

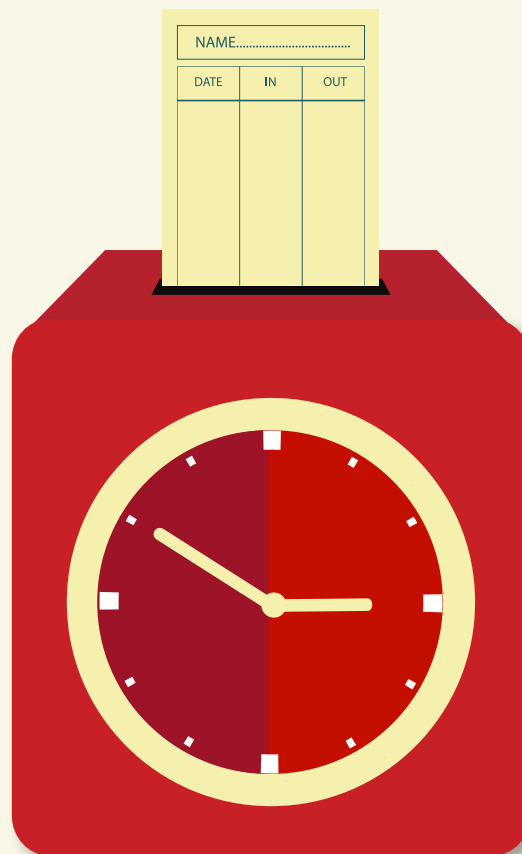
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NADA MANAGEMENT SERIES

L1

A DEALER GUIDE TO

Federal Wage and Hour, Child Labor, and Wage Discrimination Compliance



The National Automobile Dealers Association (NADA) has prepared this management guide to assist its dealer members with compliance with federal regulatory requirements. The presentation of this information is not intended to encourage concerted action among competitors or any other action on the part of dealers that would in any manner fix or stabilize the price or any element of the price of any good or service.



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Federal Wage and Hour, Child Labor, and Wage Discrimination Compliance

Preface

This guide outlines for new-car and -truck dealers some basic requirements for complying with the federal wage and hour, child labor, and wage discrimination laws. Since a dealer's compliance requirements can vary with potentially applicable state mandates, it is recommended that a labor attorney review these laws along with applicable state laws to assess individual dealership compliance.

The language used in this guide reflects the federal statutes and regulations discussed. For example, gender-specific terms such as *salesmen* and *partsmen* are used here to preserve the original text of the law, and the term *mechanic* is used in lieu of *technician*.

I. Introduction to the Fair Labor Standards Act (FLSA)

The FLSA sets minimum wage, overtime, record-keeping and child labor standards. Although generally applicable to automobile and truck dealerships, the FLSA contains several exemptions from its minimum wage and overtime requirements. Whether a dealership employee qualifies for an FLSA exemption typically requires a fact-specific evaluation of job duties and responsibilities. Some exemptions also involve an evaluation of how and how much the employee is paid.

The U.S. Department of Labor (DOL) primarily administers and enforces the FLSA.

State and local laws can vary from the federal law and may impose additional compliance responsibilities (i.e., higher minimum wages, different or fewer exemptions, wage payment and deduction restrictions, and living wage mandates). State labor departments, state dealership associations and dealership labor attorneys are good sources for information on state-specific wage/hour requirements.

The FLSA establishes a general minimum hourly wage for covered employees who are not exempt from its requirements. Except for child labor, the FLSA does not limit how many hours employees may work. Rather, it generally mandates overtime pay for hours worked in excess of 40 during a seven-day workweek.

The FLSA *does not* cover or require:

- ▶ Extra pay for Saturdays, Sundays or holidays.
- ▶ Vacation or holiday pay, severance pay or sick pay.
- ▶ Discharge notices.
- ▶ Rest periods.
- ▶ Time off for vacations or holidays.
- ▶ Limits on the number of hours worked by persons 16 years of age or older, as long as applicable overtime pay mandates are met.

Note: These and other employment matters may be governed by state law and/or by employment agreements.

The FLSA covers employers based on the amount of business transacted per year. Enterprises with annual gross sales in excess of \$500,000 are covered if they have at least two employees engaged in commerce or in the production of goods for commerce. Enterprises with less than \$500,000 in annual gross sales can be exempt from FLSA enterprise coverage, but may still have covered employees who engage in interstate commerce. In short, the *FLSA generally covers all automobile and truck dealerships* and applies:

- ▶ Equally to men and women.
- ▶ Whether wage payments are counted hourly, weekly, monthly or otherwise.
- ▶ Regardless of the number of dealership employees.



II. Minimum Wage

A. Background

Unless specifically exempt, employees must receive the federal (or applicable state) minimum wage for each hour worked. With very few exceptions, wages must be paid in cash. The law severely restricts an employer's ability to offset non-cash items against minimum wages due.

To assure compliance with the minimum wage requirements, employers should divide an employee's total compensation for a pay period by the total hours worked during that pay period. The resulting wage rate must be equal to or greater than the statutory minimum. If the hourly wage rate falls below minimum wage, an employee's pay must be subsidized to equal the minimum wage.

B. Hours Worked

Covered employees must be paid for all *hours worked* in a workweek. *Hours worked* generally include all the time during which employees necessarily are required to be on an employer's premises, on duty or at any other prescribed place of work. Work not requested but *suffered or permitted*, for whatever reason, is

considered work time if an employer knows or has reason to believe that an employee is working. This category of work time includes work performed away from the premises or job site.

EXAMPLE

A salesperson's time worked may include both the time spent working on a dealership floor and the time spent traveling to and calling on customers or prospective customers.

Dealership management should take steps to prevent unauthorized work from being performed. Issuing a policy against such work is not enough; efforts should be made to enforce it.

Particular facts and circumstances help determine hours worked, including whether the:

- ▶ Activity is controlled or required by the employer.
- ▶ Employee has the freedom to leave the premises.
- ▶ Employer has knowledge of and approves of such work.



- ▶ Activity was undertaken primarily for the employer's benefit.
- ▶ Employee has the freedom to engage in personal activities.

Leaves of absence for any reason (e.g., holidays, illnesses and vacations), with or without pay, generally are a matter of agreement between employers and employees. Time spent on such leave need not be counted as *hours worked*. An employee's expressly or implicitly required attendance at meetings or training programs is considered compensable time worked, unless the:

- ▶ Attendance is outside of the employee's regular working hours.
- ▶ Attendance is voluntary.
- ▶ Course, lecture or meeting is not directly related to the employee's job.
- ▶ Employee does not perform any productive work during such attendance.

Attendance is not voluntary if employees are led to believe that their working conditions or continued employment will be adversely affected by nonattendance.

Bona fide meal periods are not *hours worked*, absent an agreement to the contrary. Rest periods or coffee breaks of short duration (e.g., between five and 20 minutes), however, promote employee efficiency and must be counted as *hours worked*.

Certain preparatory and concluding activities normally classified as *preliminary* or *postliminary* are considered integral to an employee's work and must be taken into account when computing *hours worked*. A *preliminary* activity is engaged in by an employee before commencement of the employee's *principal* activity or activities. A *postliminary* activity is engaged in by an employee after the completion of a *principal* activity or activities.

EXAMPLE

Technicians oiling, cleaning, greasing or installing new tools at the commencement of their workday and cleanup work done prior to the commencement of a regular shift if integral to an employee's principal activities and not preliminary to them.

