New Mexico Restaurant Association

US Department of Labor

Fair Labor Standards Act

NMRA New Mexico Restaurant Association

www.nmrestaurants.org
505-343-9848

Housekeeping

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- Please use the chat box to ask questions.
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NMRA New Mexico Restaurant Association

Your Host...

Carol Wight

CEO

New Mexico Restaurant Association

New Mexico Restaurant Association

Introducing…

Presenting today will be:

Michael Killough

- **Investigator: Wage and Hour Division**

U.S. Department of Labor

NMRA New Mexico Restaurant Association

But first…Introducing…

Keith Sonderling

- **Senior Policy Advisor at**

U.S. Department of Labor

New Mexico Restaurant Association

PAID A NEW NATIONWIDE PROGRAM

The Payroll Audit Independent Determination (PAID) program expedites resolution of inadvertent overtime and minimum wage violations under the Fair Labor Standards Act, and provides a framework for employers to proactively resolve those violations without litigation.

FAIR LABOR STANDARDS ACT

UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION

dol.gov/whd
1-866-487-9243

Major Provisions

Coverage

Youth Employment

Minimum Wage

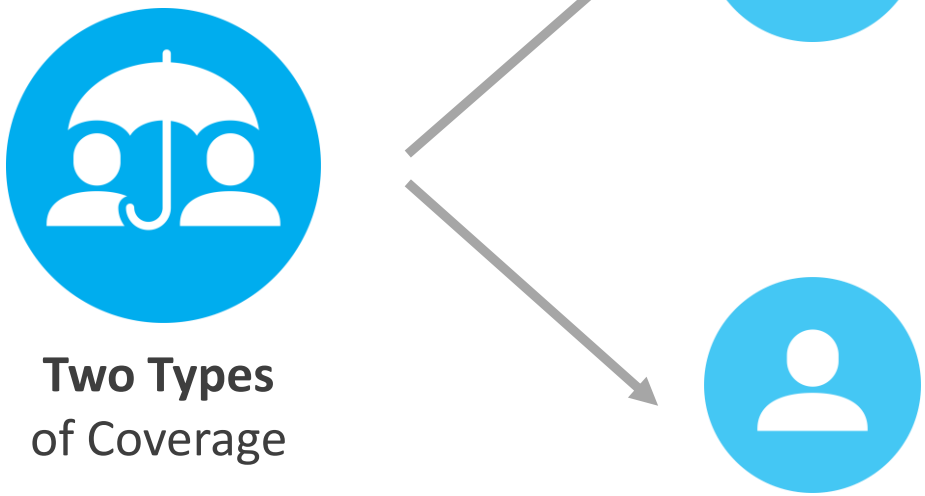
Recordkeeping

Overtime

Employment Relationship

In order for the FLSA to apply, there must be an employment relationship between the "employer" and the "employee"

Coverage



Two Types
of Coverage

Enterprise Coverage
Enterprise, as a whole, is covered and all employees are entitled to FLSA protections

Individual Coverage
Enterprise, as a whole, is NOT covered; however individual employees are covered and entitled to FLSA protections

Enterprise Coverage

Enterprise coverage may apply to a business if:

- It engages in commercial activities that result in no less than $500,000 in annual dollar volume (ADV), sales or total business, and
- It has two or more employees

Minimum Wage

Covered, non-exempt employees must be paid at least the federal minimum wage, in cash or the equivalent, free and clear, for all hours worked

Current federal minimum wage

$7.25

Minimum Wage

Compensation includes:

- Wages (salary, hourly and piece rates)
- Commissions
- Certain bonuses
- Tips received by eligible employees up to $5.12 per hour (where the employer takes a tip credit)
- Reasonable cost of room, board, other "facilities" provided by employer for employee's benefit

Minimum Wage

Board & Lodging – credit toward wages
(known as the 3(m) credit)

The following five requirements must be met:

(1) the lodging is regularly provided by the employer or similar employers;
(2) the employee voluntarily accepts the lodging;
(3) the lodging is furnished in compliance with applicable federal, state, or local law;
(4) the lodging is provided primarily for the benefit of the employee rather than the employer; and
(5) the employer maintains accurate records of the costs incurred in furnishing the lodging.

