

## Hours of Work and Overtime Compensation

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Effective February 19, 1985, the Supreme Court declared State and local governments subject to the Fair Labor Standards Act. These revisions are in accordance with that ruling.

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## Hours of Work and Overtime Compensation (continued)

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### Minimum Wage

Employees shall be paid the Federal minimum wage or the North Carolina minimum wage, whichever is higher. Effective January 1, 2007, the North Carolina minimum wage is \$6.15. The Federal minimum is \$7.25 effective July 24, 2009.

All of the approved salary rates published by the Office of State Personnel provide more than the federal or state minimum wage to all employees certified for employment. Under this policy, compliance with the required minimum wage should be automatic.

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### 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 exempt.

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 a 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 Personnel. Such review will take into consideration organizational structure, scheduling of work, position complement, and personnel classifications.

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### Exempt Employees

Each agency head will recommend which employees are exempt from hours of work and overtime pay standards under the terms of exemptions. The present practice of submitting this information to the Office of State Human Resources for review will be continued.

## Hours of Work and Overtime Compensation (continued)

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No employee whose position is designated as exempt from 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 approved. This shall not be construed to prohibit any agency from adopting and using a compensatory leave policy in accordance with the Compensatory Leave Policy.

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### 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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### Overtime Compensation

For 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 on the basis of 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.

## Hours of Work and Overtime Compensation (continued)

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- 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 exempt-FLSA position or to another agency before taking overtime compensatory time, it shall be paid in the current or next regular paycheck by the releasing agency.

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

Prior to employment, each successful candidate for State employment in a position subject to hours of work and overtime pay standards must sign a form acknowledging 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 such agreement will prevent employment of that person. This signed form 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.

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### 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.

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### Overtime Hourly Rate of Pay

The hourly rate of pay is the rate published by the Office of State Personnel and is obtained by dividing the annual salary by 2080 hours (52x40).

## Hours of Work and Overtime Compensation (continued)

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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 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.

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### 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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### 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.

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### Gap Hours

For permanent subject-FLSA 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."

## Hours of Work and Overtime Compensation (continued)

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For permanent subject-FLSA 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 subject-FLSA 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 compensation.

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### 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 his 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 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.

## Hours of Work and Overtime Compensation (continued)

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- 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 exempt-FLSA 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 subject-FLSA employees or other hourly subject-FLSA 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 subject-FLSA Law Enforcement employees shall receive straight time monetary payment for all hours worked up to 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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### 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:

## Hours of Work and Overtime Compensation (continued)

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- all time during which an employee is required to be on duty on the employer's premises or at a prescribed work place, 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 work day to the end with exception of periods when the employee is relieved of all duties for the purpose of eating meals.
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### 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.

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### On Call

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. Employees who are merely required to leave word as to where they may be reached are not on call in this sense.

The fact that an employee lives on the employer's premises and is on call for 24 hours a day 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 nights 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 not worked. As a

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## Hours of Work and Overtime Compensation (continued)

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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.

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### 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.

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### 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.

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### Grievance Time

The time an employee spends during a regular work schedule in adjusting a grievance under the State policy on Employee's Appeals and Grievances is work time. Such time spent outside the employee's regularly work schedule is work time only if the employee's attendance is required by the agency or the State.

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### 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.

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## Hours of Work and Overtime Compensation (continued)

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### **Travel Time**

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

#### **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.

#### **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.

#### **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. 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 for this designated place to the work place is part of the day's work and must be counted as hours worked.

## Hours of Work and Overtime Compensation (continued)

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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.

### 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 cuts across the employee's regular scheduled workdays. 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. Regular meal period time is not counted. That time spent in travel away from home outside of regular working hours (8:30 - 5:30) as a passenger on airplane, train, bus, or automobile is not considered as work time. The example below will help explain the accountability for travel time away from home community.

#### Example:

An employee who has headquarters in Raleigh leaves for Asheville on Sunday afternoon at 2:00 p.m., and arrives in Asheville at 7:00 p.m.:

- The 3-1/2 hours traveled between 2:00 p.m. and 5:30 p.m., are hours worked 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.
- 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 considered as time earned and may be given as time off on straight-time basis.

Administrative, Executive, and Professional employees may be granted time off as a result of travel in accordance with the agency leave policy.

## Hours of Work and Overtime Compensation (continued)

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### 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 three years.

- Name
  - Home Address
  - Date of Birth, if under 19
  - Sex and position classification in which employed (sex may be indicated by use of prefixes Mr., Mrs. or Ms.)
  - 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
  - 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
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## Hours of Work and Overtime Compensation (continued)

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### 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.

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### Executive, Administrative and Professional Employees

The exempt or non-exempt 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 head to determine whether the exemption is applicable to particular employees.

Following is an outline of the terms and conditions to be followed in determining those employees exempt from this policy.

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### Executive Employee Exemption

To meet the executive exemption, an employee has 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

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- is paid at least \$455 a week or \$23,660 annually free and clear of board, lodging or other non-cash items.

**Primary Duty** - Primary duty means 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.

**Management** - The primary duty must be management. Management includes activities related to supervising employees such as interviewing, selecting and training of employees; setting and adjusting pay rates and work hours; conducting performance appraisals, handling employee complaints and grievances; and disciplining employees. Other 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.

