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## Equal Rights Division Presentations for Job Order Staff Labor Standards Issues May 2 & 3, 2005

*Jim Chiolino*  
*Labor Standards Section Chief*  
*Equal Rights Division*  
*(608) 261-4894*  
*jim.chiolino@dwd.state.wi.us*

### 1. Employee or Independent Contractor?

- A. The courts have different rules or tests for determining whether a worker is an employee or an independent contractor, depending upon what laws are involved. Unemployment Insurance, for example, has very specific requirements. Wis. Stat. § 108.02(12)(bm).<sup>1</sup>
- B. The Internal Revenue service considers one of two common law tests. In Labor Standards, for purposes of minimum wage, overtime, and wage payment, we will use the common law test. The IRS has an excellent publication on the subject at <http://www.irs.gov/pub/irs-pdf/p1779.pdf>.
- C. No one factor is determinative, but the factors tend to fall into three main categories, behavioral control, financial control, and the overall relationship of the parties.
  1. **Behavioral Control** – often described as the “right to control” test
    - a. Instructions – if the worker receives instructions as to how, when, or where to do the work; what tools or equipment to use; what assistants to hire; or where to purchase supplies or services.
    - b. Training – If the business sets required procedures and provides training on these procedures, it is more likely that this is employment.
  2. **Financial Control** – “right to control” the business aspect of work
    - a. Investment – If worker has large investment, it may not be employment.

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<sup>1</sup> The statute provides that a worker is not an “employee” for Unemployment benefit purposes if it meets seven out of ten listed conditions ‘by contract.’ Those conditions include such things as “the individual holds or has applied for an identification number with the federal internal revenue service... the individual maintains a separate business...[or] the individual maintains a separate business with his or her own office, equipment, materials...”

- b. Expenses – if there is no expectation of reimbursement of business expenses, then this may not be employment, especially when expenses are high.
- c. Opportunity for profit or loss – If the worker can realize a profit or a loss, then that favors the independent relationship.

3. **Relationship** – how the parties themselves perceive the relationship

- a. Employee benefits – is insurance provided? Pension? Paid Leave?
- b. Written contract – a written contract is indicative of an independent relationship – but again, it is not determinative.

2. **Employment of Minors** – Wis. Stat. §§ 103.64 – 103.82; Wis. Admin. Code DWD 270. (<http://dwd.wisconsin.gov/dwd/publications/erd/pdf/ERD-4758-PWEB.pdf>)

A. Minimum Ages for Employment

- 1. 14 years of age for most types of employment
- 2. 12 if working in parents' business (sole proprietorship)
- 3. 12 in agriculture
- 4. 12 in their school lunch program
- 5. 12 in street trades
- 6. any age if ordered by a court to make restitution

B. Except in Agriculture, all employed minors must have a work permit **prior to** commencing work.

C. Prohibited and Permitted Types of Employment

- 1. Prohibitions are against hazardous employments. Wis. Admin. Code § DWD 270.12 lists employment prohibited to all minors. For example:
  - a. Manufacture of clay construction products (brick and tile);
  - b. Work in confined spaces;
  - c. Excavation;
  - d. Work with explosives;
  - e. Operating, etc., amusement park rides – including loading & unloading passengers. Exception for water slides (okay at 16).
  - f. Operating hoists and hoisting apparatuses.
  - g. Woodworking power-driven machines.
- 2. Wis. Admin. Code § DWD 270.13 lists employment prohibited under age 16. For example:
  - a. Boiler or engine rooms;
  - b. Warehouses;
  - c. Construction sites;
  - d. Cooking, except with direct adult supervision;
  - e. Ladders prohibited over 6 feet high.

