

WEST VIRGINIA LEGISLATIVE RULE
DEPARTMENT OF LABOR
CHAPTER 21-5C
SERIES VIII

Title: Minimum Wages and Maximum Hours Standards Regulations

	Page No.
Section 1. General	1
2. Definitions	1
3. Enforcement	2
4. Records To Be Kept By Employers	3
5. Records To Be Kept And Reserved For A Period Of Not Less Than Two Years	4
6. Petition For Exemptions	5
7. Place For Keeping Records	5
8. Specific Exemptions And Other Special Requirements	8
9. Principles For Determination Of Hours Worked	10
10. Credits	11
11. Notification To Employees And Records To Be Kept By Employer	12
12. Collection Of Wages Due Through Action By The Commissioner	12
13. Amendments To Regulations	12

Title 42

~~WEST VIRGINIA LEGISLATIVE RULE~~
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Title: Minimum Wages And Maximum Hours Standards Regulations

Section 1. General

1.1 Scope - These legislative rules and regulations for Minimum Wage and Maximum Hours Standards for Employees are promulgated pursuant to Chapter 21, Article 5C of the Code of West Virginia, as amended under authority of §21-5C-6.

1.2 Authority - W. Va. Code 21-5C-6.

1.3 Effective Date - December 31, 1982

1.4 Filing Date - December 31, 1982

1.5 Severability - If any provision 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.

Section 2. Definitions

2.1 ACT means the Minimum Wage and Maximum Hours Standard Act for Employees passed February 8, 1966, and in effect ninety days from passage, and amended March 8, 1980 to be effective June 1, 1980.

2.2 APPEAL means an application to the Commissioner for corroboration or decision.

2.3 AUTHORIZED REPRESENTATIVE means, and includes, the director and employees of the Labor Department under his supervision.

2.4 COMMISSIONER means the Commissioner of Labor or his duly authorized representatives.

2.5 DEPARTMENT means the West Virginia Department of Labor.

2.6 DIRECTOR means the Wage and Hour Division Director appointed by the Commissioner as administrative head of the Wage and Hour Division.

2.7 DIVERSIFIED EMPLOYMENT means work performed as both service and non-service on any day.

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 or more employees in any one separate, distinct, and permanent location or business establishment, but shall not include an employer if eighty percent of his employees are subject to any federal act relating to minimum wage, maximum hours and overtime compensation.

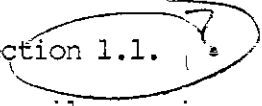
2.10 EMPLOY means to hire or permit to work.

2.11 FULL-TIME EMPLOYEE means any employee other than a "student worker" as defined in 2.17 of this section.

2.12 THE LAW or THIS LAW means the West Virginia Minimum Wage and Maximum Hours Standards Act as embraced in West Virginia Code, Chapter 21, Article 5C, Sections 1 through 11.

2.13 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.

2.14 PART-TIME BASIS means a student worker who is employed twenty-four hours or less in a workweek.

2.15 REGULATIONS means Regulations as defined by Section 1.1. 

2.16 SERVICE EMPLOYEE means an individual who customarily receives tips or gratuities.

2.17 STUDENT WORKER means an individual who has matriculated and participates in regular and prescribed courses at any recognized school, college, or university.

2.18 WAGE means compensation due an employee by reason of his employment.

2.19 WORKWEEK means a regular recurring period of one hundred sixty-eight hours in the form of seven consecutive twenty-four hours periods.

Section 3. Enforcement

3.1 These Regulations shall be enforced as prescribed by Chapter 21, Article 5C of the West Virginia Code.

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 judgement are necessary to administer and enforce the Act and these regulations.

3.3 Inspection By Department

(a) The Wage and Hour Division of the West Virginia Department 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 §21-5C-7 of the Code of West Virginia.

Section 4. Records To Be Kept By Employers

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 years.

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

(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;

(b) Home address;

(c) Date of birth, if under 18;

(d) Occupational or job classification;

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

(f) Rate of pay;

(g) Hours worked each work day 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;

(i) Regular hourly rate of pay for any week overtime is worked and such overtime excess compensation as due under Section 21-5C-3 of the Act.

(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.

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

(l) Date of payment and pay period covered.

4.3 Records Of Retroactive Payments of Wages

(a) Record and preserve, as an entry on his 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 days after payment is made.

4.4 Posting Of Notices - Every employer, as defined in subsection (e) of Section 1 of the Act, or who as specified employee exemptions, as defined as subsection (f) of Section 1 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 Division, in conspicuous places in every establishment where employees are employed so as to permit them to observe readily such notices.

Section 5. Records To Be Kept And Reserved For A Period Of Not Less Than Two Years

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

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 Schedules - 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.

Section 6. Petition For Exceptions

6.1 Written Petition - Any employer, who due to peculiar conditions under which he 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.

