



February 28, 2018

Dear Employer,

The Alaska Department of Labor and Workforce Development, Wage and Hour Administration is responding to an increase in complaints concerning misclassification of employees as independent contractors in the nail salon industry. For the purpose of education, this letter is being sent as an industry-wide notice to address multiple issues that appear to be subject to widespread misunderstanding throughout the industry. Among the issues that have been the focus of the complaints and subsequent enforcement activities are:

- The absence of written hiring agreements between the employer and the employee;
- Changes to the rate of pay without the required written notice;
- Payment of wages and overtime inconsistent with the *Alaska Wage and Hour Act*;
- Nonpayment of wages for all hours worked;
- Insufficient or non-existent records of all daily and weekly hours worked by every employee;
- Employees being incorrectly classified as independent contractors; and
- Employees subjected to unlawful deductions from wages, the withholding of paychecks, or who are being compelled to reimburse employers without written authorization.

We will address each of these issues in this letter and we are always available to discuss any follow-up questions you may have.

Written Hiring Agreements and Changes in the Rate of Pay

Under Alaska law, employers must provide all employees a written notice of their rate of pay, where they will be receiving payment, and the established pay day (weekly, bi-weekly, monthly) before the employee starts work. Any time the employer wants to make a change to any of these items, they must provide the employee with another written notification no later than on the payday before the time of change. The change cannot be made in the middle of a pay period and cannot be retroactive.¹

¹ AS 23.05.160

Minimum Wage and Overtime

Except as otherwise provided for in law, an employer shall pay to each employee a minimum wage, for all hours worked in a pay period, whether the work is measured by time, piece, commission or otherwise.

The current minimum wage is \$9.84 per hour as of January 1, 2018. Alaska's minimum wage is subject to annual adjustment using the Consumer Price Index for the previous calendar year. Barring any allowable exemptions, an employee who works over 8 hours in a day and/or more than 40 straight-time hours in a week must be paid 1.5 times their *regular rate*² of pay (this requirement of the law is referred to as "overtime").³ Furthermore, if an employee is paid at more than one rate of pay for work performed during a workweek the overtime is to be calculated by using a *weighted average* formula.

Time spent working is compensable time, even if an employee's license or other certifications have lapsed. If the work is directed by or allowed by the employer or if the employer has reason to suspect that the employee worked, the time spent working is compensable.⁴ An accurate record of all daily and weekly hours worked must be kept, and most importantly, the employee must be paid correctly for all these hours.

Salary

Payment on a salary basis does not eliminate overtime requirements. Individuals receiving payment on a non-exempt salary basis must be paid in a manner consistent with the minimum wage and overtime requirements of the *Alaska Wage and Hour Act*.

Manicurists are not specifically exempt from overtime requirements and must be paid time-and-a-half for work performed in excess of 8 hours per day and/or 40 straight-time hours in a work week. Payment on a salary basis does not eliminate overtime pay obligations. If a fixed and recurring pay rate (salary) has been established, "the applicable compensation basis must be converted to an hourly rate when determining the regular rate for computing overtime compensation and a written contract must be provided showing the hourly rate, the overtime rate, and the fixed number of hours worked each week to arrive at the specified, fixed salary amount. If the contract fails to establish a fixed number of daily and weekly hours that the salary is intended to compensate, or if the actual hours of work deviate from the hours specified in the contract without a corresponding adjustment in hourly pay, the salary will be considered to be compensation for an eight-hour workday and 40-hour workweek, and overtime will be computed on that basis."⁵

Note: To determine if an employee meets the exemptions from Alaska's minimum wage and overtime requirements, based on work in a bona fide executive, administrative, or professional capacity, consult the *Code of Federal Regulations 29 C.F.R. § 541, Alaska Statute 23.10.055, and Alaska Administrative Code 8 AAC 15.908*, or contact the Wage and Hour office in your region.

² 8 AAC 15.100

³ AS 23.10.060

⁴ 29 C.F.R. § 785.11 (2013)

⁵ 8 AAC 15.100

Accurate Record of Hours Worked

An employer shall keep an accurate record of all the daily and weekly hours worked by each person.⁶ A mere record of hours scheduled may not be sufficient to account for all the hours actually worked by the employee.

Independent Contractor, Volunteer, or Employee?

Frequent calls to the Wage and Hour Administration have also raised the issue of workers being treated as independent contractors rather than employees. When determining whether or not the relationship between the business and the alleged employee is subject to the *Alaska Wage and Hour Act* and the *Fair Labor Standards Act* (FLSA), it must be determined “whether the worker is dependent upon finding employment in the business of others. If the facts show such a dependency, the worker is an employee.”⁷ Employers are encouraged to review the factors established by the Alaska Supreme Court (see footnote #7). In general, all manicurists should be treated as employees to avoid issues with agencies such as Wage and Hour, Worker’s Compensation, Unemployment Insurance, and the I.R.S., unless the alleged employer can clearly demonstrate that a worker is an independent contractor. The mere possession of an Alaska business license or a contract is not enough to substantiate independent contractor status.

Many factors are used to assist in determining whether a worker is an employee or an independent contractor. Wage and Hour looks at whether the work is an integral part of the business, if the worker is able to hire their own assistants, if the worker provides their own tools, the worker’s opportunity for profit or loss, if the worker is economically dependent on the business directing the work, the degree of control the business has over the worker, as well as the worker’s skill, among others. Factors reviewed are not isolated nor is any one criteria alone a direct determination of employment status. The factors are reviewed as a whole as it pertains to the work being performed.

