



Montana Department of  
**LABOR & INDUSTRY**

# **Labor Standards Bureau**

**Employment Relations Division**

**Wage & Hour Unit**

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# **WAGE & HOUR LAWS ADMINISTERED BY WAGE & HOUR**

**WAGE PAYMENT ACT**

**MINIMUM WAGE AND OVERTIME LAWS**

**CHILD LABOR / YOUTH EMPLOYMENT**

**PREVAILING WAGE LAW**

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## **WAGE PAYMENT ACT**

### **Defines Employment** --- (§ 39-3-201, MCA)

- *Employ means to permit or suffer to work*
- *Employee includes any person who works for another for hire, except that the term does not include a person who is an independent contractor.*
- *Employer includes any individual, partnership, association, corporation, business trust, legal representative, or organized group of persons acting directly or indirectly in the interest of an employer in relation to an employee*

### **Defines Wages** --- (§ 39-3-201(6)(a), MCA)

*Any money due an employee from the employer or employers, whether to be paid by the hour, day, week, semi-monthly or yearly and shall include bonus, piece work, tips and gratuities of any kind.*

### **Establishes when wages are due and payable** --- (§§ 39-3-204 & 205, MCA)

- *Within ten (10) business days after they are due and payable while the employee is still employed. If, an employee does not submit their timesheet by the employer's established deadline for processing timesheets, the employer may opt to not pay the employee until the next scheduled pay period.*
- *If the employee quits, wages are on the next pay day for the period in which the employee was separated, or 15 days, whichever occurs first. This applies to public sector, private sector, and employers from within the state of Montana or employers whose payroll originates outside Montana.*
- *If an employee is laid off, or discharged, all wages are due immediately unless the employer has a pre-existing, written policy that extends the time for payment. The wages cannot be delayed beyond the next pay day for the period in which the separation occurred, or 15 days, whichever occurs first.*
- *Employee may be paid by electronic funds transfer or similar means of direct deposit if employee has consented in writing or electronically, but cannot be required to be paid in this manner.*
- *In the case of an employee discharged for allegations of theft connected to the employee's work, an employer may withhold the value of the theft provided:*
  - 1. the employee agrees in writing to the withholding, or;*
  - 2. charges have been filed with law enforcement within seven (7) business days of separation. If no charges are filed with a court of competent jurisdiction within 30 days of the filing of the report with law enforcement, the wages are due within the 30-day period. If the employee is found not guilty of the charges or the employer withholds in excess of the value of the theft, the court may order the employer to pay the withheld amount plus interest.*

### **Limits withholdings of wages to room, board and other incidentals furnished by the employer as part of the employment agreement.** --- (§ 39-3-204, MCA)

- *Wages cannot be withheld for shortages, damages or mistakes (Attorney General Opinions #17, Volume 36 and #25, Volume 11)*

### **voids any contract between an employer and employee that does not comply with the wage and hour laws.** --- (§ 39-3-208, MCA)

## RECORDS REQUIRED TO BE KEPT

(ARM, 24.16.6102)

- Name in full
- Home address
- Time of day and day of week employee's workweek begins
- Regular hourly rate of pay and length of pay period
- Hours worked each work day and total hours worked each workweek
- Date of payment and pay period covered by payment
- Social Security Number
- Date of birth
- Total daily or weekly straight time earnings or wages
- Total weekly overtime compensation
- Total additions to or deductions from wages
- Total wages paid each pay period

Records required for exempt employees differ from those for nonexempt workers. Also, special information is required on employees under uncommon pay arrangements or to whom board, lodging or other facilities are furnished. Records of the required information must be preserved for at least three years.

### Statute of Limitations under Montana jurisdiction -- (§ 39-3-207, MCA)

- *An employee has 180 days from the default of the payment to file a wage claim.*
- *An employee may recover wages and penalties for a period of 2 years, 3 years if willful violation*

### NOTES

# MINIMUM WAGE LAWS

## Federal Minimum Wage

**\$7.25**

### Companies automatically covered by the federal Fair Labor Standards Act:

- Any enterprise engaged in interstate commerce or the production of goods through such commerce
- Private hospitals
- Private schools
- Preschools and daycares
- Fraternal organizations
- Sheltered workshops
- Federal employees
- State/public sector employees and employees of the political subdivisions
- Domestic service workers such as maids, chauffeurs, cooks, or full-time babysitters
- Retail and service establishments whose gross annual sales exceeds \$500,000

### Any employee individually engaged in interstate commerce – examples:

- Communication and transportation workers
- Employees who handle, ship or receive goods moving in interstate commerce
- Clerical or other workers who regularly use the mail or telephone for interstate communication or who keep records on interstate transactions.
- Employees who regularly cross state lines in the course of their work.

## State Minimum Wage

**\$8.15\***

\*This minimum wage rate is subject to a cost-of-living adjustment based on the Consumer Price Index no later than September 30<sup>th</sup> of each year and the new rate takes effect on January 1<sup>st</sup>.

