

**010.14 Administrative Regulations of the Labor Standards Division of the
Arkansas Department of Labor**

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010.14 Administrative Regulations of the Labor Standards Division of the Arkansas Department of Labor

010.14-001 Statement of Organization and Operations

The Arkansas Department of Labor is an agency of state government created by Act 161 of 1937, Ark. Code Ann. § 11-2-101 *et seq.* The Labor Standards Division is working unit of the Arkansas Department of Labor with regulatory or enforcement authority over:

1. Minimum wage and overtime;
2. Prevailing wage;
3. Child labor;
4. Private employment agencies;
5. Claims for unpaid wages of less than \$1000; and
6. A number of miscellaneous employment standards laws, the enforcement of which is not otherwise provided for by state law or is specifically vested with the Director of Labor or the Department of Labor.

The Labor Standards Division oversees the licensure of private employment agencies. Ultimate authority for the operation of the agency is in the Director of the Department of Labor, who is appointed by the Governor. The individual charged with the day-to-day operations is referred to as the Labor Standards Administrator, who is selected by the director. From time to time, the director promulgates rules and regulations.

010.14-002 Information for Public Guidance

The mailing address and telephone number for the Labor Standards Division is:

Labor Standards Division
Arkansas Department of Labor
10421 West Markham Street
Little Rock, AR 72205
(501) 682-4500

The Department of Labor makes available a list of persons holding certain responsibilities for handling FOIA requests, licensing questions, and complaints against licensees so that the public may obtain information about the agency or make submissions or requests. The names, mailing addresses, telephone numbers, and electronic addresses can be obtained from the agency's office or Web site.

The agency has a list of official forms used by the agency and a list of all formal, written statements of policy and written interpretative memoranda, and orders, decisions and

opinions resulting from adjudications, which may be obtained from the agency's office or Web site. The Department of Labor Web site is: <http://www.arkansas.gov/labor/>. The address for the Labor Standards Division is:

Labor Standards Division
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

Copies of all forms used by the agency, written statements of policy and written interpretive memoranda, and all orders issued by the agency may be obtained from the agency's office.

010.14-003 General Organization

- A.** The Labor Standards Division is generally divided into an office staff and a field staff. The field staff is composed of investigators.
- B.** All public meetings will be conducted pursuant to Robert's Rules of Order and in conformity with the Arkansas Freedom of Information Act.
- C.** The director may create standing and ad hoc committees. The director will select members of committees. A quorum for the transaction of committee business is a majority of the number of voting members of the committee.

010.14-004 Rule-Making

A. Authority

The agency has been authorized by the Legislature to promulgate rules. Ark. Code Ann. § 11-4-209(a)(minimum wage and overtime); § 22-9-307(prevaling wage); §§ 11-6-111(b)(2) and 11-12-105(1)(child labor); and § 11-11-204(d)(private employment agencies). The agency follows the procedural requirements of the Arkansas Administrative Procedure Act, in particular Ark. Code Ann. § 25-15-203 and § 25-15-204. Additionally, the agency is required to abide by the provisions of Ark. Code Ann. §10-3-309.

B. Initiation of Rule-Making

The process of adopting a new rule or amending or repealing an existing rule (hereinafter referred to "rule-making") may be initiated by request of the director that the staff submit proposed drafts. Additionally, staff of the agency may request-permission of to initiate rule-making. Third persons outside the agency may petition for the issuance, amendment, or repeal of any rule.

C. Petition to Initiate Rule-Making

Third parties may initiate rule-making to adopt, amend, or repeal a rule by filing a petition with the agency to initiate rule-making. The petition must contain the name, address, and telephone number of the petitioner, the specific rule or action requested, the reasons for the rule or action requested, and facts showing that the petitioner is regulated by the agency or has a substantial interest in the rule or action requested.

The petition to initiate rule-making shall be filed with the Director of the Department of Labor.

Within thirty (30) days after submission of the petition, the director will either deny the petition, stating its reasons in writing, or will initiate rule-making.

D. Pre-Filing with the Bureau of Legislative Research

Thirty (30) days before the public-comment period ends, the agency will file with the Bureau of Legislative Research the text of the proposed rule or amendment as well as a financial impact statement and a Bureau of Legislative Research questionnaire as provided by Ark. Code Ann. § 10-3-309.

E. Public Input

1. Before finalizing language of a proposed new rule or an amendment to, or repeal of, an existing rule, the director or his designee will receive public input through written comments and/or oral submissions. The agency will designate in its public notice the format and timing of public comment.

2. Any public hearing will provide affected persons and other members of the public a reasonable opportunity for presentation of evidence, arguments, and oral statements within reasonable conditions and limitations imposed by the agency to avoid duplication, irrelevant comments, unnecessary delay, or disruption of the proceedings.

3. The director or his designee may preside at the public hearing. The agency must ensure that the agency personnel responsible for preparing the proposed rule or amendment are available, and will notify third parties initiating rule changes to be available to explain the proposal and to respond to questions or comments regarding the proposed rule.

4. The agency will preserve the comments made at the public hearing by a recording.

5. Any person may submit written statements within the specified period of time. All timely, written statements will be considered by the director and be made a part of the rule-making record.

F. Notice of Rule-Making

The agency will give notice of proposed rule-making to be published pursuant to Ark. Code Ann. § 25-15-204. The notice will set any written comment period and will specify the time, date, and place of any public hearing.

G. The Decision to Adopt a Rule

1. The agency will not finalize language of the rule or decide whether to adopt a rule until the period for public comment has expired.

2. Before acting on a proposed rule, the agency will consider all of the written submissions and/or oral submissions received in the rule-making proceeding or any memorandum summarizing such oral submissions, and any regulatory analysis or fiscal impact statement issued in the rule-making proceedings.

3. The agency may use its own experience, specialized knowledge, and judgment in the adoption of a rule or consider the experience, specialized knowledge and judgment of agency staff.

H. Variance Between Adopted Rule and Published Notice of Proposed Rule

1. The agency may not adopt a rule that differs from the rule proposed in the published notice of the intended rule-making on which the rule is based unless:

- a. The final rule is in character with the original scheme and was a logical outgrowth of the notice and comments stemming from the proposed rule, or
- b. The notice fairly apprised interested persons of the subject and the issues that would be considered so that those persons had an opportunity to comment.

2. In determining whether the final rule is in character with the original scheme and was a logical outgrowth of the notice and comments, and that the notice of intended rule-making provided fair warning that the outcome of that rule-making proceeding could be the rule in question; the board must consider the following factors:

- a. The extent to which persons who will be affected by the rule should have understood that the rule-making proceeding on which it is based could affect their interests; and
- b. The extent to which the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the notice of intended rule-making; and

- c. The extent to which the effects of the rule differ from the effects of the proposed rule contained in the notice of intended rule-making.

I. Concise Statement of Reasons

1. When requested by an interested person, either prior to the adoption of a rule or within thirty (30) days after its adoption, the agency shall issue a concise statement of the principal reasons for and against the adoption of the rule. Requests for such a statement must be in writing and be delivered to the Director of the Department of Labor. The request should indicate whether the statement is sought for all or only a specified part of a rule. A request will be considered to have been submitted on the date on which it is received by the agency.

2. The concise statement of reasons must contain:

- a. The agency's reasons for adopting the rule;
- b. An indication of any change between the text of the proposed rule and the text of the rule as finally adopted, with explanations for any such change; and
- c. The principal reasons urged in the rule-making procedure for and against the rule, and the agency's reasons for overruling the arguments made against the rule.

J. Contents

The agency shall cause its rules to be published and made available to interested persons. The publication must include:

1. The text of the rule; and
2. A note containing the following:
 - a. The date(s) the board adopted or amended the rule;
 - b. The effective date(s) of the rule;
 - c. Any findings required by any provisions of law as a prerequisite to adoption for effectiveness of the rule; and
 - d. Citation to the entire specific statutory or other authority authorizing the adoption of the rule;
3. The publication of the rule(s) must state the date of publication.