D. Hours of Work

- 1. 12-15 year old minors

- a. Weekly – 18 hours in school week; 24 hours in week with fewer than 5 days; 40 hours in non-school week
  - b. Daily – 4 hours on school days; 8 hours on last school day of the week; 8 hours on non-school days.
  - c. DIFFERENT FEDERAL HOURS LIMITS
2. 16-17 year old minors
- a. Weekly – 26 hours in school week; 32 hours in week with fewer than 5 days; 50 hours in non-school week.
  - b. Daily – 5 hours on school days; 8 hours on last school day of the week; 8 hours on non-school days during school weeks; unlimited during non-school weeks.
  - c. During unlimited weeks, minor must be paid 1.5 times the regular rate for work in excess of 40 hours per week or 10 hours per day, whichever is greater.
  - d. NO FEDERAL HOURS LIMITS
- E. Time of Day Limitations
- 1. 12-15 year old minors – No work before 7:00 am. No work after 8:00 pm if there is school the next day. No work after 11:00 pm if there is no school the next day. Again, there are different (stricter) federal requirements.
  - 2. 16-17 year old minors – No work before 7:00 am on school days; no work before 5:00 am on non-school days during school weeks. No work after 11:00 pm when school is in session the next day. No work after 12:30 am if there is no school the next day (in a school week). During non-school weeks, hours are not limited, except that 16 or 17 year old minor may not work between 12:30 am and 5:00 am unless supervised by an adult.

### 3. Piecework Compensation

- A. Legal method of pay whereby employee earns a certain amount per completed part or job. Sometimes the payments for different parts or types of jobs differ.
- B. Employer must keep record of hours worked.<sup>2</sup>
- C. **Minimum wage** must be paid for all hours worked, and is enforced by the pay period. At the end of the pay period, the employer needs to divide the gross piecework pay by the actual hours worked. If the result is less than \$5.15 per hour, the employer must make up the difference.
- D. **Overtime** must be paid after 40 hours actually worked. Even though the employee is not paid on an hourly basis, overtime requirements still apply. To calculate the overtime, the employer divides the piecework pay for the pay period by the hours worked. The result is the “regular rate.” The employer then pays

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<sup>2</sup> Wis. Admin. Code § DWD 272.11 provides that employers must keep records “for each employee,” which show (1) time in and out each day; (2) total number of hours worked per day and per week; (3) time out and back in from meal breaks when those breaks are not counted as hours worked; among other things. Meal breaks need not be counted as hours worked if they are at least 30 consecutive minutes in duration and the employee is free to leave the premises.

half of this regular rate for each hour in excess of 40 in a week, in addition to the regular piecework pay. Each week stands alone – you can't pay after 80 hours in a bi-weekly period.

#### 4. Commissions

- A. Commissions are a legal method of payment. Generally employees paid by commission earn a certain amount for selling product. Agreements vary widely, from a percentage of the price to percentage of the net profit.
- B. **Minimum wage** must be paid to commissioned employees each pay period, even if they do not make any sales. Employees may be 100% commissioned, but if they do not earn enough to meet \$5.15 per hour in a pay period, the employer must make up the difference. The record-keeping requirement applies here, as well.
- C. **Overtime** must generally be paid – unless the salesperson is “exempt” from overtime requirements. There are two exemptions that could apply: (1) outside salespersons and (2) “higher paid” commission employees.
  - 1. Outside salespersons spend at least 80% of their time away from the employer’s place of business. These employees do not necessarily have to be paid by commission, but often are.
  - 2. “Higher paid” commission employees are employees who
    - a. Earn at least 50% of their earnings by commission; and whose
    - b. Earnings average to time and one-half of minimum wage for all hours worked (\$7.73 per hour).
- D. **The Wage Payment** law, Wis. Stat. §§ 109.01-109.12, sometimes no longer applies to commissioned salespersons, based upon 2003 amendments.

#### 5. Minimum Wage – Wis. Stat. §§ 104.01-104.12, and Wis. Admin. Code DWD 272. (<http://dwd.wisconsin.gov/dwd/publications/erd/pdf/ERD-39-PWEB.pdf>)

- A. Wisconsin sets varying minimum wage rates for non-opportunity employees, opportunity rates, tipped rates, agricultural rates, caddie rates, and camp counselor rates. An opportunity employee is under 20 yr. old and in the initial 90 calendar days of employment.
- B. Wisconsin’s minimum wage rates may vary from federal minimum wage rates. If a business is covered by both the federal, state, and now municipal rates, the business needs to comply with each requirement to which it is subject. Normally by complying with the more stringent pay rate, the employer will be in compliance with all.
- C. By agreement, an employer may receive limited credit for meals and lodging provided to employees toward meeting its minimum wage obligation. Tips may be credit toward the minimum wage obligation in the proper situation.

#### Your Questions?