

Hours of Work and Overtime Compensation Policy

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NOTE:

Effective February 19, 1985, the Supreme Court declared State and local governments subject to the Fair Labor Standards Act (FLSA). This policy is in accordance with that ruling.¹

The salary thresholds for minimum wage and overtime pay requirements under the Fair Labor Standards Act have been updated to reflect changes in federal regulations effective July 1, 2024.² As of July 2024, these federal regulations are currently subject to multiple pending legal challenges. The thresholds will be adjusted to the previous levels if the legal challenges invalidate the regulations or delay their effective date for State of North Carolina employees.

§ 1. Minimum Wage

Employees shall be paid at least the Federal minimum wage, unless the North Carolina minimum wage is higher. Effective January 1, 2007, the North Carolina minimum wage is \$6.15.³ The federal minimum is \$7.25 effective July 24, 2009.⁴

¹ Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). After the Garcia decision, the FLSA was amended to adjust how it applies to state employees. 99 Stat. 787 (Nov. 13, 1985).

² 89 Fed. Reg. 32842 (Apr. 26, 2024), modifying 29 C.F.R. § 541.600 to 541.607

³ N.C.G.S. § 95-25.3

⁴ 29 U.S.C. § 206

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All of the approved salary rates published by the Office of State Human Resources provide more than the federal or state minimum wage to all employees certified for employment. The minimum annual state employee salary for employees whose salary is state funded and set by the Appropriations Act or pursuant to the North Carolina Human Resources Act is \$31,200.⁵ Under this policy, compliance with the required minimum wage should be automatic.

§ 2. Administration of Overtime

The payment of premium time and one-half rates in form of monetary compensation or time off is required for hours worked in excess of 40 within a week, with exception of those considered FLSA Not Subject.

Agency heads and supervisors shall hold hours worked by the employee to the State's established 40-hour workweek standard except in those cases where excessive hours of work are necessary because of weather conditions, necessary seasonal activity or emergencies. It shall be the responsibility of each agency or executive head to determine that the provision of overtime pay is administered in the best interest of the State. Although each agency head is responsible for the manner in which overtime is authorized, it is equally important to control unauthorized overtime. The practice of overtime work will be subject to review by the Office of State Human Resources. Such review will take into consideration organizational structure, scheduling of work, position complement, and personnel classifications.

§ 3. FLSA Not Subject Employees

Each agency HR Director or their designee will determine which employees are not subject to the hours of work and overtime pay standards under the terms of FLSA exemptions for positions within their classification delegated authority.

No employee whose position is designated as FLSA Not Subject overtime compensation provisions shall be paid in any way for hours worked in excess of forty in a workweek unless a specific exception has been (1) recommended in writing by the agency head in consultation with the agency's Human Resources Director, (2) submitted to OSHR,

⁵ Session Law 2018-5, Senate Bill 99, Section 35.1.(a). For most full-time work schedules, this \$31,200 minimum will be equivalent to an hourly wage of \$15.

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and (3) approved as an exception or variance by the State Human Resources Director under 25 NCAC 01A .0104. Agency heads can recommend payment of overtime compensation under this paragraph only for employees of their own agencies, not for employees of other agencies.

The reasons for the recommendation must be fully documented by the agency on the Pay/Leave Exception Request SmartSheet, which includes sample factors for agency heads and agency Human Resources staff to consider in these circumstances. Under this section:

(a) Agencies may seek to incentivize employees by authorizing payment of excess hours expected to be worked in the future.

or

(b) An agency may ask for retroactive compensation, authorizing payment of excess hours worked in the past. A retroactive request will be approved by OSHR only in extraordinary circumstances.

In either case, the agency's recommendation shall state a defined limit, defined time frame, and defined group of employees. In either situation (a) or (b) listed above, the Director will approve recommendations only if:

- They promote efficiency of administration for state services; and
- Are fair and reasonable in light of the state's overall system of personnel administration.

This shall not be construed to prohibit any agency from adopting and using a compensatory leave policy in accordance with the Compensatory Leave Policy.

The requirement for a written recommendation and approval by the State Human Resources Director under this section of this policy **shall not** apply to the section of this policy entitled "Overtime / Compensatory Time Off Option for Law Enforcement, Fire Protection and Emergency Response Personnel" (§ 25.8), but **shall** apply to approvals under the section of this policy entitled "Overtime Pay for FLSA Not Subject Employees When the Governor Declares an Emergency or a Disaster" (§ 25.9).

§ 4. Salary

The annual and monthly salary rates of an employee are established under current personnel policy for each position. This salary is to represent the employee's straight time pay for a standard 40-hour workweek.

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§ 5. Overtime Compensation

For FLSA Subject employees whose regular work schedule is 40 hours per week, the employee shall receive straight-time pay for a standard 40-hour workweek, with the provision that:

- an additional amount equal to 1½ times the employee's regular hourly rate times the number of hours worked in excess of 40 shall be added to the base pay or,
- an employee shall be given compensatory time off equal to 1½ times the amount of time worked beyond 40 hours during a week.

The following provisions apply to Overtime Compensatory Time:

- Overtime compensatory time may be accumulated up to a maximum of 240 hours (160 hours straight time). Any overtime worked above this amount shall be paid in the employee's next regular paycheck.
- Overtime compensatory time off cannot be denied to an employee unless the compensatory time off will unduly disrupt agency operations.
- Overtime compensatory time shall be taken before any vacation or bonus leave. (Exceptions may be made for retirees who may need to exhaust vacation leave prior to retirement.)
- Agencies should allow overtime compensatory time to be taken as soon as possible.
- Overtime compensatory time shall be taken within twelve months from the date the work is performed. If not taken within 365 days, the time shall be paid out in the next paycheck.
- If an employee separates before taking overtime compensatory time, it shall be paid in a lump sum along with unused vacation.
- If an employee transfers to an FLSA Not Subject position or to another agency before taking overtime compensatory time, it shall be paid in the current or next regular pay period by the releasing agency.

NOTE: The preceding provisions are not applicable to persons in law enforcement or fire protection activities with a 28 day work period and in-residence employees. For provisions relating to those groups, see SPECIAL PROVISIONS section.

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Prior to employment, each successful candidate for State employment in a position subject to hours of work and overtime pay standards must acknowledge that it has been explained that it is the State's policy to give time off in lieu of monetary compensation, wherever possible, for hours worked beyond 40 in a work week. Agreement to this is a condition of employment with the State; failure or refusal to sign or acknowledge such agreement will prevent employment of that person. This signed form or acknowledgement shall be a part of the employee's personnel file; it must be kept for at least three years following that person's separation from State employment.

§ 6. Pay Rate for Overtime Compensatory Time

Overtime compensatory time shall be paid at a rate of compensation not less than either the average regular rate received by such employee during the last three years of the employee's employment or the final regular rate received by such employee, whichever is higher.

§ 7. Overtime Hourly Rate of Pay

The hourly rate of pay is the rate published by the Office of State Human Resources and is obtained by dividing the annual salary by 2080 hours (52x40) for full time positions.

The rate that must be used in computing overtime is referred to as the regular hourly rate. The regular hourly rate must include all remuneration for employment paid to, or on behalf of, the employee, except payments specifically excluded by the Fair Labor Standards Act. Payments that are not excluded and must be included in the hourly rate are: (a) Shift Premium Pay, (b) Longevity Pay as explained below and (c) On-Call Compensation. These payments must be included in order to comply with the provisions of the Fair Labor Standards Act.

Longevity pay must be included in the regular rate when computing overtime.

Overtime for an employee working in two positions with different rates of pay is paid at the average of the two rates of pay for each position.

§ 8. Non-Overtime Workweeks

When an employee works 40 hours or less during a workweek because of vacation, holidays, or sick leave, the regular weekly salary is paid in accordance with established personnel policies.

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§ 9. The Workweek

A workweek is a regularly recurring period of 168 consecutive hours. The workweek need not coincide with the calendar week. It may begin any day of the week and any hour of the day, but it must in each case be established in advance. The workweek may be changed, but only if the change is intended to be permanent and is not made to evade the overtime policy.

§ 10. Gap Hours

For permanent FLSA Subject employees whose regular work schedule is less than 40, gap hours are those hours that are caught in the gap between the maximum hours of work required to meet the work schedule and the overtime threshold. For example, if a permanent part-time employee is required to work 20 hours a week, the hours worked between 21 and 40 would be considered “gap hours.”

For permanent FLSA Subject law enforcement employees whose regular work schedule is 28 days, gap hours are those hours that are caught in the gap between 160 hours and 171 hours worked before overtime compensation begins.