K. Format

The published rules of the board will be organized substantially in the following format:

1. Statement of Organization and Operations
2. Information for Public Guidance
3. General Organization
4. Purpose and Scope
5. Definitions
6. Rule-making
7. Emergency Rule-making
8. Declaratory Orders
9. Adjudicative Hearings
10. Licensing
11. Et seq. Substantive rules and other rules of Agency

L. Incorporation by Reference

By reference in a rule, the agency may incorporate all or any part of a code, standard, rule, or other matter if the agency finds that copying the matter in the agency's rule would be unduly cumbersome, expensive, or otherwise inexpedient. The reference in the rule must fully and precisely identify the incorporated matter by title, citation, date, and edition, if any; briefly indicate the precise subject and general contents of the incorporated matter; and state that the rule does not include any later amendments or editions of the incorporated matter. The agency may incorporate such a matter by reference in a proposed or adopted rule only if the agency makes copies of the incorporated matter readily available to the public. The rules must state how and where copies of the incorporated matter may be obtained at cost from the agency, and how and where copies may be obtained from an agency of the United States, this state, another state, or the organization, association, or persons originally issuing that matter. The agency must retain permanently a copy of any materials incorporated by reference in a rule.

M. Filing

1. After the agency formally adopts a new rule or amends a current rule or repeals an existing rule, and after the rule change has been reviewed by the Legislative Council, the agency staff will file final copies of the rule with the Secretary of State, the Arkansas State Library, and the Bureau of Legislative Research, or as otherwise provided by Ark. Code Ann. § 25-15-204(d).

2. Proof of filing a copy of the rule, amendment, or repeal with the Secretary of State, the Arkansas State Library, and the Bureau of Legislative Research will be kept in a file maintained by the Legal Division of the Arkansas Department of Labor.

3. Notice of the rule change will be posted on the agency Web page.

010.14-005 Emergency Rule-Making

A. Request for Emergency Rule-Making

The proponent of a rule may request the agency to adopt an emergency rule. In addition to the text of the proposed rule or amendment to an existing rule and any other information required by Rule 010.14-004(C), the proponent will provide a written statement setting out the facts or circumstances that would support a finding of imminent peril to the public health, safety, or welfare.

B. Finding of an Emergency

Upon receipt of the written statement requesting an emergency rule-making and documents or other evidence submitted in support of the assertion that an emergency exists, the agency will make an independent judgment as to whether the circumstances and facts constitute an imminent peril to the public health, safety, or welfare requiring adoption of the rule upon fewer than 30 days notice. If the agency determines that the circumstances warrant emergency rule-making, it will make a written determination that sets out the reasons for its finding that an emergency exists. Upon making this finding, the agency may proceed to adopt the rule without any prior notice or hearing, or it may determine to provide an abbreviated notice and hearing.

C. Effective Date of Emergency Rule

The emergency rule will be effective immediately upon filing, or at a stated time less than ten (10) days thereafter, if the agency finds that this effective date is necessary because of imminent peril to the public health, safety, or welfare. The agency will file with the rule the agency's written findings justifying the determination that emergency rule-making is appropriate and, if applicable, the basis for the effective date of the emergency rule being less than ten (10) days after the filing of the rule pursuant to Ark. Code Ann. § 25-15-204(e). The agency will take appropriate measures to make emergency rules known to persons who may be affected by them.

010.14-006 Declaratory Orders

A. Purpose and Use of Declaratory Orders

A declaratory order is a means of resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory order may be used only to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory order is not the appropriate means for determining the conduct of another person or for obtaining a policy statement of general

applicability from an agency. A petition or declaratory order must describe the potential impact of statutes, rules, or orders upon the petitioner's interests.

B. The Petition

The process to obtain a declaratory order is begun by filing with the Director of the Department of Labor a petition that provides the following information:

1. The caption shall read: Petition for Declaratory Order Before Arkansas Department of Labor.
2. The name, address, telephone number, and facsimile number of the petitioner.
3. The name, address, telephone number, and facsimile number of the attorney of the petitioner.
4. The statutory provision(s), agency rule(s), or agency order(s) on which the declaratory order is sought.
5. A description of how the statutes, rules, or orders may substantially affect the petitioner and the petitioner's particular set of circumstances, and the question or issue on which petitioner seeks a declaratory order.
6. The signature of the petitioner or petitioner's attorney.
7. The date.
8. Request for a hearing, if desired.

C. Agency Disposition

1. The agency may hold a hearing to consider a petition for declaratory statement. If a hearing is held, it shall be conducted in accordance with Ark. Code Ann. §§ 25-15-208 and 25-15-213, and the agency's rules for adjudicatory hearings.
2. The agency may rely on the statements of fact set out in the petition without taking any position with regard to the validity of the facts. Within ninety (90) days of the filing of the petition, the agency will render a final order denying the petition or issuing a declaratory order.

010.14-007 Adjudicative Hearings

A. Scope of This Rule

This Rule, 010.14-007, applies in all administrative adjudications conducted by the Labor Standards Division of the Arkansas Department of Labor. This procedure is developed to provide a process by which the agency formulates orders (for example, an order revoking a license to practice, or imposing civil penalties).

B. Presiding Officer

The Director of the Department of Labor shall preside at a hearing or may designate an examiner, referee, or hearing officer to preside at a hearing.

C. Appearances

1. Any party appearing has the right, at his or her own expense, to be represented by counsel.
2. The respondent may appear on his or her own behalf.
3. Any attorney representing a party to an adjudicatory proceeding must file notice of appearance as soon as possible.
4. Service on counsel of record is the equivalent of service on the party represented.
5. On written motion served on the party represented and all other parties of record, the presiding officer may grant counsel of record leave to withdraw for good cause shown.

D. Consolidation

If there are separate matters that involve similar issues of law or fact, or identical parties, the matters may be consolidated if it appears that consolidation would promote the just, speedy, and inexpensive resolution of the proceedings, and would not unduly prejudice the rights of a party.

E. Notice to Interested Parties

If it appears that the determination of the rights of parties in a proceeding will necessarily involve a determination of the substantial interests of persons who are not parties, the presiding officer may enter an order requiring that an absent person be notified of the proceeding and be given an opportunity to be joined as a party of record.

F. Service of Papers

Unless the presiding officer otherwise orders, every pleading and every other paper filed for the proceeding, except applications for witness subpoenas and the subpoenas, shall be served on each party or the party's representative at the last address of record.

G. Initiation and Notice of Hearing

1. An administrative adjudication is initiated by the issuance by the agency of a notice of hearing.

2. The notice of hearing will be sent to the respondent by U.S. Mail, return receipt requested, delivery restricted to the named recipient or his agent, as well as by regular U. S. mail. Notice shall be sufficient when it is so mailed to the respondent's latest address on file with the agency.

3. Notice will be mailed at least twenty (20) days before the scheduled hearing.

4. The notice will include:

a. a statement of the time, place, and nature of the hearing;

b. a statement of the legal authority and jurisdiction under which the hearing is to be held; and

c. a short and plain statement of the matters of fact and law asserted.

H. Motions

All requests for relief will be by motion. Motions must be in writing or made on the record during a hearing. A motion must fully state the action requested and the grounds relied upon. The original written motion will be filed with the agency. When time allows, the other parties may, within seven (7) days of the service of the written motion, file a response in opposition. The presiding officer may conduct such proceedings and enter such orders as are deemed necessary to address issues raised by the motion. However, a presiding officer, other than the Director, will not enter a dispositive order unless expressly authorized in writing to do so.

I. Answer

A respondent may file an answer.

J. Discovery

1. Upon written request, the agency will provide the information designated in Ark. Code Ann. § 25-15-208(a)(3).

2. Such requests should be received by the agency at least ten (10) days before the scheduled hearing.

K. Continuances

1. The presiding officer may grant a continuance of hearing for good cause shown. Requests for continuances will be made in writing. The request must state the grounds to be considered and be made as soon as practicable and, except in cases of emergencies, no later than five (5) days prior to the date noticed for the hearing. In determining whether to grant a continuance, the presiding officer may consider:

- a. Prior continuances;
- b. The interests of all parties;
- c. The likelihood of informal settlements;
- d. The existence of an emergency;
- e. Any objection;
- f. Any applicable time requirement;
- g. The existence of a conflict of the schedules of counsel, parties, or witnesses;
- h. The time limits of the request; and
- i. Other relevant factors.

2. The presiding officer may require documentation of any grounds for continuance.

L. Hearing Procedures

1. The presiding officer presides at the hearing and may rule on motions, require briefs, and issue such orders as will ensure the orderly conduct of the proceedings; provided, however, any presiding officer other than the Director shall not enter a dispositive order or proposed decision unless expressly authorized in writing to do so.

