

640.60 EMPLOYMENT RELATIONSHIPS—WAGE & HOUR ACT—WAGE
PAYMENT CLAIM.¹

*NOTE WELL: If the plaintiff claims to be owed more than one type of wage payment (such as wages, bonuses and commissions), or wage payments that may be calculated over different time periods (such as bonuses earned prior to separation from employment and bonuses or commissions that were pending when the employment ended but only could be calculated at a future time period), then the Court may want to create separate issues using this instruction for each of the different wage types and/or time periods as established by the evidence.*²

The [first] [(state number)] issue reads:

“Was the plaintiff entitled to any [wages] [bonuses] [commissions] [sick pay] [vacation pay] [severance pay] [overtime] [(identify any other types of payments promised when the employer has a policy or practice of making such payments)] [[on] [after] [as of] (date)]?”

On this issue, the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, that the defendant failed to pay [wages] [bonuses] [commissions] [sick pay] [vacation pay] [severance pay] [overtime] [(identify any other types of payments promised when the employer has a policy or practice of making such payments)] that were owed to the plaintiff [[on] [after] [as of] (date)].³ I instruct you that if any such [wages] [bonuses] [commissions] [sick pay] [vacation pay] [severance pay] [overtime] [(identify any other types of payments promised when the employer has a policy or practice of making such payments)] were owed, they are considered wages under the North Carolina Wage and Hour Act.

The plaintiff contends that (*describe the contentions as to the wages, bonuses, commissions, sick pay, vacation pay, severance pay, overtime or other payments the plaintiff claims are owed by the defendant under the employer's practices and policies*).

The defendant contends that (*describe the contentions that the alleged wages, bonuses, commissions, sick pay, vacation pay, severance pay, overtime or other payments are not owed to the plaintiff*).

Under the North Carolina Wage and Hour Act, wages are compensation for labor or services rendered by an employee whether determined on a time, task, piece, job, day, commission or other basis of calculation.⁴ [Wages may include [bonuses] [commissions] [sick pay] [vacation pay] [severance pay] [other amounts] promised when the employer has a policy or practice of making such payments.⁵]

[The law also requires payment for overtime.⁶ The law requires that every employer pay each employee who works longer than 40 hours in any workweek at a rate of not less than time and one half of the regular rate of pay of the employee for those hours in excess of 40 per week.⁷ "Workweek" means any period of 168 consecutive hours.⁸]

[The law requires that every employer of seasonal amusement or recreational establishment employees pay each seasonal amusement or recreational establishment employee who works longer than 45 hours in any workweek at a rate of not less than time and one half of the regular rate of pay of the employee for those hours in excess of 45 per week.⁹ A "seasonal amusement or recreational establishment" is an establishment which [does not operate for more than seven months in any calendar year] [during the preceding calendar year had average receipts for any six months of that year of not more than 33 1/3% of its average receipts for

the other six months of that year].¹⁰ “Workweek” means any period of 168 consecutive hours.^{11]}

The law requires that every employer shall pay every employee all wages [and tips] accruing to the employee on a regular payday.¹² [Wages based upon [bonuses] [commissions] [other forms of calculation] may be paid as infrequently as annually if such period is prescribed in advance.^{13]}

An employee whose employment is discontinued for any reason shall be paid all wages due on or before the next regular payday. [When a separation occurs, wages based on [bonuses] [commissions] [other forms of calculation] shall be paid on the first regular payday after the amount becomes calculable.¹⁴ Such [bonuses] [commissions] [other forms of calculation] do not have to be calculable at the time of separation so long as they will become calculable in the future.^{15]}

An employer is required to notify its employees, orally or in writing at the time of hiring, of the promised wages and the day and place for payment.¹⁶ An employer is also required to notify employees of its employment practices and policies with respect to promised wages in writing or through a posted notice in a place accessible to its employees.¹⁷

An employer must notify its employees of any changes to promised wages at least 24 hours prior to such changes. Such notification must be in writing or through a posted notice in a place accessible to its employees.¹⁸

Wages cannot be forfeited unless the employer provides written notice of such forfeitures or changes which result in forfeitures in accordance with these notice provisions.¹⁹

[If an employer changes a policy or practice to establish specific earning criteria, such as a policy to provide that an employee must be employed in order to receive a [bonus] [commission] when that criteria was not a part of the initial compensation terms, then the employee is entitled to any [bonus] [commission] earned up to the date of that change in policy or practice. Wages earned under a program that does not have specific earning criteria cannot be reduced or eliminated by a change in policy or practice to impose such criteria. Wages may not be retroactively eliminated and a forfeiture of wages cannot rest on an unwritten policy or practice.]

[Ambiguous employment policies and practices are to be construed against the employer in favor of the employee.]

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the plaintiff was entitled to [wages] [bonuses] [commissions] [sick pay] [vacation pay] [severance pay] [overtime] [(*identify any other types of payments promised when the employer has a policy or practice of making such payments*)] [[on] [after] [as of] (*date*)] under the rules that I have provided you, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

1 In determining whether an individual is an employee under the Wage and Hour Act, courts consider factors such as: "(1) the degree of control the alleged employer exerted over the person, and (2) the permanency of the relationship between the person and the alleged employer." *Horack v. Southern Real Estate Co. of Charlotte, Inc.*, 150 N.C. App. 305, 309, 563 S.E.2d 47, 51 (2002).

2 See *Morris v. Scenera Research, LLC*, 229 N.C. App. 31, 747 S.E.2d 362, 367 (2013) (noting the trial court submitted separate issues to the jury on patent bonuses earned under a bonus program and bonuses pending as of the date the bonus program was eliminated), *aff'd in part and rev'd in part*, 368 N.C. 857, 788 S.E.2d 154 (2016).

3 See N.C. Gen. Stat. § 95-25.2(16).

4 *Id.*

5 *Id.*

6 NOTE WELL: N.C. Gen. Stat. § 95-25.14 sets forth certain exemptions to which the overtime pay requirements of N.C. Gen. Stat. § 95-25.4 do not apply. If the plaintiff falls within any of these exemptions, do not give that portion of this instruction involving overtime. See, e.g., *Bonham v. Wolf Creek Academy*, 767 F. Supp. 2d 558, 565 (2011) (noting that claim for unpaid overtime wages under the NC Wage & Hour Act was not allowed where Fair Labor Standards Act governed the employer-employee relationship and thus fell within the exemption set forth in N.C. Gen. Stat. § 95-25.14).

7 N.C. Gen. Stat. § 95-25.4(a).

8 N.C. Gen. Stat. § 95-25.2(17).

9 N.C. Gen. Stat. § 95-25.4(a).

10 N.C. Gen. Stat. § 95-25.2(13).

11 N.C. Gen. Stat. § 95.25.2(17).

12 N.C. Gen. Stat. § 95-25.6.

13 *Id.*

14 N.C. Gen. Stat. § 95-25.7.

15 See *Morris*, 229 N.C. App. at 44, 747 S.E.2d at 370 (holding the question of calculability under the Wage and Hour Act is a jury question), *aff'd in part and rev'd in part*, 368 N.C. 857, 864, 788 S.E.2d 154, 159 (2016).

16 N.C. Gen. Stat. § 95-25.13(1).

17 N.C. Gen. Stat. § 95-25.13(2).

18 N.C. Gen. Stat. § 95-25.13(3).

19 N.C. Gen. Stat. § 95-25.7.