Gap hours can also occur during a workweek when a permanent FLSA Subject employee takes a holiday, civil leave, or other management approved leave that is not offset by hours worked in the same workweek. Example, if a full-time employee has a holiday on Monday, but also works 40 hours in the same workweek as the holiday. The employee will receive 8 hours pay for the holiday, 32 hours regular straight-time pay, and 8 additional hours straight-time compensation.

§ 11. Gap Hours Compensation

Employees shall receive straight time pay for the gap hours worked with the provision that agencies will be given the option of providing cash payment or compensatory time for gap hours worked. The decision to pay cash versus compensatory time shall not be an employee decision. The agency head, or their designee, shall determine the best method of compensation for gap hours worked based on consideration of budget and organization needs of the agency. The decision to pay cash versus compensatory time should be applied consistently throughout an agency. The agency head shall report their compensation method to the Office of State Human Resources. Exceptions to the agency's

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chosen compensation method must be reviewed and approved by the Office of State Human Resources.

The following provisions apply to Gap Hours Compensatory Time:

- Gap hours compensatory time cannot be merged with overtime compensatory time or any other compensatory leave accounts.
- There is no maximum accumulation for gap hours compensatory time. Agencies may choose to pay out accumulated compensatory time at any time based on consideration of budget and organization needs.
- Gap hours compensatory time shall be taken before any vacation or bonus leave. (Exceptions may be made for retirees who may need to exhaust vacation leave prior to retirement.)
- Gap hours compensatory time shall be taken within twelve months from the date the work is performed. If not taken within 365 days, the time shall be paid out in the next paycheck.
- If an employee separates before taking gap hours compensatory time, it shall be paid in a lump sum along with unused vacation.
- If an employee transfers to an FLSA Not Subject position or to another agency before taking gap hours compensatory time, it shall be paid in the current or next regular paycheck by the releasing agency.

Note: Temporary FLSA Subject employees or other hourly FLSA Subject employees who are in a non-leave earning appointment type shall receive straight time monetary payment for a standard 40-hour workweek, and an additional amount equal to 1½ times the employee's regular hourly rate for all hours worked in excess of 40. Also, temporary FLSA Subject Law Enforcement employees with a 28 day work period shall receive straight time monetary payment for all hours worked up to and including 171 hours, and an additional amount equal to 1½ times the employee's regular hourly rate for all hours worked in excess of 171. There is no option to award overtime compensatory time or gap hours compensatory time for these temporary/hourly employees.

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§ 12. Hours Worked

Generally, all time during which an employee is required, suffered, or permitted to be on the employer's premises on duty or at a prescribed work place, except for meals or other periods when the employee is free from duty, is considered as hours worked. This is so even if the duties are pleasurable rather than burdensome and even if no productive work is actually performed.

As a general rule, hours worked will include:

- all time during which an employee is required to be on duty on the employer's premises or at a prescribed workplace, and
- all time during which an employee is suffered or permitted to work whether or not required to do so. In the large majority of cases, the determination of an employee's working hours will be easily calculable under this formula and will include, in the ordinary case, all hours from the beginning of the workday to the end with exception of periods when the employee is relieved of all duties for the purpose of eating meals.

§ 13. Unauthorized Work

Hours worked by an employee without the employer's permission or contrary to instructions may or may not be considered as hours worked. Unrecorded hours worked during a workweek by an employee at the job site or at home must be counted as hours worked if the employer knows or has reasons to know of such practice. The employer must enforce the no-work rule and may not unjustly benefit from work performed without knowledge of it. Unauthorized overtime may be addressed with the employee as a performance or conduct issue.

§ 14. Waiting Time

§ 14.1. On Call Waiting Time

Time spent by an employee who is required to remain on call on the employer's premises or so close thereto that the time cannot be used for the employee's own purposes is considered working time and must be compensated at the employee's regular rate of pay or overtime rate of pay. However, employees who are merely required to leave word as to

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where they may be reached are not working while on call in this sense.⁶ Time spent responding to a call received while on-call is time worked. See the **On-Call and Emergency Callback Pay Policy** for more information.

The fact that an employee lives on the employer's premises does not mean that the employee is entitled to pay for all those hours. Such an employee has regular duties to perform but is subject to work at any time in the event of an emergency. Ordinarily, employees have a normal night's sleep, ample eating time and may, during certain periods, come and go as the employee pleases.

An agreement should be reached with an employee in this category as to the extent of duty which will make clear the time that should be considered as hours worked and not worked. As a rule, allowance for 8 hours sleep and 3 hours for meal periods might be reasonable, plus any other hours that the employee may be free of unnecessary restrictions of use of the time. See Section 25.4 of this policy for additional information related to in-residence employees and Section 25.6 for additional information related to sleep time. See the **On-Call and Emergency Callback Pay Policy** for information pertaining to supplemental pay for which employees may be eligible for time spent on-call.

§ 14.2. On and Off Duty Waiting Time

Agencies may also need to consider whether any waiting time, including time spent on call, is time worked. An employee may be engaged to wait, or they may be waiting to be engaged. This determination must be made based on the facts and circumstances of each case, including the working agreement between the employer and the employee, the nature of the service being performed, and its relation to the waiting time. Time spent engaged to wait is time worked and time spent waiting to be engaged is not time worked.⁷

§ 15. Vacation, Sick Leave and Holidays

In determining the number of hours worked by an employee within a given week, time spent on vacation, sick leave, and holidays will not be counted as time worked. Such time off must be included in straight-time pay, but is not included in computing hours of work for overtime pay. See the **Leave Offsetting Policy** for additional information.

⁶ 29 C.F.R. § 785.17

⁷ See 29 C.F.R. § 785.14 to 785.16

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§ 16. Rest Periods (Break Time)

A rest period of short duration, between 5 and 20 minutes, must be counted as hours worked.⁸ It is at the discretion of the agency whether to allow break times for employees.⁹ Unauthorized break time may be addressed as a performance or conduct issue.

See the **Work Schedule Policy** about the meal period that is part of the standard work schedule for full-time state employees, and about how employees should arrange meal periods in any variable work schedule with their supervisors.¹⁰ As stated in the North Carolina Administrative Code and in the Work Schedule Policy, an FLSA Subject employee's hours worked do not include a bona fide meal period of at least 30 consecutive minutes during which an employee is completely relieved of duty. A meal period of less than 30 consecutive minutes must be considered as hours worked for employees who are FLSA Subject.¹¹

§ 17. Meal Period

A bona fide meal period is a span of at least 30 consecutive minutes (never less) during which an employee is completely relieved of duty and free to use the time for his/her own purposes. It is not counted as hours worked or paid time. Any so-called "meal period" of less than 30 consecutive minutes must be paid as hours worked.¹²

§ 18. Grievance Time

The time an employee spends during a regular work schedule in addressing a grievance under the Employee Grievance Policy is work time.¹³ See the **Other Management Approved Leave Policy** for information related to leave options for grievances. Such time spent outside the employee's regular work schedule is work time only if the employee's attendance is required by the agency or the State.

⁸ 29 C.F.R. § 785.18

⁹ The North Carolina Wage & Hour Act does not require mandatory rest breaks or meal breaks for employees 16 years of age or older.

¹⁰ See Sections 2 and 3 of the **Work Schedule Policy**, along with 25 NCAC 01C .0502 and .0503.

¹¹ 25 NCAC 01C .0503(b).

¹² 29 C.F.R. § 785.19

¹³ 29 C.F.R. § 785.42

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§ 19. Training Time

Required attendance at training sessions, workshops, and other meetings, whether before, during or after the employee's regular work schedule, is work time.

Voluntary attendance at training sessions, workshops, and other meetings is not work time. Attendance is voluntary only if the employee is not led to believe that working conditions or continued employment would be adversely affected by nonattendance.

§ 20. Travel Time

Whether travel time is considered as hours worked depends on the circumstances and should be determined on a case-by-case basis.¹⁴

§ 20.1. Home To Work

An employee who travels from home before the regular workday and returns home at the end of the workday is engaged in ordinary home to work travel that is a normal incident of employment. This is true whether the employee works at a fixed location or at different job sites. Normal travel from home to work is not work time.¹⁵

§ 20.2. Travel That Is All In The Day's Work

Time spent by an employee in travel, as part of the employee's principal activity, such as travel from job site to job site during the workday, must be counted as hours worked.¹⁶ When an employee is required to report at the employer's premises, or at a meeting place, to receive instructions or to perform other work there, the travel time from this designated place to the work place is part of the day's work and must be counted as hours worked.

If an employee normally finished work at a particular job site at 5:00 p.m., and is required to go to another job that is finished at 8:00 p.m., and is required to return to the employer's premises arriving at 9:00 p.m., all of the time is working time. However, if the employee goes home instead of returning to the employer's premises, the travel after 8:00 p.m. is home-to-work travel and is not hours worked.