- Businesses NOT engaged in interstate commerce with gross annual sales of \$110,000 or less per year may pay \$4.00 per hour if the employee is not covered under the FLSA. (§ 39-3-409, MCA)
- Any employee who is exempt or not covered by the FLSA is covered by Montana state law as is any employee for whom state law establishes a higher standard for payment than does federal law.
- Agricultural employees covered by state law may be paid the applicable minimum hourly wage as provided above or a monthly salary of at least \$635 per month.

If more than 500 man days\*\* are worked for the employer in a quarter year, the FLSA applies and the employee must earn at least minimum wage for all hours worked.

If less than 500 man days\*\* are worked for the employer in a quarter year, state law applies.

\*\* Language used in federal regulations. A man day is when one employee performs at least one hour of work on a day.

**Note: Montana laws do not allow a tip credit, meal credit, or training wage.**

## METHODS OF PAYMENT

- Hourly
- Commission Basis
- Piece Rate
- Salary
- Salary Plus Bonus
- Salary Plus Commission
- Flat Book Rate
- Combination of any of the above

All are wages and must at least equal the applicable minimum wage for each hour of work unless a specific exemption applies.

## REGULAR RATE

The regular rate is determined by dividing the total wages for employment in any workweek by the total number of hours actually worked in that workweek for which such compensation was paid.

### Calculations:

**Weekly:**  $\$350 \div 40 \text{ hrs/week} = \$8.75$

**Bi-Weekly:**  $\$675 \times 26 \text{ pay periods/yr} \div 52 \text{ weeks/yr} \div 40 \text{ hrs/week} = \$8.44$

**Semi-Monthly:**  $\$725 \times 24 \text{ pay periods/yr} \div 52 \text{ weeks/yr} \div 40 \text{ hrs/week} = \$8.37$  (twice per month)

**Monthly:**  $\$1500 \times 12 \text{ months/yr} \div 52 \text{ weeks/yr} \div 40 \text{ hrs/week} = \$8.65$

Regular rate may not be less than the applicable minimum wage.

## WORKWEEK

Basis for determining if minimum wage is met and overtime due.

The workweek is a regularly recurring period of 168 hours in the form of seven consecutive 24-hour periods. Each workweek stands alone and cannot be averaged together. (ARM, 24.16.501)

**Example:** An employee is paid on a commission or piece rate basis and is paid biweekly. The first week in the pay period the employee works 50 hours and earns \$350 so the regular rate equals \$7.00. The employer must make up the \$1.15 per hour difference between \$7.00 and \$8.15 per hour to ensure minimum wage is paid that week. The employee would then be entitled to overtime compensation at time and one-half minimum wage. The second week the employee works 30 hours and earns \$270 so the regular rate is \$9.00 per hour. The weeks are not averaged together.

## NOTES

## OVERTIME LAWS

A non-exempt employee must be paid at a rate of one and one-half times the regular rate for all hours worked over 40 in a workweek. (§ 39-3-405, MCA)

**Holiday pay, sick leave, and vacation hours do not count toward the 40 hours.** (ARM, 24.16.2503)

## COMPENSATORY TIME

**Public Sector** (State, County, City government or any political subdivision and School Districts)

Permissible in public sector for exempt and nonexempt employees following rules and regulations established under the federal Fair Labor Standards Act (FLSA).

\*\* Non-exempt public employees accumulate comp time at 1 ½ hours for every hour over 40 within a workweek\*\*

**Private Sector** (Non-government employers)

Banking of overtime hours is not allowed.

## OVERTIME CALCULATIONS

**Different Rates Of Pay:** Employees who perform different types of work for which they receive varying rates of pay must be paid overtime at a weighted average hourly rate.

Example: One week an employee works in a housekeeping position for 36 hours for which \$8.15 per hour is paid. The employee then spends 10 hours in a front desk position for which \$9.00 per hour is paid. The wages are computed as follows:

36 hours x \$8.15 per hour	= \$293.40
<u>10</u> hours x \$9.00 per hour	= \$ <u>90.00</u>
46 hours worked	\$383.40 regular earnings

$\$383.40 \div 46 \text{ hours} = \text{regular rate} = \$8.34 \text{ per hour}$   
 $\$8.34 \div 2 = \frac{1}{2} \text{ time rate} = \$4.17 \text{ per hour}$   
 $\$4.17 \times 6 \text{ overtime hours} = \$25.02 \text{ overtime earnings}$

\$383.40
<u>\$ 25.02</u>
\$408.42 total due

## NOTES



**Commission/Piece Rate:** The regular rate of an employee paid on a commission, piece rate, or flat book rate basis is arrived at by dividing the total weekly earnings by the total number of hours actually worked in the week. The employee is entitled to payment of one-half this regular rate for each hour worked over 40 - in addition to the full commission or piecework earnings.

