

## ADMINISTRATIVE POLICY



### STATE OF WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES EMPLOYMENT STANDARDS

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**TITLE:      PROCESS PROTOCOLS FOR REASONABLY      NUMBER:      ES.A.8.3**  
**EQUIVALENT OVERTIME COMPENSATION**  
**PLANS FOR TRUCK & BUS DRIVERS**

**CHAPTER:   [RCW 49.46.130\(2\)\(f\)](#) and      ISSUED: 10/24/2008**  
**[WAC 296-128-011](#) and - [012](#)      REISSUED: 11/4/2008**

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#### ADMINISTRATIVE POLICY DISCLAIMER

This policy is designed to provide general information in regard to the current opinions of the Department of Labor & Industries on the subject matter covered. This policy is intended as a guide in the interpretation and application of the relevant statutes, regulations, and policies, and may not be applicable to all situations. This policy does not replace applicable RCW or WAC standards. If additional clarification is required, the Program Manager for Employment Standards should be consulted.

This document is effective as of the date of print and supersedes all previous interpretations and guidelines. Changes may occur after the date of print due to subsequent legislation, administrative rule, or judicial proceedings. The user is encouraged to notify the Program Manager to provide or receive updated information. This document will remain in effect until rescinded, modified, or withdrawn by the Director or his or her designee.

#### **A. Purpose:**

Companies may voluntarily submit to L&I for its review under [RCW 49.46.130\(2\)\(f\)](#) and [WAC 296-128-011](#) and [-012](#) a compensation system for truck and bus drivers subject to the Federal Motor Carrier Act that includes overtime pay for hours over forty per workweek and is reasonably equivalent to traditional overtime. These protocols, which are based on L&I's general historical practices, describe processes for employers' submission and L&I's evaluation of non-hourly compensation systems for truck and bus drivers.

#### **B. What a company making a request that L&I evaluate its compensation system must do:**

1. The company must follow the requirements in [WAC 296-128-012](#) when making a request that L&I evaluate its compensation system. To meet this requirement, an employer may, with notice to a truck or bus driver subject to the provisions of the Federal Motor Carrier Act, establish a rate of pay that is not on an hourly basis and that includes compensation for overtime in the rate of pay.

2. Companies that seek L&I's approval of a compensation system as reasonably equivalent must submit to L&I's Employment Standards Program Manager a letter, which must state at least:
  - a. That the company seeks L&I's review of its compensation system under [RCW 49.46.130\(2\)\(f\)](#) and [WAC 296-128-011](#) and [-012](#);
  - b. Whether all drivers covered by the compensation system are subject to the Federal Motor Carrier Act;
  - c. Whether the compensation system has been in effect prior to submission for approval, and if so, for how long (as this may relate to the period of time for which L&I may request records);
  - d. Whether employees are covered by a collective bargaining agreement;
  - e. Whether the company anticipates or is engaged in litigation regarding its compensation for Washington-based employees, or has been engaged in such litigation concerning any time period in the two years preceding the request for review of the compensation system;
  - f. If the compensation system was previously implemented, the letter must identify whether, when, and how the rate of pay was communicated to employees. If the compensation system is not yet in effect, the letter must identify how the company intends to communicate the rate of pay to its employees.
  - g. Send the letter to:

Program Manager  
Employment Standards Program  
Department of Labor & Industries  
P O Box 44510  
Olympia, WA 98504-4510

or

Program Manager  
Employment Standards Program  
Department of Labor & Industries  
7273 Linderson Way SW  
Tumwater, WA 98501-5414

3. L&I will acknowledge receipt of the request for approval of the compensation system as reasonably equivalent and will request that the company supply additional required information within 60 days from L&I's acknowledgement of receipt, to include the following:
  - a. Description of compensation system. The company must supply to L&I's Employment Standards Program Manager a letter that describes its compensation system and includes at least the following information:
    - i. How the company performed all calculations on which the compensation system was based, and the identity of persons who performed such calculations or are familiar with the creation or implementation of the company's compensation system;

