



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia  
Secretary Of State

## NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

AGENCY: Labor

RULE TYPE: Legislative

TITLE-SERIES: 42-08

RULE NAME: Minimum Wage, Maximum Hours, and  
Overtime Compensation

CITE AUTHORITY: W. Va. Code §21-5C-1(h), §21-5C-4, and  
§21-5C-6(a)

The above proposed Legislative rules, following review by the Legislative Rule Making Review Committee, is hereby modified as a result of review and comment by the Legislative Rule Making Review Committee. The attached modifications are filed with the Secretary of State.

**BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.**

Yes

**Mitchell E Woodrum -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.**

TITLE 42  
LEGISLATIVE RULE  
DIVISION OF LABOR

SERIES 8  
MINIMUM ~~WAGES~~ WAGE, MAXIMUM HOURS, AND OVERTIME COMPENSATION

**§42-8-1. General.**

1.1. Scope. -- This rule 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 the Minimum Wage and Maximum Hours Standards for Employees Act, W. Va. Code §21-5C-1 *et seq.*

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

1.3. Filing Date. -- ~~April 15, 2016.~~

1.4. Effective Date. -- ~~May 1, 2016.~~

1.5. Sunset Date. -- This rule shall terminate and have no further force or effect on August 1, 2029.

**§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~~ Wage and Maximum Hours Standards for Employees Act, W. Va. Code §21-5C-1 *et seq.*

2.2. Pursuant to W. Va. Code §21-5C-1(e), the provisions of this rule relating to maximum hours and overtime compensation are not enforceable against or applicable to any individual, partnership, association, corporation, person or group of persons, or similar unit if ~~eighty percent~~ 80% of the persons employed by him or her are subject to any federal act relating to maximum hours and overtime compensation.

2.3. Enforcement. The enforcement of this rule is vested ~~with~~ in the West Virginia Division of Labor.

**§42-8-3. Definitions.**

3.1. "Act" means the Minimum Wage and Maximum Hours Standards for Employees Act, W. Va. Code §21-5C-1 *et seq.*

3.2. "Agriculture" means 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 (including commodities defined as agricultural commodities in ~~section 1141 (g), section fifteen of the Agricultural Marketing Act, as amended, of the Code of the United States~~ the Agricultural Marketing Act of 1946, 12 U.S.C. § 1141j), 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 preparation for market, delivery to storage or to market or to carriers for transportation to market.

3.3. "Bona fide sleep period," for an employee who is on duty for ~~twenty-four (24)~~ or more consecutive hours, means a regularly scheduled time period of eight ~~(8)~~ hours, provided that the employer furnishes adequate sleeping quarters for the employee, during which the employee can usually enjoy a night's sleep.

3.4. "Claimant" means an employee or former employee who submits a request for assistance to the Division of Labor, 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 sum of money paid by an employer to an employee when the employee performs or completes a certain task, such as the selling of a specified amount of goods or services, or for performing a specified service for the employer.

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," as that term is used in ~~section 8.11.1~~ 8.11.2 of this rule, means work performed by an employee that is directly related to assisting with the running or servicing of an employer's business or the business of an employer's customer, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment. Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax, finance, accounting, budgeting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations, computer network, internet and database administration, legal and regulatory compliance, and similar activities.

3.10. "Director" means the director of the Division of Labor Wage and Hour Section, ~~or his or her designee~~ and his or her authorized representatives.

3.11. "Discretion and independent judgment" means the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The phrase "discretion and independent judgment" must be applied in light of all the facts involved in a particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has the authority to formulate, affect, interpret, or implement an employer's management policies or operating practices or the management policies or operating practices of an employer's customer; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to the operation of a particular segment of the business; whether the employee has the authority to commit the employer in matters that have significant financial impact; whether the employee has the authority to

waive or deviate from established policies and procedures without prior approval; whether the employee has the authority to negotiate and bind the employer on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long – or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the employer in handling complaints, arbitrating disputes, or resolving grievances.