2. All objections must be made in a timely manner and stated on the record.

3. Parties have the right to participate or to be represented by counsel in all hearings or pre-hearing conferences related to their case.

4. Subject to terms and conditions prescribed by the Administrative Procedure Act, parties have the right to introduce evidence on issues of material fact, cross-examine witnesses as necessary for a full and true disclosure of the facts, present evidence in rebuttal, and, upon request by the agency, may submit briefs and engage in oral argument.

5. The presiding officer is charged with maintaining the decorum of the hearing and may refuse to admit, or may expel, anyone whose conduct is disorderly.

M. Order of Proceedings

The presiding officer will conduct the hearing in the following manner:

1. The presiding officer will give an opening statement, briefly describing the nature of the proceedings.

2. The parties are to be given the opportunity to present opening statements.

3. The parties will be allowed to present their cases in the sequence determined by the presiding officer.

4. Each witness must be sworn or affirmed by the presiding officer, or the court reporter, and be subject to examination and cross-examination as well as questioning by the agency. The presiding officer may limit questioning in a manner consistent with the law.

5. When all parties and witnesses have been heard, parties may be given the opportunity to present final arguments.

N. Evidence

1. The presiding officer shall rule on the admissibility of evidence and may, when appropriate, take official notice of facts in accordance with all applicable requirements of law.

2. Stipulation of facts is encouraged. The agency may make a decision based on stipulated facts.

3. Evidence in the proceeding must be confined to the issues set forth in the hearing notice, unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence outside the scope of the notice, over the objection of a party who did not have actual notice of those issues, that party, upon timely request, will receive a continuance sufficient to prepare for the additional issue and to permit amendment of pleadings.

4. A party seeking admission of an exhibit must provide three (3) copies of any exhibit in a hearing before the agency. The presiding officer must provide the opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. All exhibits admitted into evidence must be appropriately marked and be made part of the record.

5. Any party may object to specific evidence or may request limits on the scope of the examination or cross-examination. A brief statement of the grounds upon which it is based shall accompany such an objection. The objection, the ruling on the objection, and the reasons for the ruling will be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve the ruling until the written decision.

6. Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony will briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it shall be marked as part of an offer of proof and inserted in the record.

7. Irrelevant, immaterial, and unduly repetitive evidence will be excluded. Any other oral or documentary evidence, not privileged, may be received if it is of a type commonly relied upon by reasonably prudent men and women in the conduct of their affairs.

8. Reasonable inferences. The finder of fact may base its findings of fact upon reasonable inferences derived from other evidence received.

O. Default

If a party fails to appear or participate in an administrative adjudication after proper service of notice, the agency may proceed with the hearing and render a decision in the absence of the party.

P. Subpoenas

1. At the request of any party, the Director of the Department of Labor shall issue subpoenas for the attendance of witnesses at the hearing. The requesting party shall specify whether the witness is also requested to bring documents and reasonably identify said documents.

2. A subpoena may be served by any person specified by law to serve process or by any person who is not a party and who is eighteen (18) years of age or older. Delivering a copy to the person named in the subpoena shall make service. Proof of service may be made by affidavit of the person making service. The party seeking the subpoena shall have the burden of obtaining service of the process and

shall be charged with the responsibility of tendering appropriate mileage fees and witness fees pursuant to Rule 45, Arkansas Rules of Civil Procedure. The witness must be served at least two days prior to the hearing. For good cause, the agency may authorize the subpoena to be served less than two days before the hearing.

3. Any motion to quash or limit the subpoena shall be filed with the agency and shall state the grounds relied upon.

Q. Recording the Proceedings

The responsibility to record the testimony heard at a hearing is borne by the agency. Upon the filing of a petition for judicial review, the agency will provide a transcript of testimony taken before the agency. If the agency is successful upon appeal, the agency may request that the court assess the costs against the opposing party.

R. Factors to be Considered in Imposing Sanctions or Fines

In addition to any other considerations permitted by law, if applicable, the agency in imposing any sanction or fine may consider the following:

1. The nature and degree of the misconduct for which the sanction is being sought.
2. The seriousness and circumstances surrounding this misconduct.
3. The loss or damage to clients or others.
4. The assurance of future compliance.
5. The profit to the wrongdoer.
6. The avoidance of repetition.
7. Whether the conduct was deliberate, intentional, or negligent.
8. The deterrent effect on others.
9. The conduct of the individual during the course of the disciplinary proceeding.
10. Any prior enforcement or disciplinary actions or sanctions, including warnings.
11. Matters offered in mitigation or extenuation, except that a claim of disability or impairment resulting from the use of alcohol or drugs may not

be considered unless the individual demonstrates that he or she is successfully pursuing in good faith a program of recovery.

S. Final Order

The agency will serve on the respondent a written order that reflects the action taken by the agency. The order will include a recitation of facts found based on testimony and other evidence presented and reasonable inferences derived from the evidence pertinent to the issues of the case. It will also state conclusions of law and directives or other disposition entered against or in favor of the respondent.

The order will be served personally or by mail on the respondent. If counsel represents respondent, service of the order on respondent's counsel shall be deemed service on the respondent.

010.14-100 Minimum Wage and Overtime

A. The Minimum Wage Act of the State of Arkansas is codified at Ark. Code Ann. §§ 11-4-201 *et seq.* The Director of the Department of Labor is authorized to promulgate administrative regulations for the administration and enforcement of the law. Ark. Code Ann. § 11-4-209.

B. Definitions

1. "Act" means the Minimum Wage Act of the State of Arkansas, Ark. Code Ann. §§ 11-4-201 *et seq.*;

2. "Administrator" means the Administrator of the Labor Standards Division of the Arkansas Department of Labor;

3. "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities, the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. "Agriculture" also includes the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacean, sponges, seaweeds, or other aquatic forms of animal and vegetable life. "Agriculture" includes cotton ginning and work performed as necessary and incidental to cotton ginning in an establishment primarily engaged in the ginning of cotton, including all work exempt from overtime pursuant to the provisions of 29 U.S.C. 213(h) and (i);

4. "Department" means the Arkansas Department of Labor;

5. "Director" means the Director of the Department of Labor;
6. "Division" means the Labor Standards Division of the Department of Labor;
7. "Employ" includes to suffer or permit to work;
8. "Employee" includes any individual employed by an employer, but does not include those individuals specifically excluded by Ark. Code Ann. § 11-4-203(3) and Rule 010.14-104 and -105; and
9. "Employer" includes any individual, partnership, association, corporation, business trust, the State, any political subdivision of the State, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee. The term "employer".

010.14-101 Rules Incorporated By Reference

Throughout these rules for minimum wage and overtime, Rule 010.14-100 *et seq.*, the Arkansas Department of Labor has adopted by reference and incorporated herein certain sections or parts of the Code of Federal Regulations (C.F.R.) or the United States Code (U.S.C.). In all cases, references to volume 29 of the Code of Federal Regulations shall mean the July 2005 edition, specifically 29 C.F.R., Parts 500-899 (July 1, 2005). In all cases, references to the United States Code means the U. S. C. as it existed on March 1, 2006. These Rules do not include any later editions or amendments to the United States Code or the Code of Federal Regulations. Copies of the incorporated matter may be obtained at cost from the Arkansas Department of Labor, Labor Standards Division or may be purchased directly from the U. S. Government Printing Office. Copies of the incorporated matter may be viewed on the website of the U. S. Department of Labor at: <http://www.dol.gov/esa/regs/cfr/main.htm> and <http://www.dol.gov/esa/regs/statutes/whd/allfair.htm>

010.14-102 Records To Be Kept By Employer

A. General requirements

1. Every employer shall maintain and preserve payroll or other records which are true and accurate and which contain the following information and data for each employee:
 - a. Name in full, as used for Social Security recordkeeping purposes, and on the same record, any identifying symbol or number used in place of name on any time, work, or payroll records;

- b. Home address, including zip code;
- c. Date of birth, if under 19;
- d. Sex and occupation;
- e. Time of day and day of week on which the employee's workweek begins. A single notation will suffice if the entire workforce in an establishment have the same workweek and workday beginning;
- f. Regular hourly rate of pay for any workweek in which overtime compensation is due, as well as the basis on which wages are paid, such as per hour, per day, per week, per piece or rate of commission;
- g. Hours worked each workday and total hours worked each workweek;
- h. Total daily or weekly straight time earnings or wages due for hours worked during the workday or workweek, exclusive of overtime compensation;
- i. Total overtime compensation. This amount excludes the straight-time earnings for overtime hours recorded under 010.14-101(A)(1)(h) above;
- j. Total additions or deductions from wages paid each pay period, as well as the nature of the items which make up the additions or deductions;
- k. Total wages paid each pay period; and
- l. Date of payment and the pay period covered by payment.