**Example:** Bernadette works 45½ hours and earns \$375. Her regular rate is \$8.24 per hour ( $\$375 \div 45\frac{1}{2}$  hours). She is entitled to her regular earnings (\$375) plus an additional half of her regular rate ( $\$8.24 \div 2$ ) or \$4.12 for each hour worked over 40. In this case, she is due an additional \$22.66 or a total of \$397.66 ( $\$375.00 + \$22.66$ ) for that workweek.

**Salary:** An employee paid on a salary basis is entitled to overtime pay at a rate that is based in part on the terms of employment.

**Example:** 40 Hour Workweek Basis

$\$1800 \times 12 \div 52 \div 40 = \$10.38$  (regular rate)  
 $\$10.38 \times 1.5 = \$15.57$  (overtime rate)

**Example:** Fluctuating Workweek

\*This method may not be used unless the salary is sufficiently large to assure no workweek's regular rate is less than the minimum wage and employee clearly understands the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked.

1st week -  $\$2000 \times 12 \div 52 \div 55 = \$8.39$  (regular rate)  
2nd week -  $\$2000 \times 12 \div 52 \div 46 = \$10.03$  (regular rate)  
3rd week -  $\$2000 \times 12 \div 52 \div 36 = \$12.82$  (regular rate)  
Regular rate/week  $\div 2 =$  half time overtime rate for hours worked over 40

\*We recommend the pay agreement be in writing.

**NOTES** 

## **“PART 541” EXEMPTIONS**

### **Executive Employee**

When applying the executive exemption under state jurisdiction, ARM, 24.16.211, provides:

"(3) The following federal regulations are adopted by reference...(b) 29 CFR part 541, subpart B, as in effect on July 1, 2009."

Title 29 of the Code of Federal Regulations (CFR) Part 541.100 (Subpart B - Executive Employees) states:

"(a) The term "employee employed in a bona fide executive capacity" in section (13)(a)(1) of the Act shall mean any employee:

- (1) Compensated on a salary basis at a rate of not less than \$455 per week...exclusive of board, lodging or other facilities;
- (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
- (3) Who customarily and regularly directs the work of two or more other employees; and
- (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight."

### **Administrative Employee**

When applying the administrative exemption under state jurisdiction, ARM, 24.16.211, provides:

"(3) The following federal regulations are adopted by reference...(c) 29 CFR part 541, subpart C, as in effect on July 1, 2009."

Title 29 of the CFR Part 541.200 (Subpart C - Administrative Employees) states:

"(a) The term "employee employed in a bona fide administrative capacity" in section 13(a)(1) of the Act shall mean any employee:

- (1) Compensated on a salary or fee basis at a rate of not less than \$455 per week...exclusive of board, lodging or other facilities;
- (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance."

### **NOTES**

## **“PART 541” EXEMPTIONS (continued)**

### **Professional Employee**

When applying the professional exemption under state jurisdiction, ARM, 24.16.211, provides:

"(3) The following federal regulations are adopted by reference...(d) 29 CFR part 541, subpart D, as in effect on July 1, 2009."

Title 29 of the CFR Part 541.300 (Subpart D - Professional Employees) states:

"(a) The term "employee employed in a bona fide professional capacity" in section 13(a)(1) of the Act shall mean any employee:  
(1) Compensated on a salary or fee basis at a rate of not less than \$455 per week...exclusive of board, lodging, or other facilities; and  
(2) Whose primary duty is the performance of work;  
(i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or  
(ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor."

Other important factors to consider when applying Administrative, Executive, and Professional exemptions:

- ❖ Title 29 CFR Part 541, Subpart G – Salary Requirements
- ❖ Title 29 CFR Part 541, Subpart H – Definitions and Miscellaneous Provisions

### **Computer Employee**

On October 1, 2013, Montana enacted a new minimum wage and overtime exemption which applies to computer related occupations. As Montana did not recognize the computer exemption until October 1, 2013, no exemption of this nature may be applied prior to October 1, 2013.

Section 39-3-406(1)(j), MCA states "...a computer systems analyst, computer programmer, software engineer, network administrator, or other similarly skilled computer employee who earns not less than \$27.63 an hour pursuant to 29 CFR 541.400 or 541.402..."

29 CFR Part 541.400 states, in pertinent part:

"...job titles vary widely and change quickly in the computer industry, job titles are not determinative of the applicability of this exemption...  
(1) The application of systems analysis techniques and procedures, including consult  
(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 federal law allows for an exemption when the employee meets either a salary or the hourly criteria. However, when the state and federal law are not the same, the law with the higher standard would apply. Since Montana law specifically refers to the hourly rate or its equivalent, in order to meet the exemption, the employee must be paid \$27.63 per hour or a salary which would, if divided by the total number of hours worked in the workweek, equate to \$27.63 per hour.

## **“PART 541” EXEMPTIONS (continued)**

### **Outside Salesman**

Under 29 CFR, Part 541.500, the term *employee employed in the capacity of outside salesman* in section 13(a)(1) of the Act shall mean any employee:

(1) Whose primary duty is:

- (i) making sales within the meaning of section 3(k) of the Act, or
- (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

(b) The term “primary duty” is defined at §541.700. In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences.