Time spent changing clothes and washing up at the beginning or end of a workday is not considered *hours worked* if merely an employee convenience. However, if these activities are required by law or an employer's rules, or if they are integral to an employee's principal activities, such time should be counted as *hours worked*.

Waiting time may be working time depending on whether there are benefits to the employer, the degree to which employees are free to pursue their own activities or to leave the premises, and whether employees are engaged to wait or are waiting to be engaged. Time spent waiting for and receiving medical attention on the premises or at the direction of an employer during normal working hours constitutes *hours worked*.

III. Overtime

A. Background

Unless exempted, employees covered by the FLSA must receive overtime pay for hours worked in excess of 40 in a seven-day workweek, at a rate of not less than one and one-half times the employee's *regular rate of pay*. **Before calculating and paying overtime, determine if employees qualify for one of the overtime exemptions discussed in Section IV.**

A workweek is a fixed and regularly recurring period of 168 hours during seven consecutive 24-hour periods. It begins on any day of the week and hour of the day the employer establishes. It remains fixed unless permanently changed in a manner not meant to evade overtime laws. Do not average workweeks when computing overtime. Each workweek stands alone.

EXAMPLE

An employee working 30 hours one week and 50 hours the next must receive overtime pay for the hours worked beyond 40 in the second week, even though the average number of hours worked in the two weeks is 40.

It does not matter if employees work on a standard or swing-shift schedule or if their payment basis is daily, weekly, biweekly, monthly, piecework, or commission.

The *regular rate* must never be less than the federal minimum wage and includes all remuneration earned by an employee during the workweek, except exclusions such as:

- ▶ Gifts and holiday or special occasion bonuses rewarding service.
- ▶ Bonuses paid solely at a dealer's discretion and not pursuant to any contract, agreement or promise causing the employee to expect the bonus regularly. Non-discretionary bonuses (e.g., spiffs) must be included in regular rate of pay computations regardless of the method used to compensate an employee.
- ▶ Contributions irrevocably made pursuant to bona fide old-age, life, accident or health insurance; or retirement plans.
- ▶ Payments made on behalf of employees to bona fide profit-sharing, thrift or savings plans.
- ▶ Payments made for occasional periods when employees are not at work due to vacation, holiday, illness, or failure of a dealer to provide work.
- ▶ Reimbursements for expenses incurred on a dealer's behalf.
- ▶ Extra compensation paid at a premium rate of at least time and one-half for work on Saturdays, Sundays, holidays and other special days. If the premium rate is less than time and one-half, include the extra compensation when determining the *regular rate of pay*; do not credit toward any overtime due.

Determine the *regular rate* by dividing the total remuneration for employment in a workweek (less any exclusions) by the total hours actually worked. Employees need not be paid on an hourly basis merely because minimum wage is defined on an hourly basis. Employees may be paid on an hourly, salary, commission, monthly, piecework or any other basis, as long as their pay for each workweek equals or exceeds minimum wage.

B. Hourly-Rate Employees

Hourly-rate employees must receive at least minimum wage for each hour worked. For *hours worked* in excess of 40 per week, they must receive at least one and one-half times their *regular rate*.

EXAMPLE

An hourly employee who earns \$20 per hour and works 44 hours during a workweek is entitled to \$20 per hour for the first 40 hours worked and \$30 (1.5 x \$20) for each hour over 40. The pay for the week should total \$920 (\$800 for the first 40 hours plus \$120 for the four overtime hours).

C. Salaried Employees

There is no exemption from the FLSA's minimum wage or overtime provisions simply because an employee is paid a salary. Nonexempt salaried employees must be paid overtime and their regular rate must never be less than the minimum wage.

To compute the *regular rate* and therefore the overtime pay of a salaried employee who is paid on a basis other than weekly, convert the salary into its weekly equivalent. Multiply semi-monthly salaries by 24 and monthly salaries by 12, and then divide by 52 (alternatively, multiply semi-monthly salaries by 0.4615, monthly salaries by 0.2308, and yearly salaries by 0.01923).

EXAMPLE

If an employee's salary is \$5,200 per month (with each workweek being 40 hours), the weekly equivalent is \$1,200 ($\$5,200 \times 12 \text{ months} \div 52 \text{ weeks}$ or $\$5,200 \times 0.2308$) and the regular rate is \$30 per hour ($\$1,200 \div 40 \text{ hours}$).

For salaried employees working a specified number of hours, divide the weekly salary by the number of specified hours to obtain the *regular rate*. For each overtime hour, employees must be paid one and one-half times that rate.

EXAMPLE

If an employee's salary is \$1,200 for a 40-hour workweek, the regular rate is \$30 per hour. For every hour worked over 40, the employee is entitled to \$45 ($\30×1.5). Thus, if 42 hours are worked in a workweek, the employee's salary increases by \$90 ($\$45 \times 2 \text{ overtime hours}$) for a total of \$1,290.

An excellent method to reduce overtime costs is the *fixed guaranteed salary for fluctuating hourly workweeks* technique, which allows nonexempt employees to be paid as little as one-half their *regular rate* for overtime premium pay. Nonexempt employees compensated on a *fixed guaranteed salary for fluctuating hourly workweeks* basis must be guaranteed the same salary from pay period to pay period, without reductions in pay due to sickness, vacations, holidays or other idle periods when the dealership is closed for business.

By rule, guaranteed salaries are considered straight-time for all hours worked, requiring a premium penalty of only one-half the resultant hourly rate (which fluctuates in inverse proportion to the hours worked). To calculate the overtime pay owed, first determine the weekly salary and divide it by the total number of hours worked in the workweek to arrive at an hourly straight-time rate. Next, divide that straight-time rate by two to determine the half-time overtime premium rate. Overtime may not be paid

at a rate less than this amount, and may be paid in excess of this amount only at a rate that is a multiple of the half-time rate. Finally, multiply the premium rate by the total number of overtime hours.

EXAMPLE

A fixed guaranteed salaried nonexempt employee earning a \$2,600 semi-monthly salary works 44 hours a week. The equivalent weekly salary is \$1,200 ($\$2,600 \times 24/52$). Since the hourly straight-time rate is \$27.27 ($1,200/44$), the half-time overtime premium rate is \$13.64 ($\$27.27/2$). Total overtime is \$54.56 ($\13.64×4), so the total due for the week is \$1,254.56.

The *fixed guaranteed salary for fluctuating hourly workweeks* method of compensating nonexempt employees requires that they be informed in writing that their compensation is not based on a minimum number of hours worked each week, and that they



will receive the same salary week to week without reductions due to sickness, vacations, holidays or idle periods. Use written agreements to set out regular hourly rates, the fixed guaranteed salaries for fluctuating hours in each workweek, the upper limits on total non-overtime hours to be worked and the formula by which regular rates will be computed.

D. Commission Payments

Commissions, whether based on a percentage of total sales, on sales in excess of a specified amount or on some other formula, are payments for hours worked and must be included in an employee's regular rate. It does not matter whether commissions are computed daily, weekly, monthly or otherwise, or whether they are the sole or partial source of an employee's compensation.

If paid weekly, add commission payments to an employee's other earnings (if any) in a workweek and divide the total by the number of hours worked to obtain the *regular rate* for that workweek. Unless exempt, the employee must be paid extra compensation at one and one-half times that rate for each overtime hour worked.

If commissions are not calculated and paid until sometime after the regular payday for a workweek, disregard them until then. When commissions are computed and paid, the additional overtime compensation must be paid. Compute the additional overtime compensation by apportioning commissions over the workweeks when they were earned, so that employees receive additional overtime pay for each week during the period when overtime was worked.