2. For employees working on fixed schedules, an employer may maintain records showing instead of the hours worked each day and each work week, the schedule of daily and weekly hours and a statement or other method or recordkeeping that indicates that such hours were in fact actually worked. In weeks in which more or less than the scheduled hours are worked, the exact number of hours worked each day and each week must be recorded.

3. Each employer shall maintain and preserve the records required by this Rule for a period of at least three (3) years.

4. No particular or form of records is prescribed. The records must be accessible and clear and identifiable. In the event records are maintained in format other than paper, such as electronically or on microfilm, adequate projection, viewing, or copying equipment must be available.

5. Each employer shall keep the records required by this Rule safe and accessible at the place or places of employment or in a central record-keeping office in Arkansas. In unusual circumstances, an employer may petition the Director to maintain the records outside the state. Such approval must be obtained in advance. In the event the Director approves such records to be maintained outside the state, the employer shall make such records available for inspection, transcription or copying by the division in Arkansas within 72 hours following notice from the division.

6. Posting of notices. Every employer employing an employee subject to the Act shall post and keep posted a notice approved by the Director explaining and summarizing the requirements of the Act and the regulations. Such notice shall be posted in a conspicuous and accessible place in every establishment where such employees are employed.

7. All records shall be available for inspection, transcription or copying by the division.

B. Special circumstances

1. Exempt from minimum wage and overtime. With respect to employees exempt from both the minimum wage and overtime provisions of the Act, an employer shall maintain and preserve those records listed in Rule 010.14-101(A)(1)(a) through (e).

2. Exempt from overtime. With respect to employees exempt from the overtime provisions of the Act pursuant to Ark. Code Ann. § 11-4-211(e), an employer shall maintain and preserve all those records listed in Rule 010.14-101(A)(1), except those outlined in paragraphs (f) and (i).

3. Tipped employees. With respect to each tipped employee whose wages are determined pursuant to Ark. Code Ann. § 11-4-212, the employer shall maintain and preserve payroll or other records containing all the information and data required in Rule 010.14-101(A)(1) and, in addition, the following:

a. A symbol, letter or other notation placed on the pay records identifying each employee whose wage is determined in part by tips.

b. Weekly or monthly amount reported by the employee, to the employer, of tips received (this may consist of reports made by the employees to the employer on IRS Form 4070).

c. Amount by which the wages of each tipped employee have been deemed to be increased by tips as determined by the employer (not in excess of 58 percent of the applicable statutory minimum wage). The amount per hour which the employer takes as a tip credit shall be reported to the employee in writing each time it is changed from the amount per hour taken in the preceding week.

d. Hours worked each workday in any occupation in which the employee does not receive tips, and total daily or weekly straight-time payment made by the employer for such hours.

e. Hours worked each workday in occupations in which the employee receives tips, and total daily or weekly straight-time earnings for such hours.

4. Employees receiving board, lodging or other facilities. In addition to other records required by this Rule, an employer who makes a deduction from the wages of employees for board, lodging, or other facilities pursuant to Ark. Code Ann. § 11-4-213 shall maintain and preserve records substantiating the cost of furnishing the board, lodging or other facilities. Such records shall include itemized accounts showing the nature and amount of any expenditures entering into the computation of the costs.

5. In addition to other records required by this Rule, an employer shall maintain and preserve the following records as applicable:

a. any certificate of eligibility to pay a sub-minimum wage to a full-time student pursuant to Ark. Code Ann. § 11-4-21(b) and Rule 010.14-102;

b. any permit or authorization to pay a student-learner a sub-minimum wage pursuant to Ark. Code Ann. § 11-4-215 and Rule 010.14-103; and

c. any permit or authorization to employ handicapped persons at wages less than the applicable minimum wage pursuant to Ark. Code Ann. § 11-4-214 and Rule 010.14-104.

6. Additional record-keeping requirements are contained in Rule 010.14-104 for bona fide executive, administrative and professional employees, and in Rule 010.14-107 for employees of state and local government, including employees engaged in fire protection or law enforcement activities.

C. Recording working time

1. Differences between clock records and actual hours worked. Time clocks are not required. In those cases where time clocks are used, employees who voluntarily come in before their regular starting time or remain after their closing time, do not have to be paid for such periods provided, of course, that they do not engage in any work. Their early or late clock punching may be disregarded. Minor differences between the clock records and actual hours worked cannot ordinarily be avoided, but major discrepancies should be discouraged since they raise a doubt as to the accuracy of the records of the hours actually worked.

2. "Rounding" practices. It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of

recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.

010.14-103 Employment of Full Time Students at Sub-Minimum Wages

A. Conditions of employment

1. An employer may pay a full-time student a sub-minimum wage of not less than eight-five percent (85%) of the applicable minimum wage rate, provided the following conditions are met:

 a. The employer has, in advance of employment at less than the applicable minimum wage rate, a full-time student certificate issued by the department;

 b. The full-time student attends an accredited institution of education within the State of Arkansas on a full-time basis in accordance with the institution's definitions;

 c. The employer does not employ the student more than twenty (20) hours per week during times school is in session and not more than forty (40) hours per week during times school is not in session; and

 d. Notwithstanding paragraph (c) above, the employer does not employ the student in violation of any applicable child labor laws.

2. A full-time student retains that status during the student's Christmas, summer and other vacations.

3. Notwithstanding paragraph 1(b) above, a full-time student residing in a border town may attend an accredited institution of education within the border sister state on a full-time basis and qualify for the sub-minimum wage allowed by this rule provided the student is otherwise qualified.

B. Full-time student certificates

1. An application for a full-time student certificate shall be made on a form approved by the department and shall require submission of verification from an accredited institution of education within the State of Arkansas that the student is a full-time student in accordance with the institution's definition of same.

2. A full-time student certificate will be issued for a period of one year and shall not be valid upon its expiration.

3. A full-time student certificate issued by the U. S. Department of Labor pursuant to 29 C.F.R. 519 is acceptable in lieu of one issued by the Arkansas Department of Labor, however the employer is responsible for complying with the other conditions of employing full-time students at a sub-minimum wage rate provided in Rule 010.14-102(A) above, including payment of wages at not less than eighty-five percent (85%) of the minimum wage established by Ark. Code Ann. § 11-4-210.

010.14-104 Student Learners, Learners and Apprentices

An employer may employ a learner, a student learner, or an apprentice at a sub-minimum wage, provided:

A. For learners and apprentices, the employer has current and valid certification from the U. S. Department of Labor to employ learners and apprentices at a sub-minimum wage pursuant to 29 C.F.R. 520.400 through 520.412 and pays wages to such learners and apprentices at a rate of not less than eighty-five percent (85%) of the minimum wage rate established by Ark. Code Ann. § 11-4-210(a); and

B. For student learners, the employer has current and valid certification from the U. S. Department of Labor to employ student learners at a sub-minimum wage pursuant to 29 C.F.R. 520.500 through 520.508 and pays wages to such learners and apprentices at a rate of not less than eighty-five percent (85%) of the minimum wage rate established by Ark. Code Ann. § 11-4-210(a).

010.14-105 Employment of Workers With Disabilities

A worker with a disability may be employed at a special minimum wage rate pursuant to Ark. Code Ann. § 11-4-214, by obtaining either certification and authorization for such employment from the U. S. Department of Labor or from this division.

A. Federal certification

A worker with a disability may be employed at a special minimum wage rate pursuant to a special certificate issued for workers with disabilities by the U. S. Department of Labor pursuant to 29 C.F.R. Part 525, provided the worker with a disability is actually paid as authorized by the U. S. Department of Labor.

B. State certification

The division will issue a state certificate of authorization to employ a worker with a disability at a special minimum wage rate under the same terms and conditions as the

U. S. Department of Labor and for such purpose the provisions of 29 C.F.R., Part 525 (July 2005) are adopted by reference and incorporated herein.