(c) The requirements of subpart G (salary requirements) of this part do not apply to the outside sales employees described in this section.

**\*\*Section 3(k) states: “ ‘Sale’ or ‘sell’ includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.”**

### **NOTES**

## HOURS WORKED

Includes all the time an employee is required to be on duty or on the employer's premises or at a prescribed work place and all the time during which he is suffered or permitted to work for the employer. --- (ARM, 24.16.1005)

**On call time** --- (ARM, 24.16.1005)

**Time spent waiting** --- Waiting to be engaged/Engaged to Wait (ARM, 24.16.1005)

**Preparatory and concluding activities** --- (ARM, 24.16.1008)

**Staff/Business meetings and training are not work time if:** --- (ARM, 24.16.1009)

- *attendance is outside of employee's regular working hours,*
- *attendance is voluntary,*
- *not directly related to employee's job, **and***
- *employee does not perform any productive work during attendance*

**Sleeping time** --- (ARM, 24.16.1007)

- 24 hours or more
- Less than 24 hours

**Rest breaks** --- (ARM, 24.16.1006(1))

There is **not** a federal or Montana state law that requires an employer to furnish a rest break (coffee break); however, if provided the time spent on the break is work time.

**Meal periods** --- (ARM, 24.16.1006(2))

There is **not** a federal or Montana state law that requires an employer to furnish a meal break; however, if provided the following criteria would need to be met for it to be a bona fide period in which the time is not work time:

- employee completely relieved of duty
- at least 30 minutes in duration

## NOTES

## TRAVEL TIME

**General Rule for Travel Time** (ARM, 24.16.1010): For those individuals and enterprises NOT exempt from overtime and/or minimum wage or for employees whose travel time is NOT covered by a collective bargaining agreement:

- Time spent in a travel status may be considered work time for wage payment purposes and for purposes of minimum wage and overtime calculation.
- Time spent in travel to special events, such as training or conferences, whether for a day or for periods of overnight duration, may also be work time.

Not all circumstances can be addressed, for instance the applicability of collective bargaining agreements, but the applications contained herein are intended to address common travel situations.

Realize, the following are only examples and each travel situation needs to be weighed based on its own merits to determine whether it is work time or not.

How is the general rule applied?

1. Normal travel from the home of the employee to the place of business of the employer is not work time. For instance, if the work starts at 8:00 and the employee leaves home at 7:30, time spent in travel to the place of business where the principal activity is performed is not work time.
2. If the employer requires the employee to report to a shop or the employer's principal office either at the beginning of the day, or at the conclusion of the day, any time spent traveling from the shop to the first location or from the last location to the shop is work time.
3. Time spent traveling between job sites is all in a day's work and is considered work time. For instance, a plumber who arrives at the shop and travels to the different worksites throughout the day is working while traveling from the worksite to worksite.
4. Time spent traveling to other sites during the day is work time, as is time spent returning to the shop from the last work location. If the employee is relieved from duty after working at the last location and it is not required to report back to the shop, travel to home from that location is not work time, unless there is an agreement to the contrary.
5. A work crew is given the option of meeting at the employer's premises at 7:30 a.m. to ride to the job site in the company vehicle or reporting to the job site at 8:00 a.m. However, the crew leader is required to drive the company truck from the employer's premises to the job site to transport tools and employees.

The travel time from 7:30 to 8:00 a.m. for the crew choosing to ride in the company's vehicle is home to work travel and does not need to be counted as hours worked, provided the employees do not perform any work prior to traveling to the job site, i.e. loading the truck with tools and supplies. However, travel time for the crew leader required to drive the company vehicle is work time, as it is work for the employer's benefit at the employer's request.

6. A mechanic's normal workday is 8:00 a.m. to 5:00 p.m. However, the mechanic receives a phone call at 9:00 p.m. requesting he go to a customer's shop to repair a malfunctioning machine. Travel time from the worker's home to the customer's shop and back is work time.

7. An asbestos removal company contracts jobs throughout the state. Employees report to the various job sites at 8:00 a.m. each day for the duration of each project. This work on various job sites is a normal part of this type of employment and would not be considered special assignments. Employees travel to and from the distant locations on a daily basis or may choose to temporarily reside in the area. Travel time is home to work travel and does not need to be counted as hours worked.
8. An employee who normally finishes the day's work on the employer's premises at 5:00 p.m. is sent to a job site completing work at 8:00 p.m. The employee is allowed to return home from the job site instead of returning to the employer's premises. The travel from the job site to the employee's home is home-to-work travel and not hours worked, except for any time spent in travel which exceeds the employee's normal home-to-work travel time. The difference is then compensable.
9. An employee who regularly works at a fixed site is given a special one-day assignment in another city. The employee's usual workday ends at 5:00 p.m. The special assignment is completed at 4:00 p.m.; the employee arrives at the airport in his home community at 7:00 p.m., and arrives home at 7:30 p.m. In this case, the travel time between the assignment and airport (between 4:00 and 7:00 p.m.) is work time since the travel was performed for the employer's benefit, at the employer's request. The half-hour travel time between the employee's home and the airport may be considered home-to-work travel time, and does not need to be counted as hours worked.