Minimum wages need not be paid weekly, but some regular pay period (i.e., weekly, biweekly or monthly) must be established. Pay minimum wages promptly on a regular payday. Pay minimum wages on the regular payday for the workweek in which the particular period ends. Commission settlement periods should not exceed one month in length.

Overtime also need not be paid weekly. Generally, pay overtime earned in a particular workweek on the regular payday for the pay period. If the correct amount of overtime cannot be determined until after the regular pay period, pay it as soon after the regular pay period as practicable. Avoid delaying payment longer than reasonably necessary to compute and arrange for it, and in no event beyond the next regularly scheduled payday.



IV. Exemptions

The FLSA contains various minimum wage and overtime exemptions potentially applicable to dealership employees. Some exemptions apply both to minimum wage and overtime, others just to overtime.

Carefully review the exempt/nonexempt status of all employees. Incorrectly classifying employees as *exempt* can lead to liability for back pay, liquidated damages, interest and even attorneys' fees. But incorrectly classifying employees as *nonexempt* may result in excessive labor costs. **Note: It's possible for employees to potentially fall under more than one exemption.**

To limit a dealership's liability for excessive labor costs, take steps to properly manage how many hours nonexempt employees work. This includes ensuring that nonexempt employees:

- ▶ Begin work, end work and subtract meal times consistent with their approved schedule.
- ▶ Obtain authorization before working more than 40 hours in a workweek.
- ▶ Be paid an appropriate base hourly rate if earning overtime consistently.

A. The "White Collar" Exemptions

Neither the federal minimum wage nor overtime mandates apply to persons employed in a bona fide *executive, administrative, professional, highly compensated or computer* employee capacity. Determining whether dealership employees fall within one of these exemptions involves an examination of their job duties and responsibilities along with a review of their compensation. Job duties and responsibilities are analyzed based on what employees do, not on their titles or job descriptions. Thus, an employee does not become an exempt executive merely by being called an "assistant manager." Conversely, an employee may qualify for the executive exemption even without an executive title. **Since DOL defines these exemptions narrowly, they should be applied with caution.**

The Salary Requirements

The "white collar" exemptions generally require that employees be paid "salaries" of at least \$23,660 annually (or \$455 per week). On January 1, 2020, these salary figures will change to \$35,568 annually (or \$684 per week). "Salaries" are regularly paid predetermined amounts, generally not subject to

reduction due to variations in the quality or quantity of the work performed. Do not count the value of non-cash items, including demonstrators, toward a minimum salary. As discussed below, a higher salary threshold applies to *highly compensated* employees.

Review the compensation plans of "white collar" employees to ensure they are being paid the required minimum annual, weekly (or equivalent) salary. Many (if not most) exempt "white collar" dealership employees receive incentive compensation in addition to salaries. Effective January 1, 2020, up to 10% of the minimum white-collar salary requirements may be met by nondiscretionary bonuses or commissions. Moreover, some exempt dealership "white collar" employees also may be eligible for the *commission* employee and/or *highly compensated* employee exemptions.

EXAMPLE

A used-car sales department manager earning \$700/week in salary and \$900/week in commissions is likely exempt under both the *executive* employee tests and the *commission* employee exemption discussed later in this guide.

Although exempt employees need not be paid their salary for workweeks in which they perform no work, payment on a salary basis precludes deductions for absences occasioned by operating requirements of the dealership. Thus, salary deductions should not be made for time that work is not available if the exempt "white collar" employee is ready, willing and able to work.

Salary deductions may be made for absences of one or more full days for personal reasons. For sickness or disability, full-day salary deductions may be made only if the dealership has a bona fide plan, policy or practice of providing compensation for such absences (e.g., paid sick leave, disability insurance or workers' compensation).

EXAMPLE

An *administrative* employee is out sick for five days. The dealership provides three paid sick days per year. No salary need be paid on top of the paid sick leave for the first three days, and a salary deduction may be made for the next two days. But, if sick days are earned on an accrual basis and the employee has yet to qualify for any, a salary deduction may be made for all five days

Salary deductions for absences occasioned by jury duty, attendance as a witness, or temporary military leave may not be made, but the salary may be offset by any amount employees receive for such activities. Proportionate salary deductions are permitted for initial and terminal weeks of employment, and for Family and Medical Leave Act leave. Salary deductions also may be made for penalties imposed in good faith pursuant to a written policy for safety rule infractions of major significance and for good-faith disciplinary suspensions of one or more full days for workplace conduct rule infractions.

Maintain written employee leave policies detailing paid and unpaid leave issues, consistent with federal and state law. Again, federal law does not govern holidays or unexcused absences.

Improper salary deductions could render an employee (and all other employees in the same job classification and location) nonexempt for the time period in which the deductions were made. During an investigation, DOL will look for facts suggesting that the dealership did not intend to pay the employee on a salary basis. Isolated or inadvertent deductions will not result in a loss of exempt status if employees are properly reimbursed. **Maintain a written policy prohibiting improper pay deductions, along with an employee complaint mechanism and a reimbursement procedure.**

Exempt Executive Employees

Generally, exempt *executive* employees:

- ▶ Must be compensated according to the applicable minimum salary requirements discussed above,
- ▶ As their primary duty, manage an enterprise or recognized department of an enterprise,
- ▶ Regularly direct the work of two or more (full-time or equivalent) employees, *and*

- ▶ Have the authority to hire or fire other employees (or their recommendations as to the hiring or firing of other employees are given great weight).

This exemption often applies to dealers and dealership department managers (e.g., general, sales, parts, service and body managers; shop foremen, etc.). The job duties and job descriptions of *executive* employees should note the enterprise (i.e., dealership or other business) and department they manage, stress the degree to which they direct the work of others, and detail their hiring and firing authority. Dealers and other business owners with at least a 20 percent equity interest in the enterprise need not meet the minimum salary test in order to qualify for this exemption.

Exempt Administrative Employees

Generally, exempt *administrative* employees:

- ▶ Must be compensated according to the applicable minimum salary requirements discussed above,
- ▶ As their primary duty, engage in office or non-manual labor directly related to the management or general business operations of the dealership or its customers, *and*
- ▶ As part of their primary duties, use discretion and independent judgment regarding matters of significance.

The phrase *directly related to the management or general business operations* refers to the type of work performed. Dealership management- or business-related activities include financing, accounting, budgeting, auditing, insurance, purchasing, procurement, advertising and marketing. They also include computer, Internet, and database administration; safety and health administration; personnel management; legal and regulatory compliance, etc. *Discretion and independent judgment regarding matters of significance* is the critical element of this exemption. DOL rules list numerous factors that may be applied to a given employee to determine whether this element is met. **When applying this exemption, make sure employee job duties and written job descriptions detail the exercise of discretion and independent judgment regarding matters of significance.**

The *administrative* exemption typically applies to assistant departmental managers, office managers, human resources personnel, and others whose work involves matters of significance and the exercise of

discretion and independent judgment. As important as their jobs may be, this exemption typically *does not* apply to clerks, porters, cashiers, administrative assistants, body shop appraisers, and others whose main duties involve bookkeeping, payroll preparation, sending out monthly statements of account, or routine clerical duties. Assuming the salary test is met, this exemption also may apply to F&I managers who help decide whether credit should be granted and who otherwise exercise discretion and judgment regarding matters of significance.

