

10.2. Meal allowance:

(a) The credit. -- A credit of one dollars (\$1.00) per day shall be allowed for meals made available and eaten if an employee completes a workday of at least eight (8) hours.

(b) Proration. -- ~~Less than an eight (8) hour day shall be computed on a prorated basis of twelve and five-tenths cents (12.5¢) per hour.~~

~~(c) Exemptions. -- No credit shall be allowed when an employee is under bona fide medical care related to dietary problems.~~

~~(d) No credit while employee is on leave. -- No credit shall be allowed while employees are on leave (sick, annual or holiday) when such leave is on a compensatory basis.~~

12.2. Meal credit.

12.2.1. When an employer makes meals available to an employee, if an employee completes a work day of at least eight (8) hours worked and if the employee eats an available meal, an employer may deduct four dollars (\$4.00) per day as a meal credit from the employee's wages.

12.2.2. If an employee completes a workday of less than an eight (8) hours but eats an available meal, an employer may deduct fifty cents (\$.50) per hour as a meal credit from the employee's wages.

12.2.3. An employer shall not deduct a meal credit if an employee does not eat a meal.

~~10.3. Living quarters. -- When an apartment is a compulsory condition of employment, employer must provide adequate living quarters, including heat, light and water and space for cooking, sleeping and toilet purposes for which the employer will receive credit not to exceed one third (1/3) of the minimum wage.~~

12.3. Living quarters credit.

12.3.1. When living quarters are a compulsory condition of employment, an employer shall provide adequate and habitable living quarters, which includes heat, light, toilet facilities, hot and cold running potable water, and space for cooking, sleeping, and bathing.

12.3.2. The employer may deduct thirty-three per cent (33%) of the hourly minimum wage from the employee's wages as a living quarters credit.

~~10.4. Uniforms. -- The cost of uniforms and their laundering, where the nature of the business requires the employee to wear a uniform, is found to be primarily for the benefit or convenience of the employer, and, therefore, this cost will not be recognized as reasonable and may not be included as a credit in computing wages.~~

12.4. Uniforms. When an employer requires an employee to wear a uniform, the employer may not take a credit against the employee's wages for the cost of the uniforms or their laundering.

§42-8-12 13. Collection of wages due through action by the Commissioner Employee Claim for Unpaid Wages or Other Violation of the Act; Investigation by the Division.

~~12.1. Action by the Commissioner. -- Pursuant to W. Va. Code §21-5C-8 (b), the Commissioner or his or her designated representative, upon the request of any person whose wages have not been paid in accordance with the law, may bring any legal action necessary to collect such claim.~~

~~12.2. Request by claimant to be in writing. -- Request for the assistance of the Commissioner shall be made upon forms as provided by the Commissioner and executed by the claimant before an officer authorized by the laws of this State to take acknowledgements.~~

13.1. An employee or former employee who reasonably believes that he or she has been paid in violation of any provision of the Act or this rule, and who wants the Division to investigate his or her claim, may submit a request for assistance to the Division, and provide the Division with the necessary information and documents in support of such claim, including the following:

13.1.1. The claimant shall provide his or her complete contact information, including updates when applicable;

13.1.2. The claimant shall provide the name, address and telephone number of his or her employer;

13.1.3. The claimant shall provide the amount of wages he or she reasonably believes the employer owes and why, or a statement explaining the employer's alleged violation;

13.1.4. The claimant shall provide a brief description of the work he or she is performing or has performed;

13.1.5. The claimant may provide copies of pay stubs, work schedules, personal calendars, or other documents that support the alleged violation, if the claimant has these in his or her possession;

13.1.6. If applicable to the wage claim or other violation, the claimant shall provide a complete copy of the employer's written policies concerning the terms and conditions of employment, if the claimant has these in his or her possession; and

13.1.7. If applicable to the wage claim or other violation, the claimant shall provide a complete copy of the employer's commissions policy, if the claimant has these in his or her possession.

13.2. The Division shall investigate the merits of the claim or violation and shall make a determination regarding whether the employer has violated any provision of the Act or this rule.

13.3. The Division shall notify the employer and the claimant of the results of its investigation, including the amount of wages owed to the claimant, if any.

13.4. The claimant may request a Director's review, and subject to the Director's approval, the request may be granted.

13.5. The employer shall be entitled to a status conference upon request to the Division.

13.6. If the employer acknowledges or otherwise admits that the claimant is owed wages, but fails to pay the wages owed to the claimant within a time frame established by the Commissioner, the Commissioner shall issue an order, setting forth findings of fact and conclusions of law regarding the wage claim.

13.6.1. The Division shall serve the employer with a copy of the Commissioner's order, either by certified mail, return receipt requested or by personal service, and shall be notified of his or her right to appeal the order.

13.6.2. The Division shall provide the claimant with a copy of the Commissioner's order.

13.7. If the employer contests the Division's determination, the employer shall be entitled to an administrative hearing, which shall be held in accordance with W. Va. Code §§ 21-5C-6, 29A-5-1, et seq. and 42 CSR 20.

13.7.1. Pursuant to the administrative hearing, the Commissioner shall issue an order, setting forth findings of fact and conclusions of law regarding the wage claim.

13.7.2. The Division shall serve the employer with a copy of the order, either by certified mail, return receipt requested or by personal service, and shall be notified of his or her right to appeal the order.

13.7.3. The Division shall provide the claimant with a copy of the Commissioner's order.

§42-8-14. Claimant's Responsibility to Enforce the Commissioner's Final Order for Wages Owed.

14.1. When the Commissioner's order becomes a final order, and if the employer fails to pay the claimant his or her wages owed as determined by the Commissioner, the Division shall notify the claimant.

14.2. The claimant shall be responsible for seeking enforcement of the Commissioner's final order, by filing a petition in the Circuit Court or Magistrate Court of Kanawha County, or other county as permitted by statute.

§42-8-13. Amendments to regulations:

~~13.1. Written petition to commissioner. -- Any person wishing a revision of any of these regulations may submit to the Commissioner a written petition setting forth the changes desired and the reasons for proposing them.~~

~~13.2. Hearing on petition. -- The Commissioner, upon inspection of the petition and believing that the grounds are reasonable, may schedule a hearing with due notice to interested persons, or make other provisions for affording interested persons an opportunity to present data, views and arguments relating to any proposed changes.~~