If the employee in this example had been unable to get a flight home the same day, and had to take an 8:00 a.m. flight the next morning, the time between 4:00 p.m. and 8:00 a.m. the following morning is not work time, if the employee is completely relieved of all duties.

10. Employees of a janitorial company meet at the employer's premises at 6:00 p.m. Employees are assigned to clean several businesses each evening. Employees travel to the various work locations and may return to the employer's premises during the workday for supplies. This travel time between work locations and between the employer's and work location is during the course of a normal workday and is work time.

### **Exceptions to the General Travel Time Rule:**

**Emergency or call out situations:** For instance, if an employee is subject to call out and is called to duty at a location other than their normal work site, the time spent traveling to that work site from their home is work time as is time spent traveling from that work site to their home.

The call to duty and associated travel time is all in the day's work as this is a special circumstance.

### **NOTES**

## WAGE AND HOUR LAWS DO NOT REQUIRE

- Vacation pay (private sector)
  - If promised, earned, and usable, vacation time is due and payable as wages - Langager vs. Crazy Creek Products, Inc., (Mont 1998)
- Sick pay (private sector)
- Holiday pay/holidays off (private sector)
- Rest breaks ---
- Meal periods ---
- Pay raises or fringe benefits
- Time clocks to be used
  - \*\*\* If using a time clock, rounding practices to the nearest one-tenth or quarter of an hour is acceptable. (ARM, 24.16.1012(3)(b))

The Wage and Hour Unit does not have jurisdiction over scheduling, disciplinary actions or terminations.

## ADMINISTRATIVE PROCESS

- Assigns the responsibility of administering wage and hour laws to the Commissioner and gives investigative powers to the department's representatives. --- (§§ 39-3-210 & 211, MCA)
- Provides a penalty for failure to pay wages when due and payable in an amount up to 110% on wages not paid as specified above. --- (§ 39-3-206, MCA)
  - ◊ *Lesser penalties under certain circumstances* -- (ARM, 24.16.7556 – 24.16.7569)
- Provides for required mediation of labor law disputes. --- (§ 39-3-216, MCA)
- Provides for an administrative hearing in cases that are not resolved informally. -- (§ 39-3-216, MCA)

## NOTES



## WAGE CLAIM PROCEDURES

1. When a wage claim is filed with the Wage and Hour Unit of the Montana Department of Labor and Industry, it is assigned to a compliance specialist. In the first step of this process, a letter is sent to the employer asking for payment of the claim, records, or a statement as to the validity of the claim. **It is vital the employer respond to the claim by the date specified in the letter.** Requests for extension may be granted. Failure to respond may result in increased penalties.
2. In most cases, if the claim is paid in full, the compliance specialist will forward payment to the claimant and close the case. Exceptions exist for special circumstances such as insufficient fund checks and previous history of failure to pay wages.
3. If a payment is made less than the amount claimed, the claimant will be notified. If they accept the payment, the case will be dismissed and the check mailed to the claimant. If they do not accept the amount as satisfying the wage claim, the check will be held until the claim is resolved. Any payments submitted before a decision is issued are not subject to penalties.
4. If the employer fails to respond to the letter sent by Wage and Hour, a Determination will be issued finding the wages claimed are owed, and a penalty equal to 110% of the amount claimed is owed.
5. If the employer provides information as requested, the compliance specialist will review the information with the claimant and the employer. Based on the information obtained, a Determination Dismissal will be issued. **If wages are determined due, the applicable penalties will be assessed.**
6. The Determination or Dismissal will be made in writing and served on the parties by mail. Either party may submit a timely written notice of appeal or request for redetermination. The determination or dismissal will provide the information you need to file an appeal. **The written notice of appeal or redetermination may not be received electronically.** If it is determined wages are owed and a request for redetermination or an appeal is not received, an Order on Default in the amount of the determination plus any applicable penalties will be issued. Appealed determinations or dismissals will go through mandatory mediation prior to transfer to the administrative hearing process. Appeal dates are set by law and an extension cannot be granted.
7. Determinations are subject to settlement discussion. Upon request, or if the facts merit, the compliance specialist may assist the parties in compromise settlements.