¹⁴ 29 C.F.R. § 785.33

¹⁵ 29 C.F.R. § 785.35

¹⁶ 29 C.F.R. § 785.38

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§ 20.3. Home To Work On Special One-Day Assignments in Another City

When an employee who regularly works at a fixed location in one city is given a special one-day assignment in another city, such travel cannot be regarded as home-to-work travel. For example, an employee who works in Raleigh with regular working hours from 8:30 a.m. to 5:30 p.m., may be given a special assignment in another city, with instructions to leave Raleigh at 7:00 a.m. The employee arrives at 12 noon, ready for work. The special assignment is completed at 3:00 p.m., and the employee arrives back in Raleigh at 8:00 p.m. Such travel cannot be regarded as ordinary home-to-work travel occasioned merely by the fact of employment. It was performed for the State's benefit and would, therefore, qualify as an integral part of the "principal" activity that the employee was hired to perform on that particular workday. All the time involved, however, need not be counted as work time. Since, except for the special assignment, the employee would have had to report to the regular work site, the travel between home and the airport, or the usual time required to travel from home to work may be deducted, such time being in the "home-to-work" category. Also, of course, the usual mealtime would be deductible.¹⁷

§ 20.4. Travel Away From Home Community

Travel that keeps an employee away from home overnight is travel away from home. Travel time away from home community is work time when it is within the employee's **regular working hours** on any day of the week. The time is not only hours worked on regular working days during normal working hours but also during the corresponding hours on nonworking days. Therefore, if an employee regularly works from 8:30 a.m. to 5:30 p.m., from Monday through Friday, the travel time during these hours is work time on Saturday and Sunday as well as the other days.¹⁸ Regular meal period time is not counted.

That time spent in travel away from home **outside of regular working hours** as a passenger on airplane, train, bus, or automobile is not considered as work time, unless the employee is performing work.

If the employee **drives** the vehicle outside of regular working hours, the time spent driving the car is performing work and is counted as hours worked. (The same is true, if the

¹⁷ 29 C.F.R. § 785.37

¹⁸ 29 C.F.R. § 785.39

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option was available, for the time that would have been spent had the employee used public transportation rather than driving their own vehicle.)

Time spent in travel as a **passenger outside of regular working hours, while the passenger was not performing other work duties**, is not time worked under the FLSA. Instead, employees should enter this time under code 9515, "Travel Time 1x," in the HR-Payroll System, which produces time off on a straight-time basis rather than a time-and-a-half basis. Code 9500 (for time worked) should instead be used if the passenger performed other work duties while traveling (such as completing paperwork or holding a work call) or if the travel was during regular working hours.

The example below will help explain the accountability for travel time away from home community.

Example:

Two employees who have headquarters in Raleigh and work on a Monday-Friday 8:30 a.m. to 5:30 p.m. schedule depart for Asheville on Sunday afternoon at 2:00 p.m., and arrive in Asheville at 7:00 p.m. During the travel, they are not performing any duties for work other than traveling.

- For both employees, the 3-1/2 hours traveled between 2:00 p.m. and 5:30 p.m., are hours worked, should be entered under code 9500 in the HR-Payroll System, and must be included in the total hours worked within the workweek. If the total hours worked exceeds 40 per week, the employee is to be compensated in accordance with the State's overtime time-off policy.
- For the passenger, the 1-1/2 hours traveled between 5:30 p.m. and 7:00 p.m. are not considered as time worked for the purpose of determining total hours worked. However, it shall be recorded as travel time and entered under code 9515, "Travel Time 1x," in the HR-Payroll System. This will produce any time off only on a straight-time basis.
- For the driver, the 1-1/2 hours traveled between 5:30 p.m. and 7:00 p.m. are considered time worked and should be entered under code 9500 in the HR-Payroll System.

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FLSA Not Subject employees may be granted time off as a result of travel in accordance with the agency leave policy.

§ 20.5. **Travel time for Hybrid (Part Time Telework), Full Time Telework Employees and Field/Home Based Employees Who Live Within a Reasonable Commute Distance**

This section is for hybrid, teleworking, and field-based or home-based employees who live **within a reasonable commute distance**. The reasonable commute distance is defined by each agency; see the **Teleworking Program Policy**. For employees who are outside a reasonable commute distance, see the next section.

Generally, travel is not considered time worked when it is to and from a duty station for employees who live within a reasonable commute distance.¹⁹ This is considered home to work travel (see Section 20.1).

However, travel time is considered time worked to the onsite duty station in the following scenario: the employee works from an alternate work location some or all of the time, and is required by the employer to come to the duty station on a day in which the employee was scheduled to telework, and the employee was not provided enough notice²⁰ to allow for travel to the onsite duty station before the beginning of their regular workday. (See Section 20.2.)

As an example, if an employee regularly teleworks on Tuesdays, and the employee is advised at 11:00am on Tuesday that they need to report to the office for an 11:30am in-person meeting, the time spent driving to the office will be considered time worked.²¹

Once the employee has reported to the duty station, travel time from the duty station to the alternate work site would not be considered time worked, regardless of when the

¹⁹ Agencies should refer to the State Budget Manual and their agency travel reimbursement policy to determine when such travel should be reimbursed for field/home based employees. A hybrid or full time teleworker may not charge mileage for travel between their place of residence and their duty station.

²⁰ For the purposes of this policy, "enough notice" means by the close of business the day before the employee is expected to report to the onsite duty station. This is only as it relates to travel time and hours worked and does not imply employees are expected to be able to rearrange medical appointments, transportation, and the like in order to report to an onsite duty station with this amount of notice.

²¹ 29 C.F.R. § 785.38; 29 U.S.C. § 790.6

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employee chooses to return to their alternate work site, as the employee has the ability to travel to the alternate work site at the end of their regular workday.

Travel time will not be considered time worked to and from a worksite that is required by the employer on a day in which the employee was scheduled to telework, but the employee was notified in advance of the need to report to the worksite such that the employee could arrange travel to and from the worksite before and after their regular workday. This is considered normal home to work travel (see Section 20.1). This is true even if the employee chooses to begin their workday at home and then report to the worksite during work hours.

§ 20.6. **Travel time for Hybrid (Part Time Telework) , Full time Telework or Home/Field Based Employees that Live Outside of a Reasonable Commute Distance**

This section is for hybrid, full time telework, and field-based or home-based employees who **live outside a reasonable commute distance**. The reasonable commute distance is defined by each agency; see the **Teleworking Program Policy**. For employees who are within a reasonable commute distance, see the previous section.

For employees who live outside a reasonable commute distance, generally travel time will be considered time worked if it would be considered time worked under the provisions of Sections 20.3 or 20.4 of this policy, whichever is most applicable to the specific employee.²² The following paragraphs apply these provisions.

§ 20.6(a) **Hybrid and Full Time Telework Employees**

Hybrid and full time telework employees reporting to their onsite duty station, on a regularly scheduled day, that live outside of a reasonable commute distance (as defined by their agency telework policy) will not count travel from home to work time as time worked.²³ For example, a hybrid employee that lives 120 miles from their onsite duty station, who is expected to report to their onsite duty station every Wednesday will not count as time

²² Agencies should refer to the State Budget Manual and their agency travel reimbursement policy to determine when such travel should be reimbursed for field/home based employees. A hybrid or full-time teleworker may not charge mileage for travel between their place of residence and their duty station.

²³ A hybrid or full time telework employee that lives outside of the reasonable commuting distance defined by their agency's telework policy should be a limited occurrence and an agency should provide advanced approval of such an arrangement. See Section 8 of the **Teleworking Program Policy**.

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worked their travel from home to their duty station before their workday begins or their travel from their duty station to home after their workday ends.

Hybrid and full time telework employees who are requested to report to their onsite duty station **in addition to** the day(s) they typically or regularly report to their onsite duty station, who live outside of a reasonable commute distance as defined by their agency telework policy, will count the travel to and from the worksite as time worked under the provisions of Section 20.3 or 20.4 of this policy, whichever is most applicable. This means that the employee and Human Resources team need to look back at the provisions above about travel outside the home community to determine which portion of the travel would be time worked.

Full time telework employees that live outside of a reasonable commute distance as defined by the agency telework policy who do not have a regular on-site schedule will count travel time as time worked under the provisions of Section 20.3 or 20.4, whichever is most applicable to the employee.

§ 20.6(b) Home/Field Based Employees

Home/Field based employees that live outside of a reasonable commute distance as defined by the agency telework policy will count travel time as time worked under the provisions of Section 20.3 or 20.4, whichever is most applicable to the employee.

§ 21. Recordkeeping

Records of hours worked and wages paid are required to be kept for each employee subject to this policy. Each agency head is responsible for making available the following information for review by Federal and State auditors and the Office of State Human Resources. Records must be preserved for at least five years after the calendar year in which wages for services are paid²⁴.

