

State of Wisconsin
Department of Workforce Development
Chapter DWD 274
HOURS OF WORK AND OVERTIME

The Wisconsin Department of Workforce Development proposes an order to amend ss. DWD 274.01(3), 274.01(4), and 274.015; and to repeal and recreate s. 274.04(9), relating to hours of work and overtime.

Analysis Prepared by the Department of Workforce Development

Statutory authority: Sections 103.02 and 227.11, Stats.

Statutes interpreted: Sections 103.01 and 103.02, Stats.

Relevant federal law: 29 USC 213(b)(12), 29 USC 203(f), and 29 CFR Part 780.

Chapter DWD 274 requires each private employer to pay each employee time and one-half the regular rate of pay for all hours worked in excess of 40 hours per week, unless the employer is not subject to the chapter or is exempt from the overtime section. Chapter DWD 274 also requires each private employer to keep permanent records showing the name, address, hours of employment, and wages of each employee and to pay employees for on-duty meal periods.

Currently, employees employed in farming, as defined in s. 102.04 (3), Stats., are not subject to chapter DWD 274. Employees of independent contractors who erect silos and other farm buildings or equipment, build terraces, dig wells or build dams for ponds; employees engaged in inspecting and culling flocks of poultry; and pilots and flagpersons engaged in the aerial dusting and spraying of crops are subject to the chapter but are exempt from the overtime pay requirement.

The proposed rule broadens the exemption from the overtime pay requirement for agricultural employees by adopting the federal definition of agriculture as found in the Fair Labor Standards Act. The federal definition of agriculture is more comprehensive and logical than the current chapter DWD 274, and there are extensive federal regulations and case law to assist in interpreting the federal definition.

The federal definition of agriculture has two distinct branches. The primary meaning of agriculture includes cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities, and the raising of livestock, bees, furbearing animals, or poultry. The secondary meaning of agriculture includes any practices performed by a farmer or on a farm as an incident to or in conjunction with the farming operations of that farm, including preparation for market or delivery to storage, to market, or to carriers for transportation to market.

The current chapter DWD 274 includes items in the federal primary meaning of agriculture and some, but not all, of the items in the secondary meaning. Some activities considered secondary agriculture under the federal meaning are in the current s. DWD 274.04 (9) as piecemeal exemptions to the overtime requirement. The department believes that it is fairer and more logical to adopt a broader general definition of agriculture rather than exempt certain activities on a piecemeal basis and not others.

Under the current rule, some agricultural activities are not subject to the chapter and some are just exempt from the overtime pay requirement. Under the proposed rule, the new broader definition of agriculture will be an exemption to the overtime pay requirement. Agricultural employers will be required to keep permanent records showing the name, address, hours of employment, and wages of each employee and to pay employees for on-duty meal periods.

The farming definition used in the current rule at s. 102.06(3), Stats., includes the exchange of labor or services, the exchange of the use of equipment with other farmers in pursuing listed activities, and the operation for not to exceed 30 days during any calendar year of farm machinery in performing farming services for other farmers for a consideration other than exchange of labor. Under the proposed rule, activities within the primary meaning of agriculture are farming regardless of where they are performed and without any time limits. Activities within the secondary meaning of agriculture must relate to the farming operations of that particular farm to be exempt so exchange of labor or services of these activities would not qualify.

The proposed rule also clarifies that the nonapplicability of the chapter to domestic service employees in a household applies only to workers employed by the household. This is merely a language clarification and not a change in policy. In addition, the proposed rule deletes an obsolete reference in the definition of regular and overtime.

SECTION 1. DWD 274.01 (3) and (4) are amended to read:

DWD 274.01 (3) “Regular” time means 40 hours of work per week. ~~Except in restaurants as provided in s. DWD 274.03.~~

DWD 274.01 (4) “Overtime” means hours in excess of 40 hours of work per week. ~~Except in restaurants as provided in s. DWD 274.03.~~

SECTION 2. DWD 274.015 is amended to read:

DWD 274.015 Applicability of chapter. Pursuant to s. 103.01 (1), Stats., employees employed in manufactories, mechanical or mercantile establishments, beauty parlors, laundries, restaurants, confectionary stores, telegraph or telephone offices or exchanges or express or transportation establishments, hotels, and by the state, its political subdivisions and any office, department, independent agency, authority, institution, association, society or other body in state or local government created or authorized to be created by the constitution or any law, including the legislature and the courts, are covered by this chapter. Employees employed ~~in farming, as defined in s. 102.04 (3), Stats.,~~ or in domestic service in a household by a household are not subject to this chapter.

SECTION 3. DWD 274.04 (9) is repealed and recreated to read:

DWD 274.04 (9) Persons employed in agriculture including farming in all its branches, including, among other things, 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, furbearing animals, or poultry, and any practices 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.

SECTION 4. EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22 (2)(intro.), Stats.