**Remember** - it is important you respond to the enclosed letter or pay the claim by the date specified.

## COMMON ERRORS

- Misclassifying Independent Contractors
- Assuming all employees paid a salary are not due overtime
- Improperly applying an exemption
- Failing to pay for all hours an employee is “suffered or permitted” to work
- Limiting the number of hours employees are allowed to record
- Failing to include all pay required to be included in calculating the regular rate for overtime
- Making improper deductions from wages.  
**Examples:** shortages, drive-offs, damage, tools, and uniforms
- Confusing Federal and State law

## NOTES

## **MONTANA PREVAILING WAGE LAW a/k/a LITTLE DAVIS BACON ACT**

(ARM, 24.17.101)

The purpose of the Montana Prevailing Wage Law is to protect local labor markets, to maintain the general welfare of Montana workers on public works projects, to eliminate wage cutting as a method of competing for public contracts, to maintain wages and rates paid on public works at a level sufficient to attract highly skilled laborers performing quality workmanship and to prevent the rate of wages from adversely affecting the equal opportunity of Montana contractors to bid on public works. (ARM 24.17.101)

- ♦ Defines public works contract --- (18-2-401 (11)(a), MCA)
  - Contract for construction services let by the state, county, municipality, school district, or political subdivision, or
  - Nonconstruction services let by the state, municipality, school district, or political subdivision.
  - The total cost of the contract is in excess of \$25,000.
  
- ♦ Establishes standard prevailing rate of wages --- (18-2-402, MCA)
  - Commissioner may determine the standard prevailing rate of wages, including fringe benefits, applicable to public works contracts under this part.
  - Whenever this part is applicable, the standard prevailing rate of wages, including fringe benefits, is the greater of the highest applicable rate of wages in the area for the particular work in question as negotiated under existing and current collective bargaining agreements or the rate determined by the applicable survey under this part.
  
- ♦ Establishes preference of Montana labor in public works --wages--- (18-2-403, MCA)
  - There must be inserted in the bid specification and the public works contract a provision requiring the contractor to give preference to the employment of bona fide Montana residents in the performance of the work.
  - Contracts for construction (except those for heavy and highway construction) and nonconstruction services, must contain a provision requiring the contractor to pay:
    - ❖ Travel allowance that is in effect and applicable to the district in which the work is being performed, and
    - ❖ The standard prevailing rate of wages, including fringe benefits, that is in effect and applicable to the district in which the work is being performed.
  - In every public works contract for heavy and highway construction, there must be inserted a provision to require the contractor to pay the standard prevailing wage rates established statewide for heavy and highway construction services conducted at the project location or under special circumstances.
  - Transportation of goods, supplies, materials, and manufactured or fabricated items to or from the project location is not subject to payment of the standard prevailing rate of wages.
  - Failure to include the provisions required by 18-2-422, MCA in a public works contract relieves the contractor from the contractor's obligation to pay the standard prevailing wage rate and place the obligation on the public contracting agency.

- ♦ All public works contracts entered into under the provisions of this part, at least \$1,000 of the contract price must be withheld at all times until the termination of the public works contract. --- (18-2-404 (2), MCA)
- ♦ The contractor performing work or providing construction services shall post in a prominent and accessible site on the project or staging area, not later than the first day of work and continuing throughout the entire duration of the project, a legible statement of all wages and fringe benefits to be paid to the employees. --- (18-2-406, MCA)
- ♦ A contractor, subcontractor, or employer who pays workers or employees at less than the standard prevailing rate of wages as established under the public works contract shall forfeit to the department (18-2-407, MCA):
  - ❖ Amount of wages owed
  - ❖ A penalty at a rate of up to 20% of the delinquent wages plus fringe benefits, attorney fees, audit fees and court costs
  - ❖ \$25 a day for each day that the employee was underpaid
- ♦ On any state construction project funded by state funds each contractor shall ensure that at least 50% of the contractor's workers performing labor on the project are bona fide Montana residents – (18-2-409, MCA)
- ♦ A contractor or a subcontractor shall pay employees receiving an hourly wage on a weekly basis. – (18-2-423, MCA)

**NOTES** 

## PREVAILING WAGE RATE DISTRICTS (18-2-411 MCA)

Four prevailing wage rate districts were created and adopted for building construction services and nonconstruction services.

### Montana Prevailing Wage Districts



## SURVEYS

(18-2-413 through 415, MCA)

Surveys are conducted annually. Rates are determined based on the information submitted on the surveys during the employer's peak month of employment.

- Building, Heavy and Highway construction surveys are reported by licensed electrical contractors, licensed plumbers, fire suppression contractors and construction contractors that are registered with the State of Montana and perform commercial work.
- Nonconstruction services surveys are reported by employers whose names and addresses are supplied by a political subdivision of the state as employers who have submitted bona fide bids or responses to requests for proposals for public works contracts for nonconstruction services.

## PROJECT CLASSIFICATION

(18-2-418 MCA)

The contracting agency shall determine, based on the preponderance of labor hours to be worked, whether the project is classified as a highway construction project, a heavy construction project, or a building construction project.

## **BUILDING CONSTRUCTION**

(ARM 24.17.501 (2))

Building construction projects generally are the constructions of sheltered enclosures with walk-in access for housing persons, machinery, equipment, or supplies. It includes all construction of such structures, incidental installation of utilities and equipment, both above and below grade level, as well as incidental grading, utilities and paving.