- Name
- Home Address
- The state or states in which the individual performed services
- Date of Birth, if under 19
- Sex

²⁴ 04 NCAC 24D .0501

Hours of Work and Overtime Compensation Policy (cont.)

- Position classification in which employed
- Time and day of week the workweek or work period begins
- Total wages paid each pay period
- Date of payment and pay period covered
- Basis on which wages are paid (such as \$10.00 hr., \$400 wk., or \$1600 a month)
- Regular hourly rate of pay for any work week or work period in which overtime is worked
- Amount and nature of each payment excluded from regular rate
- Dates on which the employee performed work
- Hours worked each workday and total hours worked each workweek or work period
- Total daily or weekly straight-time earnings or wages
- Total overtime earnings for the workweek
- Total additions to or deductions from wages paid each pay period plus the dates, amounts and nature of the items which make up the total additions and deductions
- Compensatory time accrued, used or paid

§ 22. Enforcement

The Secretary of Labor is authorized by the FLSA to sue for back wages and for an equal amount of liquidated damages without a written request from the employees even though the suit might involve issues of law that have not been finally settled by the courts.

The act also specifically authorizes suits against public employers by their employees. This amendment clarifies the right of State and local government employees to bring private actions in Federal and State courts against their employers to enforce their rights and recover any back wages that may be due under the Fair Labor Standards Act.

§ 23. Employees Not Subject to FLSA Overtime Rules

The FLSA Subject or FLSA Not Subject status of any particular employee must be determined on the basis of whether duties, responsibilities and salary meet the requirements for exemption. The employee's title or classification is of no significance in determining whether the tests are met.

It shall be the responsibility of the agency HR Director or their designee to determine whether the exemption is applicable to particular employees.

Hours of Work and Overtime Compensation Policy (cont.)

Following is an outline of the terms and definitions to be followed in determining those employees not subject to FLSA overtime rules.

§ 23.1. Executive Employee Exemption

To meet the executive exemption, an employee's position must meet the following requirements:

- primary duty is management of the enterprise or of a customarily recognized department or subdivision;
- customarily and regularly directs the work of two or more employees;
- has authority to hire or fire other employees or whose suggestions and recommendation as to hiring, firing, advancement, promotion or other change of status of other employees are given particular weight; and
- is paid at least \$844 a week or \$43,888 annually free and clear of board, lodging or other non-cash items.²⁵

Primary Duty²⁶ - the principal, main, major, or most important duty that the employee performs. An employee's primary duty is determined by looking at all the facts, with the major emphasis on the character of the employee's job as a whole.

Important factors to consider when determining the primary duty include:

- the relative importance of the exempt duties as compared with other types of duties;
- the amount of time spent performing exempt work;
- the employee's relative freedom from direct supervision; and
- the relationship with the employee's salary and wages paid to other non-exempt workers for the same kind of nonexempt work.

Employees who spend more than 50% of their time performing exempt work will generally satisfy the primary duty requirement. However, the regulations do not require that exempt employees spend more than 50% of their time performing exempt work.

Management²⁷ - Management includes activities related to supervising employees such as interviewing, selecting and training of employees; setting and adjusting pay rates and work hours; directing the work of employees; conducting performance appraisals, handling employee complaints and grievances; and disciplining employees. Other

²⁵ 29 C.F.R. § 541.100

²⁶ 29 C.F.R. § 541.700

²⁷ 29 C.F.R. § 541.102

Hours of Work and Overtime Compensation Policy (cont.)

management duties include planning and controlling the budget; monitoring or implement legal compliance measures; providing for the safety and security of employees or property; planning and apportioning work among employees; and other functions related to running or servicing a business.

A **“customarily recognized department or subdivision”**²⁸ must have a permanent status and continuing function. To meet this requirement, this does not include a mere collection of employees assigned from time to time to a specific job.

–**“Customarily and regularly”**²⁹ means a frequency that must be greater than occasional but which may be less than constant. As this relates to the supervision of other workers, this means that normally an exempt executive employee must direct the work of other employees at least once a week, but not every day.

“Two or more other employees”³⁰ means that the exempt manager must supervise two full-time employees or equivalent. The exempt executive generally must supervise other employees who work a total of 80 work hours.

An exempt executive employee must have “the authority to hire or fire other employees” or must have his or her suggestions and recommendations as to hiring, firing advancement, promotion or any other change of status be given “particular weight.”

Particular weight³¹ - Factors to consider when determining whether an employee’s recommendation is given “particular weight” include, but are not limited to:

- whether it is part of the employee’s job duties to make recommendations;
- the frequency with which recommendations are made or requested (does not include occasional suggestions); and
- the frequency with which the recommendations are relied upon.

Suggestions/recommendations may be reviewed by a higher-level manager. The exempt employee need not have authority to make the ultimate decision.

Concurrent Duties - Concurrent performance of exempt and nonexempt work does not automatically disqualify an employee from exemption.

- Not subject employees generally decide when to perform nonexempt duties and remain responsible for success or failure of business operations.

²⁸ 29 C.F.R. § 541.103

²⁹ 29 C.F.R. § 541.701

³⁰ 29 C.F.R. § 541.104

³¹ 29 C.F.R. § 541.105

Hours of Work and Overtime Compensation Policy (cont.)

- Subject employees generally are directed by a supervisor to perform the exempt work or perform the exempt work for defined time periods

For example, an assistant manager can supervise employees, and serve customers at the same time without losing the exemption. In contrast, a relief supervisor or working supervisor whose primary duty is performing nonexempt work on the production line in a manufacturing plant does not become exempt merely because he occasionally has some responsibility for directing the work of other nonexempt production line employees when, for example, the exempt supervisor is on vacation.

§ 23.2. Administrative Employee Exemption

§ 23.2(a) General Exemption

To meet the administrative exemption, an employee's position must meet the following requirements:

- 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;
- primary duty includes the exercise of discretion and independent judgment with respect to matters of significance; and
- is paid at least \$844 a week or \$43,888 annually free and clear of board, lodging or other non-cash items³²

Primary Duty has the same meaning as defined in Section 23.1 of this policy.

Management or General Business Operations³³ - This refers to the type of work performed by the employee. To meet this requirement, the employee must perform work directly related to assisting with the running or servicing of the business. This includes but is not limited to, work in such areas as tax, finance, accounting, budgeting, auditing, insurance; quality control, purchasing; advertising, marketing; research, safety and health; human resources; public relations; legal and regulatory compliance; and similar activities.

³² 29 C.F.R. § 541.200

³³ 29 C.F.R. § 541.201

Hours of Work and Overtime Compensation Policy (cont.)

Discretion and Independent Judgment³⁴ - Generally involves an employee comparing and evaluating possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, decisions and recommendations may be reviewed at a higher level and, upon occasion, revised or reversed. The term “matters of significance” refers to the level of importance or consequence of the work performed.

Discretion and independent judgment factors include but are not limited to whether the employee:

- has authority to formulate, affect, interpret, or implement management policies or operating practices;
- carries out major assignments in conducting the operations of the business;
- 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;
- has the authority to commit the employer in matters that have significant financial impact;
- has the authority to waive or deviate from established policies and procedures without prior approval;
- has authority to negotiate and bind the company on significant matters;
- provides consultation or expert advice to management;
- is involved in planning long- or short-term business objectives;
- investigates and resolves matters of significance on behalf of management; and
- represents the company in handling complaints, arbitrating disputes or resolving grievances.

Discretion and independent judgment does not include applying well-established techniques, procedures or specific standards described in manuals or other sources; clerical or secretarial work; recording or tabulating data; or performing mechanical, repetitive, recurrent or routine work. Exempt employees may use manuals, guidelines or other established procedures if they contain or relate to highly technical, scientific, legal financial,

³⁴ 29 C.F.R. § 541.202

Hours of Work and Overtime Compensation Policy (cont.)

or other similar complex matters and they can be understood or interpreted by those with advanced or specialized knowledge and skills.³⁵

Examples of employees that would meet the administrative exemption criteria³⁶:

- an employee who leads a team of other employees assigned to complete major projects;
- an executive assistant or administrative assistant to a business owner or senior executive of a large business who has been delegated authority regarding matters of significance; or
- Human resources managers who formulate, interpret or implement employment policies;
- a management consultant who studies the operations of a business and proposes changes in organization.

Examples of subject positions include ordinary inspection work involving well established techniques and procedures; examiners and graders who perform work involving comparisons of products with established standards; and public sector inspectors or investigators.

§ 23.2(b) **Educational Establishments Exemption**³⁷

- To meet the administrative exemption, an employee's position must meet the following requirements: Primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof.
- is paid at least \$844 a week or \$43,888 annually free and clear of board, lodging or other non-cash items; or on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which employed.