Where application of the *administrative* exemption involves a close call, consider the employee non-exempt. As for all nonexempt employees, limit overtime liability by closely monitoring hours worked (start times, end times, lunch, etc.), by carefully managing the authorization of overtime and by thoughtfully crafting base pay plans designed to achieve mutually acceptable employee compensation.

Exempt Learned Professionals

Generally, exempt *learned professionals*:

- ▶ Must be compensated according to the applicable minimum salary requirements discussed above, *and*
- ▶ As their primary duty, perform work requiring advanced knowledge, in a field of science or learning, customarily acquired by a prolonged course of specialized intellectual instruction.

This exemption typically applies to in-house dealership attorneys and accountants, but not to accounting clerks or bookkeepers.

Exempt Highly Compensated Employees

Generally, exempt *highly compensated* employees:

- ▶ Customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee, *and*
- ▶ Are paid a total annual compensation of at least \$100,000 (\$107,432 effective January



1, 2020), which includes a salary or guarantee that meets the applicable minimum salary requirements discussed above.

This “safe harbor” exemption applies to highly paid “white collar” dealership employees. The minimum salary or fee must be paid without regard to the receipt of nondiscretionary bonuses or incentives.

EXAMPLE

A new-vehicle sales manager who earns a minimum salary of \$1000 per week and who earns \$90,000 in commissions based on departmental gross meets the *highly compensated* employee overtime exemption compensation test (and likely qualifies for the *executive* employee exemption and the *commission* employee exemption). Another example might be a long-time, well-paid office manager.

Exempt Computer Employees

Generally, exempt *computer* employees:

- ▶ Are compensated according to the applicable minimum salary requirements discussed above or receive not less than \$27.63 per hour.

- ▶ As their primary duty, they must be engaged in:
 - › The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional applications, *or*
 - › The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based in and related to user or system design specifications, *or*
 - › The design, documentation, testing, creation or modification of computer programs related to machine operating systems, *or*
 - › A combination of duties described above, the performance of which requires the same level of skills.

Dealership employees will not qualify for this exemption if they are primarily engaged in hardware repairs or computer maintenance. Employees who simply use computers a lot or have jobs that are highly dependent upon computers are not necessarily covered by this exemption.

B. Outside Sales Exemption

Exempt *outside sales* employees:



- ▶ As their primary duty, make sales, or obtain orders or contracts for services or for the use of facilities for which consideration will be paid by a customer, *and*
- ▶ Are regularly engaged away from their employer's place or places of business.

This exemption typically applies to outside salespeople who make sales at a customer's location (rather than by mail, telephone or the Internet). Unlike the "white collar" exemptions, *no minimum salary is required for the outside sales minimum wage and overtime exemption*. Parts drivers are not covered by this exemption unless their primary duty is sales, not deliveries.

C. Salesmen, Partsmen and Mechanics Overtime Exemptions

Salesmen, partsmen or mechanics who are primarily engaged in selling or servicing automobiles, trucks or farm implements, if employed by a non-manufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers, are exempt from overtime but not minimum wage. The exemption applies regardless of the annual dollar volume of dealership sales and does not depend on how or how much employees are paid. To be exempt, *salesmen, partsmen and mechanics* must be:

- ▶ Primarily engaged in selling or servicing automobiles, trucks or farm implements. If they spend over 50 percent of their time doing exempt work, they are entirely exempt from overtime, even if they also perform some non-exempt work usually subject to overtime, *and*
- ▶ Employed in a department that is functionally operated as part of a dealership, whether in the dealership's principal building or in a physically separate building or area.

EXAMPLE

Service department mechanics repairing used vehicles sold at a physically separate dealership-operated used-car lot, or partsmen working in a physically separate dealership-operated wholesale parts facility.

The dealership must be *primarily engaged* in the business of selling automobiles, trucks or farm implements to ultimate purchasers (i.e., over half the dealership's

annual dollar sales volume or business must involve automobiles, trucks or farm implements). Salesmen, partsmen or mechanics employed by establishments primarily engaged in selling trailers are not exempt. Whether a recreational vehicle or mobile home qualifies as a trailer depends on whether it was designed and manufactured to be a vehicle or moving conveyance or a permanent home. Mobile homes are considered trailers if they are designed to be transported from place to place (i. e., they have their own wheels and suspension system, can be towed behind a powered vehicle, can be easily emplaced after parking, and can be readily detached and moved).

Salesmen

Salesmen are employed for the purpose of and are *primarily engaged* in making sales or obtaining orders or contracts for the sale of automobiles, trailers, trucks or farm implements. Work performed incidental to and in conjunction with a salesman's sales or solicitations (e.g., incidental deliveries and collections) falls within this exemption. Under federal law, service writers, service advisors, assistant service managers or service salesmen, whose primary duty is to record the condition of vehicles and to write up reports noting the parts and labor needed, qualify for the *salesmen* exemption from overtime, provided the majority of their sales by dollar volume is for non-warranty work.

Employees *primarily engaged* in automobile leasing are not *salesmen* under this exemption, since they are not selling vehicles to ultimate purchasers (even if lessees have an option to purchase their vehicles upon expiration of the lease). However, work performed in connection with selling leased vehicles falls within the scope of this exemption.

Partsmen

Partsmen are employed for the purpose of and are *primarily engaged* in requisitioning, stocking, dispensing and selling parts. *Partsmen* who spend over half their time in a week doing such work for dealerships that derive the majority of their annual dollar volume of sales from selling automobiles, trucks or farm implements to ultimate purchasers, are exempt from overtime even if involved in wholesale sales. Employees who primarily drive trucks to deliver parts do *not* qualify for the partsmen exemption.

Mechanics

Mechanics must *primarily engage* in exempt mechanical work (e.g., replacing mufflers and tail pipes, replacing brake shoes, doing tune-ups). This

includes employees who spend over half their time as get-ready mechanics; automobile, truck or farm implement mechanics; body or fender mechanics; used-car reconditioning mechanics; and wrecker mechanics, but not employees *primarily engaged* in such non-mechanical work as washing, cleaning, painting, polishing, tire-changing, installing seat covers, dispatching, lubricating and rustproofing. Body shop painters are not *mechanics* unless they spend over half their time doing mechanical body work (e.g., replacing body and trim parts in the preparation of vehicles for painting).

D. Commission Employee Overtime Exemption

Employees of retail or service establishments, primarily paid by commission for sales made or services performed, may be exempt from overtime. *Commission* employees typically include body shop painters, lube men, F&I employees and detailers. As noted above, the exemption may also apply to employees concurrently exempt under a “white collar,” *salesmen*, *partsmen* or *mechanics* exemption. The *commission* employee exemption requires that the:

- ▶ Dealership be a retail or service establishment (i.e., not derive more than 25 percent of its gross annual sales volume from wholesale or fleet sales and/or sales made pursuant to formal bid invitation), *and*
- ▶ Employee’s regular rate exceed 150 percent of the applicable minimum wage, *and*
- ▶ Employee’s compensation for a representative period (not less than a month) primarily derive from commissions on goods or services.

EXAMPLE

F&I employees who primarily earn commissions, who receive at least 150 percent of their applicable minimum wage and who are employed by a dealership meeting the retail test are eligible for the *commission* employee exemption.

This exemption does not apply to employees receiving a salary or draw against commissions if the commissions seldom or never equal or exceed their salary or draw, nor does it apply to hourly or salary employees unless they receive commissions totaling more than half of earnings.