Examples of building instruction include but are not limited to, alterations and additions to buildings, arenas, auditoriums, automobile parking garages, churches, fire stations, hospitals, libraries, water and sewage treatment plants, etc.

## **HEAVY CONSTRUCTION**

(ARM 24.17.501 (4))

Heavy construction projects include, but are not limited to, those projects that are not properly classified as either “building construction”, or “highway construction”.

Examples of heavy construction projects are antenna towers, bridges, dams, demolition (not incidental to construction), docks, irrigation projects, land leveling (not incidental to other construction), land reclamation, sewage collection and disposal lines, swimming pools, etc.

## **HIGHWAY CONSTRUCTION**

(ARM 24.17.501 (3))

Highway construction projects include, but are not limited to, the construction, alteration, or repair of roads, streets, highways, runways, taxiways, alleys, trails, paths, and parking areas, bridges constructed or repaired in conjunction with highway work, and other similar projects not incidental to building construction or heavy construction.

Examples of highway construction projects are alleys, base courses, bridle paths, concrete pavement, curbs, fencing, medians, parking lots, resurfacing streets and highways, shoulders, storm sewers, street paving, trails, etc.

## **NONCONSTRUCTION SERVICES**

(18-2-401 (9), MCA)

Nonconstruction services means work performed by an individual, not including management, office, or clerical work, for:

- The maintenance of publicly owned buildings and facilities, including public highways, roads, streets, and alleys;
- Custodial or security services for publicly owned buildings and facilities
- Grounds maintenance for publicly owned property;
- The operation of public drinking water supply, waste collection, and waste disposal systems;
- Law enforcement, including janitors and prison guards;
- Fire protection;
- Public or school transportation driving
- Nursing, nurse’s aide services, and medical laboratory technician services;
- Material and mail handling
- Food service and cooking;
- Motor vehicle and construction equipment repair and servicing
- Appliance and office machine repair and servicing

## **APPRENTICESHIPS**

(18-2-416, MCA and ARM 24.17.171)

Apprentices are those persons employed and individually registered in bona fide apprenticeship programs registered with or recognized by the Department's Bureau of Apprenticeship and Training or the U.S. Bureau of Apprenticeship and Training.

- Employer is limited in the number of apprentices permitted on the job site for any class or type of employee based on the allowable ratio of apprentices to journeymen specified in the approved program.
- Apprentice must register 30 days prior to the date the apprentice starts work on the project.
- A recognized, registered apprentice must be paid the percentage of the standard prevailing rate of wages provide for in the apprenticeship standards applicable to that apprentice. The percentage amount applies to wage rates only and not to fringe benefits.
- The full amount of any applicable fringe benefits must be paid to the apprentice while the apprentice is working on the public works contract.

For illustration purposes: Base Wage - \$2.00 Fringe - \$1.00

An apprentice may be paid a percentage amount of the base wage, as described in the apprentice agreement. For example, 60% of \$2.00 = \$1.20.

The apprentice must be paid the full fringe amount of \$1.00. Therefore, the apprentice receives \$1.20 (base) + \$1.00 (fringe) = \$2.20.

## **MULTIYEAR CONTRACTS**

(18-2-417, MCA)

Any public works contract that by the terms of the original contract calls for more than 30 months to fully perform must include a provision to adjust the standard prevailing rate of wages to be paid to the workers performing the contract.

- The standard prevailing rate of wages paid to workers must be adjusted 12 months after the date of the award of the public works contract.
- The amount of the adjustment must be a 3% increase.
- This adjustment must be made and applied every 12 months for the term of the project.
- Any increase in the standard rate of prevailing wages for worker is the sole responsibility of the contractor and any subcontractors and not the contracting agency.

\*To see specific examples, visit the State Procurement Bureau's website at:  
[http://gsd.mt.gov/ProcurementServices/procurementqas.mcp#Prevailing\\_Wage](http://gsd.mt.gov/ProcurementServices/procurementqas.mcp#Prevailing_Wage)

### **NOTES**

## RECORDS REQUIRED TO BE KEPT

(ARM 24.17.301)

- ✓ Name, address and social security number of each employee
- ✓ Work classification or craft of each employee
- ✓ Rate or rates of monetary wages and fringe benefits paid to each employee including:
  - The amount of payment (if any) for travel expenses
  - The amount of payment (if any) for per diem expenses
  - The amount of payment (if any) for other reimbursed expenses; and
  - The fair market value of any other benefits provided to the employee by the employer, such as allowing personal use of a company vehicle by the employee and the value of meals and lodging directly furnished by the employer.
- ✓ The rate or rates of fringe benefits payments made in lieu of those required to be provided to each employee
- ✓ Total daily and weekly compensation paid to each employee
- ✓ The daily and weekly hours worked by each employee, specified by actual calendar date; and if the employee worked in more than one craft or classification for which different rates were payable, the records shall show the number of hours in each day worked at the different crafts or classifications
- ✓ Apprenticeships and training agreements and standards
- ✓ Any deduction, rebates or refunds taken from each employee's total compensation and actual wages paid
- ✓ Any payroll and other records pertaining to the employment of employees on a public works project
- ✓ Owner/Operators should report/track their hours on certified payroll.