"Educational Establishment" means elementary or secondary school system, an institution of higher education or other educational institution. It also includes special schools for mentally or physically disabled or gifted children, regardless of any classification of such schools as elementary, secondary or higher. Factors relevant in determining whether post-

³⁵ 29 C.F.R. § 541.704

³⁶ 29 C.F.R. § 541.203

³⁷ 29 C.F.R. § 541.204

Hours of Work and Overtime Compensation Policy (cont.)

secondary career programs are educational institutions include whether the school is licensed by a state agency responsible for the state's educational system or accredited by a nationally recognized accrediting organization for career schools.

“Performing administrative functions directly related to academic instruction or training” means work related to the academic operations and functions in a school rather than to administration along the lines of general business operations. Such academic administrative functions include operations directly in the field of education. Jobs relating to areas outside the educational field are not within the definition of academic administration.³⁸

§ 23.3. Professional Employee Exemption

§ 23.3(a) Learned Professional³⁹

To meet the Learned Professional exemption, an employee's position must meet the following requirements:

- primary duty must be performance of work requiring advanced knowledge;
- is in a field of science or learning;
- customarily acquired by a prolonged course of specialized intellectual instruction; and
- is paid at least \$844 a week or \$43,888 annually free and clear of board, lodging or other non-cash items. (Exception: The salary level and salary basis tests do not apply to doctors, lawyers, and teachers.)

“Work requiring Advanced Knowledge” - means work that is predominately intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment. An exempt professional employee uses advanced knowledge to analyze, interpret, or make deductions from varying facts or circumstances. It is not work involving routine mental, manual, mechanical, or physical work. Advanced knowledge cannot be attained at the high school level.

“Fields of science of learning” are occupations with recognized professional status. Fields of science or learning include law, theology, medicine, pharmacy, accounting, teaching, architecture, engineering, actuarial computation, and the physical, chemical or biological sciences.

³⁸ See 29 C.F.R. § 541.204 (c)(1) and (2) for examples of positions that may qualify for this exemption.

³⁹ 29 C.F.R. § 541.301

Hours of Work and Overtime Compensation Policy (cont.)

"Prolonged course of specialized intellectual instruction" means that the learned professional exemption is limited to professions where specialized, academic training is a standard prerequisite for entering the profession. The best evidence that an employee meets this requirement is possession of the appropriate academic degree. However, the Exemption is also available to employees in such professions who possess substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attain the advanced knowledge through a combination of work experience and intellectual instruction.

This exemption is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field; with knowledge acquired through an apprenticeship; or with training in the performance of routine mental, manual, mechanical or physical processes.

Occupations generally meeting the learned professional exemption include doctors⁴⁰, nurses, physician assistants, dental hygienists, registered or certified medical technologists, lawyers⁴¹, paralegals, teachers⁴², architects, engineers, pharmacists, chefs, and actuaries.

In the case of professional employees, the compensation requirements in this section shall not apply to employees engaged as teachers (see [§ 541.303](#)); employees who hold a valid license or certificate permitting the practice of law or medicine or any of their branches and are actually engaged in the practice thereof (see [§ 541.304](#)); or to employees who hold the requisite academic degree for the general practice of medicine and are engaged in an internship or resident program pursuant to the practice of the profession (see [§ 541.304](#)).

§ 23.3(b) **Creative Professional Exemption**⁴³

To meet the creative professional exemption, the employee's primary duty must be the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

The recognized fields of artistic or creative endeavor include music, writing, acting and the graphic arts. Exempt creative professionals include musicians, composers, conductors, novelists, screenwriters, actors, painters, and photographers.

⁴⁰ See 29 C.F.R. § 541.304 for more information related to exemptions due to the practice of medicine.

⁴¹ See 29 C.F.R. § 541.304 for more information related to exemptions due to the practice of law.

⁴² See 29 C.F.R. § 541.303 for more information.

⁴³ 29 C.F.R. § 541.302

Hours of Work and Overtime Compensation Policy (cont.)

The requirement of “invention, imagination, originality of talent” distinguishes the creative professions from work that primarily depends on intelligence, diligence, and accuracy. The determination of exempt creative professional status must be made on a case-by-case basis, based on the extent of the invention, imagination, originality, or talent exercised by the employee.

§ 23.4. Computer Employee Exemption⁴⁴

To qualify for the computer employee exemption an employee’s position must meet the following requirements:

- is compensated either on a salary or fee basis at a rate not less than \$844 a week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;
- is employed as a computer system analyst, computer programmer, software engineer or other similar skilled worker in the computer field and
- The employee’s primary duties consist of:
 - (1) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
 - (2) 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;
 - (3) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
 - (4) a combination of the aforementioned duties, the performance of which requires the same level of skills.

The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computers systems analysis and programming or other similarly skilled computer-related occupations identified in the primary duties test described above, are also not exempt under the computer employee exemption.

⁴⁴ 29 C.F.R. § 541.400

Hours of Work and Overtime Compensation Policy (cont.)

§ 23.5. Highly Compensated Employee Test

An employee must meet the following criteria to meet the highly compensated test exemption:

- total annual compensation is at least \$132,964;
- is paid at least \$844 per week on a salary or fee basis;
- performs office or non-manual work; and
- customarily and regularly performs any one or more of the exempt duties identified in the standard tests for the executive, administrative or professional exemptions.

Total annual compensation does not include credit for board lodging or other facilities, payments for medical or life insurance, and contributions to retirement plans or other fringe benefits. Tasks or work performed “customarily and regularly” include work normally and recurrently performed every workweek. If a highly compensated “white collar” employee customarily and regularly performs one or more exempt duties, detailed analysis of all the job duties performed is not necessary. For example, an employee may qualify as a highly compensated executive employee if the employee meets the total annual compensation amount and customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements in the standard test for exemption as an executive.

§ 23.6. Combination Exemptions⁴⁵

Employees who perform a combination of exempt duties as set forth in the regulations in this part for executive, administrative, professional, outside sales and computer employees may qualify for exemption. Thus, for example, an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption. In other words, work that is exempt under one section of this part will not defeat the exemption under any other section.

§ 24. First Responders Generally Subject to FLSA

Police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue

⁴⁵ 29 C.F.R. § 541.708.

Hours of Work and Overtime Compensation Policy (cont.)

workers, hazardous materials workers and similar employees (“first responders”) who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims, preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects preparing investigative reports; and other similar work are not exempt under Section 13 (a) (1) of the Act and thus are protected by the minimum wage and overtime provisions of the FLSA.⁴⁶

First responders generally do not qualify as exempt employees because their primary duty is not management. They are not exempt administrative employees because their primary duty is not the performance of office or non-manual work directly related to the to management or general business operations of the employer or their employer’s customers. They are not exempt learned professionals because their primary duty is not the performance of work requiring knowledge of an advance type in a field or learning customarily acquired by a prolonged course of specialized intellectual instruction. Although some first responders have college degrees, a specialized academic degree is not a standard prerequisite for employment.

§ 25. Special Provisions

§ 25.1. Child Labor

The Fair Labor Standards Act sets 14 as the minimum age for most non-agricultural types of work but limits the number of hours that may be worked for minors under age 16. It also prohibits minors under age 18 from working in any occupation that is deemed to be hazardous. Of particular interest to all agencies are Hazardous Occupations Orders prohibiting the employment of minors between 16 and 18 years of age such as motor vehicle drivers and helpers, operators of elevators and in occupations involving the operation of certain power-driven woodworking and bakery machines.⁴⁷

⁴⁶ 29 C.F.R. § 541.3

⁴⁷ See 29 C.F.R. Subpart E for more information.

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Agencies should review the Child Labor provisions in the FLSA if questions of minimum age arise.

(Website: <http://www.dol.gov/dol/topic/youthlabor/agerequirements.htm>)

The FLSA provides for a civil penalty of up to \$1,000 for each violation of the child labor provisions of the Fair Labor Standards Act.

Minors will be paid the same rate of pay as other employees doing similar type work, including overtime premium pay for hours worked in excess of 40 per week. The only exception is for agriculture workers as explained below.

§ 25.2. **Agriculture Workers**⁴⁸

The FLSA exempts agricultural employees from overtime compensation, however it is State policy that hours of work for these employees are highly variable during seasonal periods and the hours worked may be averaged over a 12-month period but shall not exceed 2080 hours. Upon leaving State service, an agricultural employee shall be paid for any accumulated overtime balance remaining in the time records.

Agricultural workers are defined as workers who cultivate the soil or grow or harvest crops, workers engaged in dairying, or who raise livestock, bees, poultry or perform closely related research.

§ 25.3. **Student Workers**

The employment of students by the institutions in which they are enrolled is designed primarily to constitute one type of student financial aid. Such employment usually is characterized by flexible accommodation of the student's primary involvement in educational pursuits. Thus, in terms of hours worked, scheduling of work, and required skill and productivity, such student workers are materially distinguishable from regular career employees. Student workers are generally subject to FLSA and do not work more than 40 hours per week.