3.12. “Division” means the West Virginia Division of Labor.

3.13. “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.

3.14. “Engaged to wait” means a period of inactivity during which an employee remains at work or on duty, is under the employer’s direction and control, is unable to use the time effectively for his or her own purposes, and the waiting is an integral part of the employee’s job.

3.15. “Exempt employee” means an employee who is not covered by the Act and this rule.

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

3.17. “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.

3.18. “Final order” or “Commissioner’s final order” means an order issued by the Commissioner of the Division 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.

3.19. “Management” generally includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting of employees’ rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees’ productivity and efficiency for the purpose of recommending promotions or other changes in employees’ status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment, or tools to be used or merchandise to be bought, stocked, and sold; providing for the safety and security of the employees and property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

3.20. “Matters of significance” means a level of substantial importance or consequence of the work performed.

3.21. “Non-exempt employee” means an employee who is covered by the Act and this rule.

3.22. “Non-service employee” means an employee who does not customarily receive tips or gratuities in connection with his or her work.

3.23. "On-call time" means the time an employer requires an employee to remain on, or in close proximity to, the employer's premises so that the employee is not free to use the time as he or she wishes. If an employer only requires an employee to leave his or her contact information at home ~~or~~ with the employer, the employee is not working "on-call."

3.24. "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.

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

3.26. "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.

3.27. "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.

3.28. "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.

3.29. "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.

3.30. "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.

3.31. "Salary" means a predetermined 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.

3.32. "Sale" or "sell" means any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

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

3.34. "Service employee" means an individual who customarily receives tips or gratuities in connection with his or her work.

3.35. "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.

3.36. "Volunteer" means a person who performs or offers to perform a service for an educational, charitable, religious, fraternal, public, or similar non-profit agency or organization, including public

agencies, without compensation, provided that such services are not the same type of services which the individual is employed to perform for the agency or organization.

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

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

**§42-8-4. Establishment of a Workweek; Required Employee Notification of Changes; 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~~ An 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. The Division shall develop an abstract of the Act, and shall make it available on the Division's website or provide it free of charge upon request.

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

5.1. Employers shall be subject to the minimum wage provisions of the Act if the employer employs six ~~(6)~~ or more employees during any calendar week in any one separate, distinct, and permanent location and falls into one of the following categories:

~~5.1.a.~~ 5.1.1. The State of West Virginia, its agencies, departments, and ~~all its~~ political subdivisions;

~~5.1.b.~~ 5.1.2. ~~Any~~ An individual, partnership, association, public or private corporation; or

~~5.1.c.~~ 5.1.3. ~~Any~~ A person or group of persons acting directly or indirectly in the interest of any employer in relation to an employee.

5.2. When the Division opens an investigation or otherwise inspects an employer, 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 according to the actual job duties performed by each employee and shall give consideration to past decisions under state and federal law.

**§42-8-6. Employers Exempt from the Maximum Hours and Overtime Provisions of the Act.**

6.1. The following employers are exempts from the provisions of the Act ~~as long as~~ if 80% or more of their employees are subject to any federal act relating to maximum hours and overtime compensation:

~~6.1.a.~~ 6.1.1. The State of West Virginia, its agencies, departments, and political subdivisions; and

~~6.1.b.~~ 6.1.2. 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.

6.2. When the Division opens an investigation or otherwise inspects an employer, the Division shall determine whether 80% or more of an employer's employees are subject to any federal act relating to maximum hours and overtime compensation by considering first whether the employer is a covered enterprise as defined in federal law, and then, if the employer is not a covered enterprise, 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. Employee Exemptions from Coverage of the Act.**

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. 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. An individual who is a volunteer is exempt from coverage of the Act.

8.4. 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. An individual engaged in making outside sales is exempt from coverage of the Act if he or she meets the following tests:~~

~~8.5.a. The employee is customarily and regularly engaged away from his or her employer's place or places of business; and~~

~~8.5.b. 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.~~

~~8.5.c. 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.~~

8.5. 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.