With regard to volunteers, a for-profit business is barred from using volunteer labor.⁸

Workers’ Compensation Coverage

Any business operating in Alaska with even one part-time employee is required to carry workers’ compensation insurance under *Alaska Statute 23.30.075*. The policy must be bound in the State of Alaska; Alaska is not a reciprocal state and does not recognize coverage bound in any other state or country, even if the policy purports to cover an injury occurring in Alaska. There is no exemption for family members or friends for purposes of workers’ compensation liability. Employee status is determined under *Alaska Administrative Code 8 AAC 45.890*; this is an extremely difficult test to pass. Penalties for not having coverage are severe. It is a crime under the Alaska Workers’ Compensation Act for employers to deduct all or any portion of workers’ compensation premiums from an employee’s paycheck, or otherwise charge an employee for workers’ compensation premiums. If you have questions regarding workers’ compensation requirements, please contact the Alaska Division of Workers’ Compensation at (907) 269-4002.

⁶ AS 23.05.080

⁷ *Jeffcoat v. State, Dept. of Labor*, Sup. Ct. Op. No. 3162 (File No. S-1444), 732 P.2d 1073 (1987).

⁸ AS 23.10.055 (6)

Unemployment Insurance Coverage

An employer misclassifying a worker as an independent contractor instead of an employee may be liable for penalties and interest for failure to pay this tax. If you have questions regarding unemployment tax requirements, please contact Employment Security Tax at (888) 448-3527.

Deductions

An employer and employee may enter into a written agreement to provide for deductions of monetary obligations of an employee. An employer may not require compensation from an employee to which they are entitled through force, intimidation, or threat of dismissal from employment, or any other manner. A written agreement for deductions is not valid if it would reduce the employee's wage rate below the statutory minimum wage and overtime rates.

An employer may not deduct from an employee's wages the following:

- Customer checks returned due to insufficient funds or any other reason
- Non-payment for goods or services as a result of theft or credit default
- Cash or cash register shortages, unless the employee admits willingly and in writing to having personally taken the specific amount of cash that is alleged to be missing
- Lost, missing, or stolen property, unless the employee admits willingly and in writing to having personally taken the specific property alleged to be lost, missing or stolen
- Damage or breakage costs, unless clearly due to willful conduct of the employee and the employee has acknowledged responsibility in writing

An employer may deduct an amount from wages as a security deposit to ensure the return, clean and in a state of good repair, of uniforms or equipment issued by the employer if the deduction is based on a written agreement, total deposit does not exceed the cost of the item, and the deduction does not reduce the employee's wage below the statutory minimum or reduce the employee's overtime compensation below one and one-half times the contractual rate of pay.

An employer shall give each employee a written or electronic statement of earnings and deductions for each period. The statement of earnings and deductions must contain the employee's:

- Rate of pay
- Gross wages
- Net wages
- Beginning and end dates of the pay period
- Federal income tax deductions
- Federal Insurance Contribution Act deductions
- Alaska Employment Security Act contributions
- Board and lodging costs
- Advances
- Straight time and overtime hours actually worked in the pay period
- Other authorized deductions⁹

⁹8 AAC 14.160

Final Paycheck

If the employment is terminated by the employee, payment is due at the next regular payday that is at least three days after the employer received notice of the employee's termination of services. If employment is terminated by the employer, regardless of the cause for the termination, payment is due within three working days after the termination.¹⁰ The day of firing, weekends, and holidays, are not included in these three days. If an employer violates this statute, the employer may be required to pay the employee a penalty in the amount of the employee's regular wage, salary or other compensation from the time of demand to the time of payment, or for 90 working days, whichever is the lesser amount.

Resources

In conclusion, a business that is involved in practices that are not consistent with Alaska Wage and Hour laws must correct the discrepancies immediately to avoid future enforcement actions. We hope that your organization will take this opportunity to conduct an internal review and voluntarily make any wage adjustments. We have noted several applicable statutes and regulations for your review. Employers are encouraged to conduct a complete review of Alaska's wage and hour laws and regulations as published in the *Pamphlet 100* publication, which can be found at:
<http://labor.alaska.gov/lss/forms/pam100.pdf>

The Wage and Hour Administration provides a cost-free counseling service to Alaska employers, and we invite you to take advantage of this service. A regular, monthly seminar is offered to employers and employees concerning wage and hour laws. This seminar is offered at each of our three locations in Anchorage, Fairbanks, and Juneau. Check our website for the time and location of each seminar, or contact our office at (907) 269-4909. In addition, an investigator is on duty each business day from 8:00 a.m. to 5:00 p.m. to answer any questions you may have.

Our website can be found at: **<http://labor.alaska.gov/lss/whhome.htm>**

Alternatively, you may wish to contact a private attorney. The Alaska Lawyer Referral Service may be able to assist you with locating an attorney to address your specific concerns. You may contact this office at 1- 800-770-9999 or visit the following website for additional information:
http://www.alaskabar.org/servlet/content/lawyer_referral_serv.html

Sincerely,

Joe Dunham

Joe Dunham
Statewide Supervising Investigator
Anchorage Regional Office

JD/akr
Nail Salon Letter

¹⁰ AS 23.05.140