

AMENDATORY SECTION (Amending WSR 89-22-120, filed 11/1/89, effective 12/2/89)

WAC 296-128-011 Special recordkeeping requirements. (1) In addition to the records required by WAC 296-128-010, employers who employ individuals as truck or bus drivers subject to the provisions of the Federal Motor Carrier Act shall maintain records indicating the base rate of pay, the overtime rate of pay, the hours worked by each employee for each type of work, and the formulas and projected work hours used to substantiate any deviation from payment on an hourly basis pursuant to WAC 296-128-012. The records shall indicate the period of time for which the base rate of pay and the overtime rate of pay are in effect.

For the purposes of this section and WAC 296-128-012, "base rate of pay" means the amount of compensation paid per hour or per unit of work in a workweek of forty hours or less. A base rate of pay shall be established in advance of the work performed and may be based on hours or work units such as mileage, performance of specified duties, or a specified percentage of the gross proceeds charged for specified work. A base rate of pay shall not be established that will result in compensation at less than the minimum wage prescribed in RCW 49.46.020. "Overtime rate of pay" means the amount of compensation paid for hours worked (~~within the state of Washington~~) in excess of forty hours per week and shall be at least one and one-half times the base rate of pay.

(2) The records required by this section shall be made available by the employer at the request of the department. Any current or past employee may obtain copies of the formula, the base rate of pay, the overtime rate of pay, and that employee's records. Job applicants seeking employment by the employer as truck or bus drivers subject to the provisions of the Federal Motor Carrier Act, may obtain copies of the formula, the base rate of pay, and the overtime rate of pay.

AMENDATORY SECTION (Amending WSR 89-22-120, filed 11/1/89, effective 12/2/89)

WAC 296-128-012 Overtime for truck and bus drivers. (1) (a) The compensation system under which a truck or bus driver subject to the provisions of the Federal Motor Carrier Act is paid shall include overtime pay at least reasonably equivalent to that required by RCW 49.46.130 for working (~~within the state of Washington~~) in excess of forty hours a week. To meet this

requirement, an employer may, with notice to a truck or bus driver subject to the provisions of the Federal Motor Carrier Act, establish a rate of pay that is not on an hourly basis and that includes in the rate of pay compensation for overtime. An employer shall substantiate any deviation from payment on an hourly basis to the satisfaction of the department by using the following formula or an alternative formula that, at a minimum, compensates hours worked (~~(within the state of Washington)~~) in excess of forty hours per week at an overtime rate of pay and distributes the projected overtime pay over the average number of hours projected to be worked. The following formula is recommended for establishing a uniform rate of pay to compensate work that is not paid on an hourly basis and for which compensation for overtime is included:

1. Define work unit first. E.g., miles, loading, unloading, other.
2.
$$\frac{\text{Average number of work units}}{\text{per hour}} = \frac{\text{Average number of work units accomplished per week}}{\text{Average number of hours projected to be worked per week}}$$
3. Weekly Base Rate = Number of units per hour x 40 hours x base rate of pay
4. Weekly Overtime rate = Number of units per hour x number of hours over 40 x overtime rate of pay
5. Total weekly pay = Weekly base rate plus weekly overtime rate
6.
$$\text{Uniform rate of pay} = \frac{\text{Total weekly pay}}{\text{Total work units}}$$

Example:

A truck driver is paid on a mileage basis for a two hundred thirty mile trip performed about ten times a week. The base rate of pay is twenty cents a mile. The overtime rate of pay is thirty cents a mile. The average length of the trip is four and one-half hours.

1.
$$\frac{2300 \text{ mi.}}{\text{per week}} \text{ divided by } \frac{45 \text{ hours}}{\text{per week}} = \frac{51.1 \text{ miles}}{\text{per hour}}$$
2. (a) 51.1 miles/hour times 40 hours times .20/mile = \$408.80
- (b) 51.1 miles/hour times 5 hours = 255.5 miles
- (c) 255.5 miles times .30/mile = \$76.65
- (d) \$408.80 plus \$76.65 = \$485.45 divided by 2300 miles = 21.1 cents mile

(b) In using a formula to determine a rate of pay, the average

number of hours projected to be worked and the average number of work units accomplished per week shall reflect the actual number of hours worked and work units projected to be accomplished by persons performing the same type of work over a representative time period within the past two years consisting of at least twenty-six consecutive weeks.

(c) The department may evaluate alternative rates of pay and formulas used by employers in order to determine whether the rates of pay established under this section result in the driver receiving compensation reasonably equivalent to one and one-half times the base rate of pay for actual hours worked (~~((within the state of Washington))~~) in excess of forty hours per week.

(2) Where an employee receives a different base rate of pay depending on the type of work performed, the rate that is paid or used for hours worked (~~((within the state of Washington))~~) in excess of forty hours per week shall be at least the overtime rate of pay for the type of work in which most hours were worked.

(3) Compensation plans before March 1, 2007. An employer who relied on WAC 296-128-011(1) before March 1, 2007, may, within ninety days of the adoption of this subsection, submit a proposal consistent with subsection (1) of this section to the department for approval of a reasonably equivalent compensation system. The employer shall submit information to substantiate its proposal consisting of at least twenty-six consecutive weeks over a representative time period between July 1, 2005, and March 1, 2007. The department shall then determine if the compensation system includes overtime that was at least reasonably equivalent to that required by RCW 49.46.130 (1)(f). Approval of a reasonably equivalent compensation system under this subsection shall constitute continuing approval for the period the employer uses the compensation system.

Note 1: On March 1, 2007, the Washington state supreme court ruled that overtime rate of pay includes hours worked within and outside the state of Washington for Washington-based employees. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 153 P.3d 846 (2007).

Note 2: The adoption date of this subsection is October 21, 2008.