010.14-106 Coverage and Exemptions

A. Employer coverage and exemption from minimum wage and overtime

1. The Act defines “employer” to include “any individual, partnership, association, corporation, business trust, the State, any political subdivision of the State, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee”. Ark. Code Ann. § 11-4-203(4)(A).

a. An entity, including an individual, partnership, association, corporation, business trust, governmental agency, or any person or group of persons, acts indirectly in the interest of an employer in relation to an employee when such entity or entities conduct related activities, either through unified operations or common control.

b. Such related activities need not occur in the same establishment or facility.

2. The Act defines “employer” to exclude any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee for any workweek in which fewer than four (4) employees are employed. Ark. Code Ann. § 11-4-203(4)(B).

a. Employees who are exempt from the Act pursuant to Ark. Code Ann. § 11-4-203(3) or Rule 010.14-104(B) shall be counted as employees for the purpose of determining whether an employer employs fewer than four (4) employees.

B. Employee exemptions from minimum wage and overtime

1. The Act does not apply to any individual employed in a bona fide executive, administrative or professional capacity or as an outside commission-paid salesperson who customarily performs his or her services away from his or her employer’s premises taking orders for goods or services. Ark. Code Ann. § 11-4-203(3)(A).

a. For the purpose of defining and delimiting this exemption, the director adopts by reference and incorporates herein 29 C.F.R. Part 541 (July 1, 2005).

b. For the purposes of this exemption, computer employees covered by 29 C.F.R. 541.400 through .402 are hereby defined as “professional employees”.

c. For the purposes of this exemption, highly compensated employees covered by 29 C.F.R. 541.601 are hereby defined as an executive, administrative or professional employee if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee.

d. For the purposes of this exemption, executive or administrative employee includes any individual who:

(i) holds public elective office in this state; or

(ii) is selected by the elected official to be a member of his personal staff and is directly supervised by the elected official; or

(iii) is appointed by the elected official to serve on a policymaking level; or

(iv) is an immediate adviser to the elected official with respect to the constitutional or legal powers of his office;

e. Notwithstanding the provisions of Rule 010.14-104(B)(1)(a) above, the salary level test of 29 C.F.R. 541.100(a)(1) (executive employees); 29 C.F.R. 541.200(a)(1) (administrative employees); 29 C.F.R. 541.300(a)(1) (professional employees); and 29 C.F.R. 541.400(b) (computer employees) as it applies to charitable and religious organizations, and employers who have gross annual sales of less than \$500,000 per year, shall be at a rate of at least \$360 per week on a salary or fee basis.

f. It is recognized that the primary duties of the following legislative employees require the employees to customarily and regularly perform tasks or work involving the exercise of discretion and independent judgment with respect to matters of significance in the course of assisting members of the General Assembly, and they are professional, executive, or administrative employees for the purpose of this exemption: legislative attorneys, legislative auditors, legislative editors, and legislative analysts. Nothing in this provision limits the application of other exemptions to legislative employees. "Legislative employee" has the same meaning as defined by Ark. Code Ann. § 10-2-129.

2. The Act does not apply to students performing services for any school, college, or university in which they are enrolled and are regularly attending classes. Ark. Code Ann. § 11-4-203(3)(B).

3. The Act does not apply to any individual employed by the United States government. Ark. Code Ann. § 11-4-203(3)(C).

4. The Act does not apply to any individual engaged in the activities of any educational, charitable, religious, or nonprofit organization where the employer-

employee relationship does not in fact exist or where the services are rendered to the organizations gratuitously. Ark. Code Ann. § 11-4-203(3)(D).

a. This exemption does not apply to an individual performing services for an employer engaged in a for-profit enterprise in return, exchange or in anticipation of a donation or compensation to the educational, charitable, religious, or nonprofit organization.

5. The Act does not apply to any bona fide independent contractor. Ark. Code Ann. § 11-4-203(3)(E).

6. The Act does not apply to any individual employed by an agricultural employer who did not use more than 500 man-days of agricultural labor in any calendar quarter of the preceding calendar year. Ark. Code Ann. § 11-4-203(3)(F).

7. The Act does not apply to the parent, spouse, child or other member of an agricultural employer's immediate family. Ark. Code Ann. § 11-4-203(3)(G).

8. The Act does not apply to an individual who:

a. is employed as a hand-harvest laborer and is paid on a piece-rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece-rate basis in the region of employment;

b. commutes daily from his or her permanent residence to the farm on which he or she is so employed; and

c. has been employed in agriculture fewer than thirteen (13) weeks during the preceding calendar year.

Ark. Code Ann. § 11-4-203(3)(H).

9. The Act does not apply to a migrant worker who:

a. is sixteen (16) years of age or under and is employed as a hand-harvest laborer;

b. is paid on a piece-rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece-rate basis in the region of employment;

c. is employed on the same farm as his or her parent(s); and

d. is paid the same piece-rate as employees over age sixteen (16) years are paid on the same farm.

Ark. Code Ann. § 11-4-203(3)(I).

10. The Act does not apply to any employee principally engaged in the range production of livestock. Ark. Code Ann. § 11-4-203(3)(J).

11. The Act does not apply to any employee employed in planting or tending trees, cruising, surveying or felling timber or in preparing or transporting logs or other forestry products to the mill, processing plants or railroad or other transportation terminal if the number of employees employed by his or her employer in the forestry or lumbering operations does not exceed eight (8). Ark. Code Ann. § 11-4-203(3)(K).

12. The Act does not apply to any employee employed by a nonprofit recreational or educational camp that does not operate for more than seven (7) months in any calendar year. Ark. Code Ann. § 11-4-203(3)(L).

13. The Act does not apply to an employee of a nonprofit child welfare agency who serves as a houseparent who is:

a. directly involved in caring for children who reside in residential facilities of the nonprofit child welfare agency and who are orphans, in foster care, abused, neglected, abandoned, homeless, in need of supervision or otherwise in crisis situations that lead to out-of-home placements; and

b. compensated at an annual rate of not less than thirteen thousand dollars (\$13,000) or at an annual rate of not less than ten thousand dollars (\$10,000) if the employee resides in the residential facility and receives board and lodging at no cost.

Ark. Code Ann. § 11-4-203(3)(M).

14. The Act shall not apply to any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto. See 29 U.S.C. 213(a)(8).

15. The Act shall not apply to any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves. See 29 U.S.C. 213(a)(15). For the purposes of defining these terms and in order to implement, administer and enforce this exemption, the director adopts by reference and incorporates herein 29 C.F.R. Part 552 (July 1, 2005).

16. The Act shall not apply to any employee engaged in the delivery of newspapers to the consumer. See 29 U.S.C. 213(d).

17. The Act shall not apply to any homemaker engaged in the making of wreaths composed principally of natural holly, pine, cedar or other evergreens (including the harvesting of the evergreens or other forest products used in making such wreaths). See 29 U.S.C. 213(d).

C. Employee exemptions from overtime only

1. The following employees are exempt from the overtime provisions of Ark. Code Ann. § 11-4-211(a):

- a. any employee of an agricultural employer;
- b. any employee with respect to who the U.S. Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to 49 U.S.C. 31502;
- c. any employee of an employer engaged in the operation of a rail carrier subject to 49 U.S.C. part A of subtitle IV;
- d. any employee of a carrier by air subject to the provisions of title II of the federal Railway Labor Act;
- e. any individual employed as an outside buyer of poultry, eggs, cream, or milk in their raw or natural state;
- f. any employee employed as a seaman;
- g. any employee employed as an announcer, news editor, or chief engineer by a radio or television station the major studio of which is located
 - (i) in a city or town of one hundred thousand population or less, according to the latest available decennial census figures as compiles by the U. S. Bureau of the Census, except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the U. S. Office of Management and Budget which has a total population in excess of one hundred thousand, or
 - (ii) in a city or town of twenty-five thousand population or less which is part of such an area but is at least 40 airline miles from the principal city in such an area;
- h. any salesman:
 - (i) partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a non-manufacturing establishment primarily engaged in the business of selling such vehicles or implements to the ultimate purchaser; or