Any person who during any period of enrollment as a student in a public educational institution concurrently is employed by that institution shall be considered an employee within the meaning of and subject to the State Human Resources Act only if the student

⁴⁸ See 29 C.F.R. Part 780 for more information.

Hours of Work and Overtime Compensation Policy (cont.)

employee is employed by the institution on a full-time permanent basis (as defined by regulations issued by or under the authority of the State Human Resources Commission) in a permanent position established and governed pursuant to requirements of the State Human Resources Commission.

§ 25.4. In-Residence Employment

Employees who reside on, or spend a substantial amount of time on the premises, are usually on duty or subject to call at all times except when the dormitory is closed. It may be necessary for these employees to be required to work irregular schedules on a 5, 6, or 7-day workweek. Where this type of employment arrangement is necessary, the hours of work and overtime procedures must be established so as to accommodate work requirements.

While it will be difficult to determine the exact number of hours worked by such employees, it is permissible, under ruling of the Wage and Hour Division, to arrive at a reasonable agreement with the employees as to what constitutes the normal number of hours worked during a given workweek, taking into consideration the time they engage in private pursuits such as eating, sleeping, entertaining and the time they are able to be away from the dormitory for personal reasons⁴⁹. The following basis of pay may be adopted for employees in such categories:

Salary - The annual salary and monthly salary rates of an employee are established under current personnel policy for each position to which the appointment is made. With the employee's agreement, this salary is to represent the employee's straight-time pay for the agreed upon normal number of hours on duty per week. The hourly rate of pay is to be determined by dividing the stated annual salary by 52 to obtain the weekly salary and dividing this amount by 40 to obtain the hourly rate.

Overtime Compensation - Under this plan it is anticipated that weekly schedules will fluctuate and workweek schedules will be provided on a 40-45, 55, etc. basis. The employee is to receive straight-time pay for the established workweek with the proviso that where the agreed upon workweek exceeds 40 hours an additional amount equal to one-half of the hourly rate times the number of hours in excess of 40 will be added to the base pay. When it is necessary to work in excess of the agreed upon workweek hours, the employees will be

⁴⁹ 29 C.F.R. § 785.23

Hours of Work and Overtime Compensation Policy (cont.)

paid time and one-half the hourly rate for all hours worked in excess of the normal workweek.

§ 25.5. Registered Nurses

There are work units in State government where the presence of one or more Registered Nurses is required at all times. Due to emergencies or to labor market shortages, occasions occur when Registered Nurses are required to work additional hours in excess of their regular weekly schedule.

When it is necessary for an employee in a professional nursing class to work more than a regularly scheduled 40-hour workweek the excess hours shall be subject to hours of work and overtime compensation. When possible, the compensation should be in the form of time off. When the person in the position normally has twenty-four hours responsibility, (as in the case of some supervisors and most directors), overtime compensation provisions shall not be applicable, if the employee is not subject to the FLSA. If the employee with a shift of 24 hours or more is subject to the FLSA, refer to Section 25.6 of this policy.

In instances where it is not possible to pay an FLSA Subject employee overtime compensation in the form of compensatory time off, the overtime premium pay will be based on the employee's regular hourly rate of pay, except in cases where an employee may be assigned duties at a lower classification level; in such cases the base rate of pay may not exceed the maximum rate of the lower level assignment.

§ 25.6. Sleep Time⁵⁰

Under the FLSA, there are some instances in which a sleep period may be excluded from hours worked and some in which it may not.

When an employee is required to be on duty for less than 24 hours **and has been expressly permitted by the agency** to sleep or engage in other personal activities when not busy during the on-duty period, the permitted sleep time may not be excluded from compensable hours of work.⁵¹

⁵⁰ See 29 C.F.R. § 785.21, § 785.22 and § 553.222

⁵¹ 29 C.F.R. § 785.21. For law enforcement or fire protection personnel with 28 day work periods, sleep time may only be excluded on shifts of **more than** 24 hours. Sleep time may not be excluded on shifts of exactly 24 hours or less than 24 hours. 29 C.F.R. § 553.222

Hours of Work and Overtime Compensation Policy (cont.)

Where an employee is required to be on duty for 24 hours or more,⁵² the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 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.

If the sleeping period is of more than 8 hours, only 8 hours will be credited, and unless an expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and meal periods constitute hours worked.

If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted. If the employee cannot get at least 5 hours' sleep during the scheduled period, the entire time is working time.

§ 25.7. Law Enforcement Activities⁵³

The term law enforcement activities refers to any employee (1) who is a uniformed or plainclothes member of a body of officers and subordinates who are empowered by statute or local ordinance to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes, (2) who has the power of arrest, and (3) who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics. Employees who meet these tests are considered to be engaged in law enforcement activities regardless of their rank, or of their status as "probationary" or "permanent" employee, and regardless of their assignment to duties incidental to the performance of their law enforcement activities.

The term "employees in law enforcement activities" also includes "security personnel in correctional institutions". This includes any government facility maintained as part of a

⁵² Examples in the federal regulations of those "on duty" in this way include telephone operators who were given a sleeping bunk (in the text of 29 C.F.R. § 785.21), police officers on a tour of duty (in the text of 29 C.F.R. § 553.222), and firefighters (in the cases cited in 29 C.F.R. § 785.22).

⁵³ 29 C.F.R. § 553.211

Hours of Work and Overtime Compensation Policy (cont.)

penal system for the incarceration or detention of persons suspected or convicted of having breached the peace or committed some other crime. Such facilities include penitentiaries, prisons, prison farms, county, city and village jails, precinct house lockups and reformatories. Employees of correctional institutions who qualify are those who have responsibility for controlling and maintaining custody of inmates and of safeguarding them from other inmates or for supervising such functions regardless of whether their duties are performed inside the correctional institution or outside the institution (as in the case of road gangs). These employees are considered to be engaged in law enforcement activities regardless of their rank. Law enforcement employees may include, for example, fish and game wardens or criminal investigative agents assigned to the attorney general's staff or any other law enforcement agency concerned with keeping public peace and order and protecting life and property.

Not included in the term "employee in law enforcement activities" are the so-called "civilian" employees of law enforcement agencies or correctional institutions that engage in such support activities as those performed by dispatchers, radio operators, apparatus and equipment maintenance and repair workers, janitors, clerks, and stenographers. Nor does the term include correctional program assistants, directors or supervisors or employees in correctional institutions who engage in building repair and maintenance, culinary services, teaching or in psychological, medical and paramedical services. This is so even though such employees may, when assigned to correctional institutions, come into regular contact with the inmates in the performance of their duties, or may be required by statute or regulation to be certified by the Criminal Justice Training and Standards Council.

Because of the varied nature of law enforcement activities throughout the State, it may not be possible for all law enforcement classifications to be considered under the same plans for overtime. Under the Wage and Hour Law two options are permissible

- (1) For schedules requiring a 40-hour workweek, the policies on hours of work and overtime pay for a 40-hour workweek will apply.
- (2) For schedules requiring more than 40 hours in a workweek the following is permissible. The "work period" will consist of 28 consecutive days. In the workweek period of 28 consecutive days the employee shall receive, for tours of duty, which in the aggregate exceed 171 hours, compensation at a rate of one

Hours of Work and Overtime Compensation Policy (cont.)

and one-half times the regular hourly rate at which employed.⁵⁴ (The regular hourly rate is the rate computed on a 40-hour basis and published in the Salary Plan by the Office of State Human Resources, plus shift premium pay, if any.)

See the “Gap Hours” section of this policy for provisions on how to compensate for hours worked between 160 and 171.

§ 25.8. **Overtime / Compensatory Time Off Option for Law Enforcement, Fire Protection and Emergency Response Personnel with a Work Period of 28 Days⁵⁵**

The following provisions are applicable only to agencies that employ persons in subject law enforcement/fire protection/emergency response positions. Such agencies may, by letter to the State Human Resources Director, choose to use the following overtime compensation provisions in lieu of the customary overtime compensation provisions elsewhere in this policy:

- (1) Under these provisions, FLSA Subject persons in law enforcement/fire protection/emergency response positions who work more than 171 hours for law enforcement employees or 212 hours for fire protection employees in a 28 consecutive day work period may be given compensatory time off in lieu of cash payment for these overtime hours worked.
- (2) Overtime compensatory time off earned must be used no later than 180 days from the date the compensatory time off was earned.
- (3) Overtime compensatory time off earned but not used within 180 days from its being earned must be paid for in cash in the first pay period following the expiration of the 180 days.
- (4) Overtime earned under these provisions must be compensated at the rate of one and one-half times the regular hourly rate or one and one-half hours of compensatory time off for each hour of overtime earned.
- (5) If an employee under these provisions has a positive balance of earned overtime compensatory time off and is promoted to an exempt position, the accumulation of earned compensatory time off must be paid in cash before the employee goes into the exempt position.