- ii. How, and from which sources, data was collected for purposes of each calculation (e.g., how did the company determine the number of hours each employee worked in each workweek?);
  - iii. Bases for the company's assertion that the rate of pay for each employee includes compensation for overtime;
  - iv. An explanation for all terms of art associated with the company's compensation system (e.g., what is meant by "hooking"?) or other necessary information for L&I to interpret and evaluate records and descriptions provided.
- b. Raw payroll records. The company must supply copies of payroll records for employees from at least a 26 consecutive week period in the past two years. Companies may submit records for all employees covered by the compensation system or for a random sample of such employees. If a random sample of employee records are provided, the data provided must be representative of the actual number of hours worked and work units projected to be accomplished by persons performing the same type of work over the time period for which records are submitted. The period for which records are supplied, if less than all records for the two years preceding the request for approval, must be a representative period for those two years of not less than 26 consecutive weeks. Payroll records supplied must show at least the hours worked by each employee in each workweek, the work units accomplished by the employee in each workweek, the rate of pay for each work unit accomplished by the employee, and the total gross pay received by the employee for each workweek.
  - i. **Note:** If the data provided is for only some employees, L&I may require additional data, including but not limited to: a different random sample of employees' data; data for different employees specifically chosen by L&I; or, data for all employees. Such additional data must be provided within time frames specified by L&I.
  - ii. **Note:** If the period of time for which data is provided is at least 26 consecutive weeks in duration but less than the complete two year period preceding the request for approval, L&I may require additional data for any other time period in the two years preceding the request for approval, to include data for that entire period. Such additional data must be provided within time frames specified by L&I.
- c. Comparison calculations. Submit, along with the raw data (i.e., payroll records) as described above, spreadsheets that calculate the difference between what each employee whose records are provided to L&I was paid or would be paid under the company's compensation system relative to what the employee was paid or would have been paid under the overtime requirements of [RCW 49.46.130\(1\)](#). The spreadsheet must show all data used to arrive at each calculation and be calculated by employee for each workweek. The spreadsheet must contain a key or other explanation for

any formulas used to arrive at totals and for any abbreviations or company terms of art such that L&I may interpret and evaluate the calculations.

- i. For compensation systems in effect before submission of a request for approval: using data from the period constituting at least 26 consecutive weeks in the past two years, calculate what each employee in the data provided was paid under the company's compensation system, and what the employee would have been paid under traditional overtime.
- ii. For compensation systems not yet in effect before submission of a request for approval: using data from the period constituting at least 26 consecutive weeks in the past two years, calculate what each employee in the data provided would have been paid under the company's compensation system, and what the employee actually was paid under the compensation system in effect at the time. If the system in effect was not a traditional overtime system, calculate what each employee would have been paid under traditional overtime.
- iii. If the company employs truck drivers who are paid under traditional overtime as well as truck drivers who are or will be paid under a compensation system that the company proposes as reasonably equivalent to traditional overtime, then comparison calculations should be based on similarly situated drivers at the company under both payment methods. For example, a company employs both local drivers who are paid hourly under traditional overtime and line haul drivers who are paid on a mileage basis. For purposes of calculations submitted to L&I, the company should compare for each workweek what each line haul driver's gross pay was relative to what the gross pay would have been if each line haul driver was paid hourly, as if a local driver. Companies may use different base hourly rates for their comparison calculations if use of such rates is substantiated to L&I's satisfaction.
- iv. If the company employs or employed no truck drivers who are or were paid under traditional overtime, then for purposes of the calculations submitted to L&I, the company shall substantiate to L&I's satisfaction what is the comparable base hourly rate for each employee who, under the compensation system, is paid on a non-hourly basis. The company shall perform comparison calculations using such rate.
- v. All calculations of wages that were paid or would have been paid under the company's compensation system should be shown in gross wage totals for each employee. Comparisons to traditional overtime wages should also be reflected in terms of gross wages for each employee.
- vi. For the employees whose data is submitted to L&I, the spreadsheet calculations must show comparisons of the pay under the company's compensation system relative to pay under [RCW](#)

[49.46.130\(1\)](#) for each employee for each and every workweek in the period for which data is submitted.