(ii) primarily engaged in selling trailers, boats, or aircraft, if he is employed by a non-manufacturing establishment primarily engaged in the business of selling, trailers, boats, or aircraft to the ultimate purchaser;

i. any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan;

j. any employee employed in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water at least ninety percent (90%) of which was ultimately delivered for agricultural purposes during the preceding calendar year;

k. any employee employed in connection with livestock auction operations, provided such employee is primarily employed during the week by the same employer in agriculture and is paid for his employment in connection with such livestock auction operations at a rate not less than the minimum wage rate prescribed by Ark. Code Ann. § 11-4-210(a);

l. any employee employed within the area of production by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm if no more than five employees are employed in the establishment in such operations;

m. any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup;

n. any employee engaged:

(i) in the transportation and preparation for transportation of fruits and vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the state; or

(ii) in transportation, whether or not performed by the farmer, between the farm and any point within the state of persons employed or to be employed in the harvesting of fruits or vegetables;

o. any driver employed by an employer engaged in the business of operating taxicabs;

p. any employee of a public agency who in any workweek is employed in fire protection activities or any employee who in any workweek is employed in law enforcement activities (including security personnel in correction institutions or jails), if

the public agency employs during the workweek less than five (5) employees in fire protection or law enforcement activities, as the case may be;

q. any employee who is employed in domestic service in a household and who resides in such household;

r. any employee of an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife System if such employee:

(i) is an employee of a private entity engaged in providing services or facilities in such location, and

(ii) receives compensation for employment in excess of 56 hours in any workweek at a rate not less than one and one-half (1 ½) times the regular rate at which he is employed; and

s. a criminal investigator who is paid availability pay under 5 U.S.C. 5545a.

D. Partial overtime exemptions—public agencies

1. In lieu of overtime compensation, Ark. Code Ann. § 11-4-211(g) provides that the State or any political subdivision of the State may award compensatory time off at a rate of not less than one and one-half (1 ½) hours for each hour of employment for which overtime compensation would otherwise be required. The compensatory time off may be provided only:

a. (i) Pursuant to applicable provisions of a collective bargaining agreement, memorandum of understanding or other agreement between the public agency and representatives of such employees; or

(ii) In the case of an employee not covered by Rule 010.14-104(D)(1)(a)(i) above, an agreement or understanding arrived at between the employer and the employee before the performance of the work; and

b. If the employee has not terminated employment and has not accrued compensatory time in excess of the following:

(i) Four hundred eighty (480) hours for police, firefighters, emergency response personnel and employees engaged in seasonal activities; or

(ii) Two hundred forty (240) hours for any public employee not otherwise exempt or covered by Rule 010.14-104(D)(1)(b)(i) above.

2. Ark. Code Ann. § 11-4-211(f) provides that no public agency shall be deemed to have violated the overtime provisions of the Act with respect to the employment of any employee in fire protection activities or in law enforcement activities, including security personnel in correctional institutions, provided that the public agency pays overtime pay in compliance with 29 U.S.C. 207(k) as it exists on March 1, 2006.

3. In order to implement, administer and enforce the provisions of Ark. Code Ann. § 11-4-211(f) and(g), as well as Rule 010.14-106(D)(1) and(2) above, the director adopts by reference and incorporates herein 29 C.F.R. Part 553 (July 1, 2005).

010.14-107 Wage Payments

A. Generally

1. Payment of wages for minimum wage or overtime shall be made in currency, check drawn on an account with sufficient funds or by electronic deposit into an employee's account in compliance with Ark. Code Ann. §11-4-402.

2. Payment of wages shall be made free and clear and must be paid finally and unconditionally.

3. Special rules apply for tipped employees whose employer takes a credit against the minimum wage; employees who receive board, lodging or other facilities for which an employer takes credit against the minimum wage; and for public employees who receive compensatory time off in lieu of overtime pursuant to these Rules and the Act.

B. Deductions from minimum wage

1. An employer may not make deductions from the minimum wage and overtime wages required by Ark. Code Ann. §§ 11-4-210 and -211 except those authorized by the Rules, deductions authorized or required by law, and deductions not otherwise prohibited which are for the employee's benefit and authorized by the employee in writing.

2. An employer may not make deductions from the applicable minimum wage rate for such items, including but not limited to the following: spoilage or breakage; cash or inventory shortages or losses; and fines or penalties for lateness, misconduct, or quitting by an employee without notice.

C. Payments to third persons

1. Taxes. Taxes which are assessed against the employee and which are collected by the employer and forwarded to the appropriate governmental agency are

included as wages paid to the employee. No deduction may be made for any tax or share of a tax which the law requires to be borne by the employer.

2. Court order. Where an employer is legally obliged by order of a court of competent jurisdiction to pay a sum for the benefit or credit of the employee to a creditor, trustee, or other third party, such as a wage garnishment, wage attachment, income withholding order for child support, or bankruptcy proceeding, payment to the third person is equivalent to payment to the employee, provided that neither the employer nor any person acting in his behalf or in his interest derives any profit or benefit from the transaction.

3. Wage assignments. Where an employer is directed by a voluntary wage assignment or order of the employee to pay a sum for the benefit of the employee to a third party, payment to the third person is equivalent to payment to the employee, provided that neither the employer nor any person acting in his behalf or in his interest derives any profit or benefit from the transaction. This includes sums authorized by the employee in writing for such items as U.S. savings bonds, charitable contributions, insurance premiums (paid to independent insurance companies where the employer is under no obligation to supply the insurance and derives, directly or indirectly, no benefit or profit from it), and union dues.

D. Allowance for board, lodging, apparel, or other items and services

1. An employer of an employee engaged in any occupation in which board, lodging, apparel or other items and services are customarily and regularly furnished to the employee for his or her benefit shall be entitled to an allowance against the minimum wage for the reasonable value of board, lodging, apparel or other services in an amount not to exceed thirty cents (30¢) per hour. This allowance shall not be included in the wages for hours worked in excess of forty (40) hours per workweek.

2. Board, lodging, apparel or other items and services are not “furnished” to the employee unless the employee receives the benefit and his acceptance is voluntary and uncoerced. For example, an allowance can not be taken for meals not actually eaten.

3. It does not matter whether the employer calculates the allowance as additions to or deductions from wages.

4. If it is necessary to determine “reasonable value”, the division will follow the provisions of determining “reasonable cost” within the meaning of 29 C.F.R. 531.33 (July 1, 2005). “Reasonable value” does not include a profit to the employer and is not more than the actual cost to the employer of the board, lodging, apparel or other item or service.

5. The employer is not entitled to an allowance for the cost of board, lodging, apparel or other items and services furnished to the employee, but primarily for the

benefit of the employer. Apparel that has a company or business logo shall be considered primarily for the benefit of the employer.

6. The employer is not entitled to an allowance for the cost of board, lodging apparel or other items and services that are required by the employer as a condition of employment. For example, if an employer requires as a condition of employment, that the employee reside on the employer's premises, a lodging allowance is unavailable to the employer.

E. Tipped employees

1. Every employer of an employee engaged in any occupation in which gratuities have been customarily and usually constituted and have been recognized as a part of remuneration for hiring purposes shall be entitled to an allowance for gratuities as part of the hourly wage rate provided in Ark. Code Ann. § 11-4-210 in an amount not to exceed 58% of the minimum wage rate established by Ark. Code Ann. § 11-4-210, provided that the employee actually received that amount in gratuities and that the application of the gratuity allowance results in payment of wages other than gratuities to the tipped employees, including full-time students subject to the provisions of Ark. Code Ann. § 11-4-210, of no less than 42% of the minimum wage rate. If the minimum wage rate is \$6.25, then the tip credit is \$3.63 and the cash wage is \$2.62.

2. Conditions for taking the tip credit.

a. The tip credit is only available for those occupation in which tips have been "customarily and usually" recognized as part of the remuneration for hiring purposes. This includes waiters, waitresses, bellhops, beauty operators, and barbers, provided they actually receive and retain tips. For any other occupation, it will be "customarily and usually" recognized as part of the remuneration for hiring purposes if the employee actually receives tips in excess of \$20 per month.

b. The tip credit may be taken only for hours worked by the employee in an occupation in which he qualifies as a "tipped employee".

i. Under employment agreements or practices requiring tips to be turned over or credited to the employer to be treated by him as part of his gross receipts, the employer must pay the employee the full minimum hourly wage rate because the employee is not a "tipped employee".

ii. Dual jobs. Whenever an employee is required to work twenty minutes or more in any occupation in which gratuities have not been recognized as part of the remuneration for hiring purposes, the rate for the entire hour shall be at least the applicable minimum wage rate without an tip credit.