~~8.6. 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. An individual engaged in making outside sales is exempt from coverage of the Act if he or she meets the following tests:~~

8.6.1. The employee is customarily and regularly engaged away from his or her employer's place or places of business; and

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.

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.

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

~~8.7.a. 8.7.1.~~ The employee is compensated on a salary or fee basis at a rate equal to at least ~~\$455.00~~ \$684 per workweek: ~~provided, however~~ Provided, however, That if the rate set forth in 29 C.F.R. § 541 is greater than the rate set forth in this subsection, the higher rate controls: And provided further, That the salary or fee requirements of this provision do not apply to bona fide teachers or practitioners of law or medicine;

~~8.7.b. 8.7.2.~~ The employee's primary duty is the performance of work requiring advanced knowledge;

~~8.7.c. 8.7.3.~~ The advanced knowledge is in a field of science or learning; and

~~8.7.d. 8.7.4.~~ The advanced knowledge is customarily acquired by a prolonged course of specialized intellectual instruction.

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

~~8.8.a. 8.8.1.~~ The employee is compensated on a salary or fee basis at a rate equal to at least ~~\$455.00~~ \$684 per workweek: Provided, however, That if the rate set forth in 29 C.F.R. § 541 is greater than the rate set forth in this subsection, the higher rate controls; and

~~8.8.b. 8.8.2.~~ 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.

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

~~8.9.a. 8.9.1.~~ ~~The employee is compensated at a rate not less than \$27.63 an hour~~ The employee is compensated on a salary or fee basis at a rate equal to at least \$684 per workweek, or, if the employee is compensated on an hourly basis, at a rate not less than \$27.63 an hour: Provided, however, That if the rate set forth in 29 C.F.R. § 541 is greater than the rate set forth in this subsection, the higher rate controls;

~~8.9.b. 8.9.2.~~ 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 8.9.c~~ subsection 8.9.3 of this section; and

~~8.9.c. 8.9.3.~~ The employee's primary duty consists of the following or a combination of the following:

~~8.9.c.1.~~ 8.9.3.a. The application of systems analysis techniques and procedures, including consulting with users to determine hardware, software, or system functional specifications;

~~8.9.c.2.~~ 8.9.3.b. The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on or related to user or system design specifications; or

~~8.9.c.3.~~ 8.9.3.c. The design, documentation, testing, creation, or modification of computer programs related to machine operating systems.

8.10. An executive employee is exempt from coverage of the Act if he or she meets ~~all~~ of the following tests:

~~8.10.a.~~ 8.10.1. The employee is compensated on a salary basis at a rate of at least ~~\$455.00~~ \$684 per workweek: Provided, however, That if the rate set forth in 29 C.F.R. § 541 is greater than the rate set forth in this subsection, the higher rate controls;

~~8.10.b.~~ 8.10.2. 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;

~~8.10.c.~~ 8.10.3. The employee customarily and regularly directs the work of two ~~(2)~~ full-time employees or the equivalent of two ~~(2)~~ or more full-time employees; and

~~8.10.d.~~ 8.10.4. The employee has the authority to hire or fire other employees or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees is given particular weight.

8.11. An administrative employee is exempt from coverage of the Act if he or she meets ~~all~~ of the following tests:

~~8.11.a.~~ 8.11.1. The employee is compensated on a salary or fee basis at a rate at least equal to ~~\$455.00~~ \$684 per workweek: Provided, however, That if the rate set forth in 29 C.F.R. § 541 is greater than the rate set forth in this subsection, the higher rate controls;

~~8.11.b.~~ 8.11.2. 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

~~8.11.c.~~ 8.11.3. The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

8.12. 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:

~~8.12.a.~~ 8.12.1. 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:

~~8.12.a.1.~~ 8.12.1.a. Customarily learned in a practical way;

~~8.12.a.2.~~ 8.12.1.b. Clearly identified with and commonly recognized throughout a specific industry or trade; and

~~8.12.a.3.~~ 8.12.1.c. Developed by participation in both classroom instruction and work experience; and

~~8.12.b.~~ 8.12.2. The training program maintains a written record of the employee's time and progress.