Minimum Wage

Deductions from pay are illegal if:

- Items are primarily for the benefit or convenience of employer, and
- Deduction reduces employee earnings below required minimum wage

Examples of illegal deductions: deductions for uniforms, unreasonable dress codes, walked tabs, wrong orders, and cash register shortages

FACT SHEET:
Deductions

Minimum Wage

****IMPORTANT NOTE ON DEDUCTIONS****

If an employer claims the tip credit by paying tipped employees at a rate below the Federal MW, any deductions that are primarily to the benefit and convenience of the employer would violate the Federal MW law since the employer can only claim up to the Federal MW for tips received.
See 29 CFR 531 (wage payments)

FACT SHEET:
Deductions

Minimum Wage

Exercise (No Tip Credit Claimed)

Hourly Rate: $8.00
Weekly Hours: 30
Employer-required uniform cost: $30.00

Earnings: ($8.00) x (30 hours) =	$240.00
Less uniform charges:	- $30.00
Leaves worker with:	$210.00
(MW $7.25/hour) x (30 Hours) =	$217.50

Deduction for uniform takes wages below required MW

Minimum Wage

Tipped Employee

- Engaged in an occupation in which he or she customarily and regularly receives more than $30 per month in tips (Some states require more than $30 per month)
- Applied on an individual basis

FACT SHEET:
Tipped Employees

Minimum Wage

Clarification of Term Cash Wage

For Purposes of the discussion on Tipped Employees, the "cash wage" is the rate paid to the tipped employee exclusive of any tips received by the customer or from a bona fide tip pool.

- **The cash wage does not mean – paid in cash**

FACT SHEET:
Tipped Employees

Minimum Wage

Tip Credit

<u>Applicable</u> MW – Cash Wage Paid = Tip Credit

Employer may claim "tip credit" only if:

- Employee informed of tip credit allowance and amount of wage claimed as "tip credit"
- Employer documents sufficient tips received to bring total wage to at least minimum wage
- Tips retained by employee, not shared with employer or other employees except in valid tip pooling arrangement

Minimum Wage

How Does an Employer Claim a Tip Credit?

- An employer who pays a cash wage less than the Federal MW to a customarily tipped workers is essentially claiming a tip credit.

****

- However, the tip credit can be denied if the employer fails to comply with all requirements of the tip credit provision of the FLSA.

Minimum Wage

Consolidated Appropriations Act of 2018

Congress amended the FLSA in the Consolidated Appropriations Act, 2018 (Act), Pub. L. No. 115-141, Div. S., Tit. XII, § 1201.

This amendment prohibits employers from keeping tips received by their employees, regardless of whether the employer takes a tip credit under 29 U.S.C. § 203(m).

Minimum Wage

Hours Worked

An employee must be paid for all of the time considered to be “hours worked” under the FLSA.

This may include time spent engaged to wait, on-call, in training, or travelling, as well as sleep time.

Work not requested but “suffered or permitted” is work time.

FACT SHEET:
Hours Worked

Minimum Wage

Rest and Meal Periods

- Short rest breaks (20 min or less) are compensable
- Bona fide meal periods (typically 30 minutes or more) need not be paid as hours worked
- Worker must be completely relieved of duty for meal period not to be compensable time.

Minimum Wage

Training Time

Time spent in meetings, lectures or training is considered *hours worked* and must be paid, unless:

- Attendance outside regular work hours
- Attendance voluntary
- Course, lecture, meeting not job related, ***and***
- Employee does not perform any productive work

Minimum Wage

Training Time with Tip Credit

The tip credit typically does not apply to employees in training as they often spend more than 20% of their time in activities not directly related to serving their own customers. The tips usually go to the trainer, not the trainee.

The tip credit is not available for employees who spend more than 20% of their time in "related activities" such as rolling silverware, setting tables, making coffee, filling condiments, sweeping, cleaning artifacts, & restocking dishes.

Minimum Wage

Common Violations

- ***Suffered or Permitted:*** working "off the clock"
- ***Waiting Time:*** engaged to wait
- ***Meal and Rest Periods:*** not free from duty
- ***Training Time:*** unpaid training during work time
- ***Invalid Tip Pool (See Next Slide)***
- ***Minimum Wage Deficiency***: Failure to ensure tipped employees receive enough tips to meet the Federal MW and Tip Credit on a weekly basis.

Minimum Wage

Valid Tip Pooling Arrangement

- An invalid tip pool is grounds for the denial of the tip credit whereas an employer would be required to pay no less than the Federal MW to customarily tipped employees.
- 100% of the money in the tip pool must be redistributed to customarily tipped employees.
- Customarily tipped employees do not include chefs, cooks, dishwashers, managers, or janitors.

Overtime

Covered, non-exempt employees must receive one and one-half times their regular rate of pay for all hours worked over forty in a workweek

All time that is hours worked must be counted when determining overtime hours worked.