⁵⁴ 29 C.F.R. 553. § 201

⁵⁵ See 29 C.F.R. § 553.230-233

Hours of Work and Overtime Compensation Policy (cont.)

- (6) Employees in these positions cannot accumulate more than 480 hours of compensatory time. Any compensatory time earned in excess of 480 hours must be paid in cash as earned.

When an agency chooses the time off provisions in a letter under this section of the policy, it does not require any additional approval by the State Human Resources Director, and it shall not require approval of an exception or variance as described in § 3 of this policy.

The subject or not subject status of law enforcement personnel will be determined under the terms of exemptions for Executive, Administrative and Professional employees.

Employees engaged in law enforcement activities may also engage in some non-law enforcement work as an incident to or in conjunction with their law enforcement activities. The performance of such work will not cause the employee to lose law enforcement status unless such work exceeds twenty percent of the total hours worked by that employee during the workweek or the applicable work period. A person who spends more than twenty percent of their working time in non-law enforcement activities shall not be considered as being engaged in law enforcement activities for coverage under this subsection of policy.⁵⁶

§ 25.9. Overtime Pay for FLSA Not Subject Employees When the Governor Declares an Emergency or a Disaster

Agencies are authorized to pay overtime (1) at time and one-half for FLSA Subject employees and (2) at straight-time rates to FLSA Not Subject employees when all of the following conditions occur:

- There is a gubernatorial declaration of a state of emergency/disaster;
- Employees are performing law enforcement activities or response/recovery activities during the emergency/disaster;
- There is a requirement by management for employees to work overtime during the emergency/disaster; and
- Funds are available. The agency shall determine if funds are available and obtain prior approval from the Office of State Budget and Management to use such funds to cover the overtime payments. The agency shall distribute any overtime pay consistently with a pre-defined standard that treats all employees equitably.

⁵⁶ 29 C.F.R. § 553.212

Hours of Work and Overtime Compensation Policy (cont.)

This authorization requires a written recommendation and approval by the State Human Resources Director under § 3 of this policy.

The absence of any of these conditions will require the agency to follow (1) the Hours of Work and Overtime Policy for FLSA Subject employees and (2) the agency's compensatory leave policy for FLSA Not Subject employees.

§ 25.10. **Tour of Duty and Compensable Hours of Work**⁵⁷

The term “tour of duty” is a unique concept applicable only to employees in law enforcement and fire protection activities. This term means the period of time during which an employee is considered to be on duty for purposes of determining compensable hours. It may be a scheduled or unscheduled period. Scheduled periods also include time spent in work outside the “shift” which the public agency employer assigns. Unscheduled periods include time spent in court by officers, time spent handling emergency situations and time spent working after a shift to complete an assignment. Such time must be included in the compensable tour of duty even though the specific work performed may not have been assigned in advance. The tour of duty does not include time spent substituting for other employees by mutual agreement as set out elsewhere in this policy. The tour of duty also does not include time spent in volunteer law enforcement and fire protection activities performed for a different jurisdiction.

§ 25.11. **Occasional or Sporadic Employment in a Different Capacity**⁵⁸

Where employees, solely at their option, work occasionally or sporadically on a part-time basis for the same public agency in a different capacity from their regular employment, the hours worked in the different jobs shall not be combined for the purpose of determining overtime compensation under this policy.

“Occasional or Sporadic” - The term “occasional or sporadic” means infrequent, irregular, or occurring in scattered instances. There may be an occasional need for additional resources in the delivery of certain types of services which is at times best met by the part-time employment of an individual who is already employed by the State. Where employees freely and solely at their own option enter into such activity, the total hours

⁵⁷ 29 C.F.R. § 553.220

⁵⁸ 29 C.F.R. § 553.30

Hours of Work and Overtime Compensation Policy (cont.)

worked will not be combined for purposes of determining any overtime compensation due on the regular, primary job. However, in order to prevent overtime abuse, such hours worked are to be excluded from computing overtime compensation due only where the occasional or sporadic assignments are not within the same general occupational category as the employee's regular work.

In order for hours of such work not to be combined with hours worked on the primary, regular job, the employee's decision to work in a different capacity must be made freely and without coercion. The employee's decision to perform such work will be considered to have been made at their sole option when it has been made without fear of reprisal or promise of reward.

Typically, recreation and park facilities, university athletic facilities or other public events may need to utilize employees in occasional or sporadic work. Employment in such activity may be considered occasional or sporadic for regular State employees even when the need for such work can be anticipated because it recurs seasonally (the State Fair, for example).

In order to be "occasional or sporadic" it is essential that the character of the activity be intermittent and irregular, rather than continuous or regular.

In order for employment in these occasional or sporadic activities not be considered subject to the overtime provisions of this policy, the regular State employment of the individual must also be in a different capacity; that is, it must not fall within the same general occupational category.

§ 25.12. Substitution⁵⁹

Two persons employed by the same agency may agree, solely at their option and with the approval of the agency, to substitute for one another during scheduled work hours in performance of work in the same capacity. The hours worked in a substituting capacity shall be excluded from the calculation of hours for which the substituting employee is entitled to overtime compensation under this policy. This provision will apply only if the employees' decisions to substitute for one another are made freely and without coercion, direct or implied. An agency may suggest that an employee substitute or "trade time" with another employee working in the same capacity during regularly scheduled hours, but each

⁵⁹ 29 C.F.R. § 553.31

Hours of Work and Overtime Compensation Policy (cont.)

employee must be free to refuse to perform such work without sanction, and without being required to explain or justify that decision. Such a decision will be considered voluntary when it has been made without fear of reprisal or promise of reward and for the employee's convenience, rather than the convenience of the agency.

Agencies whose employees engage in substitute work under this provision are not required to keep a record of the hours of the substitute work. There is also no limit on the period of time during which hours worked may be traded or paid back among employees. Any agreement between employees to substitute for one another at their own option must be approved by the agency; this approval must be prior to the substitution and the agency must know what work is being done, who is doing the work, and when and where the work is being done. The type of approval (formal, informal, oral, written or otherwise) is left to the decision of the agency.

§ 25.13. **Volunteers**

State policy does not recognize volunteer work as creating an employer-employee relationship so as to require coverage under wage and hour and overtime compensation standards. The following provisions are intended to provide guidance in determining whether service performed is voluntary, thus exempt from treatment under this policy.⁶⁰

A volunteer is one who performs hours of service for a State agency for civic, charitable or humanitarian reasons without promise or expectation of compensation for services provided.⁶¹ Service provided by a volunteer is not subject to the provisions of this policy. However, an individual shall not be considered a volunteer if the person is otherwise employed by the same agency to perform the same type of services as those for which the person proposes to volunteer.⁶² Volunteers may receive expenses, reasonable benefits, a nominal fee, or any combination thereof without losing their status.⁶³

⁶⁰ Employees within the first six months of their retirement period should ensure any volunteer work allows the employee to continue to meet the definition of retirement in N.C.G.S. 135-1(20).

⁶¹ 29 C.F.R. § 553.101(a)

⁶² 29 C.F.R. § 553.101(d), § 553.102. § 553.103

⁶³ 29 C.F.R. § 553.106(a)

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§ 26. Sources of Authority

This policy is issued under the following source of law:

- [N.C.G.S. § 126-4\(2\)](#), which authorizes policies governing “[c]ompensation plans ... for all employees subject to the provisions of this Chapter.”

It is compliant with:

- [The Fair Labor Standards Act, 29 U.S.C. § 201 et seq.](#)
- The [North Carolina Wage and Hour Act, N.C.G.S. § 95-25.1 et seq.](#), to the extent that Act applies to state governments under G.S. § 95-25.14(d).
- The Administrative Code rules at [25 NCAC 01D .1900 et seq.](#)

§ 27. History of This Policy

Date	Version
November 3, 1965	No overtime work with pay is allowable. Compensatory time off may be permitted for overtime worked at the request of the appointing authority.
February 1, 1967	Fair Labor Standards Act of 1938 amended by Congress in October, 1966, extended to colleges, universities, schools and hospitals.
March 3, 1967	Revised policy statement due to amended Federal Fair Labor Standards Act – “The basic policy of the State, that no monetary compensation is authorized for overtime work, will remain in effect for all positions not covered by the amendments to the Federal statute.” “Although the Federal Act provides that overtime is paid for hours worked in excess of 44 per week, the State’s policy is to pay overtime at standard rates for hours in excess of 40. Since the State has adopted a 40-hour workweek, it is more in keeping with our past policies in personnel management to continue the 40-hour workweek rather than extend the standard hours per week to 44.” “It is the policy of the State that overtime work be held to a minimum consistent with the needs and requirements of sound and orderly administration of

Hours of Work and Overtime Compensation Policy (cont.)