3. Payments which constitute tips.

a. A tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed. It is to be distinguished from payment of a charge, if any, made for the service. A compulsory charge for service, such as 10% of the amount of the bill, imposed on a customer by an employer's establishment, is not a tip and, even if distributed by the employer to his employees, cannot be counted as a tip.

b. In addition to cash, sums presented by customer which an employee keeps as his own, tips received by an employee include, within the meaning of the Act, amounts paid by bank check or other negotiable instrument payable at par and amounts transferred by the employer to the employee pursuant to direction from credit customers who designate amounts to be added to their bills as tips. Special gifts in forms other than money or its equivalent as above described, such as tickets, passes or merchandise, are not counted as tips.

c. Tip pooling. Where employees practice tip splitting, as where waiters give a portion of their tips to the busboys, both the amounts retained by the waiters and those given the busboys are considered tips of the individual employees who retain them. Similarly, where an accounting is made to an employer for his information only or in furtherance of a pooling arrangement whereby the employer redistributes the tips to the employees upon some basis to which they have mutually agreed among themselves, the amounts received and retained by each individual as his own are counted as his tips.

4. The tip credit is in addition to any credit for board, lodging, apparel or other items or services pursuant to Ark. Code Ann. § 11-4-213 and Rule 010.14-107(C).

5. Overtime payments. When overtime is worked by a tipped employee, his regular rate of pay is determined by dividing his total remuneration for employment in any workweek by the total number of hours actually worked by him in that workweek. A tipped employee's regular rate of pay includes the amount of tip credit taken by the employer (not in excess of 58% of the minimum wage rate); any allowance taken by the employer for board, lodging, apparel or other items and services as authorized by Ark. Code Ann. § 11-4-213 and Rule 010.14-107(C); and the cash wages paid including commissions and certain bonuses or other payments paid by the employer. Any tips received by the employee in excess of the tip credit need not be included in the regular rate of pay for determining overtime payments.

6. Failure to maintain tip records. It is the employer's obligation to maintain tip records as required by Rule 101.14-102(B)(3) if the employer utilizes a tip credit or allowance. If the employer fails to maintain such records, the employer is not entitled to a tip credit or allowance against the minimum wage unless the employer can prove that the employee against who a tip credit or allowance is sought actually received and retained each workweek tips in an amount equal to or greater than the tip credit or allowance claimed.

F. Effect of collective bargaining agreements

Allowances as part payment of the applicable minimum wage for gratuities, board, lodging, apparel or other items and services shall not be permitted to the extent such deductions from cash wages are not permitted under the terms of a collective bargaining agreement applicable to an employee.

010.14-108 Hours Worked

A. Employees “suffered or permitted” to work

1. Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time.

2. The rule is also applicable to work performed away from the premises or the job site, or even at home. If the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked.

3. In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

B. Waiting Time

1. Generally. Whether waiting time is time worked under the Act depends upon particular circumstances. The determination involves a scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the circumstances. Facts may show that the employee was engaged to wait or they may show that he waited to be engaged.

2. On duty. A stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity. The rule also applies to employees who work away from the plant. For example, a repair man is working while he waits for his employer's customer to get

the premises in readiness. The time is worktime even though the employee is allowed to leave the premises or the job site during such periods of inactivity. The periods during which these occur are unpredictable. They are usually of short duration. In either event the employee is unable to use the time effectively for his own purposes. It belongs to and is controlled by the employer. In all of these cases waiting is an integral part of the job. The employee is engaged to wait.

3. Off duty. Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked. He is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived. Whether the time is long enough to enable him to use the time effectively for his own purposes depends upon all of the facts and circumstances of the case.

4. On-call time. An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call". An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call.

C. Rest and meal periods

1. Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time.

2. Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

D. Sleeping time and certain other activities

1. Under certain conditions an employee is considered to be working even though some of his time is spent in sleeping or in certain other activities.

2. Less than 24-hour duty. An employee who is required to be on duty for less than 24 hours is working even though he is permitted to sleep or engage in other personal activities when not busy. A telephone operator, for example, who is required to be on duty for specified hours is working even though she is permitted to sleep when not busy answering calls. It makes no difference that she is furnished facilities for sleeping. Her time is given to her employer. She is required to be on duty and the time is worktime.

3. Duty of 24 hours or more.

a. Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. If sleeping period is of more than 8 hours, only 8 hours will be credited. Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked.

b. Interruptions of sleep. If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted. If the employee cannot get at least 5 hours' sleep during the scheduled period the entire time is working time.

4. Residing on the employer's premises or working at home.

An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the pumper of a stripper well who resides on the premises of his employer and also to a telephone operator who has the switchboard in her own home.

E. Lectures, meetings and training programs

Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:

1. Attendance is outside of the employee's regular working hours;
2. Attendance is in fact voluntary;

3. The course, lecture, or meeting is not directly related to the employee's job; and

4. The employee does not perform any productive work during such attendance.

F. Traveltime

1. Home to work; ordinary situation.

An employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. This is true whether he works at a fixed location or at different job sites. Normal travel from home to work is not worktime.

2. Home to work in emergency situations.

There may be instances when travel from home to work is overtime. For example, if an employee who has gone home after completing his day's work is subsequently called out at night to travel a substantial distance to perform an emergency job for one of his employer's customers all time spent on such travel is working time. The Divisions are taking no position on whether travel to the job and back home by an employee who receives an emergency call outside of his regular hours to report back to his regular place of business to do a job is working time.

3. Home to work on special one-day assignment in another city.

A problem arises when an employee who regularly works at a fixed location in one city is given a special 1-day work assignment in another city. For example, an employee who works in Washington, DC, with regular working hours from 9 a.m. to 5 p.m. may be given a special assignment in New York City, with instructions to leave Washington at 8 a.m. He arrives in New York at 12 noon, ready for work. The special assignment is completed at 3 p.m., and the employee arrives back in Washington at 7 p.m. Such travel cannot be regarded as ordinary home-to-work travel occasioned merely by the fact of employment. It was performed for the employer's benefit and at his special request to meet the needs of the particular and unusual assignment. It would thus qualify as an integral part of the "principal" activity which the employee was hired to perform on the workday in question; it is like travel involved in an emergency call (described in Rule 010.14-108(G)(2)), or like travel that is all in the day's work (see Rule 010.14-108(G)(4)). All the time involved, however, need not be counted. Since, except for the special assignment, the employee would have had to report to his regular work site, the travel between his home and the railroad depot may be deducted, it being in the "home-to-work" category. Also, of course, the usual meal time would be deductible.

4. Travel that is all in the day's work.

Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked.

5. Travel away from home community.

Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly worktime when it cuts across the employee's workday. The employee is simply substituting travel for other duties. The time is not only hours worked on regular working days during normal working hours but also during the corresponding hours on nonworking days. Thus, if an employee regularly works from 9 a.m. to 5 p.m. from Monday through Friday the travel time during these hours is worktime on Saturday and Sunday as well as on the other days. Regular meal period time is not counted. As an enforcement policy the Divisions will not consider as worktime that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

6. When private automobile is used in travel away from home community.

If an employee is offered public transportation but requests permission to drive his car instead, the employer may count as hours worked either the time spent driving the car or the time he would have had to count as hours worked during working hours if the employee had used the public conveyance.

7. Work performed while traveling.

Any work which an employee is required to perform while traveling must, of course, be counted as hours worked. An employee who drives a truck, bus, automobile, boat or airplane, or an employee who is required to ride therein as an assistant or helper, is working while riding, except during bona fide meal periods or when he is permitted to sleep in adequate facilities furnished by the employer.

010.14-109 Overtime Compensation

A. For the purposes of determining and calculating overtime pay requirements and what constitutes an employee's "regular rate" of pay, the agency adopts and incorporates herein the provisions of 29 C.F.R. 778 (July 1, 2005) as applicable.

B. Hospitals and residential care facilities

Hospitals and residential care facilities shall be deemed in compliance with Ark. Code Ann. § 11-4-211 provided they comply with the provisions for computing overtime pursuant to 29 U.S.C. § 207 (j) and 29 C.F.R. 778.601 (July 1, 2005), which are adopted and incorporated herein.