Typically, employees paid on a flat-rate basis (on a percentage or proportion of the customer labor

charge) are *commission* employees; those paid on a piece-rate basis are not. For example, detailers may be eligible for the *commission* employee exemption if paid on a flat-rate basis (dollars/hour billed) but not if paid on a piece-rate basis (dollars/vehicle).

V. Salesmen and Commission Employees: Advances and Settlement Periods

Salesmen and commission employees exempt from overtime must receive prompt payment of at least the minimum wage for each hour worked during a settlement period. Minimum wages need not be paid at any specific time, but a regular pay period (i.e., weekly, biweekly or monthly) must be established and settlement periods should not exceed one month.

No specific time is required for minimum wage payments. Advances or draws may be made weekly or biweekly, with commissions settled on a regular weekly, biweekly or monthly basis. When a settlement period is established, draws against commissions within the settlement period need not meet or exceed the applicable minimum wages due for the period covered by the draw. Draws and advances may be credited against earned commissions when settling the amount due, as long as employees receive the minimum wage for all hours worked in the settlement period.

A. Minimum Wage Subsidy, Recoupment and Commission Carry-Forward

At the end of a settlement period, if commissions do not equal or exceed the required minimum wages due, a subsidy must be paid. If such a subsidy is made, it may be carried forward to a future pay period as a deduction or offset from any excess commissions earned but not yet paid. *Subsidy recoupment may be made only from earnings in excess of minimum wages due in any given pay period and may not be deducted from future minimum wages due.*

Commissions in excess of the minimum wages due for a settlement period may be carried forward and applied to minimum wages due in a subsequent period. *Once commissions are paid, they may not be carried forward to satisfy minimum wages due in a subsequent period.* The following examples illustrate minimum wage subsidy, recoupment and commission carry-forward.

EXAMPLE 1

Minimum Wage Exceeds Commissions Earned:

A salesman works 50 hours a week for a four-week pay period and draws \$250/week against earned commissions, which are paid on an end-of-the-month settlement date. By the settlement date, the salesman has earned \$1,300 in commissions for the month and has received a draw of \$1,000 ($\$250/\text{week} \times 4 \text{ weeks}$). If the minimum wage is \$7.25/hour, the salesman has earned less than minimum wage for the settlement period ($\$7.25/\text{hour} \times 50 \text{ hours} \times 4 \text{ weeks} = \$1,450$). The salesman is entitled to another \$150 ($\$1,450 - \$1,300$) to satisfy the minimum wage requirement. That \$150 may be deducted from commissions earned (but not yet paid) in a subsequent settlement period, if in excess of the minimum wages due for that period.

EXAMPLE 2

Commissions Earned in Excess of Minimum Wage:

Same facts as Example 1, except that by the settlement date, the salesman has earned \$1,500 in commissions, exceeding the \$1,450 in minimum wages due. At settlement, the salesman is paid \$500, which represents commissions earned less \$1,000 paid by weekly draw. The salesman properly was paid more than minimum wage for all hours worked during the settlement period. Commissions in excess of minimum wages due (\$50) may be carried forward to apply against minimum wages due on the next settlement date. However, once commissions are paid, they may not be carried forward.

EXAMPLE 3

Same facts as in Examples 1 and 2 except, by the settlement date, the salesman has earned only \$900 in commissions. The salesman must be paid \$550 ($\100 in draw plus $\$450$) as a minimum wage subsidy, which may be carried forward as an advance in excess of commissions earned to be applied against excess commissions earned in a subsequent settlement period.



B. Sample Settlement Plans

Consider the following examples:

EXAMPLE 1

Monthly Settlement (Plan I): A salesman is compensated solely on a commission basis. Commissions are computed and paid every four weeks. On the settlement date, the salesman is paid the minimum wages due for each workweek, plus any commissions earned over and above that amount. Based on the following, the salesman earns (and is paid) \$1,800 in commissions (or \$422.50 in excess of minimum wages due).

Week	1	2	3	4	Total
Hours Worked	40	45	50	55	190
Commissions Earned	—	\$900.00	—	\$900.00	\$1,800.00
Minimum Wage (at \$7.25/hour)	\$290.00	\$326.25	\$362.50	\$398.75	\$1,377.50

EXAMPLE 2

Weekly Settlement with Subsidy Recoupment (Plan II): Same facts as Example 1 except commissions are computed and paid on a weekly settlement date, at which time the salesman is paid minimum wages due plus the difference between excess commissions earned and previously paid minimum wage subsidies.

Week	1	2	3	4	Total
Hours Worked	40	45	50	55	190
Commissions Earned	—	\$900.00	—	\$900.00	\$1,800.00
Minimum Wage (at \$7.25/hour)	\$290.00	\$326.25	\$362.50	\$398.75	\$1,377.50
Weekly amount due under Plan II	\$290.00	\$610.00	\$362.50	537.50	\$1,800.00

EXAMPLE 3

Weekly Settlement without Subsidy Recoupment (Plan III): Same facts as Example 2 except on the weekly settlement date, the salesman is paid both the minimum wages due and any commissions earned over and above that amount.

Week	1	2	3	4	Total
Hours Worked	40	45	50	55	190
Commissions Earned	—	\$900.00	—	\$900.00	\$1,800.00
Minimum Wage (at \$7.25/hour)	\$290.00	\$326.25	\$362.50	\$398.75	\$1,377.50
Weekly amount due under Plan III	\$290.00	\$900.00	\$362.50	\$900.00	\$2,452.50

Monthly Cost of Plans Comparison: Plan I-\$1,800, Plan II-\$1,800, Plan III-\$2,452.50. A failure to reimburse the dealership for the payment of minimum wage subsidies can result in high labor costs. However, factors such as local competition and union agreements can prove controlling when designing pay plans that work best for both dealership employers and their employees.

To avoid confusion, establish clearly written pay plans for all employees and especially for those earning commissions and other incentive pay. Detail commission formulas indicating the applicable percentage, the base to which it applies (i.e., gross profit, net profit, etc.), and all expenses, charge-backs or other reductions that may apply. Educate salesmen and other commission employees on the elements and requirements of their compensation plans, including pay periods and dates, settlement periods and dates (if different), whether minimum wage subsidies will be carried forward against excess commissions earned in subsequent periods, and whether excess commissions will be carried forward to apply against minimum wage shortfalls in subsequent periods. Set defined pay periods and keep accurate daily time records for all hours worked, both inside and outside the dealership.

VI. Recordkeeping

Under the FLSA, dealerships must make, keep and preserve records. No particular order or form is prescribed, but records should be detailed. Well-documented records and timekeeping are important since controversies often are resolved in favor of employees when necessary documentation is lacking. **State laws may require additional records to be kept and/or may specify longer record retention periods.** In addition, it is recommended that detailed job descriptions and written pay plans be maintained for all employees.

A. Records for Nonexempt Employees

Keep the following records for employees entitled to both minimum wage and overtime:

1. Full name and employee symbol or number identifier used.
2. Social Security number.
3. Home address (including zip code).
4. Date of birth if under 19 years of age.
5. Sex and occupation.
6. Time and name of day on which employee's workweek begins.



7. Regular hourly rate of pay and basis on which wages are paid.
8. Hours worked each workday and total hours worked each workweek.
9. Total daily or weekly straight-time earnings or wages.
10. Total weekly overtime excess compensation.
11. Dates, amounts, and nature of additions and deductions to wages.
12. Total wages paid each pay period.
13. Date of payment and the pay period covered by the payment.