FACT SHEET:
Overtime

Overtime

- Compliance determined by workweek
- Each workweek stands alone
- Workweek is 7 consecutive 24-hour periods (168 hours)

Overtime

Regular Rate

- Determined by dividing total earnings in workweek by total number of hours worked in workweek

Total Compensation ÷ Total Hours Worked = RR

- *Regular Rate* may not be less than the applicable minimum wage

- ***Total earnings include commissions, certain bonuses, and cost of room, board, and other facilities provided primarily for the employee's benefit***

Overtime

Exclusions from the *Regular Rate*

- Gifts, *discretionary* bonuses
- Payments for time not worked
- Reimbursements for expenses
- Profit sharing plans, stock options
- Retirement and insurance plan contributions
- Overtime premium payments

Overtime

Regular Rate and Premium Pay for OT Hours

STEP 1: Total compensation paid in a workweek (minus statutory exclusions) divided by total hours worked in the workweek

Total Compensation ÷ Total Hours = RR

STEP 2: **RR** x .5 = Half-time Premium Pay per OT Hour

STEP 3: (Half-time) Premium Pay Rate x Overtime Hours in the Workweek = Overtime Compensation Due

Overtime

Exercise: Tipped Employee

Employer Paid Hourly Wage:	$2.13
Tip Credit Claim:	$5.12
Hours worked:	50
Regular Rate:	$7.25
Additional Half-Time Rate:	$3.63

50H x $7.25 = $362.50

10H x $3.63 = $36.30

Total Due:

$362.50 + $36.30 = $398.80

Tip Credit:

$5.12 x 50 = $256.00

Total Cash Wage Due:

$398.80 - $256.00 = $142.80

Overtime

Exercise: Tipped Employee

Alternate Method from Previous Slide

Employer Paid
Hourly Wage: $2.13
Tip Credit Claim: $5.12
Hours worked: 50
Regular Rate: $7.25
Half-Time Rate: $3.63
OT Rate: $5.76 ($2.13 + $3.63)

40H x $2.13 = $85.20
$10H x $5.76 = $57.60
Total Cash Wage Due:
$85.20 + $57.60 = $142.80

Overtime

Deductions in Overtime Workweeks

Board, Lodging and Facilities

- Lodging must be regularly provided by the employer or similar employers
- Employee must voluntarily accept lodging
- Lodging furnished in compliance with federal, state or local laws
- Lodging primarily for the benefit of employee
- Employer maintains accurate records of costs incurred in furnishing of lodging

Overtime

Deductions in Overtime Workweeks

Items OTHER THAN Board, Lodging, and Facilities

Deduction allowed if:

- Bona fide
- Made under prior agreement
- Purpose not to evade overtime requirements, other laws
- Limited to amount above highest applicable minimum wage for first 40 hours

Overtime

Exemptions

There are numerous exemptions from the minimum wage and/or overtime standards of the FLSA

One of the most common FLSA minimum wage and overtime exemptions is often called the **“541,” “white collar”** or **“EAP”** exemption

Overtime

Three Tests for the “White Collar” Exemptions

FACT SHEET: Blue Collar Workers

Overtime

On July 26, 2017, the Department of Labor published a Request for Information (RFI) regarding the Overtime Final Rule, which was published on May 23, 2016, asking for public input on what changes the Department should propose. That comment period has ended and the Department is reviewing those submissions.

On August 31, 2017, U.S. District Court Judge Amos Mazzant granted summary judgment against the Department of Labor in consolidated cases challenging the Overtime Final Rule. The court held that the Final Rule's salary level exceeded the Department's authority, and concluded that the Final Rule is Invalid.

On October 30, 2017, the Department of Justice, on behalf of the Department of Labor, appealed the district court's decision to the U.S. Court of Appeals for the Fifth Circuit. On November 6, 2017, the Fifth Circuit granted the government's motion to hold the appeal in abeyance while the Department of Labor undertakes further rulemaking to determine what the salary level should be.

Overtime

Salary Level Test

For most employees the minimum salary level required for exemption is **$455.00 per week.**

It may be paid in equivalent amounts for longer periods.

Bi-weekly:	$910.00
Semi-monthly:	$985.83
Monthly:	$1971.66

Note: Until the Department issues its final rule, it will enforce the part 541 regulations in effect on November 30, 2016, including the $455 per week standard salary level.

Overtime

Deductions from Salary

Not permissible

- Deductions from predetermined salary for absences occasioned by employer for operating requirements of business
- Work not available, but employee ready, willing and able to work

Overtime

Deductions from Salary

Permissible Deductions

Seven Exceptions from the "No Pay-Docking" Rule

1. One or more *full days* absence not related to sickness~~,~~ or disability
2. One or more *full days* absence for sickness or disability if deductions made under bona fide plan, policy, or practice of wage replacement
3. Offset of payments received for jury fees, witness fees or military pay

Overtime

Deductions from Salary

Seven **Exceptions from "No Pay-Docking" Rule**

4. Good-faith penalties for safety rule violations of "major significance"
5. Unpaid disciplinary suspension of one or more *full days*, imposed in good faith, for violations of written workplace conduct rules
6. Proportionate part of employee's full salary may be paid for time worked in first and last weeks of employment
7. Unpaid leave taken pursuant to Family and Medical Leave Act