8.13. A physically or mentally disabled ~~person~~ individual 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.*

8.14. An individual employed in a boys or girls summer camp is exempt from coverage of the Act.

8.15. An individual who is at least ~~sixty-two (62)~~ years old and who receives benefits from the Social Security Administration is exempt from coverage of the Act.

8.16. An individual employed in agriculture is exempt from coverage of the Act.

8.17. An individual employed as a firefighter by the State of West Virginia or one of its agencies is exempt from coverage of the Act.

8.18. An individual employed as an usher in a theater is exempt from coverage of the Act.

8.19. A student enrolled in a recognized school or college is exempt from coverage of the Act if he or she is employed for ~~twenty-four (24)~~ hours or less during a workweek. A 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.

8.20. An individual who is employed by a local or inter-urban motorbus carrier is exempt from coverage of the Act.

8.21. 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.

8.22. 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.

8.23. 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.

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

8.25. An individual employed as a seasonal employee by an amusement park is exempt from coverage of the Act.

**§42-8-9. Record-keeping Requirements; Contents of Employee Records; Employee Pay Stub Information.**

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

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

~~9.2.a.~~ 9.2.1. The employee's full name;

~~9.2.b.~~ 9.2.2. The employee's home address;

~~9.2.c.~~ 9.2.3. The employee's occupational title or job classification;

~~9.2.d.~~ 9.2.4. The employee's regular rate of pay, whether hourly, by piece rates, by commission, etc;

~~9.2.e.~~ 9.2.5. The employee's total hours worked each workday and total hours worked each workweek;

~~9.2.f.~~ 9.2.6. The time of day and the day of the week that the employee's workweek begins;

~~9.2.g.~~ 9.2.7. The employee's total weekly regular wages and total overtime wages earned each pay period;

~~9.2.h.~~ 9.2.8. The employee's itemized deductions for each pay period; and

~~9.2.i.~~ 9.2.9. The date of payment and pay period covered.

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 12 of this rule, the employer shall include a written record of the credits taken in the employee's payroll and employment records.

9.5. An employer shall furnish each employee with a written pay stub for each pay period that the employee works that includes the employee's rate of pay, overtime rate of pay, if any, the units of time or rate used to calculate his or her wages, and a statement of deductions made from his or her gross pay. If an employee consents to the direct deposit of his or her wages, the employer may furnish the pay stub electronically, by email, or by giving the employee access to a database containing his or her pay stub information.

**§42-8-10. Place for Keeping Employee Records.**

10.1. An employer shall keep the employee records required by 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 employee records are customarily maintained.

10.2. Employee records shall be open at reasonable times to the Division for inspection, examination, copying, photographing, or otherwise reproducing 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 five ~~(5)~~ business days.

**§42-8-11. Determination of Compensable Time for Non-Exempt Employees.**

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

11.2. An employer shall include as compensable time the time an employee spends changing clothes or washing, when such activities are required by law or by the employer for safety, decontamination, or production reasons.

11.3. Employee break time and meal time.

~~11.3.a.~~ 11.3.1. 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.b.~~ 11.3.2. When an employer authorizes one or more employee break times or meal times, typically 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.

11.4. Employee on-call time.

~~11.4.a.~~ 11.4.1. When an employer requires an employee to be on-call, as defined in subsection 3.23 of this rule, the employer shall treat the on-call time as compensable time.

~~11.4.b.~~ 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.

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

~~11.5.a.~~ 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.b.~~ 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.c.~~ 11.5.3. When an employee's meal time or break time is interrupted by a call to duty, the employer shall count the entire meal time or break time as compensable time.