Section 7. Place For Keeping Records

7.1 Records To Be Kept - Each employer shall keep the records required by these regulations safe and accessible at the place or places of employment, or at one or more established central record-keeping offices where such 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 hours following written notice from the Commissioner.

7.2 Records To be Open To the Department For Inspection - All records shall be open at reasonable times for inspection, examination, copying, photographing, or otherwise reproducing of all records directly relating to wages and hours of employment.

Section 8. Specific Exemptions And Other Special Requirements

8.1 Records On Exempt Employees To Be Kept - Every employer operating under the complete exemptions of §21-5C-1(e) 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 §21-5C-1(f) of the Act as follows:

8.2 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 §21-5C-1(c) of the Act, 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.

8.3 Voluntary Service Employees - Any individual engaged in the activities of an 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.

(a) Employer-employee relationship shall be determined thusly; an employee is any 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 state 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 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.

8.5 Traveling Salesmen - Traveling salesmen and outside salesmen who are:

(a) Employed salesmen and outside salesmen who are customarily and regularly engaged away from their employer's place or places of business 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 30 percent 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.

(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 Services Performed by Son, Daughter, Etc. - Services performed by an individual in the employ of his parent, son, daughter, or spouse are exempt.

8.7 Professional, Administrative or Executive Employee - Any individual employed in a bona fide professional, executive or administrative capacity shall be recorded as exempt if he fulfills the duties of such capacity as defined thusly:

(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.

(b) 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

1. Who customarily and regularly directs the work of two or more employees therein; and
2. Who has the authority to hire and fire other employees or whose suggestions and recommendations as to the hiring and firing and as to the advancement and promotion and any other change of status of other employees will be given particular weight;
3. Who customarily and regularly exercises discretionary powers.

(c) 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 employer or his employer's customers; and

1. Who customarily and regularly exercises discretion and independent judgment; and
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, 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 Sections 21-5C-2 and 21-5C-3 of the Act.

8.8 Employee In On-The-Job Training

(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,

1. Customarily learned in a practical way;
2. Clearly identified and commonly recognized throughout industry;
3. Requires related instruction to supplement the work experience, and
4. The keeping of appropriate records concerning time and progress.

(b) Such plan shall be one which is registered, recognizing, and approved by either the Area Vocational Education Program as set forth in Chapter 18, Article 2B, Section 1 of the Code of West Virginia as amended, or the Bureau of Apprenticeship and Training of the United States Department of Labor, or the Commissioner.

8.9 Handicapped Person In A Sheltered Workshop - Any person having a physical or mental handicap so severe as to prevent his 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 Article 10B, Chapter 18, of the Code of West Virginia, as amended.

8.10 Summer Camp Worker - Any individual employed in a boys or girls summer camp.

8.11 Person Over 62 Receiving Old Age Or Survivors Benefits - Any person sixty-two year of age or over who receives old age or survivors benefits from the Social Security Administration is a clearly defined explanation.

8.12 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 Section 15(g) 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.

8.13 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.

8.14 Ushers In Theaters - Ushers in theaters.

8.15 Student Worker - Any individual employed twenty-four or less who is a student in any recognized school or college.

(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 Chapter 18 of the Code of West Virginia, as amended, or similar Acts of other states.

8.16 Local Or Interurban Motorbus Driver - Any individual employed by a local or interurban motorbus carrier.

8.17 Salesmen - So far as the maximum hours and overtime compensation provisions of this law are concerned, any salesman, partsman 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.

8.18 Employee Under The Regulation 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.

Section 9. Principles For Determination Of Hours Worked

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 Non-Work Time - Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his 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.

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.

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.

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

9.9 Rest Periods - Rest periods of short duration, running from five to twenty minutes, must be counted as hours worked.

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 home, so that he 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 home or with his employer where he may be reached is not working while on-call.

9.11 Extended Periods On Duty - Duty of twenty-four hours or more:

(a) Where an employee is required to be on duty twenty-four 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 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 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.

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

Section 10. Credits

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 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 was less than the amount determined by the employer as the amount paid such employee by his employer shall be deemed to have been increased by such lesser amount.

10.2 Meal Allowance

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

(b) Proration - Less than an eight hour day shall be computed on a pro-rated basis of 12.5 cents 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 is on leave (sick, annual or holiday) when such leave is on a compensatory basis.

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 of the minimum wage.

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 of 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.

Section 11. Notification To Employees And Records To Be Kept By Employers

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.

11.2 Employees To Be Furnished With Written Accounting Of Wages Paid - The firm shall furnish the employees with a written 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 (if applicable) and the units of time or rate upon which wages are calculated.

Section 12. Collection Of Wages Due Through Action By The Commissioner

12.1 Action By The Commissioner - Pursuant to §21-5C-8(b) of the law, the Commissioner or his 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.

Section 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 charges desired and the reasons for proposing them.

13.2 Hearing On Petition - The Commissioner, upon inspection of the

Department of Labor
Leg. Rule, 21-5C
Series VIII, Sec. 13

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.