Overtime

Effect of Improper Deductions

Improper deductions from salary may result in loss of exemption

- During period in which improper deductions made
- For employees in same job classification
- For employees working for manager making improper deductions

Isolated, or inadvertent improper deductions will not result in loss of exempt status if employee reimbursed

Overtime

Common Overtime Violations

- **Regular Rate:** Failure to include production bonuses, shift differentials, piece rates in determining the regular rate for calculating OT compensation due
- **Combined hours, rates for dual jobs:** Failure to combine all hours in dual jobs or multiple sites of single employer
- **Tipped Employees:** Failure to calculate correct cash OT payment

Overtime

Common Overtime Violations

- **“White Collar” Exemptions:** Misapplication of exemption, or improper assumption that all salaried employees are exempt
- **Deductions:** Improper deductions in OT weeks
- **Misclassification:** Improper treatment of employee as independent contractor
- **Hours worked:** Failure to record, pay for all hours worked
- **State Law:** Confusion between state and federal law

Youth Employment

Federal youth employment rules set both hours and occupational standards for youth

FACT SHEET:
Youth Employment

Youth Employment

- **16 and 17 year olds**

  Unlimited hours; may work in any occupation other than those declared hazardous by Secretary of Labor

- **14 and 15 year olds**

  May work outside school hours and for limited periods of time; only non-manufacturing,
  non-hazardous jobs, and specific conditions apply

- **Children under 14**

  With limited exceptions, no employment permitted in covered, non-agricultural occupations

Recordkeeping

- All employers subject to any provision of the FLSA must make, keep, and preserve certain records
- Time clocks are not required and records need not be kept in any particular form
- Every covered employer must keep basic records for each worker, with additional requirements for non-exempt workers

FACT SHEET:
Recordkeeping Requirements

Recordkeeping

“Basic records” that a covered employer must keep for each non-exempt worker include:

- Full name, sex , DOB if younger than 19
- Regular rate of pay, total hours worked, total daily or weekly straight-time earnings, total overtime compensation, if any
- Deductions, date of payment and pay period for payment

Recordkeeping

Posting

Covered employers must post a notice explaining the FLSA, as prescribed by the Wage and Hour Division, in a conspicuous place such as a lunch room or employee lounge area.

Download the poster electronically at :

www.dol.gov/oasam/boc/osdbu/sbrefa/poster/matrix.htm

To request by phone call:

1-866-487-9243

FLSA Enforcement

Limits of the FLSA

FLSA does ***NOT*** require

- Vacation, holiday, severance, sick pay
- Meal or rest periods, holidays off, vacations
- Premium pay for weekend or holiday work
- Discharge notice, reason for discharge
- Limit on number of hours or days employees 16 years or older may work
- Pay raises, fringe benefits

FLSA Enforcement

- 2-year statue of limitations generally applies to back pay recovery; if willful violation, a 3-year statue of limitations may apply
- If voluntary agreement not obtained, the Wage and Hour Division may bring suit to restrain employer from violating FLSA and/or obtain back wages and liquidated damages
- Employees may file private suit for back pay, liquidated damages, plus attorney and court fees

FLSA Enforcement

Penalties

- Willful violations may be prosecuted with fines amounting to thousands of dollars
- Violators of youth employment are subject to civil money penalties
- Willful, repeat violations of minimum wage or overtime requirements subject to civil money penalties for each violation

Civil Money Penalties Chart

FLSA Compliance Assistance

Fair Labor Standards Act of 1938
Regulations
FLSA Poster.pdf
Handy Reference Guide.pdf
Frequently Asked Questions (FAQs)
Fact Sheets
Opinion Letters

Visit the WHD home page: www.dol.gov/whd

FLSA Compliance Assistance

Fact Sheets specific to Restaurants

- #2 – Restaurants & Fast Food Establishments
- #2A – Employing Youths in Restaurants
- #15 – Tipped Employees & Tip Pooling
- #15A – Ownership of Tips
- #16 – Deductions from Wages
- #17A – White Collar Exemptions Overview
- #58 – Minors under 18 Cooking & Baking

FLSA Compliance Assistance

New Mexico Tip Credit

Current Maximum Tip Credit = $5.37

- www.dol.gov/whd/state/tipped

For examples on computing overtime while claiming a tip credit in New Mexico, see:

- www.dol.gov/whd/foh
  - Chapter 32j18 (g-h)

FLSA Compliance Assistance

- Call WHD toll free and confidential information and helpline: **1-866-4US-WAGE** (1-866-487-9243)
- Call or visit the nearest Wage and Hour Division Office: **WHD Offices**
- Employment Laws Assistance for Workers and Small Businesses (ELAWS): **Elaws**

Wage and Hour Division

Disclaimer

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Questions?
(in the chat box)

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THANK YOU!

You can contact Carol at executive@nmrestaurants.org

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