B. Records for Exempt Employees

Keep the following records for exempt employees:

- ▶ For employees covered by the “white collar” or *outside salesmen* exemptions, maintain and preserve all the items in [Section A](#) above, except for items 6 through 10. Records should note the basis on which wages are paid for each pay period to permit a calculation of total remuneration, including fringe benefits and perquisites.
- ▶ For *salesmen, partsmen and mechanics*, maintain and preserve all the items in [Section A](#)

above, except for items 6 and 9. Keep data and information regarding the basis upon which wages are paid.

- ▶ For *commission employees*, maintain and preserve all the items in [Section A](#) above, except for items 6, 8, 9 and 11. Records should note if an employee is being considered as exempt under the *commission* exemption. Keep copies of employment agreements showing the basis of compensation, the length of the agreement and the date entered into.

C. Records Retention

Preserve the following for at least *three* years:

- ▶ From the last date of entry, payroll or other records containing the information described in [Sections A](#) and [B](#), above.
- ▶ Any certificates required to pay sub-minimum wages to certain individuals, any collective bargaining agreements and any individual employment contracts.
- ▶ Ordinary course of business sales and purchase records showing the total dollar volume of sales or business and the total volume of goods purchased or received in a period (week, month, quarter, etc.).



Preserve the following for at least *two* years:

- ▶ Employment and earnings records, including time and earnings cards or sheets showing starting and stopping times or the amounts of work done daily, weekly or monthly.
- ▶ Tables or schedules showing the rates used in computing straight-time earnings, wages or salary, commission schedules and over-time compensation.
- ▶ Order, shipping and billing records.
- ▶ Records of additions to or deductions from wages.
- ▶ Records explaining the basis of any wage differential paid to opposite sex employees doing substantially equal work.

All complete and accurate compensable time records must be kept, but any timekeeping method (e.g., time clock, timecard, time sheet, computer logs, etc.) is acceptable. Take necessary steps to help ensure the accuracy of records, to make necessary corrections and to have employees initial their time records. Keep employment and payroll records at the place of employment or at a central recordkeeping office. Records must be open to inspection and transcription by duly authorized DOL representatives and must be made available within 72 hours upon request.

D. Posting of Notices

Display an official federal wage and hour poster in a conspicuous location that can be readily seen by dealership employees. [Free DOL posters are available online.](#)

VII. Enforcement

The DOL administers and enforces the FLSA and other federal labor laws (i.e., Equal Pay Act, Family and Medical Leave Act, etc.) and may partner with state and local agencies to help ensure compliance. DOL compliance officers stationed nationwide have the authority to investigate compliance and, in the event of violations, to supervise the payment of unpaid minimum wages or overtime compensation. They may inspect places and transcribe records, question employees, and investigate facts, conditions or practices.

Investigations typically result from information suggesting possible violations, including complaints from present or former employees. If involved in an investigation, be courteous and cooperative. If necessary, request a short extension of time to produce records or obtain legal advice. Investigators may insist on interviewing employees on the job. Employers need not volunteer information, but a refusal to permit an investigation may result in the issuance of a subpoena or other court action.

Once an investigation is complete, findings are made. If the findings are adverse, the dealership is given an opportunity to contest them. At that point (if not before), the assistance of competent labor counsel may be advisable. The DOL may demand the restitution of wages and even civil penalties in cases of willful or repeat violations. To recover unpaid minimum wages or overtime, DOL or state labor departments may supervise the payment of back wages or sue for back wages and liquidated damages. In addition, employees may sue for back pay and liquidated damages, plus attorneys' fees and court costs, unless back wages were already paid under supervision or pursuant to a government lawsuit.

DOL or a state may also obtain injunctions to restrain violations of the law, including the unlawful withholding of minimum wage and overtime compensation. Willful violations may be prosecuted criminally, with the potential imposition of fines and/or imprisonment. A two-year statute of limitations applies to the recovery of back pay, three years for willful violations.

VIII. Commonly Asked Wage and Hour Questions

A. Hours Worked

Must employees be paid for meal time if they eat at their desks? Employees who eat at their desks and are completely relieved from duty need not be paid, so long as no work is performed. Employees required to eat at their desks must be paid for that time. Employees who “voluntarily” eat at their desks, but who answer phones or perform other work must be paid for that time.

Are coffee breaks considered working time?

Coffee and snack breaks of 20 minutes or less are compensable rest periods and cannot be excluded from hours worked.

Does federal law entitle nursing mother employees to breaks to express milk and, if so, must that time be compensated? The Patient Protection and Affordable Care Act amended the FLSA to require employers to provide nursing mother nonexempt employees with a reasonable amount of break time and a location to express milk. Federal law does not require such break time to be compensated, unless the employer otherwise provides compensated breaks. *Note:* State laws in this area may provide additional protections.

Are sick, vacation or holiday days considered compensable work time? Federal law does not require payment for non-work time, including holidays, sick leave, vacations or jury duty. But, again, state laws may apply.

B. Overtime

Is a nonexempt employee who took eight hours of sick leave on Monday but worked a total of 40 hours during the remainder of the work week entitled to overtime? The requirement to pay overtime for hours worked in excess of 40 per week applies only to the time employees actually spend working. Sick leave, even if paid, is not considered hours worked. Treat other types of non-compensable time (e.g., holidays, annual leave, weather-related absences, jury duty, etc.) the same way.

Do state labor laws supersede the FLSA?

The FLSA allows for state laws or municipal ordinances that establish more restrictive wage and hour requirements.

If nonexempt employees volunteer to work overtime, do they have to be paid? Employees who “volunteer” to work overtime must be paid overtime if they are suffered or permitted to work for the employer’s benefit. Instruct nonexempt employees to get prior authorization for overtime and, if necessary, discipline those who fail to do so.

May exempt employees who work overtime be paid for that overtime? Although exempt employees are not subject to the FLSA’s overtime requirements, dealers may pay them overtime voluntarily or if required pursuant to a union contract.

Must overtime pay be paid in the paycheck for the pay period in which the overtime was worked? Under the FLSA, work periods need not coincide with pay periods, but state labor laws may govern when employees must be paid overtime. In any event, avoid delaying payment beyond the pay period after the pay period in which the work was performed.

Do salespeople involved with leasing qualify for the salesmen’s overtime exemption? To qualify for the salesmen’s exemption, employees who both sell and lease vehicles must be primarily engaged (i.e., spend over half their time) selling vehicles. If their primary responsibility is leasing, they do *not* qualify for the *salesmen’s* exemption. However, they may qualify for the *commission* employee exemption if their regular rate of pay exceeds 150 percent of the applicable minimum hourly rate and more than half of their compensation is derived over a representative period (i.e., not less than a month) from commissions on goods or services.

What constitutes the use of discretion and independent judgment regarding matters of significance in determining if employees are covered by the administrative exemption? Employees who use *discretion and independent judgment* tend to make decisions freely without consulting superiors. Their work requires them to compare and evaluate possible courses of conduct and act or make decisions. This decision-making power should be real and substantial, free from immediate supervision, and exercised with regard to matters of significance.

What if employees are doing work of an administrative nature, but are paid hourly? The *administrative* exemption requires that a salary test be met, so hourly employees are not eligible.

Could employees whose work is only generally approved be considered exempt? It depends on how specific and frequent the general approval is. For example, employees working only under general supervision may qualify for the *administrative* exemption.

IX. Child Labor

The FLSA generally sets 16 as the minimum age for employment for all occupations. Exceptions and conditions are discussed below. Employees 18 and older may perform any job, whether hazardous or not, for unlimited hours during any periods of time. Penalties for child labor infractions can be severe. Look to state dealer associations and state labor departments for information on state child labor law which, as with wage and hour law, can be stricter than the federal.