## Hours of Work and Overtime Compensation (continued)

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A “customarily recognized department or subdivision” 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.

**Supervision of other workers** - The phrase “customarily and regularly” means a frequency that must be greater than occasional but which may be less than constant. Normally an exempt executive employee must direct the work of other employees at least once a week, but not every day. The phrase “two or more other employees” 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.

**Particular weight** - 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.”

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.

- Exempt employees generally decide when to perform nonexempt duties and remain responsible for success or failure of business operations.

## Hours of Work and Overtime Compensation (continued)

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- Nonexempt 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.

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### Administrative Employee Exemption

To meet the administrative exemption, an employee has 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 \$455 a week or \$23,660 annually free and clear of board, lodging or other non-cash items

**Management or General Business Operations** - The phrase "management or general business operations" 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.

**Discretion and Independent Judgment** - Exercising "discretion and independent judgment" generally involves an employee comparing and evaluating possible courses of conducting and acting or making a decision after the various possibilities have been

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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;
- 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

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

Examples of employees that would meet the administrative exemption criteria:

- 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
- a management consultant who studies the operations of a business and proposes changes in organization.

Examples of **non-exempt** 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.

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### Professional Employee Exemption

**Learned Professional** - To meet the earned professional exemption, an employee has 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 \$455 a week or \$23,660 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.)

**Advanced Knowledge** - The learned professional exemption applies only if the employee's primary duty is the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course in specialized

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

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

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.

Occupations meeting professional exemptions include doctors, physician assistants, lawyers, teachers, architects, engineers, pharmacists, chefs, and actuaries.

**Creative Professional** - 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

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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.

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.

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### Computer Employee Exemption

To qualify for the computer employee exemption an employee must meet the following tests:

- is compensated either on a salary or fee basis at a rate not less than \$455 a week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour; and
  - is employed as a computer system analyst, computer programmer, software engineer or other similar skilled worker in the computer field performing the duties described below.
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- The employee’s primary duty must 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.

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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.

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### Highly Compensated Test

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

- total annual compensation is at least \$100,000;
- is paid at least \$455 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 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.

## Hours of Work and Overtime Compensation (continued)

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### First Responders Not Exempt

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 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 victim, preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected an 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 regulations and thus are protected by the minimum wage and overtime provisions of the FLSA.

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.

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### SPECIAL PROVISIONS

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#### 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 Orders prohibiting

## Hours of Work and Overtime Compensation (continued)

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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.

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.

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### Agriculture Workers

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, dairying, or who raise livestock, bees, poultry or perform closely related research

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### 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

## Hours of Work and Overtime Compensation (continued)

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skill and productivity, such student workers are materially distinguishable from regular career employees.

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-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.

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### In-Residence Employment

Employees such as Cottage Parents and Dormitory Directors 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 is necessary that these employees 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 reasons. 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

## Hours of Work and Overtime Compensation (continued)

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

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### 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. There is often little or no opportunity to allow these employees to take time off on a straight time basis.

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.

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.

## Hours of Work and Overtime Compensation (continued)

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### Law Enforcement Activities

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 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.

## Hours of Work and Overtime Compensation (continued)

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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 and one-half times the regular hourly rate at which employed. (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.

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### Overtime/ Compensatory Time off Option for Law Enforcement, Fire Protection and Emergency Response Personnel

The following provisions are applicable only to agencies that employ persons in nonexempt law enforcement/fire protection/emergency response positions. Such

## Hours of Work and Overtime Compensation (continued)

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agencies may, by letter to the State Human Resources Director, choose to utilize the following overtime compensation provisions in lieu of the customary overtime compensation provisions elsewhere in this policy:

- (1) Under these provisions, nonexempt persons in law enforcement/fire protection/emergency response positions who work more than 171 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 time 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.
- (6) Employees 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.

The exempt or non-exempt status of law enforcement personnel will be determined under the terms of exemption 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

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## Hours of Work and Overtime Compensation (continued)

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by that employee during the workweek or the applicable work period. A person who spends more than twenty percent of his 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.

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### Overtime Pay for Exempt Employees When the Governor Declares an Emergency or a Disaster

Agencies are authorized to pay overtime (1) at time and one-half for FLSA non-exempt employees and (2) at straight-time rates to FLSA exempt 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.

The absence of any of these conditions will require the agency to follow (1) the Hours of Work and Overtime Policy for FLSA nonexempt employees and (2) the agency's compensatory leave policy for FLSA exempt employees.

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### Tour of Duty and Compensable Hours of Work

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

## Hours of Work and Overtime Compensation (continued)

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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.

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### Occasional or Sporadic Employment in a Different Capacity

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 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 his sole option when it has been made without fear of reprisal or promise of reward.

## Hours of Work and Overtime Compensation (continued)

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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.

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### Substitution

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 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

## Hours of Work and Overtime Compensation (continued)

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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.

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### 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, and thus exempt from treatment under this policy.

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. 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. Volunteers may receive expenses, reasonable benefits, a nominal fee or any combination thereof without losing their status.

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