C. Local enterprise engaged in the wholesale or bulk distribution of petroleum products.

An independently owned and controlled local enterprise engaged in the wholesale or bulk distribution of petroleum products shall be deemed in compliance with Ark. Code Ann. § 11-4-211 provided it complies with the provisions of determining overtime pursuant to 29 U.S.C. § 207(b) and 29 C.F.R. 794.101 through 794.144 (July 1, 2005), which are adopted and incorporated herein.

D. Employers subject to collective bargaining agreement covered by 29 U.S.C. § 207(b).

Employers subject to collective bargaining agreement covered by 29 U.S.C. § 207(b) shall be deemed in compliance with Ark. Code Ann. § 11-4-211 provided they comply with the provisions of determining overtime pursuant to 29 U.S.C. § 207(b) and 29 C.F.R. 778.602, which are adopted and incorporated herein.

E. Employment necessitating irregular hours of work.

Employers who pay overtime for work covered by the provisions of 29 U.S.C. § 207(f) shall be deemed in compliance with Ark. Code Ann. § 11-4-211 provided they comply with the provisions of 29 U.S.C. § 207(f) and 29 C.F.R. 778.402 through 778.421 (July 1, 2005) which are adopted and incorporated herein.

F. Employment at piece rates.

Employers who pay on a piece rate basis for overtime pursuant to the provisions of 29 U.S.C. § 207(g) shall be deemed in compliance with Ark. Code Ann. § 11-4-211 provided they comply with the provisions of 29 U.S.C. § 207(g) and 29 C.F.R. Part 548 (July 1, 2005), which are adopted and incorporated herein.

G. Retail or service establishment whose employees are compensated principally by commissions.

Retail or service establishments shall be deemed in compliance with Ark. Code Ann. § 11-4-211 provided they comply with the provisions of 29 U.S.C. § 207 (i) and 29 C.F.R. 779.410 through 779.421 (July 1, 2005), which are adopted and incorporated herein.

010.14.110 Joint Employment

A. A single individual may stand in the relation of an employee to two or more employers at the same time since there is nothing in the Act which prevents an individual employed by one employer from also entering into an employment relationship with a different employer. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the Act depends upon all the facts in the particular case. If all the relevant facts establish that two or more employers are acting entirely independently of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the Act. On the other hand, if the facts establish that the employee is employed jointly by two or more employers, *i.e.*, that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act. In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the Act, including the overtime provisions, with respect to the entire employment for the particular workweek. In discharging the joint obligation each employer may, of course, take credit toward minimum wage and overtime requirements for all payments made to the employee by the other joint employer or employers.

B. Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

1. Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or
2. Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or
3. Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

010.14-111 Enforcement

A. Employee Claims

1. An employee may file a claim with the Director charging that an employer has violated Ark. Code Ann. §§ 11-4-210 or -211 with respect to minimum wage and overtime as to the complaining employee or other person. Such claim shall be on a form or process approved by the division.

2. The division shall promptly investigate each claim and at the conclusion of such investigation shall issue a "Notice of Assessment" pursuant to Rule 010.14.111(B) or a letter advising the employer and the employee that no violation was found.

3. The name of any employee identified in a claim shall be kept confidential until the director issues a Notice of Assessment. The Notice of Assessment is an "administrative complaint" within the meaning of Ark. Code Ann. § 11-4-220.

B. Notice of Assessment

1. Whenever the Administrator determines that there has been a violation of the Act or these Rules, 010.14-100 *et seq.*, the Administrator shall issue a Notice of Assessment, which shall include the following:

- a. the dates of any violations;
- b. the statute or Rule violated;
- c. the amount of any back wages assessed;
- d. the amount of any civil money penalty assessed and the reasons for such a penalty;
- e. the amount of any liquidated damages assessed and the reasons for such an assessment;
- f. the name(s) of any employees on whose behalf back wages are assessed;
- g. a statement of how to contest the assessment and obtain an administrative hearing; and
- h. a statement that the failure to contest the assessment will result in the Administrator's decision becoming the final administrative determination.

2. A Notice of Assessment may be issued as a result of investigations initiated by a claim filed by an employee, as well as a result of investigations initiated by the division.

3. A Notice of Assessment shall be delivered to the employer by certified mail. Where service by certified mail is not accepted or unclaimed by the party, notice shall be deemed received on the date of attempted delivery. Where service is not accepted or unclaimed, the Administrator may exercise discretion to serve the Notice of Assessment by regular mail.

C. Civil Money Penalties

1. The Administrator may issue a civil money penalty for the following:

a. willfully hindering or delaying an investigation under the Act or these Rules or willfully hindering or delaying any representative of the Director in the performance of his duties in the enforcement of the Act or these Rules;

b. willfully failing to make, keep, or preserve any record required by the Act or these Rules or willfully falsifying such records;

c. willfully refusing to make any record accessible to the division upon demand or willfully refusing to furnish a sworn statement of the record or any other information required for the proper enforcement of the Act and these Rules;

d. willfully failing to post a summary of the law as required by Ark. Code Ann. § 11-4-216;

e. paying or agreeing to pay wages at a rate less than required by the Act;

f. otherwise willfully violating any provision of the act or any Rule issued thereunder; and

g. willfully discharging or in any other manner willfully discriminating against any employee because the employee has:

i. made a complaint to his or her employer or to the director or his authorized representative regarding compliance with the Act or these Rules;

ii. instituted or is about to institute any proceeding under or related to this Act; or

iii. testified or is about to testify in any proceeding under or related to this Act.

2. The amount of any civil money penalty shall be between \$50 and \$1000 for each violation. Each violation shall constitute a separate offense. For the purposes of Rule 010.14-111(C)(1)(g), each day the violation continues shall constitute a separate offense.

3. In determining the amount of a civil penalty, the Administrator shall consider the appropriateness of the penalty to the size of the business and the gravity of the violation.

a. Matters which indicate that the gravity of the matter justifies maximum civil penalty assessments are:

- i. multiplicity of violations;
- ii. recurring violations;
- iii. falsification and/or concealment of information or records;
- iv. failure to assure future compliance.

and

b. The size of the business includes the number of employees and the gross volume of sales.

4. Assessment of a civil money penalty shall be made no later than three (3) years from the date of the occurrence of the violation.

D. Liquidated damages

The Administrator may assess liquidated damages to be paid an employee in an amount up to but not greater than the back wages assessed on behalf of the employee. Liquidated damages shall be assessed for willful violations of the Act or these Rules.

E. Contesting an assessment

1. An employer may contest an assessment made by the Administrator by filing a written request for a hearing with the Director of Labor, 10421 West Markham, Little Rock, AR 72205. The written request must be made within fifteen (15) days after the employer's receipt of the Notice of Assessment or the assessment will become final.

2. A written request for a hearing shall be referred to a hearing officer designated by the Director and shall be handled as an adjudicative matter pursuant to Rule 010.14-007.

010.14-112 Interpretation And Application of Rules

The department may rely on the interpretations of the U. S. Department of Labor and federal precedent established under the Fair Labor Standards Act in interpreting and applying the provisions of the Act and Rule 010.14-100 through -113, except to the extent a different interpretation is clearly required.

010.14-113 Repealer, Severability, Effective Date and History

A. All previous rules and regulations of the Arkansas Department of Labor regarding the Arkansas Minimum Wage Act, Ark. Code Ann. §§ 11-4-201 *et seq.* are hereby repealed.

B. If any provision of these Rules or their application to any person or circumstance is held invalid, such invalidity shall not effect other provisions or applications which can be given effect without the invalid provision or application, and to this end the provisions of these Rules are declared to be severable.

C. The effective date of these Rules is January 26, 2007.

D. History.

The Arkansas Minimum Wage Act, Ark. Code Ann. §§ 11-4-201 *et seq.* was initially passed in 1968. 25 Ark. Acts 1968 (1st Ex. Session). The Labor Board of the State of Arkansas promulgated administrative regulations effective September, 1979. These regulations were repealed and emergency rules were adopted effective October 1, 2006. The emergency rules were replaced by these rules effective January 26, 2007

Note: The Labor Board was abolished and all its functions, powers, and duties transferred to the Director of the Department of Labor by Act 536 of 1989.