A. Minors 14 and 15 Years of Age

Minors 14 and 15 years of age may be employed in certain occupations, if the work is confined to periods that do not interfere with their schooling and to conditions that do not interfere with their health and well-being. Generally, working time is limited to:

- ▶ Outside of school hours and between the hours of 7 a.m. and 7 p.m. (9 p.m. in summer).
- ▶ Not more than three hours per day or 18 hours per week when school is in session, *and*

- ▶ Not more than eight hours a day or 40 hours a week when school is not in session.

Work must be non-hazardous and is restricted in retail establishments to jobs like:

- ▶ Office and clerical.
- ▶ Cashiering and selling.
- ▶ Assembling orders, packing and shelving parts.
- ▶ Errands and deliveries by foot, bicycle and public transportation.
- ▶ Cleaning up (e.g., vacuuming and floor-waxing).
- ▶ Maintenance of grounds.
- ▶ Car cleaning, washing and polishing.
- ▶ Dispensing gasoline and oil (but *not* the use of pits, racks and lifting apparatus or the inflation of tires mounted on rims equipped with removable retaining rings).

Generally, 14 and 15-year-olds should not be employed in jobs involving the operation of power equipment or the unloading/loading of motor vehicles.



B. Minors 16 and 17 Years of Age

At 16, minors may be employed for any number of hours, during any periods of time and in any occupation other than those declared hazardous. For hazardous occupations, employees generally must be at least 18.

C. Teenage On-the-Job Driving

Federal law limits on-the-job driving on public roads by 17-year-olds. Sixteen-year-olds may not drive for work on public roads, but may do so on dealership property. **A driver safety program is highly recommended for all employees, of any age, who drive on the job.**

Seventeen-year-olds may drive on public roads while on-the-job only if they:

- ▶ Hold a state driver's license,
- ▶ Have completed a state-approved driver education course,
- ▶ Are instructed that seat belts must be used, *and*
- ▶ Do not have any record of moving violations at the time of hire.

Moreover, the motor vehicle being driven must:

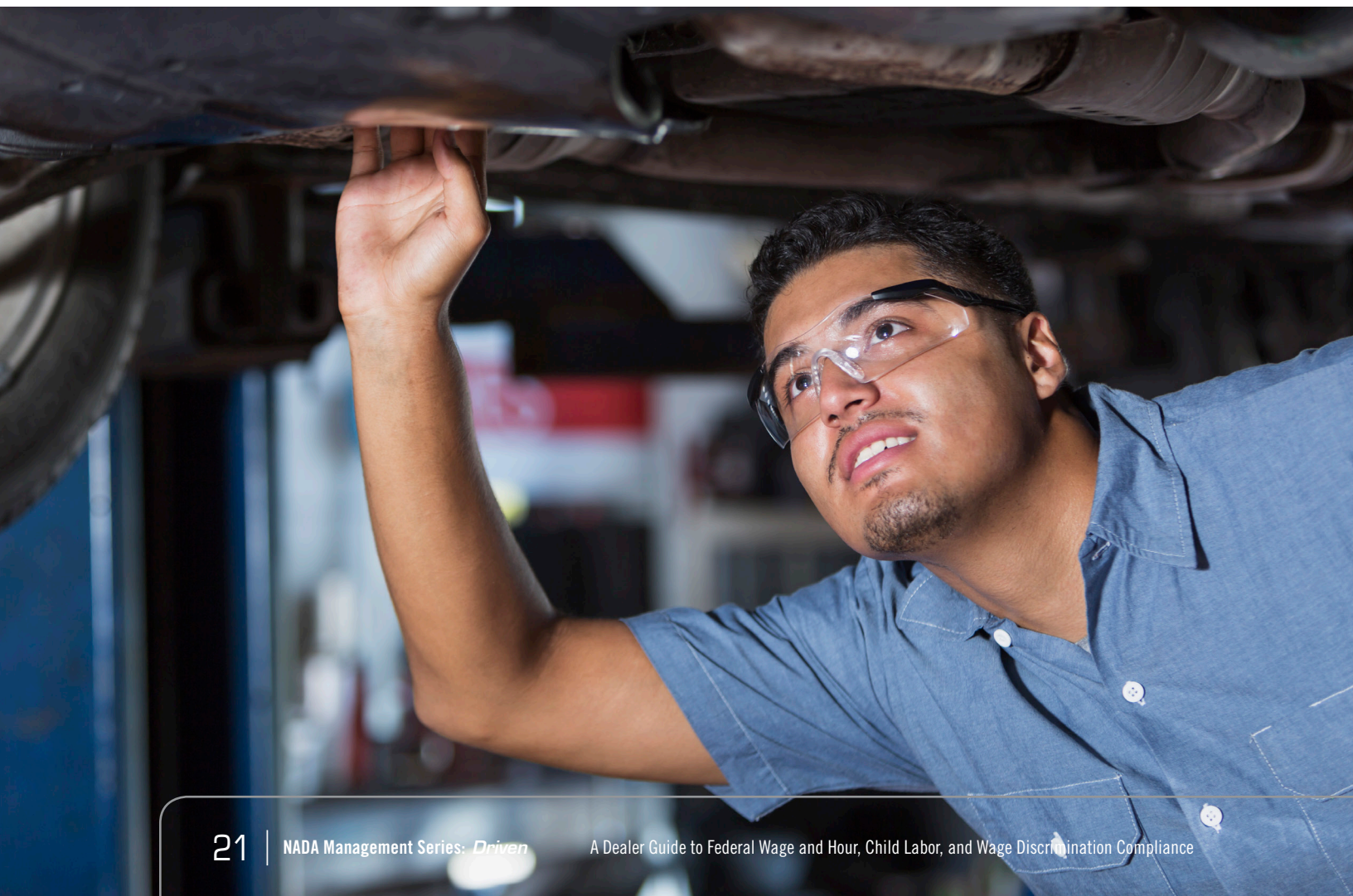
- ▶ Not exceed 6,000 lbs. gross vehicle weight,
- ▶ Be equipped with seat belts, *and*
- ▶ Not be used for towing vehicles.

Finally, teenage on-the-job driving is permitted, if it is:

- ▶ Restricted to daylight hours,
- ▶ Within a 30-mile radius of the place of employment, *and*
- ▶ *Occasional and incidental*, i.e., no more than 1/3 of an employee's daily work time or more than 20 percent of an employee's weekly work time.

Additionally, 17-year-olds may not be employed as delivery or shuttle drivers, but may make limited daily trips for delivery and passenger transport, constrained as follows:

- ▶ Up to two trips a day may be made to deliver an employer's goods to a customer. The delivery of vehicles is not subject to this limitation.



- ▶ The transport of persons is limited to three passengers (including employees).
- ▶ The transport of non-employee passengers is limited to two trips daily.
- ▶ Route deliveries, route sales, time-sensitive deliveries and for-hire transportation of property, goods or passengers are prohibited.

How does this law affect the hiring of minors?

Seventeen-year-olds may be hired for jobs involving limited driving on public roadways (e.g., moving cars from lot to lot, driving customers home, fueling vehicles at nearby gas stations). Licensed 16-year-olds may be hired for jobs involving the operation of vehicles on dealership premises, but may not drive on-the-job on public roadways.

When are prospective employees eligible to drive on public roadways? To be eligible to drive on-the-job on public roads, prospective employees must:

- ▶ Be at least 17 years old,
- ▶ Have a current and valid driver's license,
- ▶ Have successfully completed a state-approved driver education course, *and*
- ▶ Have no record of moving violations.