	State government.” “It is the policy of the State to reduce cost by providing compensable time off whenever possible.”
February 1968	Approved a plan of paying overtime in those agencies not subject to the Fair Labor Standards Act in order to provide equal treatment to all employees.
October 1, 1971	Amendment to hours of work and overtime compensation to meet Federal minimum wage for state employees under the Personnel Act who are employed at Universities, college schools and hospitals. They are subject to the minimum wage and time and one half overtime for hours worked in excess of 40 a week. Also amendments for employees not covered by the Federal law in regard to minimum wage, overtime compensation, etc.
February 1, 1972	General provisions of Federal Wage and Hour applied to all employees as a matter of Commission policy.
May 1, 1974	Federal Wage and Hour Law was made applicable to all State employees.
January 1, 1975	Special provisions for fireman and law enforcement.
May 1, 1975	Supreme Court ruled 1966 and 1974 amendments to Wage and Hour Law unconstitutional. Provisions adopted by Commission will still apply.
February 1, 1977	Provided different employment arrangement for Houseparents who are employed in the care of children in our four schools for the blind or the deaf as regarding Hours of Work and Overtime Compensation.
February 1, 1978	Added provision that make-up time because of adverse weather would not be considered as work time in computing overtime.
March 17, 1978	Overtime pay for Highway Patrolmen - Pay all Highway Patrolmen overtime pay for all hours worked in the Federally-funded Highway Safety Project Grant under Section 402c of Public Law 89-564, entitled “55 MPH SPEED AND DWI ENFORCEMENT SELECTIVE ENFORCEMENT”. This is considered as an exception to the policy and not as an amendment to the policy.
August 1, 1978	Overtime for SBI.

Hours of Work and Overtime Compensation Policy (cont.)

October 1, 1978	Exception to Overtime Policy - Seasonal and Emergency Operations - DOT. Employees to receive straight-time pay for standard 40 hour workweek, hours worked in excess of 40 but not to exceed 50 hours per week will be compensated for by granting time off on an hour and one-half for hour basis. Compensatory time off will be given at the convenience of the agency, taking into consideration work curtailment due to weather conditions.
May 1, 1979	Special provisions for registered nurses.
January 1, 1982	Overtime pay for Forest Firefighters.
October 1, 1982	Overtime compensation for NRCD seasonal employee.
August 1, 1984	SBI Overtime policy.
February 19, 1985	Supreme Court declared State and local governments subject to the Fair Labor Standards Act.
April 15, 1986	Policy changed to conform to legislation. Revised provisions in Adverse Leave policy to not allow time to result in overtime.
September 1, 1989	Clarified that FLSA exempt employees are not eligible for overtime pay.
March 1, 1994	Changed "pay period" to "calendar month" for giving compensatory time.
December 1, 1995	Revised to allow compensatory time to accumulate up to a maximum of 240 hours and taken off within twelve months instead of within 30 days. Must be paid at end of 12 months if not taken.
September 1, 1997	Policy arranged in new format.
N/A	Memorandum, State Personnel Manual Changes – Revision No. 4, dated 3-17-2000 advised: "This revision of pages 4-203 through 4-106 represents a correction only. The third paragraph on page 104 has been deleted since this is an outdated provision and should have been deleted before the Manual was published. Some of the wording was omitted in the last sentence on page 105. This has been corrected.
December 13, 2001	A special provision added to allow agencies to pay FLSA exempt employees overtime at straight-time rates when there is a gubernatorial declaration of a state of emergency.

Hours of Work and Overtime Compensation Policy (cont.)

December 1, 2002	Under On-Call, first paragraph, last sentence, corrected the “work” to “word.”
March 1, 2003	Correction of wording in item No. (2) under Overtime/Comp Time Off Option.
August 23, 2004	Incorporates changes to the Fair Labor Standards Act.
September 1, 2006	Clarified that if an employee is retiring, compensatory time may be paid in a lump sum rather than exhausted.
January 1, 2007	Revised to include North Carolina’s new minimum wage of \$6/15
July 24, 2007	Under Minimum Wage, changed the Federal minimum to \$5.85 effective July 24, 2007.
October 1, 2007	Under the paragraph Compensation: <ul style="list-style-type: none"> a) Deleted sentence stating that overtime worked shall be recorded and compensated in units of one-tenths of an hour b) Added Advisory Note stating that before generating compensatory time, the BEACON HR/Payroll System will use hours worked in excess of the employee’s established work schedule to: <ul style="list-style-type: none"> • pay back advanced leave liabilities owed to the State, • pay back adverse weather liabilities owed to the State, and • offset paid leave hours reported in the same overtime period.
July 24, 2008	Revised to reflect the change in the Federal minimum wage from \$5.85 to \$6.55.
July 1, 2009	(1) Revises minimum wage to \$7.25 effective July 24, 2009. (2) Adds provisions for “gap hours” – the hours that are in between the maximum hours of work required to meet the work schedule and the overtime threshold.
September 7, 2017	Additional changes.
August 7, 2023 (effective October 1, 2023)	Added detail to explain precisely how an agency may be approved to pay out compensatory time to employees who are exempt from the Fair Labor Standards Act. Matching existing practice: <ul style="list-style-type: none"> • State Human Resources Director approval is not required when an agency chooses an option involving compensatory time payout for

Hours of Work and Overtime Compensation Policy (cont.)

	<p>law enforcement, fire protection, or emergency response positions. See § 29.7 of the Policy.</p> <ul style="list-style-type: none"> • An agency head recommendation and State Human Resources Director approval, under the exception/variance process set out in the Administrative Code, is required for all other payouts of compensatory time to positions that are designated as exempt from overtime compensation provisions. See §§ 3 and 29.8 of the Policy. Also added “Source of Authority” section to policy and placed policy history in the policy’s text.
November 30, 2023	<ul style="list-style-type: none"> • Added a Note at the beginning of the policy to explain these revisions are the first of two parts. • Updated Section 1, Minimum Wage: <ul style="list-style-type: none"> ○ Added a footnote that cites to the North Carolina Wage and Hour Act Minimum Wage. ○ Added information on the state employee minimum annual salary of \$31,200, including a footnote referencing its implementation by Session Law 2018-5. • Updated FLSA Exempt employee minimum salary to reflect \$684 per week or \$35,568 annually in Sections 23 (Executive Employee Exemption), 24 (Administrative Employee Exemption), and 25 (Professional Employee Exemption). • Updated the FLSA Computer Employee Exemption minimum salary to reflect \$684 per week. • Updated the FLSA Highly Compensated employee exemption to reflect a minimum annual compensation of \$107,432 and \$684 per week.
July 11, 2024	<p>Generally, updated the policy to better reflect the Fair Labor Standards Act (the “FLSA”) and associated federal regulations. In this revision, the major changes to the policy include the following.</p>

Hours of Work and Overtime Compensation Policy (cont.)

	<ul style="list-style-type: none">• The threshold salary for FLSA exemptions has been updated to match 89 Fed. Reg. 32842 (Apr. 26, 2024). The effective date of the new federal rule is July 1, 2024.• To reduce confusion with the concept of being “exempt” from the State Human Resources Act, text about being exempt from or subject to the FLSA has been changed to consistently read “FLSA Not Subject” or “FLSA Subject.”• In Section 3, the reference to submitting FLSA information to OSHR has been removed, since this information is available in the HR-Payroll System.• In Section 5, the language has been made more flexible about employees acknowledging the State’s overtime policy, since some agencies perform this task on paper and some perform this task using electronic means.• In Section 13, a sentence has been added to avoid any doubt that an employee may be disciplined for engaging in unauthorized overtime.• In Section 14, the “On Call” section is now entitled “Waiting Time.” This text distinguishes, based on FLSA regulations, between<ul style="list-style-type: none">○ An employee who is required to remain on call so that the time cannot be used for the employee’s own purposes, and○ An employee who is merely required to leave word as to where they may be reached.• In Section 16, new text was added, based on federal regulations, concerning rest periods and break time.• In Section 20, several changes have been made to clarify whether time is compensable under the FLSA for specific travel situations.
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Hours of Work and Overtime Compensation Policy (cont.)

	<ul style="list-style-type: none">• Section 23, on exceptions to FLSA Subject status, was generally updated to reflect changes in the law. New sections were added on additional exceptions to FLSA Subject status that were not covered in the existing policy:<ul style="list-style-type: none">○ The educational establishments exemption (covered in new § 23.2(b)), and○ The combination exemption (covered in new § 23.6).• A new section was added (§ 25.6) on when a sleep period may be excluded from hours worked.
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