- vii. **Note:** L&I may require additional calculations based on data for different employees or time periods as described above, to include a requirement that the company supply additional spreadsheets.
- d. Certification of accuracy and validity. An authorized representative of the company must certify under penalty of perjury under the laws of the State of Washington that the data and calculations provided to L&I for review are accurate, and are either complete or are reflective of the actual number of hours worked and work units projected to be accomplished by persons performing the same type of work over the time period for which records are submitted.

**Note:** L&I may for good cause or by agreement extend the deadlines within which it requires the company to provide records or information.

**Note:** Any and all documents submitted to L&I for review are subject to public disclosure both during and after completion of L&I's review.

### **C. General protocol for L&I's review of requests for evaluation of compensation system:**

1. After it receives a request for evaluation of a company's compensation system, L&I will determine whether the compensation system is reasonably equivalent under all requirements of [RCW 49.46.130\(2\)\(f\)](#) and WAC [296-128-011](#) and [-012](#). L&I's determination is an agency interpretation of whether the facts under review comply with [RCW 49.46.130\(2\)\(f\)](#), considering L&I's specialized expertise in this area. As a practical matter, this interpretation may be further scrutinized by courts. See *Schneider v. Snyder's Food, Inc.*, 116 Wn. App. 706, 66 P.3d 640 (2003).
2. In evaluating a company's compensation system, L&I may consider factors that include but are not limited to:
  - a. The basis for pay (e.g., mileage-based pay system, combination of mileage and piece rate, etc.);
  - b. Extent to which the compensation system includes compensation for overtime in the rate of pay for each employee;
  - c. Size of the company and the number of drivers subject to the plan;
  - d. Notice provided to employees of their rate(s) of pay;
  - e. Quantitative difference from traditional overtime, if any, when comparing employees' gross pay under the compensation system relative to what they would receive if they were paid under [RCW 49.46.130\(1\)](#) (i.e., how many drivers receive compensation less than, how many equal to, and how many greater than what they would receive under traditional overtime for each workweek?);

- f. Qualitative difference from traditional overtime, if any, when comparing each employee's gross pay under the compensation system relative to what each employee would receive if he/she was paid under [RCW 49.46.130\(1\)](#) (i.e., for drivers who receive greater or less compensation under the company compensation system than under traditional overtime for each workweek, what is the amount of difference?);
  - g. Accuracy and completeness of data, calculations, and information submitted by company or provided upon L&I's request.
  - h. Timeliness of company's submission of data or information requested by L&I (e.g., company's responsiveness to requests for copies of payroll records or to requests for additional information on the compensation system or on the contents of the raw data or calculations). If a company does not provide data or information by deadlines established by L&I, then L&I may choose to take no action on the request for approval, set new deadlines for submission of such data or information, or issue a determination that the proposed compensation system is not reasonably equivalent because the company has not substantiated to L&I's satisfaction its deviation from payment on an hourly basis.
3. L&I may require that the company and/or its representatives put on a presentation describing its compensation system submitted for evaluation. Such presentation will typically be held in L&I's Tumwater offices.
4. L&I may require that it be given a list of all employees of the company for the two years preceding the request for approval who are/were subject to the compensation system. L&I may require that the company provide payroll records or calculations for any or all of these employees.
5. L&I may visit the company's worksite to view company payroll records in order to verify the accuracy and/or completeness of data, calculations, and information submitted.
6. L&I may require that the company provide additional information and documentation that includes, but is not limited to, additional descriptions of the company's compensation system, additional payroll records or calculations for different employees, different data or calculations within the period for which records were furnished, and/or data or calculations for different periods of time within the two years preceding the request for approval of the compensation system. L&I may require information or records not specifically referenced in these protocols.
7. L&I may condition its approval or continued approval of a compensation system on fulfillment or continued fulfillment of specified criteria, or may limit the future duration of its approval, or may require that additional information or documentation be submitted at specified future points to ensure continued compliance with the reasonably equivalent exemption from traditional overtime. Companies may need to make adjustments for unforeseen changes or circumstances for a reasonably

equivalent compensation system to be valid in the future. Changes in circumstances may affect continuing approval. Continuing approval is also based on consistency with the approved compensation system.