It is best to have teenage job applicants authorize driver record checks and driver's education verifications. If hired, teenagers should certify in writing that they meet the above criteria. Certification forms should include a statement that any falsification or omission may result in the employee's termination and an acknowledgment that instruction in safety belt use was received. Keep completed certifications in employee files.

Are there restrictions regarding the types of motor vehicles that may be driven? All vehicles must be equipped with seat belts. Seventeen-year-olds may not drive vehicles over 6,000 lbs. GVW or tow another vehicle on a public roadway.

Are there driving limitations? Since driving is limited to daylight hours, be sure that 17-year-olds out on the road have ample time to return to the dealership before dark. Seventeen-year-olds may drive no more than one-third of their daily and 20 percent of their weekly work time.

EXAMPLE

A 17-year-old with a part-time job of 20 hours per week (four hours per day, five days per week), may drive on public roads for one hour and 20 minutes a day or four hours a week.

Also, 17-year-olds may not drive beyond a 30-mile radius from the dealership (e.g., exchange a vehicle farther than 30 miles away).

Does the law require recordkeeping logs to be kept?

No, but at the very least, these driving restrictions should be set out in the written job descriptions used for teenage employees.

Can licensed 17-year-olds be hired as delivery persons?

Do not hire 17-year-olds exclusively to deliver parts since no more than two trips per day delivering parts to customers are allowed. Route deliveries or sales, transporting property, goods or passengers for hire and urgent, time-sensitive deliveries are prohibited. Vehicle deliveries and errand-running are not restricted (e.g., delivering a new car or driving to a bank or post office).

Can licensed 17-year-olds be hired as shuttle drivers?

No, since 17-year-olds may make no more than two trips per day transporting non-employee passengers and may not transport more than three passengers (including employees) at any time.

Do state graduated licensing or labor laws govern on-the-job teenage driving? Teenage driving also may be restricted under state labor and/or driver licensing laws. Although most state labor laws mirror the federal, some states are more restrictive **Check with the appropriate state dealer association to determine if state labor or driver licensing law imposes stricter requirements.**

D. Parental Exemption

Parents or custodians may employ their children under 18 years old in any occupation other than those deemed hazardous by DOL. This exemption applies only if the children are employed exclusively by their parents, but not if they assist with work for a parent's employer.

E. Apprentices, Trainees and Students

Apprentices, beginners, learners or students generally must be paid the federal minimum wage, unless covered by a special DOL-issued certificate (which may authorize certain students to be paid wages of at least 85 percent of the statutory minimum). They also may be covered by one or more of the federal overtime exemptions.

Sometimes no employment relationship exists between a trainee and a dealership (i.e., under certain high school auto repair training programs). Whether trainees are employees depends on the circumstances surrounding their activities at the dealership. If all of the following criteria apply, trainees *are not employees*:

- ▶ The dealership-based training is akin to that given at a vocational school.
- ▶ The training is for the benefit of the trainees.
- ▶ The trainees are closely observed by but do not displace regular employees.
- ▶ The dealership derives no immediate advantage from trainee activities which, on occasion, may actually impede dealership operations.
- ▶ The trainees are not necessarily entitled to jobs at the conclusion of the training.
- ▶ The dealership and trainees understand there is no wage entitlement for training time.

Requirements for employing apprentices, beginners, learners or students are complex. Consult Automotive Youth Educational Systems, ayes.org, for more information.

X. Equal Pay and Compensation Discrimination

A. The Equal Pay Act (EPA)

The EPA requires that men and women in the same workplace be given equal pay for equal work. All forms of pay are covered, including salary, overtime, bonuses, stock options, profit sharing, life insurance, vacation and holiday pay, cleaning and gasoline allowances, hotel accommodations, travel reimbursement and other benefits. If there is an inequality in pay between men and women, employers may not reduce the pay of one sex to equalize their pay.

The EPA allows for wage differentials:

- ▶ Based on any factor other than sex.
- ▶ Paid pursuant to a bona fide seniority system.
- ▶ Paid pursuant to a bona fide merit system.
- ▶ Paid pursuant to a system that measures earnings by quantity or quality of production.

The EPA is administered by the Equal Employment Opportunity Commission (EEOC) which has the authority to impose penalties and other sanctions for violations. The law has a two-year limitation period for non-willful violations and a three-year period for willful violations. State laws may apply.

B. Other Federal Laws Regulating Compensation Discrimination

Other federal laws that prohibit compensation discrimination include Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA) and the Pregnancy Discrimination Act (PDA). Unlike the EPA, these laws do not require that jobs be substantially equal. Again, state and local laws may also regulate in this arena. Compliance with the ADA is covered by the NADA publication [A Dealer Guide to the Americans with Disabilities Act-Part II](#).

Title VII

Title VII prohibits discrimination in compensation and other terms, conditions and privileges of employment. Under Title VII, race, color, religion, sex, national origin or age may not serve as the basis for differences in pay or benefits, work assignments, performance evaluations, training, discipline or discharge or any other area of employment. The EEOC interprets the Title VII prohibition on sex discrimination as extending to issues involving gender identity and sexual orientation. Title VII allows for compensatory and punitive damages in cases involving intentional discrimination, and punitive damages where employers commit especially malicious or reckless acts of discrimination.

ADEA

The ADEA aims to protect workers and job applicants age 40 and over from age-based discrimination in all aspects of employment, including compensation and wages. It regulates employers with at least 20 employees, but does not apply to independent contractors. The ADEA exempts:

- ▶ *Bona fide occupational qualification*: certain age limitations are allowable if necessary in order for an employee to perform the functions of the job adequately (e.g., if there is a reasonable belief that workers over a certain age are unable to perform the job safely).
- ▶ *Bona fide seniority systems*: legitimate seniority systems used to determine wages and benefits.
- ▶ *Bona fide executive or high policymaker*: executives and others in high policy-making positions can be required to retire at age 65 if they receive annual pension benefits of at least \$44,000.

The EEOC administers the ADEA together with state agencies. Remedies for ADEA violations include reinstatement and promotion, wages, back pay and benefits, money damages, injunctive relief and attorney fees.

PDA

Technically, the PDA is an amendment to Title VII that specifically aims to protect job applicants and employees by prohibiting discrimination on the basis

of pregnancy, childbirth or related medical conditions. It applies to employers with 15 or more employees (some state laws cover smaller employers). It protects against discrimination in any area of employment, including compensation. Interestingly, although employers have an obligation under federal and state law to provide for healthy and safe workplaces, they have no extra duty to protect pregnant or potentially pregnant employees from potentially dangerous work conditions. Thus, policies that exclude women from workplace assignments solely to *protect* fetuses or potential fetuses are impermissible.

The PDA allows employers to exclude pregnant women from certain jobs where non-pregnancy is a bona fide occupational qualification based on objective and verifiable skills necessary to those jobs (i.e., pregnancy necessarily interferes with a female employee's ability to perform the job). Employers have rarely had success making this showing.

The EEOC administers the PDA together with state agencies. Remedies for PDA violations include reinstatement and promotion, wages, back pay and benefits, money damages, injunctive relief and attorney fees.

XI. Further Advice

Visit the web for compliance assistance on [wage and hour](#), [child labor](#) and [wage discrimination](#). Questions may be directed to NADA Regulatory Affairs, 703.821.7040 or regulatoryaffairs@nada.org.



Acknowledgments

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