When apprentices are employed on a public works project, the records must clearly distinguish them from other employees. The records must also clearly identify the date each apprentice started working on the public works project and must include verification of apprenticeship registration.

When a contractor, subcontractor, or employer employs an employee on public works projects and non-public works projects during the same work week and the employee is paid a rate of pay which is less than the prevailing wage rate when working on a non-public works project, the employer must separately record the hours worked on a public works contract project and those hours worked elsewhere.

## RECORDS AVAILABILITY

(ARM 24.17.304)

Every employer (including a contractor or subcontractor) performing work on a public works project shall make available to the Department records necessary to determine if the prevailing wage rate has been or is being paid to employees on the public works project. Such records shall be made available for inspection and transcription within 72 hours of an on-site inspection, within five (5) days of a mail-in request or at such later time may be specified by the Department.

### **NOTES**



## CERTIFIED PAYROLL (ARM 24.17.307 & 24.17.311)

The Department shall send a letter requesting copies of the contractor, subcontractor, or employer's payroll records. Included with the records must be a statement with respect to the wages paid each employee. This statement shall be executed by the contractor, subcontractor, employer, or by an authorized officer or employee of the contractor, subcontractor or employer who supervises the payment of wages and shall certify the payroll records, or copies thereof, are true and accurate and reflect all payments and deductions made for employees employed on the public works project each week.

The Department encourages the use of, but does not require, the certified federal payroll from WH-347. If you wish to utilize this form, it is available on our website at:  
[http://erd.dli.mt.gov/images/stories/pdf/labor\\_standards/payrollform12-2009.pdf](http://erd.dli.mt.gov/images/stories/pdf/labor_standards/payrollform12-2009.pdf).

## FRINGE BENEFITS (18-2-412, MCA & ARM 24.17.321)

To fulfill the obligation to pay the standard prevailing rate of wages under 18-2-403, a contractor or subcontractor may:

- Pay the amount of fringe benefits and the basic hourly rate of pay that is part of the standard prevailing rate of wages directly to the worker or employee in cash;
- Make an irrevocable contribution to a trustee or a third party person pursuant to a fringe benefit fund, plan, or program that meets the requirements of the Employee Retirement Income Security Act of 1974 or that is a bona fide program approved by the U.S. Department of Labor; or
- Make payments using any combination of methods set forth in subsections (1)(a) and (1)(b) so that the aggregate of payments and contributions is not less than the standard prevailing rate of wages, including fringe benefits and travel allowances, applicable to the district for the particular type of work being performed.

Fringe benefits are paid for all hours worked (straight time and overtime hours). However, fringe benefits are not to be considered a part of the hourly rate of pay for calculating overtime, unless there is a collectively bargained agreement in effect that specifies otherwise.

Examples of fringe benefits are life insurance, health insurance, pension, vacation, holidays and sick leave.

## **ZONE PAY AND PER DIEM** (18-2-419, MCA)

The Department may establish a zone pay or a per diem amount that reasonable approximates an applicable average zone pay or per diem rate that is payable for the trade classification. The hourly wage rates applicable to each project shall be determined by measuring the road miles over the shortest practical maintained route from the County Courthouse of the following towns to the center of the job: Billings, Bozeman, Butte, Great Falls, Helena, Kalispell, and Missoula. Zone pay is in addition to the applicable base rate and must be included in the overtime calculation.

Per diem typically covers the costs associated with board and lodging expenses and are paid when an employee is required to work at a location outside the daily commuting distance and is required to stay overnight or longer.

### **NOTES**

## **COMPUTING TRAVEL BENEFITS**

Travel pay, for the purposes of public works projects, shall be paid for travel to and from the job site, except those with special provisions listed under the classification. The rate is determined by measuring the road miles one direction over the shortest practical maintained route from the nearest county courthouse or the employee's home, whichever is closer, to the center of the job from the following listed cities:

- Billings, Bozeman, Butte, Great Falls, Helena, Kalispell, and Missoula

## **OVERTIME** (39-3-405, MCA & ARM 24.17.326)

Fringe benefits are not used in the calculation of overtime.

## **EXEMPTIONS**

The following is a list of occupations that may be considered exempt from the payment of prevailing wages.

- Engineering
- Superintendence
- Management
- Office
- Clerical
- Consulting contracts
- Contracts with commercial suppliers
- Contracts with licensed professionals
- Transportation of goods, supplies, materials, and manufactured or fabricated items to or from the project location.

**PREVAILING WAGE CONTACTS:**

**COMPLIANCE SPECIALISTS:**

**MITCH LESLIE (406) 444-1824**  
**DAVE LUCKEY (406) 444-1823**  
**RANDY SIEMERS (406) 444-4619**

**PREVAILING WAGE SURVEY QUESTIONS:**

**MIKE SMITH (406) 444-1741**