~~11.5.d.~~ 11.5.4. When an employee's bona fide sleep period is interrupted by a call to duty to the extent that the employee cannot get at least five (5) hours sleep during the scheduled sleep period, the employer shall count the entire sleep period as compensable time.

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.a.~~ 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~~ preparing for and attending the training session, meeting, or lecture, including travel time as set forth in subsections 11.8 and 11.9 of this ~~rule~~ section.

~~11.7.b.~~ 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~~ preparing for and attending the training session, meeting, or lecture, including travel time as set forth in subsections 11.8 and 11.9 of this ~~rule~~ section.

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

~~11.8.b.~~ 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.a.~~ 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.b.~~ 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.

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

12.1. Tip credit.

~~12.1.a.~~ 12.1.1. An employer shall be entitled to take a tip credit equal to ~~seventy percent (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 percent (70%)~~ of the current minimum wage for all hours worked.

~~12.1.b.~~ 12.1.2. When a service employee spends more than ~~twenty percent (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.c.~~ 12.1.3. An employer shall be entitled to take a tip credit equal to ~~seventy percent (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 percent (70%)~~ of the current minimum wage.

~~12.1.d.~~ 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.e.~~ 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.e.1.~~ 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.e.2.~~ 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.e.1~~ 12.1.5.a of this ~~rule~~ section.

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 taking a tip credit 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. An employer taking a tip credit shall not be entitled to receive any shared or pooled tips.

12.2. Meal credit.

~~12.2.a.~~ 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, without a written wage assignment, deduct ~~four dollars (\$4.00)~~ per day as a meal credit from the employee's wages.

~~12.2.b.~~ 12.2.2. If an employee completes a work day of less than eight (~~8~~) hours but eats an available meal, an employer may, without ~~taking a wage assignment~~ a written wage assignment, deduct fifty cents (\$.50) per hour as a meal credit from the employee's wages.

~~12.2.c.~~ 12.2.3. An employer shall not deduct a meal credit if an employee does not eat a meal.

### 12.3. Living quarters credit.

~~12.3.a.~~ 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.b.~~ 12.3.2. The employer may deduct ~~thirty three percent (33%)~~ of the hourly minimum wage from the employee's wages as a living quarters credit.

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.

### **§42-8-13. Employee Claim for Unpaid Wages or Other Violation of the Act; Investigation by the Division.**

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

~~13.1.b.~~ 13.1.2. The claimant shall provide the name, address, and telephone number of his or her employer;

~~13.1.c.~~ 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.d.~~ 13.1.4. The claimant shall provide a brief description of the work he or she is performing or has performed;

~~13.1.e.~~ 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.f.~~ 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.g.~~ 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 employer shall be entitled to a status conference upon request to the Division.

~~13.4.a.~~ 13.4.1. At that time, the employer shall have the opportunity to review all records collected by the Division during its investigation with respect to all portions of the investigation that the Division has not resolved in favor of the employer.

~~13.4.b.~~ 13.4.2. Within ~~twenty (20)~~ days of the conclusion of the status conference, an employer may prepare and submit a written statement and/or evidence for consideration by the Division.

13.5. 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.

~~13.5.a.~~ 13.5.1. 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.

~~13.5.b.~~ 13.5.2. The Division shall provide the claimant with a copy of the Commissioner's order.

13.6. 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.

~~13.6.a.~~ 13.6.1. Pursuant to the administrative hearing, the Commissioner shall issue an order, setting forth findings of fact and conclusions of law regarding the wage claim.

~~13.6.b.~~ 13.6.2. 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.

~~13.6.c.~~ 13.6.3. The Division shall provide the claimant with a copy of the Commissioner's order.

13.6.4. Any person adversely affected by the Commissioner's order may appeal the order to the Intermediate Court of Appeals as provided in W. Va. Code §51-11-1 *et seq.*

**§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 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.